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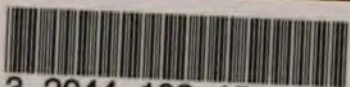
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THE  
SOUTHWESTERN REPORTER,  
VOLUME 47,

CONTAINING ALL THE CURRENT DECISIONS OF THE

SUPREME COURTS OF MISSOURI, ARKANSAS, AND TENNESSEE, COURT  
OF APPEALS OF KENTUCKY, SUPREME COURT, COURT OF CRIM-  
INAL APPEALS, AND COURTS OF CIVIL APPEALS  
OF TEXAS, AND COURT OF APPEALS  
OF INDIAN TERRITORY.

PERMANENT EDITION.

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AUGUST 29—DECEMBER 19, 1898.

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WITH TABLE OF WRITS OF ERROR DENIED BY THE SUPREME COURT OF TEXAS IN CASES IN THE COURTS  
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ALSO TABLES OF SOUTHWESTERN CASES PUBLISHED IN VOLS. 143, 144, MISSOURI REPORTS; 99,  
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# COURT RULES.

## MISSOURI.

### Division Number Two of the Supreme Court.

**SERVICE OF ABSTRACTS AND BRIEFS IN CRIMINAL CASES.** Beginning with the October term, 1898, of this court, the attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of the supreme court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the attorney general, and, thereupon, the attorney general shall, fifteen days before the day of trial, serve defendant or his

counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeal as poor persons, by the circuit court, counsel will be permitted to file type-written briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs and assignments of error fifteen days before the hearing, and the attorney general his brief and statement five days before the hearing.

Adopted July 6, 1898.

## AMENDMENTS TO RULES

### TEXAS.<sup>1</sup>

It is ordered that existing rules 29 and 30 in reference to the practice in the courts of civil appeals, and rule 95 of rules for the district and county courts, be so amended as hereafter to read as follows:

#### BRIEFS.

29. The appellant or plaintiff in error, in order to prepare properly a case for submission when called, shall have filed a brief of the points relied on, in accordance with and confined to the distinct specifications of error (which assignments shall be copied in the brief) and to such fundamental errors of law as are apparent upon the record, each ground of error being separately presented under the proper assignment; and each assignment not so copied and accompanied with its appropriate propositions and statements, shall be regarded as abandoned. The assignments as presented in the brief shall be numbered from the first to the last in their consecutive order; but it is not required that they shall be presented in the order in which they appear in the original assignment of errors filed in the office of the clerk of the trial court, and the numbers in such original assignments may be disregarded.

30. The appellant or plaintiff in error in preparing his brief shall make a preliminary state-

ment in general terms of the nature and result of the suit,—such, for example, as the following: "This was an action of trespass to try title which was brought by the appellant against the appellee and in which judgment was rendered for the defendant." This may, at the option of counsel for the appellant or plaintiff in error, be followed by a brief statement of the case and such other matters as may be deemed proper as an introduction to the assignments of error. Then shall follow the assignments. Each point under each assignment shall be stated as a proposition unless the assignment itself may sufficiently disclose the point, in which event it shall be sufficient to copy the assignment.

95. The clerk, having made a transcript, upon the application of either party or his counsel, as prescribed in case of appeal, and in case of writ of error, as directed by law, shall deliver it to such party or his counsel, when so made out, on demand, such delivery as to the appellant or plaintiff in error to be made to him or his counsel within sixty days from the perfection of the appeal or the service of the writ of error.

As amended December 22, 1898.

<sup>1</sup> For rules as originally adopted, see 20 S. W. viii. and xvii.





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# WRITS OF ERROR

WERE DENIED BY THE

## SUPREME COURT OF TEXAS

IN THE FOLLOWING CASES IN THE  
COURT OF CIVIL APPEALS  
PRIOR TO OCTOBER 25, 1898.

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[This list includes only the writs of error denied in which no opinions were filed. All others are published in full in the Southwestern Reporter.]

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THE  
SOUTHWESTERN REPORTER.  
VOLUME 47.

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**RIPLEY NAT. BANK v. CONNECTICUT  
MUT. LIFE INS. CO. et al.**

(Supreme Court of Missouri, Division No. 1.  
June 22, 1898.)

**RELEASE OF DEED OF TRUST—AGENCY—PAYMENT  
—SUFFICIENCY OF EVIDENCE.**

1. Under Rev. St. 1889, § 7094, providing that the beneficiary under a trust deed, and not the trustee, shall release the deed on the margin of the record, the indorsee and holder of a note secured by deed of trust is proper party to release the same.

2. A note secured by deed of trust was transferred by the payee. The holder authorized the payee to collect interest, but gave no authority to collect the principal. The payee collected the principal, released the deed of trust on the record in his own name, presenting a forgery of the original note for cancellation, and appropriated the money. *Held* an invalid release.

3. Authority was given by a bank holding a note for another bank to receive payment thereof. The maker of the note deposited the amount due in the collecting bank to his own credit, and verbally instructed the bank to remit the amount to the holder. *Held*, that he made such bank his agent, and, on its failure to remit, could not maintain a plea of payment in a suit on the note.

Marshall, J., dissenting.

Appeal from circuit court, Pettis county;  
George F. Longan, Judge.

Action by Ripley National Bank against Connecticut Mutual Life Insurance Company and others. From a judgment for plaintiff, defendant M. H. Sibert appeals. *Affirmed*.

John Cashman and W. S. Shirk, for appellant. Saugree & Lamm, for respondent.

**BRACE, P. J.** On the 1st day of August, 1893, M. H. Sibert, one of the defendants in the above-entitled cause, by his deed of that date, in which his wife joined, conveyed a tract of land, containing 120 acres, described in the petition, and situate in Pettis county, to John Montgomery, Jr., in trust to secure the payment of a promissory note in words and figures as follows: "\$3,365.23. Sedalia, Mo., July 21, 1893. Four months after date I promise to pay to the order of C. Newkirk and J. C. Thompson, at the First National Bank of Sedalia, Mo., thirty-three hundred and sixty-five and twenty-three hundredths

dollars, for value received, negotiable and payable without defalcation or discount, with interest from date at the rate of eight per cent. per annum. M. H. Sibert." This deed of trust was filed for record in the office of the recorder of said county on the 19th of August, 1893, and duly recorded in Book 100, at page 133. Afterwards the following release was entered upon the margin of said record of said deed of trust: "The note herein mentioned having been fully paid, satisfaction of the deed of trust is hereby acknowledged, Dec. 8th, 1893. C. Newkirk. J. C. Thompson. Note produced and canceled. Attest: J. H. Pilkington, Recorder." On the same day, December 8, 1893, there was filed for record in the office of the recorder of said county, and duly recorded, a deed of trust, duly acknowledged and delivered by the said M. H. Sibert and his wife, whereby they conveyed the same, with other lands, the whole containing 640 acres, to E. W. Rowse, in trust to secure the payment of a principal promissory note for \$9,000, payable five years after date, and 10 interest notes, each for \$270, payable half yearly, to the Connecticut Mutual Life Insurance Company. Afterwards, on the 18th of May, 1894, this suit was instituted by the respondent bank against said insurance company. Rowse, Pilkington, Montgomery, M. H. Sibert, and Louise Sibert, his wife, charging in the petition that the said promissory note before due, and for full value, was indorsed by the said J. C. Thompson and C. Newkirk, and delivered to the plaintiff bank, which is now, and ever since has been, the owner thereof; that the same remains due and unpaid; that said deed of trust was also delivered to plaintiff, and has since remained in its hands, a subsisting and valid security for said note; that the said Newkirk and Thompson, without any power so to do, or any knowledge of or authority from the plaintiff bank, assumed wrongfully to release said deed of trust on the margin of the record thereof; that said marginal release falsely certified that said note was paid, and that said release was attested by the recorder, who certified that the note was at the time produced and canceled, all of which was untrue; that, by the filing

of the Rowse deed of trust on the same day, the same became apparently, but wrongfully, a prior lien of record on said 120 acres of land, when it should of right be a lien subsequent and inferior to plaintiff's deed of trust; and praying a decree that the pretended release be canceled, and that the lien of the Rowse deed of trust be postponed, and made subject to the other, and for general relief. The defense set up by the defendant Sibert in his answer to the petition is payment of the note in full to J. C. Thompson, who, it is therein alleged, was at the time the agent of the plaintiff, duly authorized to receive payment of the same, upon which issue was joined by reply. The answers of the other defendants do not appear in the record. Upon the hearing, the issues were found for the plaintiff bank, and a decree entered in accordance with the prayer of the petition, from which the defendant Sibert alone appeals.

It appears from the evidence that the plaintiff is a national bank doing business in Ripley, in the state of Ohio, of which W. T. Galbreath was cashier, and G. Bambach was the vice president and attorney; that the defendant Sibert, a large landowner of Pettis county, Mo., was, and for many years had been, a customer of the First National Bank of Sedalia, Mo., frequently needing in his business money, which he obtained from the Sedalia bank, of which C. Newkirk was president and J. C. Thompson cashier, without security, upon notes similar to that hereinbefore set out, which were indorsed by Newkirk and Thompson, and forwarded to and discounted by the plaintiff bank. These notes were sometimes paid, and sometimes renewed from time to time, and thus Sibert as maker, and Newkirk and Thompson as indorsers, became indebted to the Ripley National Bank, on one or two of these notes overdue, in the sum of \$3,365.23, on the 21st of July, 1893, in consideration and discharge of which indebtedness Sibert executed the note and deed of trust in question, in pursuance of an arrangement to that effect that day made between him and Mr. Bambach, attorney for the plaintiff bank. Thereupon Mr. Bambach delivered up the old note or notes, Newkirk and Thompson indorsed the note in question, and the same was delivered to Mr. Bambach for the plaintiff bank, who took the same to Ripley, Ohio, and delivered it to the plaintiff bank, to whom the deed of trust, after it was recorded, was also delivered; and both note and deed were in the actual possession of said bank at Ripley, in Ohio, on the 8th of December, 1893, when the release was entered on the margin of the record at Sedalia by Newkirk and Thompson. There can be no question, on the evidence, but that, when the note and deed of trust were thus executed and delivered, Sibert fully understood the exact relation that Newkirk and Thompson sustained to this indebtedness as his indorsers, and to the Ripley National Bank, his creditor, to

whom the note had been thus indorsed and delivered. The note fell due November 21, 1893. On the 16th of November, 1893, Galbreath, cashier, wrote Thompson, cashier, as follows: "The M. H. Sibert note, \$3,365.23, and four months' three days' interest, is also due November 21-24. I hold it here to hear from you. If he does not get the money as expected to pay it, have him send the interest due for the time as above, \$91.97, which will be credited on the note, and held longer for time you direct or find necessary, but, if he is ready to pay, advise me, and I will send it to you. Note and interest to maturity, \$3,457.20." On the 20th of that month Thompson, cashier, answered as follows: "In regard to the Sibert note, I would suggest that you hold it for the present. He has applied for a loan on his land with which to take up this and another note, and I am confident that the loan applied for will be secured. Will probably not know in regard to this before the last of the present week." The note, not having been paid at maturity, and protest having been waived by the indorsers, was held by the bank, in pursuance of this request, until the 21st of December, 1893, when Galbreath, cashier, in a letter of that date, under the impression that Sibert had failed to secure the contemplated loan, wrote Thompson, cashier, as follows: "We will carry the H. M. Sibert note, \$3,457.20, and the 4 months' interest carried with the note to maturity in amount of \$92.07, if he will pay the discount or due interest at once, but can't carry overdue notes without the interest being paid. I mean mortgage notes, in this case particularly." And the notes and accrued interest still remaining unpaid, on the 1st of January, 1894, Galbreath, cashier, inclosed the note and deed of trust, in a letter of that date, addressed to Thompson, cashier, with the following directions: "Now, if he will pay the interest accrued to November 24, and for three or four months ahead from November 24, 1893, you can credit the interest on the note accrued and ahead for time named, and return the note to us, provided the interest is paid this week. If it is not, we want it collected under your laws governing the sale of real estate held under trust deeds, as we have this year too much paper overdue, and are required by the comptroller to collect, renew, or sue to collect, so we will be compelled to comply with the requirements of the law."

The receipt of this letter, with stated inclosures, was acknowledged by Thompson, cashier, in his letter of date January 4, 1894, in which he says: "I note your special instruction concerning the M. H. Sibert loan, and also that of Gentry, and have given the parties notice to come in and arrange the interest at once." On the 8th of January he again writes to Galbreath, cashier: "I think I can get the Gentry and Sibert notes fixed to-morrow, so as to reach you by that

time [i. e. a couple of days]." Shortly after this the note, with interest paid to January 24, 1894, indorsed in pencil in Thompson's handwriting, and the deed of trust, was returned by Thompson, cashier, to the plaintiff bank, and the amount of the interest remitted to the bank. On the 28th of February, Galbreath, cashier, wrote Thompson, cashier, in which letter, after calling his attention to the fact that the interest on the Sibert note was paid only to January 24, 1894, and asking if Sibert is ready to pay the note, said: "If not, we must have the interest at once for say three months from January 24th, 1894. Please let me know if I shall send the note and trust deed to you for payment, or for the interest to be paid, as above, or can you send your check for the interest, and let me pencil the credit for the interest on the note as you done before,"—to which Thompson, cashier, replied by letter of March 3, 1894: "I inclose herein draft for \$67.30, interest on the M. H. Sibert note for \$3,365." On the 17th of April, 1894, Thompson, cashier, in a letter of that date, in answer to a letter of Galbreath, cashier, of the 14th of April, which does not appear in the evidence, wrote: "I will also attend to the collection of the interest on the Sibert note, and send you the sum covering an extension for perhaps several months;" and on the 28th of April, 1894, wrote Galbreath, cashier, another letter to the same effect, to which Galbreath replied by letter of April 30th, calling Thompson's attention to the condition of several overdue notes held by the plaintiff bank for renewal and extension, and among them the Sibert note, "interest accrued since April 24th inst.," and wrote: "All these renewals and extensions we must have fixed at once, so we can get the interest as above, this week." This seems to have closed the correspondence between the plaintiff bank and its correspondent, the First National Bank of Sedalia, which, within a few days thereafter, closed its doors, and went into the hands of a receiver, and Thompson, its cashier, became a fugitive from justice. While the plaintiff bank in Ohio was thus induced to believe by this correspondence that Sibert had failed to secure the contemplated loan, and was therefore unable to pay off the note, but was paying the accrued and accruing interest, in consideration of which the bank continued to hold at Ripley his overdue note and the security therefor for his accommodation, the truth of the matter was that he had, through this same Thompson, secured the loan on the 8th of December, 1893, from the Connecticut Mutual Life Insurance Company, to secure which he had executed the aforesaid deed of trust filed for record on that day, and had deposited the same in the First National Bank of Sedalia to his own credit; and on the same day Newkirk and Thompson, without any authority from the plaintiff so to do, and without the knowledge

or consent of any of its officers, had also, on the same day, executed the release aforesaid on the margin of the record, and Thompson, and not Sibert, had been paying the interest aforesaid.

It is but justice to the defendant Pilkington, the recorder, to say, in this connection, that his "attest" to the release, and that the note was "produced and canceled," was obtained in this way: Just before noon on the 8th of December, 1893 Newkirk came into the recorder's office, and requested the deputy recorder to write the release on the margin of the record, and signed it, saying that Mr. Thompson would bring the note in when he came to sign after dinner. Late in the day Thompson came in, and signed the release, at the same time producing a note, which the recorder compared with the note copied into the deed of trust, and, finding the same a literal copy thereof, attested the release, and stamped the pretended note "Canceled." It appeared clearly upon the trial that this pretended note was a forgery, prepared and produced for the purpose for which it was used, and that the release was executed, and the recorder's attestation was procured, while the genuine note was in the plaintiff bank in Ohio. It is perhaps also due to Mr. Sibert to give his version of his connection with this whole matter. It can be done most briefly by his deposition taken before the trial, and introduced by the plaintiff, from which his evidence, when examined on the trial in his own behalf, did not materially differ: "My name is M. H. Sibert. My age is fifty-four years. Residence, Sedalia, Mo. I remember signing note for \$3,365 and some cents, dated some time July, 1893. Said note was due in four months. This note was secured by a deed of trust on 120 acres of my land. This note represented the balance of two other notes which I had taken up. The way I understood the note was that Mr. Thompson and Mr. Newkirk were to indorse the note. They had been getting me money on my note with their indorsements. Sometime in the fall—November, I think—I made application, through J. C. Thompson, to the Connecticut Mutual Life Insurance Company for money to take up the aforesaid note, and the note I owed J. L. Smith, and a note of \$1,400 I owed the First National Bank, along in the fall. Mr. Newkirk had come to see me several times, and said the Ripley National Bank held a \$3,365 note, and he said the Ripley National Bank wanted their money, and Mr. Newkirk said the First National Bank wanted me to pay the note I owed it,—the \$1,400 one. I was also anxious to pay J. L. Smith, and wished to pay the whole thing off, and for this reason I applied for the loan from the insurance company. The negotiations for the insurance loan were pending for some two or three weeks, and the money came here to Mr. Bothwell several days before the 8th day of December, 1893, as I understood



It. The papers were signed on the 8th day of December, 1893. Had talked to Mr. Thompson about the note for \$3,365, and Mr. Thompson told me on the 8th of December that he had wired for said note, or would wire for the said note. This conversation occurred on the 8th of December, or a few days prior thereto. I did not see the note in Mr. Thompson's possession. I did not know the deed of trust was released on the 8th day of December, and did not expect it to be released until the next day, because it was very late on the 8th of December, 1893, when I completed the papers for the loan from the insurance company. Several days after this I asked at the recorder's office, and ascertained there that my deed of trust had been released, and my note had been canceled. I never heard anything more about my note and deed of trust, and the release thereof, until about ten days after the failure of the First National Bank, when old Mr. Galbreath, of the Ripley National Bank, spoke to me about it, and I could not imagine what note he was talking about. I had told Mr. J. C. Thompson when I deposited the money in the insurance loan, on the 8th day of December, 1893, to send the money and pay off the J. L. Smith note, and the note held by the Ripley National Bank, and, when he paid them off, he (Thompson) should charge my account in the First National Bank with the amount of this note, and turn both notes over to me as vouchers, and I supposed he did so, and I expected to get my notes when I settled with the bank. The first I heard to the contrary was about six weeks after this, when I heard that he had not paid the J. L. Smith note. I got after Thompson about the matter, and by different excuses he put me off, and the matter was delayed until after the failure of the First National Bank, but I never did hear about the Ripley National Bank matter until about ten days or two weeks after the failure of the First National Bank. After the failure of the First National Bank I found out that Mr. Thompson, instead of paying off my note to the Ripley National Bank, had taken \$3,365 from my account with the First National Bank and put that sum to the credit of the cashier, and then Thompson took this sum from the cashier's account and put it to his individual account. I never knew he had done this, and never authorized him to do so, and never heard of this until after the failure of said bank. I got the receiver to transfer the same back to my account, where it belonged, and I filed a claim against the bank for all my deposit, including the above amount, and the receiver allowed me my claim for upwards of \$5,600. I put my certificate of allowance up as collateral security, and borrowed money on the same from the Bank of Commerce in Sedalia, Missouri, and I used the money to pay off the J. L. Smith note. J. L. Smith had a judgment against me, and this judgment was also assigned to the Bank

of Commerce. The Smith judgment was paid off by money I borrowed out of the Bank of Commerce. I have paid the Ripley National Bank nothing, and my idea is that I should only pay the Ripley National Bank the amount of dividend realized on the sum of \$3,365 and some cents of my claim as allowed against the First National Bank, that being the sum I left at the First National Bank to pay the said Ripley National Bank."

Mr. Bothwell, the agent of the insurance company, to whom the money came for the purpose of consummating the loan, testified: "The abstract of title furnished to me showed that a certain note for about \$3,000, made by Sibert to C. Newkirk and J. C. Thompson, was secured by a deed of trust on a part of the said land, and I applied to J. C. Thompson to ascertain whether they were ready to receive payment of the note, and to release and satisfy the deed of trust, and asked Thompson whether they were prepared to enter satisfaction and release on the records, and he stated that they were ready to release the incumbrance. Some days later I notified Thompson that I was ready to close the loan, and he stated that he and Mr. Newkirk would enter satisfaction on the deeds of trust record. The satisfaction was entered that day, but not in my presence; but I examined the record afterwards, and had the maker of the abstract of title put an entry on the abstract showing that satisfaction was made. Soon afterwards I wrote my check or checks for the amount of money that was due on the loan to Sibert. And in my presence he indorsed the check or checks, and handed them to Mr. Thompson, in the First National Bank of Sedalia. I did not see the note made by Sibert to Newkirk and Thompson, but I assumed that the note was at the bank, and that it was duly and properly canceled, and the satisfaction lawfully made."

Mr. Latimer, the receiver of the Sedalia Bank, who took charge thereof about the 5th of May, 1894, and who was continuously thereafter in charge of its books, papers, and assets, to the day of the trial, testified that "on the 8th of December, 1893, Mr. Sibert had to his credit at said bank about \$5,100 as a depositor. On the 10th day of March, 1894, there was transferred to the cashier's account, from the account of M. H. Sibert, the sum of \$3,365. After I was appointed receiver, I heard from Mr. Galbreath his statement about the Sibert note for \$3,365.22, and then I looked the matter up for him, and found the transfer of a credit to cashier's account from Sibert's account, dated March 10, 1894. I could find no check drawn by Mr. Sibert to the bank for said sum, and I saw Mr. Sibert about it. He told me that he never drew such a check, and never authorized any one to draw such a check, and never authorized any one to make such a transfer, and no one was authorized to check against his account, but he had told Mr.

Thompson to pay the note, and use the paid note as a voucher against the account. I then ordered the amount (\$3,365) put back to Mr. Sibert's credit from the cashier's account, and it was so done. Mr. Sibert then put up his claim against the bank, after I made up his account, showing and explaining to him that said sum was placed back to his credit, and it was allowed by me as a claim on July 5, 1894. He had the benefit of said amount in his claim, and I told him so, and he put his claim in for his deposit on that theory, and it was allowed to him. He accepted the claim, and transferred it to another party." The receiver's certificate of the proof of the claim, dated July 5, 1894, and on the same day assigned by Sibert to the Bank of Commerce, was also put in evidence.

The appellant offered as evidence a large number of letters from Galbreath, cashier, to Thompson, cashier, in regard to notes and securities, other than those of Sibert, and having no reference to or connection with his dealings with the plaintiff bank or the Sedalia bank, all of which are set out in the record, and after careful examination of which we find they tended to prove no more than was stated by Galbreath on his cross-examination by appellant's counsel, in language as follows: "The Ripley National Bank, for some years prior to December, 1893, rediscounted some paper for the First National Bank of Sedalia, Mo., and such paper was generally sent to the First National Bank of Sedalia, Mo., for collection or renewal. The correspondence in reference to such paper was between J. C. Thompson, as cashier of the First National Bank of Sedalia, Mo., and myself, as cashier of the Ripley National Bank. The business of the Ripley National Bank with the First National Bank of Sedalia, Mo., was entirely and exclusively confined to taking notes from the latter bank as rediscounts, which were either indorsed by the First National Bank or by J. C. Thompson and C. Newkirk, and when indorsed by them the paper was always sent by them, as officers of the First National Bank of Sedalia, Mo., to our bank for discount, and then they would make the draft on us for the net proceeds, and send the same through one of their St. Louis correspondent banks. When such notes matured we would send them to the First National Bank of Sedalia, Mo., for payment, as all the notes were made payable at said bank. When payment was made we did not authorize a deposit of the amount to our credit, but always indorsed the notes for collection and remittance to the Ripley National Bank. Many of the notes I authorized to be renewed, but in every instance this was under special instructions from me as cashier of the Ripley National Bank, and nothing was left to their discretion. The Ripley National Bank never did a general exchange business with the First National Bank of Sedalia, Mo., and neither C. Newkirk nor J. C. Thompson, nor the First

National Bank, were ever agents for the Ripley National Bank, excepting that the First National Bank of Sedalia, Mo., was used by us to make collection or renew notes which we had taken from them and made payable at their bank, under special instructions in each particular instance. In every instance I would give special instructions what I wanted the First National Bank to do in regard to the papers sent, and they never had authority except what I gave them specially in each particular instance."

The foregoing somewhat lengthy and detailed statement of all the material facts, as they appear from the evidence, has been made in order that the real merits of the case might clearly appear, no injustice be done to any of the parties, and the necessity of an extended consideration in this opinion of the argument of counsel for a reversal of the judgment be obviated; for, when all the facts are considered and reduced to final expression in the ultimate facts proved, there can be no question as to the legal principles governing the case. That the respondent, as indorsee and holder of the note, was the real cestui que trust, and the only party authorized by law to release the deed of trust on the margin of the record thereof, is beyond question. Rev. St. 1889, § 7004. That the release was not executed by the respondent, through or by any of its officers or agents acting for it, or by any person assuming to act for it, or in its name, and that C. Newkirk and J. C. Thompson, who signed the release, in their own names and for themselves, had no power to release the deed of trust, is also beyond question. Why, then, should not this void release be canceled and set aside? The answer to this question returned by the appellant is that the debt to secure which the deed of trust was given has been paid by the appellant, and he is entitled to have satisfaction entered of record formally by the respondent. Hence for a court of equity to set aside this false and invalid, but apparently lawful, entry of satisfaction, would be a work of supererogation. Therefore the entry of satisfaction should stand. And in support of this contention and plea of payment, while it is alleged in the answer that payment of the debt was made by the appellant to J. C. Thompson, who, it is alleged, was at the time the agent of the appellant, duly authorized to receive the same, in the argument it is sought to be maintained that payment was made to the First National Bank of Sedalia, who, it is contended, was the general agent of the plaintiff, duly authorized at all times after the maturity of the note to receive payment thereof. How far the evidence falls short of showing that the Sedalia bank was such general agent is apparent upon the face of the statement. But if it could be conceded that the Sedalia bank possessed such authority from the respondent, the concession would avail the appellant nothing, for the reason that it plainly appears

from the evidence that no payment was ever made to the Sedalla bank, as shown in the statement. The only connection which the evidence shows, or tends to show, that the Sedalla bank had with appellant's moneys was as his depository, which it became as to the money in question on the 8th of December, 1893, when the appellant, having, through his agent, J. C. Thompson, procured the loan from the insurance company, deposited the proceeds to his own credit in said bank. Evidently no payment to plaintiff of its debt, whatever relations existed between it and said bank, can be predicated of this deposit. After the bank, at appellant's request, had accepted his money, and passed it to his credit, the same could not rightfully be paid out by the bank except on appellant's order. Such order is usually given by written check, but doubtless may be given orally, and such order would be well enough if the bank chose to take the risk and act upon it, but, whenever the bank does act in obedience to such order, it acts for the depositor, and not for the payee of the order. Hence if Thompson, as cashier, had, in pursuance of the appellant's oral request, forwarded to the plaintiff the amount of its debt, and charged the same to the appellant's account, he would, in so doing, have been acting for the appellant in making payment of the debt, and not for the respondent in receiving payment of the debt. But the bank did not, by its cashier, Thompson, or in any way, act upon that order, and appellant's money remained on deposit in the Sedalla bank to his credit, and subject to his order, until the 10th of March, 1894, when Thompson, instead of remitting the amount of respondent's debt to it, at Ripley, and charging the same to appellant's account, as he had been authorized by appellant to do, converted the same to his own use, in the manner shown in the statement; and thus it turned out, by the malfeasance of the appellant's own agent, to whom he had given the power and to whom he had intrusted the duty of paying off this debt, the same was not paid by the appellant, nor by any person for him. The fact that the respondent was lulled into a sense of security by Thompson's letters as cashier, and the payment by him of interest on the debt, while carrying out this fraud upon the appellant, in no way changes the complexion of the transaction. The evidence not only failed to show any authority from respondent to Thompson as an individual to receive payment of this debt,—and that, alone, would be decisive of the case against the appellant upon the issue made by the pleadings, if strictly interpreted,—but it also failed to show payment to the Sedalla bank for the respondent by the appellant, or by any person for him. The appellant's defense of payment failed along the whole line, and the court committed no error in its decree and judgment, which is therefore affirmed. All concur, except MARSHALL, J., dissenting.

# CARTER v. FOSTER et al.

(Supreme Court of Missouri, Division No. 1.

July 6, 1898.)

## MORTGAGE — CONSTRUCTION — PROPERTY COVERED.

A deed of trust of a lot described it by metes and bounds, including the whole lot, but by a subsequent recorded agreement the north 30 feet were excepted, subject to a city ordinance providing for the opening of a street, which agreement also provided that the proceeds of the condemnation proceedings should be applied on the debt secured by the deed. The city thereafter abandoned the street proceedings, which thereupon, by its charter, became wholly void. The entire lot was conveyed subject to the trust deed by various conveyances not mentioning the exception, to R., when it was sold under foreclosure of the trust deed to defendant; and thereafter R. conveyed the excepted 30 feet to plaintiff. *Held*, that the 30 feet were excepted from the trust deed only subject to the city ordinance, and that, after the proceedings were abandoned, it passed under its foreclosure to defendant.

Appeal from circuit court, Jackson county; Charles L. Dobson, Judge.

Action by Alexander Carter against J. Taylor Foster and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Kinley, Carskadon & Kinley, for appellant. Brumback & Brumback, for respondents.

ROBINSON, J. This is an action of ejectment, instituted in the Jackson county circuit court, to recover a strip of land 30 feet wide from north to south, and 144 feet long from east to west, fronting 30 feet on the west side of Holmes street. This 30-foot strip is the north portion of a larger strip, fronting 76 feet on the west side of Holmes street, in Kansas City. The suit was originally begun against the defendant Foster alone, J. C. Havemeyer being, on his application, made party defendant. The petition is in the usual form, alleging ouster on December 9, 1894. The defendant Foster answered, admitting possession of the premises, but denying all other allegations in the petition contained. The answer of defendant Havemeyer set up that Foster was in possession of the premises in question, as his tenant, and denied all other allegations of the position. There was no reply. J. F. Bayless is the common source of title. On the 16th day of February, 1889, said Bayless, being the owner of the entire 76-foot strip, executed his deed of trust to Samuel Foster, trustee for C. R. Hicks, to secure a note for \$5,000, payable in three years after date thereof to said Hicks, together with six interest coupon notes. The deed of trust described the entire 76-foot strip by metes and bounds, so as to include the 30 feet in controversy, and at the end of such description the following superadded words appeared: "Being the land conveyed by W. Ewing Hall and wife to Catherine McCrystle Williams, by deed dated October 14,

1880, and recorded in Book B24, page 512, excepted that part thereof taken for Holmes and 23rd streets." At the time the Bayless deed of trust was executed, a proceeding begun by the city of Kansas City to condemn the 30-foot strip, for a part of Twenty-Third street, was pending; but afterwards, and before the deed of trust was foreclosed, the condemnation proceedings were abandoned, whereby the right of the city to condemn the 30-foot strip was forfeited, so that the strip in question never was taken for street purposes. By section 5, art. 7, of the city charter of Kansas City of 1875, it is provided that if a verdict of the jury, when reported to the common council by the mayor, shall not be confirmed, etc., within 60 days after the proceedings, it shall be wholly void. It appears from the record that on February 9, 1889, five days before the deed of trust was executed, the city of Kansas passed an ordinance providing that the 30-foot strip should be taken for Twenty-Third street, directing that proceedings be had to assess the damages and benefits. Process was served on J. B. Boyd, who owned the 76-foot strip before Bayless acquired it. On July 18th following, a jury to assess damages and benefits was impaneled, and on September 10th the jury filed their verdict. On September 16th the verdict was submitted to the city council, and on the same day an ordinance was introduced to confirm the verdict. This ordinance, however, was never passed, and consequently the verdict was never confirmed. No further proceeding seems to have been taken under the ordinance; and by the charter all proceedings, as well as the ordinance itself, were vitiated by reason of the failure to confirm the verdict within the time provided in the charter. The application for the loan secured by the deed of trust was made by Boyd, who conveyed the premises to Bayless before the loan transaction was finally consummated. Thereupon Bayless signed the deed of trust, the loan, however, being made in pursuance of the application made by Boyd. In this application it is stated, in substance, that he (Boyd) offered, as security for the loan, 76 by 144 feet in N. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ , township 49, range 33. Shortly after the date of the deed of trust, Bayless executed an agreement, which was afterwards recorded, by the terms of which it was agreed that "any and all sums that may be awarded as the damage taken for the north thirty feet of said property, in the opening and establishing of 23rd street, under ordinance heretofore passed by said city of Kansas, be paid to said Hicks, or to his assigns of said notes and interest coupons, the same, however, to be applied in part payment thereof." The agreement provided, as the reason for directing the payment of said damages, that "whereas, James F. Bayless, of Douglass county, Kansas, is the owner in fee of the following described real estate, in the county of Jackson, and state of Missouri, to wit [here follows the description of the whole seven-

ty-six feet by metes and bounds], excepting, however, a strip taken from the E. end thereof by the city of Kansas City, Mo., in the widening and opening of Holmes street, excepting, further, the N. thirty feet thereof is subject to an ordinance which has been enacted by said city of Kansas, providing for the opening and establishing of 23rd street; and whereas, said James F. Bayless did heretofore borrow of Charles H. Hicks, of Kansas City, Missouri, the sum of \$5,000.00, for which he, the said Bayless, and Mary R. Bayless, his wife, executed and delivered to said Hicks one coupon note, \* \* \* said coupon note and interest coupons being secured on the above-described real estate, with the exception as stated, as evidenced by deed of trust of record in the office of the recorder of deeds of Jackson county, Missouri, at Kansas City, dated February 14th, 1889, and executed by the said James F. Bayless and Mary R. Bayless, his wife, to Samuel Foster, trustee for said Charles Hicks: Now, therefore, in consideration of the premises, I, the said James F. Bayless [here follows agreement for paying condemnation money to Hicks or his assigns, as above stated]." On May 15, 1889, Bayless, by deed in form a warranty, conveyed to F. W. McCabe the entire 76 feet, describing it by metes and bounds, "excepting, however, so much of said tract as may have been taken from the E. end thereof, for and as a part of Holmes street, subject to the Bayless deed of trust." On July 16, 1889, F. W. McCabe conveyed to J. E. McCabe the entire 76 feet, describing it by metes and bounds, without, however, mentioning or referring to either Holmes or Twenty-Third streets. This deed was subject to an incumbrance of \$5,300 and any interest which may have accumulated thereon. On the 25th of August following, J. E. McCabe conveyed, by a warranty deed, to M. J. Richards, the entire 76 feet by metes and bounds, not mentioning Holmes or Twenty-Third street. This was also subject to the Bayless deed of trust. Default having been made in the interest coupons maturing in August, 1891, the trustee named in the deed of trust on September 26, 1891, sold the entire 76 feet, in accordance with the power contained in the deed of trust, to the defendant Havemeyer, and delivered to him a trustee deed therefor in usual form, who thereupon took possession of the whole 76 feet, renting it to various tenants as one parcel. On the 15th day of April, 1893, said Richards, by quitclaim deed, for the recited consideration of \$50, conveyed to plaintiff the 30-foot strip in controversy, describing same by metes and bounds. This deed also recited that Richards assigned to plaintiff all damages awarded, or that might be awarded, for taking said tract for opening Twenty-Third street. The evidence shows that the entire 76 feet was fenced as one parcel, and had been so fenced and used for 8 or 10 years; that the house situated on the whole tract extended over on the 30-foot strip 4 or 5 feet. The circuit

court, in its special finding of the facts, made at the instance of the plaintiff, found that it was the intention of the parties to the deed of trust under consideration to except from the operation thereof only such right or easements as the city had acquired or might acquire for the street purposes, and thereupon refused a peremptory instruction for the plaintiff, and gave an instruction in the nature of a demurrer to the evidence for defendants, and rendered judgment accordingly, in favor of defendants, from which the plaintiff duly appeals to this court.

The only question presented by the record for our determination is as to the proper construction of the above-quoted clause in the Bayless deed of trust. The plaintiff contends that the true meaning of the description contained in the deed of trust is that the disputed strip had been taken for Twenty-Third street, and that, therefore, the fee-simple title thereto was excepted from the operation of the deed of trust, and did not pass thereby, but remained in Bayless, who conveyed the same to F. W. McCabe, under whom the plaintiff claims title, long before Havemeyer acquired any claim whatever thereto. The defendants, on the other hand, contend that the strip in dispute never had been "taken for 23rd street," within the meaning of the clause above mentioned, and that even if it should be held that the strip in question had been taken for street purposes, within the meaning of those words, yet the parties to said deed, by the words "that part thereof taken for 23rd street," referred only to the existing right which Kansas City had, by the passage of the ordinance, acquired to take the strip in dispute for Twenty-Third street; that the fee of the 30-foot strip passes to the trustee named in the deed of trust, subject only to this right of the city; and that, inasmuch as the right was afterwards extinguished, the whole title remained in the trustee, and the trustee's deed passed such title to defendant Havemeyer.

It is a well-settled canon of construction that, in construing a deed or any other written instrument whose terms are susceptible of more than one meaning, it is proper to place the court in the position of the parties thereto at the time the instrument was executed, and to show what was subsequently done by the parties themselves in carrying out the contract, as showing their understanding of its provisions. *Bollinger Co. v. McDowell*, 99 Mo. 632, 13 S. W. 100; *Hammond v. Johnson*, 93 Mo. 198, 6 S. W. 83; *Edwards v. Smith*, 63 Mo. 119; *Ellis v. Harrison*, 104 Mo. 270, 16 S. W. 198; *Knight v. Worsted Co.*, 2 Cush. 271. The rule is thus stated in the latter case: "In expounding a written contract, although parol evidence is not admissible to prove that other terms were agreed to which are not expressed in the writing, or that the parties had other intentions than those to be inferred from it,

yet it is competent to offer parol evidence to prove facts and circumstances respecting the relations of the parties, and the nature, quality, and condition of the real and personal property, which constitute the subject-matter respecting which it is made. It is also competent to prove by parol evidence—indeed, it can hardly be done by any other—the acts of the parties at and subject to the date of the contract, as a means of showing their own understanding of its terms." The words of the exception in this deed of trust are "excepting that part thereof taken for Holmes and 23rd street." Five days before the deed of trust was executed, the city of Kansas City passed an ordinance providing that the 30-foot strip in controversy should be taken for Twenty-Third street, and directing that proceedings should be had to assess the value of the lands to be taken, and the benefits accruing to lands not taken. No further proceedings, however, seem to have been taken under said ordinances; and, as before observed, by the charter of Kansas City, all proceeding with respect thereto, including the ordinance itself, became null and void for want of confirmation of the verdict of the jury within the time limited. Clearly, then, it cannot be said that the strip in controversy was taken by the passage of the ordinance without anything more having been done. Section 21, art. 2, of the constitution of Missouri, in defining when land shall be deemed to have been taken for public uses, after declaring that private property shall not be taken or damaged for public uses without just compensation, and providing for the manner of ascertaining the amount of compensation, says: "And until the same shall be paid to the owner or into court for the owner, the property shall not be disturbed or the proprietary rights therein of the owners divested."

In *Kiebler v. Holmes*, 58 Mo. App. 119, *Kiebler* and *Freeman* conveyed a lot on E. Ninth street, in Kansas City, to *Mrs. Wright*, by warranty deed. At the time the deed was made, an ordinance had been passed to take five feet of said lot, but nothing had been done thereunder. Afterwards damages were assessed by the mayor's jury, and both *Kiebler* and *Mrs. Wright* claimed same. *Gill, J.*, who wrote the opinion of the court, said: "The mere passage of the ordinance of February 27th, 1887 [an ordinance like the one in question], did not amount to an appropriation of the real estate, nor did it commit any damage to which the then owner was entitled. The city did not by the passage of the ordinance, take the property. This was the only initial step to an appropriation or taking in the future. After passing such ordinance, and even after the proceedings were begun before the mayor to assess damages and benefits, the city might have abandoned the condemnation, because too expensive or for other reasons." In *Re Board of Street Opening* and

Improvement of New York (Sup.) 22 N. Y. Supp. 1021, after describing a tract by metes and bounds, the deed continued: "Excepting therefrom, however, so much of said lot as has been taken for the opening of One Hundred and Twenty-Seventh street and the widening of Manhattan street." There, as here, a part of said lots had been taken for Manhattan street, and prior to the deed a street commissioner had filed a map designating certain portions of the lots to be taken for 127th street; the filing of the map in that case being a step corresponding to the passing of the ordinance in the case at bar. In that case, as in this, the proceedings to assess damages for the part to be taken for said street was taken after the deed was made. Upon the termination of the condemnation proceeding, both the grantor and grantee claimed the damages so assessed; and the merits of the controversy involved the question as to whether the land taken for 127th street passed to the grantee under the deed, with the excepting clause as above indicated. On account of the importance of the case and the similarity in many respects to the case at bar, we will quote from the opinion of that court on this question. The court said: "The court below held that it was excluded from the conveyance, and remained vested in the heirs at law of Thomas Land. We think, however, that it was not the intention of the parties to that deed that any portion of the two lots, Nos. 104 and 106 on the Loss map, to which they still had title, should be excepted from the conveyance; that all that was intended to be excepted was those portions of the lots to which they had lost title by reason of the proceedings of the city in actually taking the land for street purposes. The language used clearly implied that the exception was to relate only to so much of the lots as had been, before the execution of the conveyance, actually taken for the opening of these streets, and not to any portion of the property which might in the future be taken for the opening of the streets in question. There was nothing to show that the grantors had any intention to reserve these small pieces of land that would in the future be necessary to be taken for 127th street. So far as appears, they owned no property in the vicinity to which these pieces of land could be useful; and, in the face of the clear language used, we fail to see how any other intention could be implied." In the cases of *Blackman v. Striker*, 142 N. Y. 555, 37 N. E. 484, *Brown v. Spilman*, 155 U. S. 665, 15 Sup. Ct. 245, and *Winston v. Johnson* (Minn.) 45 N. W. 958, exceptions similar to the clause in question were under discussion, and the courts, construing their meaning, gave effect to the intention of the parties very much as was done in 22 N. Y. Supp. 1021, and by the circuit court in the case at bar. The decision in *Re Board of Street Opening and Improvement of New York*, supra, was after-

wards affirmed on appeal by the court of appeals of New York. This decision was rendered by the same court that decided *Munn v. Worrall*, 53 N. Y. 44, cited and so much relied upon by counsel for plaintiff, but is clearly distinguishable from it. In the latter case the land sought to be excepted from the deed exactly fulfilled the call in the deed. It had already been taken, paid for, and occupied by the public. A careful reading of the opinion will show that the court's reason for holding as it did was that the words of the exception could not possibly refer to the right of the city. The words of the exception were "saving and excepting from the premises hereby conveyed all and so much and such part or parts as has or have been lawfully taken for the public road or roads." It is quite different language from that used in the deed here under consideration. Besides, there was no evidence in that case as to the intention of the parties. Consequently, the court held that the word "premises," which is not used in this case, in its technical signification, together with the connection in which it was used, must be held to mean the tract of land described in the deed, and not the estate or interest of the grantor. The present case, however, does not present the peculiar feature of the exception from the "premises," as in the *Munn Case*. The same distinction is observed in *Langdon v. Mayor, etc.*, 6 Abb. N. C. 314, relied upon by the plaintiff. There the words of the deed were "saving and reserving out of the several water lots and soil under the water," etc. In construing these words, the court said: "It is not the streets which are saved and reserved, but the land under water upon which the streets were to be built." In this connection, it will be observed that, under the decisions of this state, the city only acquires an easement or use of the streets limited strictly to the public use. *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 82 Mo. 121; *Snoddy v. Bolen*, 122 Mo. 479, 24 S. W. 142, and 25 S. W. 932. Besides, in the *Langdon Case* the city was the grantor; and, even if the exception had been held to refer to such interest as the city ordinarily had in its streets, yet, under the laws of New York, the city usually acquired the entire fee, and the language would naturally refer to the fee-simple title. The same remarks are alike applicable to *Mayor, etc.*, of New York v. *New York Cent. & H. R. R. Co.*, 69 Hun, 324, 23 N. Y. Supp. 562, cited by plaintiff.

The especial and particular right of the city to appropriate the strip in controversy, as distinguished from its general power of eminent domain, might be said to have sprung into existence upon the passage of the ordinance in question. To be sure, the general right of the city to condemn property for public use existed under its charter; but the especial and particular right to appropriate this identical parcel of land arose out of the ordinance itself. This was a

valid and subsisting right existing at the time of the execution of the deed of trust. It was this right, and no other, upon which the exception was intended to operate. In the light of the evidence, giving to the words of that clause of the deed of trust relating to the exception the meaning which all the surrounding circumstances show to be the obvious one, the language used clearly implies that it was the intention of the parties that the exception was to relate only to the right which the city, by the passage of the ordinance, had acquired to take the strip in controversy for Twenty-Third street. There is nothing in the deed under consideration which warrants the construction contended for by plaintiff. The evidential tendency of the Boyd application, upon which the loan in question as made, was to show that the parties intended to give, as security for the money borrowed, the entire 76-foot strip of land; but, as they understood the matter, the 76 feet then consisted of the estate remaining in the land, together with the right to receive the money from the city; and, in order to effectuate their intentions, the right to which the city had to acquire the strip in question was excepted from the operation of the deed of trust, and Bayless, by a separate contract, transferred to Hicks merely the proceeds of such excepted rights, thereby more effectually carrying out the original intention of the parties. The contract in question, to that extent, becomes important as tending to show the intentions of the parties. While the contract cannot in anywise be said to import to the deed of trust a meaning that is not contained in its words, it tends most conclusively to show what was intended by the parties by the exception contained therein. The contract in substance states that the debt therein referred to was secured by the land, with the exceptions as stated. The exceptions in question appeared in the first part of the contract. Manifestly, then, it was these exceptions that Bayless refers to when he states that the deed in question is secured by the entire 76-foot tract of land, with the exceptions, as stated. When we come to examine the opening paragraphs of the contract, stating the exceptions, we find the following significant words employed: "Excepting further the N. thirty feet thereof is subject to an ordinance which has been enacted by the said city of Kansas providing for the opening and establishing of 23rd street." This is equivalent to saying Bayless meant, by the exception in question, that the land covered by the deed of trust was subject to the then-existing right of the city of Kansas City to take the 30-foot strip in controversy for the opening of Twenty-Third street, and nothing more; and this is precisely what the circuit court found was the true meaning of the deed of trust.

Another fact that probably had much influence upon the court in determining the

question as to the intention of the parties in making and accepting the deed of trust is that the 76-foot strip had always been used as one lot, and that the dwelling, as it then stood upon the ground, was partly on the 30-foot strip in controversy, and partly on the remaining 46 feet; 6 feet of the house standing upon the strip for which plaintiff contends. It would have been so unusual a transaction for one to have offered as security for a loan a strip of ground so divided as to cut in two the rooms of a dwelling house owned by the borrower, and so unlike the business methods pursued by the money lender to have accepted it in that condition, when a foreclosure on his security would necessarily result in its permanent impairment, that a court might well be justified in determining that such was not the intention of the parties, when the language of the deed as to what was intended was of doubtful or uncertain import. The finding of the trial court has ample sanction in the facts developed. Its judgment is therefore affirmed. All concur.

C. F. SIMMONS MEDICINE CO. et al. v. ZIEGENHEIN, City Collector.

(Supreme Court of Missouri. July 6, 1898.)

#### TAXATION—PUBLIC PURPOSES.

Acts 1895, p. 278, § 3, providing that every manufacturer of patent medicines shall pay a license, which shall be turned into a fund for maintaining free scholarships in the state university for students without means, is in violation of Const. art. 10, § 3, ordaining that taxes may be levied and collected for public purposes only.

In banc. Appeal from St. Louis circuit court.

Bill by the C. F. Simmons Medicine Company and others against Henry Ziegenhein, collector of the city of St. Louis. There was a judgment for defendant, and plaintiffs appeal. Reversed.

D. P. Dyer, for appellants. Judson & Taussig, for respondent.

ROBINSON, J. This is a suit in equity, by 14 manufacturers of and dealers in patent medicines in the city of St. Louis, to restrain the defendant, as collector of that city, from enforcing against them the provisions of section 3 of "An act providing for the endowment of the state university, and for the establishment and endowment of free scholarship of merit herein in each county," approved April 1, 1895. Acts 1895, p. 278. Said section provides: "Every manufacturer of medicines or remedies commonly known as patent medicines shall pay a license tax of twenty-five dollars, and every traveling vender of such medicines or remedies shall pay a license as now provided by law; and every such traveling vender shall take out a license in every county in which he vends such articles," etc.

The petition, after stating the business of each of the plaintiffs, and that they have joined in this action to avoid a multiplicity of suits, charges that the defendant, as collector of the city of St. Louis, claiming to act under and in pursuance of section 3 of said act as aforesaid, has demanded of each of them the license tax of \$25 provided in said section, and, upon their refusal to pay same, has threatened, and is now threatening, to seize, distrain, levy upon, and sell the property of each of said plaintiffs to pay said license tax, required by said section 3 of said act as aforesaid, and that he will do so unless enjoined. The petition then charges that said act of April 1, 1895, is violative of section 28 of article 4, and of section 3 of article 10, of the constitution of the state of Missouri, and for that reason its provisions are of no binding force upon them, or either of them. The petitioners further charge that the seizure and sale of their property by the collector under the pretended authority of the act of April 1, 1895, would cast a cloud upon its title, that the damages to each of them would be irreparable, and that they are without an adequate remedy at law, hence have come into a court of equity, where such complaints are properly cognizable, and pray for injunctive relief. To plaintiffs' petition defendant filed a general demurrer, which being by the court sustained, and final judgment entered thereon, the plaintiffs, after the usual preliminaries, have prosecuted their appeal to this court.

Although a general demurrer was filed to plaintiffs' petition, the counsel for defendant request that nothing may be considered by the court to prevent it from passing upon the constitutionality of the act under which the defendant is threatening to proceed. We will then treat the case as if the demurrer in no wise went to the question of the remedy pursued, but as if plaintiffs had the right to maintain their action, if the act under consideration is adjudged unconstitutional for either of the reasons alleged. Since this case reached this court, an original proceeding has been instituted herein for a writ of certiorari to the judge of the probate court of Boone county, commanding him to send up the record of his proceedings, in the matter of the assessment and levy of a collateral succession tax upon the estate of John C. Conley, deceased, under the provisions of the act of April 1, 1895, and an act of March 17, 1897, amendatory thereof. In that proceeding (*State v. Switzer*) the constitutionality of the act of April 1, 1895, as in this, was directly assailed upon numerous grounds, and this court, in an elaborate opinion prepared by Gantt, C. J., reported in 45 S. W. 245, held the act unconstitutional, for the reason that the tax provided therein was not levied for public purposes within the meaning of section 3 of article 10 of the constitution of Missouri,

which ordains that "taxes may be levied and collected for public purposes only." The money sought to be collected, under section 3 of the act in controversy, from the petitioners herein, as manufacturers of and dealers in patent medicines, goes to the same fund, and is to be used for the same purpose, as does the collateral succession tax provided for in section 1 of the act in controversy, under consideration in the certiorari proceeding against the probate judge of Boone county, supra. The opinion in that case determines the law of this, and upon its authority, and for the reasons therein given, without further comment or elaboration, it is held that the tax sought to be levied and collected against the petitioners herein, by the defendant, as collector of the city of St. Louis, under said act, is unconstitutional, because levied for the use and benefit of a special class of students of the state university, named and designated in the act, and not for public purposes, within the meaning of section 3 of article 10 of the constitution of this state, and that the writ of injunction staying its collection should be awarded. The judgment of the circuit court will be reversed, and the cause remanded, with directions that it enter an order making the injunction perpetual, as prayed for in plaintiffs' petition. All concur, except MARSHALL, J., who does not sit in the case, having been of counsel.

# CHICAGO, R. I. & P. RY. CO. v. GEORGE.

(Supreme Court of Missouri, Division No. 2.  
June 14, 1896.)

## EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—DAMAGES—MEASURE—EXCESSIVENESS—INSTRUCTIONS—APPEAL—REVIEW—HARMLESS ERROR.

1. In condemnation proceedings, an instruction to allow the value of the land actually taken for the right of way, and such further sum as represents the damage to the whole tract of which the right of way forms a part, is not erroneous as allowing double damages.

2. A reference in a charge in condemnation proceedings to "the farm of defendant of which the right of way forms a part" does not include a tract of land a quarter of a mile distant, of which the right of way formed no part.

3. In an action to condemn a railroad right of way, a charge is proper that, if the maintenance of a pond is not affected by the construction of the road, no sum should be allowed as damages to the pond, and that this is true even though the pond may extend upon the right of way.

4. A judgment will not be reversed on technical objections where appellant was not prejudiced.

5. Where a verdict is supported by substantial evidence, and was approved by the trial court, it will not be reversed on the ground of excessive damages.

Appeal from circuit court, Mercer county; Paris C. Stepp, Judge.

Condemnation proceedings by the Chicago, Rock Island & Pacific Railway Company against Abner B. George. There was a



judgment for defendant, and plaintiff appeals. Affirmed.

M. A. Low and W. F. Evans, for appellant. Harber & Knight, for respondent.

BURGESS, J. This is a proceeding commenced by plaintiff corporation to condemn a right of way over a tract of land owned by defendant, Abner B. George. When the petition for condemnation was filed, on July 29, 1895, in the circuit court of Mercer county, Mo., commissioners were appointed to assess the damages, who viewed the premises, assessed the damages at \$2,500, made their report, and filed the same with the clerk of the circuit court of said county. Thereafter, upon motion of plaintiff, the report was set aside, and inquiry of damages ordered before a jury. At the September term, 1895, of said court, the case was tried by a jury, who returned a verdict in favor of defendant, assessing his damages at \$3,750. After unsuccessful motions for a new trial and in arrest, plaintiff appealed.

The evidence showed that defendant owned a tract of land containing about 447 acres in one body, through which plaintiff sought to condemn a strip 100 feet wide for right of way, upon which to move its roadbed and track from where it was then located. The weight of the evidence showed that this land was worth \$45 or \$50 per acre. The strip taken runs diagonally across part of the land, and between the present right of way and the proposed there are about 17.9 acres of defendant's land, and there are 10.41 acres in the proposed right of way. Between the proposed right of way and the public road there are 9.49 acres, and there are 4.47 acres lying east of the highway running through the land. Then south of the public highway, and east of the proposed railroad, there are 47.44 acres in the northeast quarter. Where the land taken joins the present road there is a fill of 300 or 400 feet in length, and 15 feet high. The proposed roadbed runs mostly to the surface of the ground for 200 or 300 feet, and then there is another fill, about the same as the other, for about 300 or 400 feet, then a light cut, and then a fill of from 15 to 18 feet, then another cut of 29.06 feet at the center and 33 feet at the upper edge of the slope. That cut extends about 1,400 feet, and then there is another fill of 21 to 23 feet, which extends on defendant's land about 700 feet, including the bridge. There was a valuable pond on the land, which the evidence tended to show would be substantially destroyed by the construction of the road. Defendant also owned 40 acres of land which lie a quarter of a mile from the 447-acre tract, which plaintiff contends were considered by the jury in estimating the damages, but this position is not sustained by the record.

Plaintiff prayed the court to instruct the jury as follows: "(1) The court instructs the

jury that it is the duty of the railway company to erect and maintain all necessary farm crossings for the use of the proprietors or owners of the lands adjoining said railroad. You are therefore instructed to entirely exclude in your estimate of the damages all necessary expenses to erect and maintain all such crossings. (2) The court instructs the jury that you will not allow any damages that may result from the construction and operation of the railroad in question over the public highway or highways near or in the vicinity of defendant's lands. (3) The court instructs the jury that you will not allow any sum as damages to the lands lying south and east of the public highway extending through section 3, in an easterly and westerly direction, by reason of the location and construction of the proposed railway over the lands north of said public highway. (4) The court instructs the jury that the only damages that you can allow to the lands lying east and south of the public highway, referred to by the witnesses, extending in an easterly and westerly direction through section 3, are such damages, if any, as will be caused by the location and construction of the railway over the lands south and east of said public highway. (5) The court instructs the jury that you are not authorized to allow any damages because of the liability, if any, to persons or any stock being injured or killed by reason of the construction and operation of said railroad. (6) Under the law of this state, it is the duty of the plaintiff to build and maintain good and substantial fences on each side of its right of way. You are therefore to exclude entirely from your estimate of the damages all expenses necessary for the construction and maintenance of such fences. (7) The court instructs the jury that if you find from the evidence that the maintenance of the pond referred to by the witnesses, at its present location, will not be affected or disturbed by the proper construction or maintenance of the railway, then you should not allow any sum as damages to said pond. (8) The court instructs the jury that, under the law of this state, the plaintiff, by the condemnation proceedings, did not, has not, and will not acquire the absolute ownership of the lands condemned through the defendant's lands for right of way, and only has and will, by such proceedings, acquire, the right to use such lands as and for the purposes, needs, and necessities of a railway, so long as it continues to use the same for such purposes. The legal title in fee simple of such lands remains in the defendant, subject only to the right of user on the part of the plaintiff. (9) The court instructs the jury that in estimating the amount of damages to the lands north and west of the public highway which extends through section 3, as shown by the map introduced in evidence, in an easterly and westerly direction, you will only consider the location and construc-

tion of said railway through land referred to in this instruction. (10) The court instructs the jury that, in estimating the amount of damages to the land lying south and east of the public highway in section 3, extending in an easterly and westerly direction, as shown by the map introduced in evidence, you will not consider or take into consideration in any way the location or construction of said railway over the lands lying north or west of said public highway." Of which instructions the court gave to the jury instructions 1, 2, 5, and 6, and refused to give to the jury said instructions 3, 4, 7, 8, 9, and 10, to which action and ruling of the court in refusing to give said last-mentioned instructions plaintiff then and there excepted at the time. Thereupon the court modified and changed said instructions 7 and 8 by adding the words in italics, and then gave them to the jury as modified, as follows: (7) The court instructs the jury that if you find from the evidence that the maintenance of the pond referred to by the witnesses, at its present location, will not be affected or disturbed by the proper construction or maintenance of the railway, then you should not allow any sum as damages to said pond; *and this is true, even though said pond may extend onto the right of way condemned by the railway company.* (8) The court instructs the jury that, under the law of this state, the plaintiff, by the condemnation proceedings, did not, has not, and will not, acquire the absolute ownership of the lands condemned through the defendant's lands for right of way, and only has and will, by such proceedings, acquire the right to use such lands as and for the purposes, needs, and necessities of a railway, so long as it continues to use the same for such purposes. The legal title in fee simple of such lands remains in the defendant, subject only to the right of user on the part of the plaintiff; *and the defendant will at all times have the right to use any part of such right of way in any way which [will] not interfere with the use thereof by the plaintiff for its purposes, and which will not be inconsistent with the plaintiff's right of use.* To which action of the court in so changing and modifying said instructions 7 and 8, and each of them, and in giving them to the jury as modified and changed, plaintiff then and there excepted, at the time.

On behalf of defendant, the court instructed the jury as follows: (1) The jury, in determining the decrease, if any, in the market value of defendant's farm caused by the construction and operation of the plaintiff's proposed road, will consider the manner said farm is to be divided by the construction of said road, the disfigurement, if any, to the farm as a whole, and generally all such matters as, owing to the peculiar location of the railroad through defendant's farm, as may, in the judgment of the jury and from the evidence in the case, affect the convenient

use and future enjoyment of the farm, considered as a whole, in so far as they affect the market value thereof; but, in the application of this rule, the jury will not take into consideration such inconveniences to the defendant as are the consequences of the lawful and proper use of the railroad, in so far as the same are common to the other landowners in the neighborhood, portions of whose land are not taken. (2) The jury are instructed that, in estimating the damage to be allowed to defendant, they will allow him the value of the land actually taken for the right of way, as the same has been proven, and also such further sum, if any, as the jury may find from the evidence to be the damage to the whole tract or farm of defendant of which said right of way forms a part, caused by the appropriation of said right of way for said railroad, so far as the same affects the market value of said farm as a whole. (3) The jury are instructed that in estimating the damage to be awarded the defendant, A. B. George, caused by the taking of his land for the right of way for the railroad of plaintiff, they should take into consideration, so far as the same may affect the market value of the farm of defendant of which the right of way forms a part, the cuts and fills to be made by the railroad in passing through defendant's farm, and the inconvenience (if any is proven) in the proper use of said farm caused by the construction and maintenance of the railroad on said right of way; and, if the jury should find from the evidence that the construction and maintenance of said railroad on said right of way will render access to and from the portions of said farm severed by said railroad, then the inconvenience, if any, arising therefrom, should be taken into consideration by the jury in estimating the damages to be allowed." To the action of the court in giving each of said instructions, plaintiff then and there excepted at the time.

Defendant's second instruction is criticized by plaintiff upon the ground, as contended, that it allows double damages; that is, that by it the jury were told to allow the defendant "the value of the land actually taken for right of way," and such "further sum, if any, as the jury may find from the evidence to be the damages to the whole tract or farm of which the right of way forms a part." The rule in this state in such cases is that the person whose land is taken for railroad purposes by the right of eminent domain is entitled, by the way of damages, to the value of the land actually taken for the right of way, and the damages occasioned thereby to the balance of the tract. In *Doyle v. Railway Co.*, 113 Mo. 280, 20 S. W. 970, the rule is stated by Sherwood, P. J., to be as follows: "The measure of damages was correctly declared by the court in the second instruction given on behalf of plaintiffs. It told the jury to take into consideration the actual value of the strip of

land taken and appropriated for the right of way, and also the diminution in value caused thereby, if any, to the residue of plaintiff's land from which the right of way was taken." See, also, *Railway Co. v. McGrew*, 104 Mo. 282, 15 S. W. 931; *Railway Co. v. Porter*, 112 Mo. 361, 20 S. W. 568. While this instruction is subject to verbal criticism, it is not, we think, erroneous. It does not, as we understand it, authorize the jury to allow double damages. Defendant was entitled to the value of the land actually taken for right of way, and also the diminution in value caused thereby, if any, to the residue of the land from which the right of way was taken; and this is all the instruction permits. It is not, it seems to us, susceptible of any other construction. In *Railway Co. v. Waldo*, 70 Mo. 629, a similar instruction was approved by this court. It reads as follows: "In estimating the damages to the land in controversy, the jury will consider the quantity and value of the land taken by the railroad company for a right of way, and the damage to the whole tract by reason of the road running through it," etc. The court, in passing upon this instruction, said: "The first instruction for the defendant is an exact copy of one passed upon and approved by this court in *Railroad Co. v. Ridge*, 57 Mo. 601." In the case last cited, the court observed: "This instruction was in substantial conformity with the principles declared in former decisions by this court, and was properly given;" citing *Railroad Co. v. Chrystal*, 25 Mo. 544, and *Lee v. Railroad Co.*, 53 Mo. 178. The instruction is in substantial accord with the rulings of this court in the adjudications cited, and no error was committed in giving it.

Plaintiff contends that in each of the three instructions on the measure of damages given on behalf of defendant the jury was directed to determine the decrease, if any, in value of all the land of the defendant, when the evidence showed that 40 of the 487 acres owned by him were situated a quarter of a mile distant from the main farm; in other words, that the court, by these instructions, declared, as a matter of law, that all of the defendant's land constituted, and should be considered by the jury, as one tract, in assessing the damages. We cannot accede to this proposition, as it is manifest from these instructions that the damages claimed by defendant, and assessed by the jury, were for the land which was actually taken for the right of way, and the damages by reason thereof to the farm. To these two things the damages which defendant was entitled to have allowed were restricted by the instructions, and by no fair construction can it be said that the 40-acre tract was embraced within them.

It is insisted that the court erred in modifying instruction No. 1 asked by plaintiff; but this contention is not borne out by the record, in which it nowhere appears that

this instruction was in any way modified. but, on the contrary, it shows that it was given as asked. But the objection is clearly aimed at the seventh instruction asked by plaintiff, which was refused as asked, and amended by the court, and then given after adding the following: "And this is true, even though said pond may extend onto the right of way condemned by the railway company." While it is conceded by plaintiff that the proposed right of way would encroach upon a pond of water on defendant's land, it is said that the evidence showed that the pond would not be interfered with in the least, notwithstanding a portion of it is on the proposed right of way. We are unable to see the force of this contention. When a railroad company condemns land for its right of way, its right to the possession of the entire part condemned is exclusive, as much so as of its roadbed and track; and it is only by consent of the company that the owner of the fee in the land can use the surface thus condemned for any purpose. It does not seem to us, however, that the words added to this instruction in any way changed its meaning, or that by reason thereof it became erroneous. If the right of way should be fenced as required by law, defendant would have no access whatever to that part of the pond inside the fence on the right of way, but plaintiff would have the exclusive use of it.

A further contention is that the court committed error in admitting, over the objections of plaintiff, illegal and incompetent evidence on behalf of defendant, and especially with respect to the value of the pond, and what defendant would, or would not, take for it, and in refusing to strike out such testimony. While these objections were mostly well taken, they were of such a technical character that the rights of plaintiff could not, we think, have been prejudiced thereby, and we will not reverse the judgment upon that ground alone.

A final contention is that the damages are grossly excessive. The estimation of the damages was the province of the jury, and their verdict being supported by substantial evidence, and having met with the approval of the court, we are not disposed to interfere. We therefore affirm the judgment.

GANTT, P. J., and SHERWOOD, J., concur.

COOK v. JONES et al.

(Court of Chancery Appeals of Tennessee.  
Nov. 6, 1897.)

FRAUD—CONVEYANCE TO HUSBAND IN TRUST—EFFECT AS TO CREDITORS.

Where a husband purchased at a judicial sale with his wife's means and in her behalf land deeded by her direction to him in trust for the support of himself and her children, free from his debts, contracts, and liabilities, and

on his death to go to the children equally, the transaction is free from fraud of the rights of his creditors, however insolvent he may be.

Appeal from chancery court, Williamson county; A. J. Abernathy, Chancellor.

Creditors' bill by Martha Cook against Henry Jones and others. Judgment for defendants, and complainant appeals. Affirmed.

Hearn & Berry, for appellant. Atha Thomas and Henderson & Eggleston, for appellees.

**BARTON, J.** The complainant, who had obtained a judgment against the defendant Henry Jones for some \$3,000 and cost, for slander, on which judgment an execution had been issued and returned unsatisfied, filed this bill to subject to the satisfaction of the judgment a tract of land alleged in the bill to be the property of the defendant Henry Jones. In the original bill Henry Jones was alleged to be the legal owner of a tract of land described, but in the amended and supplemental bill he was alleged to be the equitable owner, and it was sought in the bill to set aside a conveyance of the land which had been made by the clerk and master of the chancery court to Henry Jones, trustee, for his support during his life, and the education and support of his children; it being alleged in the bill that the conveyance so made was fraudulent, and was an effort to cover up the property of the said Henry Jones, and to defeat, delay, defraud, and hinder his creditors. It is therefore sought to set aside the conveyance, and subject this property to the satisfaction of the unsatisfied judgment against Henry Jones. The answer filed by the defendant Henry Jones and his children denies that the conveyance made by the clerk and master to Jones for the benefit of himself and family was fraudulent; alleges that the land was bought and paid for with the money of Mrs. Samuella Jones, formerly Samuella Peay; and denies that the property was ever the property of the defendant Henry Jones. In the supplemental bill it is alleged that the wife, Samuella, had no interest in the estate, and that the land was paid for by the means of Henry Jones, and the conveyance to him of it as trustee was simply a fraudulent device. The real question, therefore, presented in the record, is whether the land in question was bought by Henry Jones with his own means, and whether, in order to defeat, defraud, hinder, and delay his creditors, he had the property conveyed to himself in trust for the benefit and support of his family and of himself, or whether, as the defendants allege, it was bought and paid for with the means of Mrs. Jones, and whether the trust created was an honest, valid, and bona fide trust. Upon this issue the facts, as we find them, are as follows:

It appears that the tract of land was purchased through a proceeding in the chancery court of Williamson county, the land having been sold in the case of Eggleston and others against Victoria W. Flemming, pending in that court. It appears that the land was first purchased by a Mrs. Bostick, who assigned her bid to Jones. The purchase was made really on behalf of Jones' wife, who furnished the money to pay Mrs. Bostick what she paid out on the land. We further find that the purchase price of the land was some \$2,804, at least \$2,000 of which was furnished by Mrs. Samuella Jones, wife of the defendant Henry Jones; and the weight of the evidence is that the balance was paid by timber cut from, and other proceeds derived from, the place. The written evidence and record in the case referred to, relating to the purchase, are as follows:

We find a decree rendered in the case of Eggleston and wife against Victoria W. Flemming on April 13, 1874, which recites, among other things not necessary to mention, that "the cause came on to be heard on a report of Edward W. Eggleston, administrator, etc., filed to the present term of the court, showing further collection made by him, since the last term of the court, on account of the sale of real estate in the pleadings mentioned, and which said report is in the words and figures following, to wit: [Then follows the report.]" Among other things in the report it is stated: "That he has made collections on the land heretofore sold to Mrs. John C. Bostick, and purchased for her by Judge T. W. Turley, and which said land was afterwards sold to Henry Jones, or, rather, the right of Mrs. Bostick therein was by her assigned and transferred to said Jones. The said Edward W. Eggleston, administrator, would therefore report that he has received of the proceeds of said land as follows, to wit: April 22, 1870, from Mrs. J. C. Bostick, \$1,000." The report then shows how the administrator paid out this sum. Again, this appears in the report: "I would report that on the 1st day of March, 1894, I received from Henry Jones upon said land the sum of \$1,005.19. \* \* \* I would further report that the clerk and master has taken the note of said Jones, due and payable on the 1st of March, 1895, being for the balance due on said land." The decree then directs the distribution of the fund, and reserves other matters until another report at the December term, 1877, to wit, on the 18th day of January, 1878. Another decree was entered, which, so far as pertinent to recite, contained the following: It was recited that the cause came on to be further heard on the report of the clerk and master, which is set out, and this report shows that there had been collected further sums on the land sold to Henry Jones, and the master reports that Henry Jones had paid the entire purchase price of the

land, and was desirous to have the title to the tract of land so purchased by him made and secured to his wife; and it is ordered and decreed by the court that the clerk and master, upon payment of the usual fee, make or cause to be made to Henry Jones, or to his wife, a deed to the land so purchased and paid for as shown by the master's report, settling or assuring the same to the wife upon such uses and trusts as they may direct, or that may be legally done.

In 1878, at the December term, another decree was entered, which recited that the cause was reinstated on the docket for the purpose of carrying out previous decrees, and in this decree, among other things, it is recited: "And thereupon, it appearing to the satisfaction of the court, from the suggestions of the clerk and master to execute and carry out the decree heretofore made in this cause, ordering him upon the payment of the proper fees to make or cause to be made to Henry Jones, or to his wife, a deed to the land purchased by him at the master's sale thereof under decrees made in the above-stated cause, that it will be necessary to have said land surveyed, and particularly that the easement or right reserved in said sale to the use of James M. Peebles shall be definitely ascertained and fixed by metes and bounds of the entire tract, to enable the clerk and master to make the deed, and it further appearing to the court that said land was bid off and purchased for the wife of Henry Jones, and paid for with her means, and with and by the assent of said Henry Jones, she is desirous and entitled to have said land conveyed to her, or to a trustee of her selection, for her own separate use, and upon such trust as she may desire or appoint consistent with the law, it is therefore decreed by the court that the county surveyor shall proceed to survey said land, fix the metes and bounds, etc. \* \* \* It is further decreed by the court that, upon ascertaining the metes and bounds aforesaid, the clerk and master proceed to execute the deed to Mrs. Jones, or to the trustee to be selected by her upon such trust and uses consistent with the law, as she may designate, upon payment to him of the usual and customary fees," etc.

It appears, however, that the deed was not made by the clerk and master in accordance with this decree until June 25, 1892, at which time the clerk and master executed a deed which recites that by decree of the court rendered at the October term, 18—, in the case above mentioned, one W. H. S. Hill, former clerk and master of the court, had sold the real estate described in the bill and in the deed for \$2,894, and that the land was sold and transferred to Henry Jones, or to his wife, and had been paid for by the means of the wife, and that she and her husband had directed the execution of a deed to Henry Jones, trustee, as evidenced

by writing set out in the deed, and that, in accordance with the direction and decree of the court, the clerk and master, Thomas F. Perkins, transferred and conveyed to Henry Jones, trustee, in trust for the maintenance and support of himself, and for the maintenance, support, and education of the children of his wife, the said Samuella Jones, for and during the natural life of the said Henry Jones, and free from his debts, contracts, and liabilities, and at the death of said Henry Jones said land to be equally divided between the children of said Samuella Jones, the child or children of such deceased child taking the share its parents would take, if living, etc.

This is all the record that we have before us showing the purchase of the property and how the title was vested. It appears that at the time the property was purchased, in 1874, the defendant Henry Jones was insolvent. At least, it clearly appears that he had no property out of which a debt could have been made or which was subject to execution at law. The weight of the evidence further indicates that he was in debt at that time, but to whom or to what extent does not appear. At the time the deed was made by the clerk and master to the defendant Jones as trustee, as above set out, the suit in which the complainant obtained her judgment was pending, though judgment had not been rendered. Only parts of the record in the case of Eggleston against Flemming are before us. We are not furnished with the original report of sale. We are not clearly informed by whom the land was sold, or under what authority. We only see from the record that it had been sold and originally bid in by Mrs. Bostick, who, it seems, sold her bid to Jones. Whether the sale made by her was in writing, and to whom she really transferred her interests, we are not informed, otherwise than by the recitals above set out. There is no contest here between the defendants and Mrs. Bostick, or the original owners of the land. We do not know whether there were any decrees rendered in this case except those set out, which might have vested or divested title, or whether there was any confirmation of the sale. It seems to be conceded, and in fact the position taken in the supplemental bill is, that the title was never in Jones until the deed was made by the clerk and master, though the supplemental bill alleges that Henry Jones was the equitable owner of the land; and from this and the record as presented we infer that the legal title was never vested in Henry Jones, either by decree or by deed. We are satisfied, from the proof before us, that, as above stated, Henry Jones made the purchase with his wife's means and on her behalf, with the understanding that a trust was to be created under her directions. On the facts as we find them, the land having been purchased with the means of Mrs. Jones, with

the understanding that it should be for the benefit of herself, or for a trust that she would direct, a case is presented in which a resulting trust might have been set up and decreed, if she and her children were in court invoking active relief to that effect, unless the rights of innocent third parties had intervened. That being so, and the title having been vested according to her directions and in accordance with the understanding had with her, we have no hesitation in finding that the transaction was not, and could not have been, in fraud of the rights of any of the creditors of Henry Jones, however insolvent he may have been. It was property belonging in fact to the wife, which the husband had never reduced to possession, and which, as we understand, was converted into money with the understanding that it should go into a home for the family. The transaction is in no respect tainted with fraud, and the complainant is not entitled to the relief sought. The chancellor so held, and dismissed the complainant's bill; and his decree will be affirmed, with cost.

WILSON and NEIL, JJ., concur.

Affirmed orally by supreme court, December 8, 1897.

UNITED STATES SAVING & LOAN CO. v.  
MILLER et ux.

PECK v. MILLER et al.

(Court of Chancery Appeals of Tennessee.  
Nov. 6, 1897.)

BUILDING AND LOAN ASSOCIATIONS—MORTGAGES—  
DELIVERY—CONFLICT OF LAWS—FOREIGN COR-  
PORATIONS—TRANSACTION OF BUSINESS—CON-  
STITUTIONAL LAW—OBLIGATION OF CONTRACTS—  
STATUTES—CONSTRUCTION—REPEAL—USURY—  
PLEADING.

1. A mortgage and bond made payable to a building and loan association in Minnesota stipulated that they were to be accepted and delivered in Minnesota, and were made with reference, and were to be construed agreeably, to the laws of that state. The loan was made on property in Tennessee, to a resident thereof, on his application, which was sent to the association in Minnesota through a local agent in Tennessee, authorized to solicit loans and forward applications and abstracts of title, but not to complete loans or draw papers. Each movement under the negotiations was directed from the Minnesota office, and was to be approved there. Another agent, a bank in Tennessee, turned over a draft for the amount of the loan in exchange for the papers and securities, which had to be approved at the Minnesota office before the draft would be paid by the association. *Held*, that there was no legal delivery of the bond and mortgage until they reached Minnesota and were approved there, and hence they constituted a Minnesota contract.

2. Where a foreign corporation appoints agents in Tennessee for the purpose of working up a loan business and inducing people to effect loans with the corporation, who do effect loans, it carries on business in Tennessee, in the sense of the foreign corporation laws.

3. Where statutes have been repeatedly enforced by the supreme court as valid laws, and

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vast property interests have been based on these decisions, and business has conformed to the law as existing and enforced, the court of chancery appeals will presume that the supreme court considered the question of their constitutionality as settled, and will refuse to determine it.

4. Acts 1877, c. 31, § 1, permitted certain classes of corporations to do business in Tennessee. Section 2 provided that they should file copies of their charters with the secretary of state, and an abstract thereof with the register of each county in which they did business. Acts 1891, c. 122, § 1, extended the former act to all foreign corporations; and section 2 contained the same provisions as section 2 of the former act, excepting a provision directing the manner of certifying the foreign charter, closing with the phrase "as now required by section 2 of chapter 31 of Acts of 1877." Acts 1895, c. 81, § 1, purporting to amend Acts 1891, c. 122, § 2, provided that a foreign corporation shall file a copy of its charter in the office of the secretary of state. *Held*, that Acts 1891, c. 122, § 2, superseded Acts 1877, c. 31, § 2, excepting as to the provision directing the manner of certifying foreign charters; and Acts 1895, c. 81, § 1, in providing that a foreign corporation should file a copy of its charter in the office of the secretary of state, repealed the provision requiring an abstract thereof to be filed in each county in Acts 1877, c. 31, § 2, as well as the same provision in Acts 1891, c. 122, § 1.

5. A party is not estopped by an averment that a loan was made on a certain day, to show that it was not made until a later day, where all the parties treated the loan as not finally consummated until the later day.

6. The proviso in Acts 1895, c. 81, reciting that the act shall not affect any contracts theretofore made, does not apply to a loan, although the negotiations theretofore had been pending for some time, and the papers had been drawn and the draft signed, where the papers were not executed, nor the draft delivered, nor the proceedings approved, until after the act went into effect.

7. Acts 1895, c. 81, requiring a foreign corporation to file a copy of its charter with the secretary of state, is complied with where such charter had been on file with the secretary of state for some years prior to the passage of the act.

8. Acts 1897, c. 25, making valid the mortgage of a foreign corporation which was invalid by reason of failure to file an abstract of its charter in the county where the loan was made, does not impair the obligation of a contract of a junior creditor, who has filed his bill against the same land.

9. Usury cannot be urged against a Minnesota contract sought to be enforced in Tennessee, where it is in accordance with the laws of Minnesota.

Appeal from chancery court, Dickson county; A. J. Abernathy, Chancellor.

Bills by the United States Saving & Loan Company against E. E. Miller and wife, and by M. K. Peck, trustee, against E. E. Miller and others. There was a decree dismissing the bill of the saving and loan company, and it appeals. Reversed.

A. G. Goodlett, for appellant. Firman Smith, Douglas Wikle, and H. H. Leech, for appellee Peck. E. S. Ashcraft, for other appellees.

NEIL, J. The original bill in this case was filed on the 20th day of April, 1897, by the United States Saving & Loan Company, a corporation organized under the laws of

the state of Minnesota, and having its home office at St. Paul, Minn., against Elmer E. Miller and his wife, Fanny Miller, in the chancery court of Dickson county, this state, to foreclose a mortgage of \$4,500 on certain real estate described in the bill. The bill charges and the proof shows that on the 26th day of January, 1895, the defendant E. E. Miller applied to complainant for a loan of \$5,000, offering to secure it by a mortgage on certain town property in the town of Dickson, upon which was situated two brick storehouses, on Main street, in that town. This application was in writing, and was addressed to the complainant at its home office in St. Paul, Minn. Complainant agreed to lend to the defendant E. E. Miller \$4,500 upon the security offered. This was accepted by him. Complainant accordingly issued to him 45 shares of stock, of the par value of \$4,500, on the 23d of February, 1895. The bill further charges as follows: "Upon the 28th day of February, 1895, complainant loaned to defendant Elmer E. Miller the sum of \$4,500; and the said Elmer E. Miller and his wife, the co-defendant, Fanny Miller, in an instrument bearing date February 28, 1895, conveyed to said complainant their above-mentioned property in Dickson, Dickson county, Tenn., to secure said loan. \* \* \* Defendants' said indebtedness to complainant is further evidenced by a mortgage bond executed by defendants, and which is herewith filed, as Exhibit C to, and is a part of, this bill. \* \* \* It will be seen from an examination of said Exhibit C (the mortgage) and D, defendants agreed to pay to complainant the monthly sum of \$72, which was to be applied as follows: First, to the payment of all fines for nonpayment of installments when due, at the rate of ten cents a share per month for each and every month any installment on said stock should be in default; second, to the payment of the premium of six per cent. on said loan, amounting to \$22.50 per month; third, to the payment of the interest on said loan at the rate of six per cent. per annum, amounting to \$22.50 per month; fourth, to the payment of the installments due on said forty-five shares of pledged stock, amounting to \$27 per month. It is further stipulated in the said mortgage that defendants should pay all taxes and assessments of every nature that may be assessed on said premises, and keep the buildings insured against fire, storm, and tornadoes, payable in case of loss to complainant; and it is further covenanted in said mortgage that if defendants default in the payment of interest, premium, monthly installments, or in any of its stipulations, conditions, provisions, or promises, and such default continues for the period of three months, it shall be lawful for complainant, its successors, assigns, or attorneys, to declare the entire sum to be due, and proceed without notice to foreclose the mortgage. \* \* \* It is now shown that

defendants have defaulted in the payment of fines, interest, premium, and installments due for considerably more than three months, and that defendant E. E. Miller has failed to keep the taxes paid on the property mortgaged, and that complainant has paid the taxes on same for 1894, and the taxes for the year 1895 are now delinquent, and that the defendants refused to pay the same. A statement of defendants' indebtedness to complainant, calculated up to March 12, 1896, is herewith filed, as Exhibit H to, and as a part of, this bill, not to be copied. This shows that defendant E. E. Miller was, at the date of making out such statement, indebted to complainant, upon said mortgage bond and loan, in the sum of \$4,626.60, after allowing all just and proper credits." The facts as above charged are true as stated, with the exception of the date of the loan, and this is true with the modification hereinafter stated. The bill further charges as follows: "Said mortgage is shown on its face to be delivered in the state of Minnesota, and, in so far as it relates to or affects the validity of the contract or the bond or debt thereby secured, is to be construed in accordance with and agreeably to the laws of Minnesota, anything in the laws of the state of Tennessee to the contrary notwithstanding; and any provision in the laws of Tennessee at variance with the laws of Minnesota, either on the subject of interest or premium or any other matter, is expressly waived by defendants, Elmer E. and Fanny Miller." This charge in the bill states substantially the contents of the mortgage upon the subject referred to; but it is not intended at this point to find as a fact that the mortgage was in fact delivered in the state of Minnesota, or to adjudge that the above stipulation made the contract a Minnesota contract, or that there was a lawful waiver of the laws of Tennessee as governing the contract. These matters are reserved for consideration in a subsequent part of this opinion. The bill asks for a foreclosure of the mortgage to enforce the payment of the entire amount of indebtedness, treating it all as due, by reason of the failure to pay the stipulated installments.

The answer, after admitting that Miller applied to the company for a loan of \$5,000, offering to secure the payment thereof by a mortgage on the property described in the bill, continues: "But the defendants further say that this application was made on one of the blanks furnished him by Mr. Egerton, a citizen then and now of Dickson county, Tenn., and the local agent at Dickson, in Dickson county, Tenn., of the complainant, and the said Egerton was at that time the local agent of the complainant at Dickson for the business of loaning money on mortgages of real estate in Dickson county; and that the complainant was at that time engaged in carrying on the business of loaning

money on mortgages; and that while the blanks furnished by the complainant, through its agent, to applicants for loans, were addressed to the home office of the complainant, at St. Paul, Minn., the transaction in fact was a contract negotiated and entered into in the state of Tennessee and in Dickson county, through its local agent and local board of appraisers at Dickson. \* \* \* The defendants further say that, while said mortgage purports on its face to be delivered in the state of Minnesota, in fact said mortgage was delivered at Dickson, in Dickson county, Tenn., to said Egerton, the local agent, and attorney at that place of the complainant. The defendants further say that this clause in the mortgage, as well as the following clause,—that the validity of the contract or bond or debt thereby secured is to be construed in accordance with the laws of the state of Minnesota, and that any provision in the laws of the state of Tennessee at variance with the laws of Minnesota, either on the subject of interest, premium, or any other matter, is expressly waived by the defendants,—is simply an attempt by the complainant to evade the laws of the state of Tennessee, the place where the contract was in fact made and entered into; and the defendants are advised that said clauses in the mortgage are for these reasons null and void. The defendants further say that at the time they executed said mortgage to the complainant, on February 28, 1895, as well as at the time they acknowledged it, on April 16, 1895, and at the time said loan was made by the complainant to them, the complainant was a foreign corporation, and was doing and attempting to do business in Dickson county, Tenn.; but at that time said complainant had not complied with the act of the general assembly of the state of Tennessee, 1891 (chapter 122), in so far as said act required a foreign corporation seeking to do business or acquire or own property in Tennessee to first have an abstract of its charter recorded in the register's office of the county where it sought to do business or own property. The complainant was at that time doing a general loan business in Dickson county, Tenn., though no abstract of its charter had been registered or filed for registration in the register's office of Dickson county, Tenn.; nor had said complainant complied with said requirements as regards Dickson county, Tenn., at the time it filed its bill in this cause. The defendants are advised that said mortgage and bond and contract of loan are for this reason illegal and void, and the complainant should not be permitted to enforce them."

The matters in controversy in this case arise upon the foregoing averments contained in the answer of Miller and wife. The relief claimed in the case of Peck against Miller is rested upon the same ground, and we need not for the present notice the pleadings in that case. The chancellor decreed against the United States Saving & Loan

Company, dismissing its bill, and subjected the property under the second bill to the judgment creditors of Miller, after allowing him a homestead of \$1,000, claimed in the answer to that bill. We shall take up these points in the order in which they occur above.

First. Was this a Minnesota contract? The complainant, at the date of the transactions we are considering, was a building and loan corporation, chartered by the state of Minnesota, and having its home there. It dealt in several forms of investment stock, and in loans effected on the building and loan plan. In general terms, its investment stock may be described as stock purchased by an investor for a sum paid down, and, when so purchased, entitled the holder to share in a given portion of the profits of the company, or to a certain per cent. on the stock. We need not go into this matter more particularly for the purposes of the present case. The stock purchased as a basis for loans was procured as an incident to a written application for the loan of a given sum, and was to be used in pledge for the loan as part of the security required to perfect it, and was to be matured in the usual manner in which such stock is brought to maturity, by the payment of installments of interest, premium, and stock payment, together with a participation in the profits of the company. The company appointed agents in various states, with power to sell investment stock, and also with power to take applications for loans, and to forward these latter to the home office. Wherever it could do so, it likewise had a local board, composed of persons owning at least 10 shares of stock. This board had no authority, its power or duty being merely advisory. The purpose of creating such a board was to guard against the placing of loans upon insufficient property, it being supposed that the personal interest of such a board, composed of stockholders, would induce them from time to time to give desirable information to the company touching proposed loans. The company also had sometimes a local collecting agent under bond to collect installments from its stockholders or borrowers. This, however, was only done where no bank was available. It preferred the services of a bank as local treasurer. In the absence of the appointment of such local treasurer, the money was to be forwarded direct to the company or its general treasurer in St. Paul. The local agent had no power to make loans or to promise them. With regard to this matter, his duty, in the initiative, was confined to making out and forwarding the written application for the loan to the home office. This application contained a request for the loan, with the proposition to pay a premium of 50 cents per month for each \$100 borrowed, as a consideration for anticipating the maturity of the stock and for the loan, and also to pay interest at the rate of 6 per cent. per annum on the full amount of the loan; also, an of-



fer to secure the loan by property described in the application. There are many other provisions, but they need not be noticed for the purposes of the present case. It may be mentioned, however, that the application was required to be accompanied by a statement of two freeholders as to the value of the property offered as security. The application, when made out, was to be forwarded to the home office. There it was to be considered by the company's board of directors. If the directors agreed to the loan, that fact would be communicated to the applicant through the local agent. The applicant would then cause to be prepared an abstract of title. This done, the title must be examined by the company's local attorney, but his fee was to be paid by the applicant. Being by the local attorney found perfect, his certificate to that effect on the company's form must be affixed to the abstract, which is then to be forwarded to the general office for examination by the general attorney. This latter official makes final examination of the title, and, if he deems it to be perfect, he draws the papers; that is, the loan note and the mortgage. These are then forwarded to the local attorney or agent, to attend to the closing of the loan, signing the papers, etc. At the same time a draft for the stipulated amount is forwarded to the company's collecting bank or local treasurer at the point where the loan is being closed, and when the papers are all completed, and the local attorney turns them over to the bank, the bank must then turn the draft over to the borrower. The bank then forwards to the home office the papers turned over to it by the local attorney or agent. At the home office these papers are turned in to the general attorney for inspection. If found satisfactory by him, the securities are handed to an officer styled the "trustee" of the company; and, upon this being done, the trustee is authorized to pay the draft when the borrower shall present it or have it presented.

The above is in outline the method of the company's business. Now, as to the special case in hand: There was no local board at Dickson when the Miller loan was effected. The local treasurer of the company at Dickson was the Dickson Bank & Trust Company. The local agent and attorney was Graham Egerton. He had such powers, and none other, as are above set out as attached to that office in the company's scheme or plan of business. We may add, however, that, as falling within those powers, he had authority to start matters by finding borrowers, and to get enough subscriptions for stock to organize a local board at Dickson. He also had left with him advertising supplies furnished by the company and blank applications for membership; also, blanks for reports and for confidential appraisements on the advisory board; also, blank certificates of stock. In January or February, 1895, Mr. Egerton was called to Nash-

ville to meet Mr. Douglas, the managing director of the company. There the subject of the Miller loan was talked over. Mr. Douglas gave Mr. Egerton to understand that he would report the Miller loan favorably at the next meeting of the board of directors in St. Paul. Subsequently, Mr. Egerton was notified by the home office that Miller's application was allowed to the extent of \$4,500. The loan was so allowed on February 28, 1895. The steps by which the loan in question was obtained were as follows: Mr. Miller signed an application for the loan, which was also accompanied by an appraisal of three disinterested persons. This application also contained a bid. The application and bid were then forwarded to the company at St. Paul, and there brought before the executive committee of the company's board of directors, at a meeting thereof at which a quorum was present, and presented to the executive committee at that meeting, and first allowed for \$4,000. After this the executive committee reconsidered their action, and allowed the loan for \$4,500, of which Mr. Egerton was informed. Mr. Miller was required to furnish an abstract of title of the land which he offered as security, and to assign to the company the stock held by him as collateral security, and also to agree to pay a premium of 6 per cent. per annum on the \$4,500, payable monthly, and give a bond and mortgage to secure the repayment of the loan and interest and premium and payments on the stock and fines. The abstract was submitted to the company's general attorney at St. Paul, Mr. F. H. Ewing; and, when approved by him, all the papers connected with the loan were prepared by him in St. Paul, and forwarded to Mr. Egerton for execution at Dickson, and to have the mortgage recorded and the abstract of title continued, showing the mortgage filed for record and the title clear in Mr. Miller, and free from all incumbrances, except the mortgage to the company. An elaborate letter of instructions accompanied the papers into the hands of Mr. Egerton. At the same time, a draft on the Minneapolis Loan & Trust Company, the trustee and paying officer of the complainant company, was drawn for \$4,500, and forwarded by mail to the Dickson Bank & Trust Company at Dickson, with another letter of careful instructions. The letter to Mr. Egerton was dated March 15, 1895, and inclosed the following papers connected with the proposed loan: The mortgage deed and bond; the abstract of title with letter of the general attorney and final certificate of Mr. Egerton to sign; certificate of stock No. 21,082, with assignment attached, also pass book; a special bond for payment of dues; mortgage and identification clauses; affidavit as to completion of the building. The letter, after noting the above inclosures, continues: "We have forwarded our draft to the Dickson Bank and Trust Company,

to be delivered to Mr. Miller upon a receipt from you, for transmission to us, of the following papers, viz.: (1) Mortgage deed duly executed and recorded, or in lieu thereof receipt from proper officer showing same filed for record; (2) bond duly signed by Miller and wife; (3) abstract of title continued to a date subsequent to the filing of our mortgage, and showing same of record; (4) final certificate of local attorney attached to abstract, duly signed with all blanks filled and no erasures; (5) certificate as to judgments against all persons who have owned this property within the time when judgments would be liens against this property to be procured from all courts of record, state and federal, whose judgments would be liens unless covered by abstracter's certificate; (6) certificates and receipts from proper officers showing that, at the time our mortgage is filed for record, there are no unpaid taxes against this property, unless covered by abstracter's certificate; (7) certificate of stock Number 21,082, with assignment duly signed and witnessed; (8) special bond for payment of dues in the sum of \$1,500, with two sureties in not less than \$3,000 each, sureties to be approved in writing by yourself and the bank and trust company; (9) all insurance in effect upon the building, fire in amount not less than \$4,000, and tornado in amount not less than \$1,500, with our mortgage and identification clauses attached; (10) affidavit as to completion of building, duly signed and certified. Please carefully note letter of our attorney. All requirements contained therein must be fully complied with before the loan is closed." On the same day the following letter was addressed by the company to the Dickson Bank & Trust Company: "We hand you herewith our draft for \$4,500 to the order of Elmer E. Miller, in payment of above loan [the Miller loan, noted at the head of the letter], which please deliver to Mr. Miller upon receipt from Graham Egerton, Esq., for transmission to us, of the following papers: [Here follows a statement of the 10 items set out in the letter to Mr. Egerton.] Please collect from Mr. Miller, at the time of delivering our draft, \$45 membership due, and send to this office, payable to the order of John Douglas, managing director; also collect \$81 installments on stock, \$67.50 premium, and \$67.50 interest on the loan from March, April, and May, and send to Germania Bank, treasurer, St. Paul. Please forward securities to this office forty-eight hours in advance of the draft, so that we can examine same, O. K., and forward receipt to our trustee, as our trustee will not pay the draft until they receive a proper receipt for the security." These directions were substantially carried out by Mr. Egerton delivering the papers required to the bank; and thereupon the bank delivered the draft for \$4,500 to Mr. Miller, on May 2, 1895, and cashed it for him on that day, and thereupon forward-

ed, in due course, the papers and the draft to the company at St. Paul. In regular course, the draft, instead of being cashed by the Dickson Bank & Trust Company, would have been forwarded by Mr. Miller himself, or by some one for him, and the papers would have been forwarded by the Dickson Bank & Trust Company to the complainant company. The Dickson Bank & Trust Company, in cashing the draft, did not act as the treasurer or agent of the complainant company, but on its own account. However, the draft was duly paid when presented, and the practical effect was the same to the bank and to Miller as if the precise course marked out in the instructions had been followed. It does not appear exactly what day the draft was paid to the Dickson Bank & Trust Company, but it was after the 2d day of May, 1895. We find then that the loan was not consummated until May 2, 1895, although it had been previously allowed, conditioned upon a compliance with the company's terms. The statement of the bill, in the light of the proof, must be understood in this sense. The mortgage bond contains at the close thereof, and immediately above the signatures of Miller and wife, the following provision: "It is hereby mutually agreed and understood that this contract is accepted and delivered in the state of Minnesota, and is made with reference to and under the laws of the state of Minnesota, and that the same shall be construed agreeably to the laws of the state of Minnesota." We have already found that there was a similar provision in the mortgage.

From the foregoing it is seen that all the steps to effectuate this loan, after the transmission of the application to the company, were directed by the company from its office in St. Paul. The authority of its local intermediaries in Tennessee was carefully circumscribed. The local agent and attorney could forward the application, but it was without effect until approved by the executive board in St. Paul. He could also forward the abstract of title to the property offered as security, but that was without effect until approved by the general attorney in St. Paul. He was not allowed to draw the various papers required to make the loan effectual, but these were all prepared by the general attorney in St. Paul, and forwarded to him. He was then to see that they were properly executed, and the mortgage recorded. He was then to hand them over to another agent of the company, the Dickson Bank & Trust Company; and the last-mentioned agent was then to turn over the draft for the loan previously placed in its hands, to the intending borrower. But still the loan was not even consummate. The bank and trust company must forward all the papers it had received from the local agent and attorney to the company at St. Paul, and they were to be again examined by the general attorney there. If found satisfactory to

him, they were to be transmitted to the company's paying officer, called the "trustee," and then the draft became payable, and not otherwise. We think these facts show that there was no legal delivery of the bond and mortgage—that is, no delivery with the intent upon both sides that these papers should become operative—until they reached the company in St. Paul, and were approved by the general attorney for the company there. In addition to the direct statement contained in the bond and mortgage that the contract was intended to be a Minnesota contract, this purpose permeates the transaction through and through. On its face the bond is payable at the office of the treasurer of the company in the city of St. Paul in monthly installments of \$72 until the amount of monthly payments on the stock pledged, together with the profits apportioned to the stock, shall amount to \$100 on each share of the stock. We find, then, that the obligation was delivered in Minnesota, and was on its face payable there, and was intended by the parties to be a Minnesota contract, and was in law a Minnesota contract. *Carnegie Steel Co. v. Chattanooga Const. Co.* (Tenn. Ch. App.) 38 S. W. 102, 103.

The next question is this: Although the contract as consummated was a Minnesota contract, was the complainant company at that time carrying on a business in Tennessee in the sense of our foreign corporation statutes, in the way of procuring this class of contracts, and did this contract arise out of such course of business, and, if so, could a suit by the complainants be entertained in the courts of this state for the enforcement of such contract, if the complainant had not complied with our foreign corporation laws? From the facts already stated under the first head and those now to be stated, we think that there can be no doubt that the complainant company was carrying on a business in Tennessee in the sense of our foreign corporation laws. The proof shows that Mr. Egerton not only initiated this loan, but others as well. It further shows that he was appointed agent for the purpose of working up the business and inducing people to effect loans with the complainant company. He was appointed by the complainant for the purpose of carrying on a distinct business; that is, to work up for the company the class of contracts of which the contract we have under consideration is a representative. Therefore, while it is true that as to the construction of the contract, and the question whether it was usurious or not, and the like, we must be governed by the laws of Minnesota, this does not relieve us from considering the question whether the complainant company has violated our foreign corporation laws before referred to. If the complainant has so violated the law, numerous cases in this state hold that the contract cannot be enforced. We need refer only to *Lumber Co. v. Thomas*, 92 Tenn.

587, 22 S. W. 743, and *Manufacturing Co. v. Wetzel* (Tenn. Ch. App.) 35 S. W. 896, 898.

The next question is whether the complainant, at the time of the loan, had complied with the law. This necessitates a brief examination of our foreign corporation statutes. It is not disputed that, at the time this loan was made, the complainant had not filed an abstract of its charter in Dickson county. This abstract was not filed until May 11, 1896. It is agreed that the complainant filed its charter in the office of the secretary of state at Nashville on May 22, 1891. It is also agreed that the complainant promptly complied with Acts 1895, c. 114, and that it has continued to comply with this act. It is insisted that the failure to register the charter or abstract thereof in Dickson county was fatal. It is insisted by the complainant, however, that, under the statutes in existence when the loan was consummated, the duty to file the abstract in the county was no longer obligatory upon foreign building and loan companies, but that the filing of the charter with the secretary of state was sufficient. It is also insisted on behalf of the complainant that complainant's compliance with chapter 114, Acts 1895, authorized it to do business in Tennessee without regard to this question. It is also insisted in behalf of the complainant that chapter 31, Acts 1877, the original foreign corporation act, is void, because in violation of section 17 of article 2 of the constitution of Tennessee, because it embraces more than one subject, and that subject not expressed in the title.

It is said that inasmuch as all of the subsequent acts are amendments to the original, or amendments of amendments, they must fall with it. We had this question before us at the last term at Knoxville. It was there debated at great length, in the case of *American Nat. Bank v. Carnegie Land Commission*, by eminent counsel. In that case we determined that inasmuch as our foreign corporation statutes had been repeatedly enforced by our supreme court as valid laws, and that vast property rights had been based upon these decisions and statutes, and business had conformed to the law as so understood and enforced, it was our duty to presume that the supreme court had considered the question as settled, and we would not enter into it. We shall take the same course here.

Recurring, then, to the other questions, we express our views as follows:

In the case of *Manufacturing Co. v. Wetzel*, decided by this court on the 8th of February, 1896, and reported in 35 S. W., at page 896, it was urged that chapter 122, Acts 1891, did not apply to foreign building and loan associations. Speaking to this subject, we there said: "The argument in support of this contention is that foreign building and loan associations are regulated by chapter 2, Acts 1891, passed two days subsequent to chapter 122 (the latter having been approved

March 26, 1891, and the former March 28, 1891), and that chapter 2 excludes the operation of chapter 122 upon such companies by necessary implication. To determine this question, we must briefly consider several statutes which together form a scheme of legislation upon the general subject. Chapter 31, Acts 1877, among other provisions not necessary to mention in this connection, directed that certain classes of foreign corporations therein named should file copies of their charters in the office of the secretary of state, and should cause an abstract of such charters to be recorded in the office of the register of each county in which such corporation proposed to do business, or to acquire any lands. Chapter 95, Acts 1891, approved March 17, 1891, applied the above-mentioned act of 1877 to foreign building and loan associations. Chapter 122, Acts 1891, applied the same act to all foreign corporations. This act, as before stated, was passed March 26, 1891. On March 28, 1891, the general building and loan act was passed. Acts 1891, c. 2. This act undertakes to regulate the business of both foreign and domestic building and loan companies. It contains elaborate provisions for the government of such companies, but we need mention only one as germane to the present inquiry. Section 3 provides that a copy of the charter shall be filed with the treasurer of the state; but the act nowhere directs the filing of such copy with the secretary of state, nor the filing of abstracts with the registers of the counties where the company proposes to do business. This is the situation. But, without pressing the matter further, we need only say that a precisely similar question was raised by an insurance company with regard to chapter 47, Acts 1891, which contained no less elaborate provisions for the regulation of insurance companies. Upon a very careful consideration of that question, the supreme court held that chapter 122, Acts 1891, applied to insurance companies, notwithstanding chapter 47; holding that there was no conflict. *State v. Insurance Co.*, 92 Tenn. 420, 21 S. W. 803."

This was the condition of the law in 1891, and until 1895. On the 30th of April, 1895, an act was passed (Acts 1895, c. 81) which proposed to amend chapter 122, Acts 1891, so as to omit the requirement for registration of an abstract of its charter by a foreign corporation in the several counties where it proposed to do business or own property, and substituted therefor the filing of a copy of its charter in the office of the secretary of state. Section 1 of the act amends section 2 of chapter 122 of the Acts of 1891 so as to produce this result. Section 2 of this act amends section 3 of the act of 1891 so as to strike from that section the clause inhibiting foreign corporations from owning or acquiring any property in this state without having first registered their charter in the office of the secretary of state, and an abstract in

the counties. Section 3 of the act amends section 4 of the act of 1891 so as to strike out of it the provision that, when a corporation complies with that act, it shall be to all intents and purposes a domestic corporation, and so as to make it read that, when a corporation complies with the act, it may then sue and be sued in the courts of this state, and shall be subject to the jurisdiction of this state as fully as if it were created under the laws of the state of Tennessee. But it contains a proviso "that this act shall not affect any contracts or remedy [any] made by foreign corporations not having complied with existing laws on the subject." It is contended by the complainant that inasmuch as the complainant's contract with Miller was not complete until after April 30, 1895, when the above act went into effect, it is not within the proviso, and is protected by the provision contained in the body of the act, above summarized, because, when this act was passed, complainant had already had its charter registered in the office of the secretary of state. In reply to this, it is contended by the defendant Miller and the complainant in the second bill that the loan was really made on February 28, 1895, and that the fact is so stated in the bill, and that in any event, if it should be held that the loan was not consummated until May 2, 1895, yet it had prior to that time gone sufficiently far to fall within the terms of the proviso. Further, it is urged that notwithstanding Acts 1895, c. 81, yet section 2, c. 31, Acts 1877, is still in force, requiring the registration of an abstract of the charter in each county where the corporation contemplates doing business or owning any property. We shall consider this point first.

We have already seen in the quotation above made from *Manufacturing Co. v. Wetzel*, supra, that chapter 95, Acts 1891, applied chapter 31, Acts 1877, to foreign building and loan associations. That act was passed on March 17, 1891. But on March 26, 1891, another act was passed (Acts 1891, c. 122), which embraced the entire substance of chapter 95, inasmuch as it applied chapter 31, Acts 1877, to all foreign corporations organized for any purpose whatever, and desiring to do any kind of business in this state. Chapter 95 not only applied to building and loan associations, but to "bond and investment companies, real estate, land, labor, and immigration companies," and sundry other kinds of foreign corporations. Chapter 122 went further, and embraced all foreign corporations desiring to carry on business in Tennessee, and so embraced the whole substance of chapter 95, and practically superseded it. Now, let us see what effect chapter 122, Acts 1891, had upon chapter 31, Acts 1877. The first section of the act of 1891 extends the provisions of the act of 1877 to all foreign corporations which may desire to do any kind of business in this state. Before that time it applied only to certain specified

classes of corporations. As just stated, it is now made to apply to all. The second section of the act of 1801 covers the whole ground occupied by section 2 of the act of 1877, except that it does not incorporate the provision directing the manner of certifying the foreign charter. Indeed, section 2 of the act of 1891 shows in its final clause—"as now required by section 2 of chapter 31 of Acts of 1877"—that it was intended to amend and supersede that section, by stating its substance in a more concise form. This view is strengthened, if not indeed rendered conclusive, by section 6 of the act of 1891, which reads: "That chapter 31 of the Acts of 1877, except in so far as the same is amended, enlarged and extended by this act, be and the same is declared to be in full force." Where the act of 1891 "amended," "enlarged," or "extended" the act of 1877, the amended, enlarged, or extended form necessarily superseded the original form it was intended to take the place of. It is immaterial whether this be called an implied repeal of the original form, or the substitution therefor of the new form; the result is the same; the new takes the place of the old. And so we hold that section 2 of the act of 1891 (chapter 122) supersedes section 2 of the act of 1877 (chapter 31), except the clause as to the certification of the charter, appearing in the last-mentioned section. Having arrived at this point, we next determine that section 1, c. 81, Acts 1895, supersedes section 2, c. 122, Acts 1891, and that it is not now necessary that any foreign corporation desiring to do business in this state should cause to be registered an abstract of its charter in each of the counties where it desires to do business or to own property; but that it is sufficient that such foreign corporation should file in the office of the secretary of state a copy of its charter; and that it is "sufficient to authenticate such copies, so filed, by the certificate of the secretary or secretaries of such corporations, and by attaching thereto the corporate seal," this latter clause of section 1, c. 81, Acts 1895, repealing by implication the former provisions upon that subject contained in section 2, c. 31, Acts 1877, above referred to.

It follows that complainant is protected by chapter 81, Acts 1895, unless the other points raised by defendant Miller and his creditors shall be held sufficient to change the result. The first of these points, as already noted, is that the bill charges that the loan was made on February 28, 1895. But we have already found that this must be construed with reference to the time when the company agreed to make the loan, and not the date of its consummation. We base this construction upon the course taken by both parties, complainants and defendants, in the proof, all parties so treating the issue.

As to the point that the loan was sufficiently advanced when chapter 81, Acts 1895, was passed, we have already found that at that

time there was an agreement between Miller and the company that the loan would be consummated by the turning over of the money if the company's terms as to security should be complied with; that is, that Miller had offered to borrow \$5,000 on security of certain land, and that the company had made an offer to lend him \$4,500 on that land if the title should prove satisfactory, and the bond and mortgage should be executed in a manner satisfactory to the company. Matters were in this condition, and steps had been taken looking to a completion of the loan at the time that the act of 1895 (chapter 81) went into effect; that is, prior to this time the company's general attorney at St. Paul had prepared the papers, and forwarded them to the company's local agent at Dickson, with instructions to have them executed, and had forwarded the draft for the \$4,500 to its local treasurer at Dickson, with directions to turn it over to Miller when the local agent should turn over to it, the local treasurer (the Dickson Bank & Trust Company), the papers that had been furnished to such local agent by the company, to have signed, and to have the mortgage, when signed and acknowledged, recorded, and to have prepared a continuation of the abstract of title so as to bring it down to the date of the record of the mortgage, etc. These directions, however, were not carried out until May 2, 1895; and the loan was not complete until after that date, when the papers had been forwarded to the company at St. Paul, and there approved. As already stated, under the terms of the application for the loan, as shown by "Hints to Borrowers," printed on the back thereof, the loan could not become consummate until the final approval was granted by the company's general attorney, upon the securities forwarded by the local treasurer, and until this indication of that approval to the company's trustee, its paying officer. And this although the draft had been delivered, because its delivery was by the contract subject to this known condition. But, in any event, it is clear that the draft was not deliverable until May 2, 1895, and that it was not delivered until that time, and the contract was without doubt inchoate until that time. But at that time the act of 1895 (chapter 81) was already in force. But it is insisted that, because the negotiations had gone the length above indicated prior to that time, the contract must be treated as falling within the proviso of that act. That proviso, as already quoted, is that the "act shall not affect any contracts or remedy [any] heretofore made by foreign corporations not having complied with existing laws on the subject." But, under the facts above recited, we hold that the contract was not "made," in the sense of the law, until it was complete, and it was not a complete contract until after April 30, 1895, the date that chapter 81, Acts 1895, went into effect; sundry things, above point-

ed out, remaining yet to be done to give it legal efficacy. We are therefore of opinion that, at the time chapter 81, Acts 1895, went into effect, the complainant company stood in the attitude of having complied with the law, its charter, or a copy thereof, being then on file in the office of the secretary of state at Nashville; that, while it so stood in the attitude of having complied with the law, its contract was made with Miller; and that that contract was protected by the act just referred to; and that, under that act, complainant had the right of suit guarantied to it, to enforce that contract when it should deem it necessary so to sue in order to protect its rights.

The case of the complainant company is further strengthened by the provisions of the validating act of 1897 (chapter 25). This act amends chapter 119, Acts 1895. This last-mentioned act provided in substance that where foreign corporations doing business in this state had been contracts or purchased property without filing a copy of their charter in the office of the secretary of state, or without filing an abstract of the same in the register's office of the counties where they did business, nevertheless such contracts or purchases should be valid if, at the date of the act, such corporation had already complied with the law, or should do so within four months from the passage of that act. The act of 1897 (chapter 25) amended this act by applying its saving provisions to "such foreign corporations as in good faith shall before September 9, 1895, have complied with the provisions of chapter 122 of Acts of 1891, as modified and amended by the provisions of chapter 81 of Acts of 1895"; that is, to such foreign corporations as had filed a copy of their charter in the office of the secretary of state. This act was passed on March 24, 1897. Its purpose was to validate the contracts of such foreign corporations as on September 9, 1895, stood in the attitude of having complied with Acts 1895, c. 81. On that day, September 9, 1895, the complainant company did stand in that attitude. It then had on file with the secretary of state a copy of its charter. True, that charter, or copy thereof, was filed in the office of the secretary of state in 1891, prior to the passage of Acts 1895, c. 81; but that statute was a remedial one, and should be liberally construed; and as the complainant company, at the time that act was passed, stood in the position contemplated by that act, it fell, as to contracts thereafter made, clearly within the equity of the statute. It would have been a mere idle form to again file with the secretary of state a paper already on file with him. So, we repeat that on September 9, 1895, the test date fixed by the act of 1897, the complainant company stood in the attitude of having complied with chapter 81, Acts 1895, and so was embraced by the terms of the validating act. We need not discuss the subject of validating acts or

their effect. Their efficacy has been fully established in this state. See full discussion of the subject by Mr. Justice Caldwell, in *Shields v. Land Co.*, 94 Tenn. 128, 146-153, 28 S. W. 608. See, also, *Butler v. Association*, 97 Tenn. 679, 37 S. W. 385, opinion by Mr. Justice Beard.

It is insisted by complainant Peck, in the second case which we have under consideration, that his rights are not affected by the validating act, because he had, as he insists, acquired a lien upon the real estate by the filing of his bill prior to the passage of the act. This contention is without merit. In the case of *Shields v. Land Co.*, supra, it was contended by the complainants in that case that they had acquired a right of action against the defendants as partners, prior to the validating act of March 10, 1890, by reason of the defendant corporations' failure to have the charter properly acknowledged before the clerk of the county court, they having acknowledged the same before a notary public; and it was contended that the validating act could not deprive them of this right. The supreme court held that this contention was unsound. The reasons are fully given in the case referred to, and we need not go into the matter further. We may add that the doctrine of this case on this point was reaffirmed by the supreme court in *Butler v. Association*, supra. But, in addition to this, the rights of Peck are inferior to the rights of the complainant company on the other ground stated above; that is, that the complainant company, on May 2, 1895, and subsequent to that time, at the date when the loan contract went into effect, was protected by chapter 81, Acts 1895.

It only remains to state the substance of the case of Peck, trustee, against Miller. The complainant, Peck, is trustee under an assignment made by Buckner & Co. On May 17, 1895, as such trustee, he obtained a judgment for \$237.63 before S. P. Larkins, a justice of the peace of Dickson county, against the defendant E. E. Miller, and caused execution to be issued thereon, and returned nulla bona. On the 29th of April, 1896, he filed his bill in behalf of himself and all other creditors of E. E. Miller, against E. E. Miller and wife and the complainant company in the first-named case. The bill described the property upon which complainant company's mortgage rests. It is filed upon the theory that that mortgage was void because of the supposed failure of the complainant company to comply with our foreign corporation laws. Having found that the mortgage is not void, it results that the only right acquired by complainant Peck was to reach such surplus as may remain after satisfying the debt of the complainant company and the homestead right of Miller and wife. As to this latter question, while the homestead cannot avail against the debt of the complainant company, because of the

execution of the mortgage by the husband and wife, yet it will be operative as against complainant Peck, it appearing that the homestead is claimed in the answer of Miller and wife to the Peck bill.

There is one other question that should be mentioned. It is insisted in the answer to the first bill that the contract sued on is usurious, and, therefore, that the complainant company should be repelled from court. It would undoubtedly be usurious under the law of this state, on the facts we have already stated; but we have found that it is a Minnesota contract, and the proof shows that it was in accordance with the law of that state; hence, by comity, it is enforceable. *Loan Co. v. Cannon*, 96 Tenn. 599, 603, 36 S. W. 386.

The amount due the complainant company at the time of the commencement of the action was \$4,626.60. It is entitled to a decree for this sum, with interest from March 15, 1896. The decree will be entered against both E. E. Miller and his wife, Mrs. Fanny Miller, she not having pleaded her coverture. A decree will also be entered directing a sale of the property for cash and without redemption, these being the terms set forth in the mortgage which the bill is filed to enforce. As provided in the mortgage, notice of the time, place, and terms of sale shall be given by at least four insertions in some weekly newspaper published in Dickson county, or by printed handbills posted in not less than five conspicuous places in Dickson county, one of which shall be at the court-house door, the posting of the first publication of the advertisement to be at least 20 days before the time of sale. The proceeds of sale will be applied first to the payment of the costs of sale and the costs incident thereto, and then to the payment of the debt of the complainant company, and then \$1,000, or such portion of the said sum as may be left, will be invested, under the orders of the court, in a homestead for E. E. Miller and wife, and then out of such funds as may be left, if any, the debt of complainant Peck will be paid. The costs of the appeal will be paid by Peck, trustee, and E. E. Miller and wife. The costs of the court below, except such as are incident to the sale herein ordered, will be paid by Peck, trustee, and E. E. Miller and wife. Let a decree be entered in accordance with the above directions. An order will be entered directing the receiver in the cause to report, and a settlement of his accounts will be had. The balance of the funds in his hands, after the payment of his fees, will be applied as above directed, concerning the proceeds of sale. A reference will also be made to ascertain whether there are any taxes due the state or the county of Dickson on the land ordered to be sold. The amount of such taxes, if any, will be first paid out of the proceeds of sale, after the costs of making the sale. The above directions as to the

disposition of the proceeds of the sale are subject to this tax order.

WILSON and BARTON, JJ., concur.

Affirmed orally by supreme court, December 18, 1897.

#### SELF v. STATE.

(Court of Criminal Appeals of Texas. June 15, 1898.)

HOMICIDE—EVIDENCE—THREATS—CONTINUANCE—COMPETENCY OF JUROR—WAIVER.

1. In a prosecution for homicide, a conversation, the night before the killing, in which accused, referring to a reported assault by the deceased with a dirk, stated that, "If he ever comes at me with a knife, I will cut off his wind," is admissible as tending to show the animus of accused, and also as rebuttal of his testimony that he went to deceased's house with no hostile intent or anticipation of trouble.

2. Where accused was represented by his leading counsel, the fact that the other member of the firm of attorneys defending him, and who had supervision of the case, was sick, and unable to attend the trial, and that accused, though able to be present, was himself sick and unable to assist counsel in his defense, does not constitute a cause for postponing the trial, where the issues were simple and it did not appear that a delay was necessary to enable counsel to understand the case.

3. Where counsel for defense neglected to examine a juror on his voir dire, so as to call attention to or develop the fact that he had served on the grand jury which found the indictment,—that being made ground for challenge by Code Cr. Proc. 1895, art. 673, subd. 7,—he is not warranted in assuming the non-existence of such cause from the juror's statement that he knew nothing of the evidence, and had no bias or opinion, and, not having been diligent in disclosing such cause, will not be heard to complain on appeal.

Appeal from district court, Ft. Bend county; T. S. Reese, Judge.

Dave Self was convicted of murder in the second degree, and appealed. Affirmed.

Kirkland & Russell, for appellant. W. W. Walling and Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 50 years; hence this appeal.

Appellant excepted to the action of the court in permitting the state to prove by the witness Miles that, on the night before the shooting, appellant came to him in the town of Richmond, "and asked witness if deceased did not have a reputation of getting after people with a knife; and witness replied that the only thing he had ever heard against deceased was that he had run one George Phillips with a dirk, and defendant said to witness, 'If he ever comes at me with a knife, I will cut off his wind.' Appellant excepted to said testimony because it was not material, was not in rebuttal, and was not a threat, being qualified by a condition that defendant would

act in necessary self-defense if deceased should run after him with a knife." The objection was overruled and the witness allowed to testify, and appellant reserved his bill of exceptions. The court explains this bill with the following statement: "That said testimony was adduced in rebuttal; that defendant testified in his own behalf that he went to deceased's house with no hostile intention, and that he had not the slightest anticipation of having any trouble with deceased, and that the testimony of the witness Miles was admitted in rebuttal of this testimony of the defendant." The circumstances of the killing tend to show that the difficulty occurred in regard to the settlement of a debt claimed by appellant against deceased for repairing his house. Deceased claimed that he only owed him \$4, and appellant claimed that he owed him \$37; the \$33 being for extras in addition to the stipulations of the contract. There were but two eyewitnesses to the difficulty,—the wife of the deceased and appellant. The wife of the deceased, by her testimony, made out a case of at least murder in the second degree; appellant's testimony tending to show self-defense. Now, with reference to the testimony above stated, and to the introduction of which a bill of exceptions was taken, it occurs to us that same was admissible as a circumstance tending to show animus towards deceased on the part of the appellant, and, in addition, the same was admissible for the reasons assigned by the court.

There is nothing in appellant's proposition contained in his motion for a postponement of the trial. He had engaged the services of the firm of Kirkland & Russell. Russell, who had supervision of the case, and with whom appellant had consulted, it appears, was sick, and not able to attend the trial; and appellant insisted that the case be postponed on that account. He also insisted that the case should be postponed because of the sickness of the appellant; that, though able to be present, he was not in condition to afford his counsel the benefit of his advice in the conduct of the case. There is nothing complicated about this case. The issues are plain and simple, and it does not occur to us that the fact that Russell was unable to attend the trial is sufficient cause for postponement. Though Kirkland, the leading counsel in the case, may not have previously consulted with his client, yet it does not appear that it was necessary to delay the case even in order for him to fully understand it. If he had craved a short postponement to enable him to consult with his counsel, no doubt the court would have permitted this. The fact that appellant was sick does not seem to have interfered with the trial, and the affidavit shows that before he was sent for he was able to be up at his place.

The only material question in this case is

presented in the motion for a new trial, and it is claimed that this case should be reversed, "because one of the jurors who sat upon the jury and tried the defendant, to wit, W. M. Darst, was a member of the grand jury that found the bill of indictment upon which this defendant was tried; that the indictment was found at the March term, 1897, and said juror was a member of the said grand jury, and passed upon the guilt of the defendant, and was therefore not an impartial juror, and neither the defendant nor his counsel knew at the time of accepting said Darst on the jury that he had been a member of the grand jury that found the bill of indictment; that said juror, when questioned upon his voir dire, stated that he had not formed or expressed an opinion that would influence him in finding a verdict in the case, and that he did not know what the evidence would be, and that he had no bias for or against the defendant; that the answer of said juror on his voir dire led defendant and his counsel to believe that he was not a member of said grand jury; that, by reason of said Darst having been a member of said grand jury, the defendant was in effect being tried by a jury that had already passed in judgment against him." This matter was presented to the court on affidavits. Darst made an affidavit for the defendant, in which he stated that, when he was examined on his voir dire, he was asked whether he had formed and expressed an opinion as to the guilt or innocence of the defendant that would influence him in finding a verdict, and that he answered that he had not, and did not know what the evidence was; that he had forgotten that he had served upon the grand jury that had found the bill of indictment; that when the indictment was read to the jury he remembered that he had served upon the grand jury, and then approached the presiding judge, and informed him of the fact, and he replied that it made no difference; that he did not make known this fact to the defendant or his attorney. Kirkland, the attorney who tried the case, also made an affidavit, that, when the district attorney examined the juror Darst upon his voir dire, the said juror answered that he had not formed or expressed any opinion as to the guilt or innocence of the defendant, and that he did not know what the evidence was; that the district attorney usually asked jurors, on their voir dire, whether they sat on the grand jury that found the bill of indictment, and affiant was under the impression that the question had been asked the juror Darst; that he did not know that said juror was a member of the grand jury that found the bill, and he concluded, from the answer of the juror, that he was not biased, and knew nothing of the facts of the case, which could not have been true when the juror had already passed on the guilt of the defendant. The



state introduced the controverting affidavit of Darst, in which he stated: "That he was a member of the grand jury at the March term, 1897, which found the bill of indictment against the defendant, but he had no recollection of the testimony before said body respecting the return of an indictment against said defendant, if such was heard; affiant was on defendant's appearance bond, and brought defendant into court on Monday, the 28th of March, 1898; and affiant's feelings towards the defendant were and are kindly. When this case was called for trial on the 28th of March, affiant, whose name was on the venire of jurors in the case, stated to the court, in open court, that he was on the grand jury at the March term, 1897; that he was on defendant's bond, and did not want to serve on the jury, and asked to be excused; and, notwithstanding this, he was accepted as a juror by both the state and defendant, and served as such, much against affiant's own wishes." The state also introduced the affidavit of C. C. Everett, who stated: "That he was present at the impanelment of the jury which tried the case; that the juror Darst was one of the defendant's bondsmen; and at the request of the court brought the defendant into court on the morning of the trial. The fact that said Darst was on the defendant's bond, and the said Darst felt kindly towards the defendant, was well known to the defendant and his counsel. Said Darst's name was on the venire of jurors in this case, a copy of which was in defendant's possession before and at the time. The customary questions asked jurors in a murder case—that is, as to scruples about capital punishment, bias or prejudice, and formation of an opinion as to the case—were propounded to Mr. Darst in open court and in defendant's presence. In answer to the last question Mr. Darst said, in substance, that he knew Dave Self, the defendant; was on his bond; had heard the killing discussed and talked about considerably, but could, he thought, render a verdict according to the law and evidence; but that he did not want to sit as juror because he was on defendant's bond, and also because whatever conclusions he might come to might be misconstrued, and was insistent that he be excused. The defendant's counsel asked Mr. Darst several questions on how far what he had heard might lead to a fixed opinion in Mr. Darst's mind, and was given every opportunity to test the qualifications of the juror, and had not exhausted his challenges. The state's counsel accepted the juror, and he was turned over to defendant for acceptance or rejection; and the defendant, after consulting with Mr. Kirkland, his counsel, for some considerable time, deliberately accepted Mr. Darst as a juror."

The law makes the fact that the juror served on the grand jury which found the indictment a cause for challenge. See Code Cr. Proc. 1895, art. 673, subd. 7. It will be noted

that a juror who may have sat upon the grand jury is not disqualified as a juror; but, as provided by statute, it is a mere cause for challenge, of which a defendant may or may not avail himself. Appellant, however, insists that he was unacquainted with this cause of challenge from no fault of his own; that he used due diligence to discover the fact when the juror was impaneled by asking him if he had formed an opinion in the case, and, on the juror replying that he had not, according to the testimony of the juror himself and according to the testimony of Everett that the opinion he had was not a fixed opinion, he did not prosecute the inquiry any further, because, from the answer of the juror, he was authorized to assume that he did not sit upon the grand jury. So that the question presented to us is one of diligence in discovering the cause of challenge, and, if he failed in the exercise of this diligence, then he cannot be heard to complain. See *And v. State*, 96 Tex. Cr. R. 76, 35 S. W. 671. We understand the claim to be that, while the statute makes the sitting on a grand jury a distinct cause of challenge, yet this is based on the apprehension that a person having sat upon the grand jury which found the bill of indictment must necessarily have formed an opinion in the case adverse to appellant, and that therefore he is subject to challenge. This may be true; but does it obviate the necessity that appellant, when the jury is impaneled, shall ask all the statutory questions which bear upon the matter of disqualification? A juror might very truthfully answer that, notwithstanding he may have served upon the grand jury that returned the bill of indictment, he had no present recollection of having formed an opinion in the case; whereas, if his attention had been called directly to the fact as to whether or not he sat upon the grand jury that found the bill of indictment, he might recall the fact. The law makes the having sat on the grand jury that found the bill of indictment, and the formation of an opinion in the case, two distinct grounds of challenge; and we hold that the interrogation of a juror as to one of these grounds might not suggest to him the other. Evidently, in this case, the questioning of the juror under the thirteenth subdivision of article 673, as to whether or not he had formed an opinion in the case, did not recall to him the fact that he had sat upon the grand jury which found the bill of indictment. And we further hold that it was not diligence on the part of appellant to rest simply upon questioning the witness as to the formation of an opinion; but he should have covered the other grounds named in the statute, if he desired to avail himself of them, before he could be held to have used due diligence as to the particular cause for challenge. It furthermore appears from the record that appellant was on very friendly terms with the juror Darst,—said juror having gone on his bond,—and, if we look to the

affidavit of Everett, this witness states that the juror informed counsel that he had an opinion in the case. It is not shown that counsel was even diligent in pressing his inquiries on this line. If he had been, possibly he might have developed the fact that the juror Darst had sat upon the grand jury which presented the bill. At any rate, it appears to us that counsel, knowing that the juror was friendly-disposed towards him, from some cause failed in diligently pressing the statutory inquiries as to grounds for challenge, and, having so failed, he cannot now be heard to complain. See *Trueblood v. State*, 1 Tex. App. 650; *Franklin v. State*, 2 Tex. App. 8; *Lester v. State*, Id. 432; 6 Cr. Law Mag. 305, and authorities there cited.

The evidence amply supports the verdict, and the judgment is affirmed.

### SPENCER v. JONES.<sup>1</sup>

(Court of Civil Appeals of Texas. June 18, 1898.)

PARTNERSHIP—SCOPE—POWER OF PARTNERS—PLEDGES—APPEAL—ASSIGNMENTS OF ERROR.

1. Two parties purchased land under an agreement that title be taken in the name of one for their joint benefit. Notes secured by lien were given the vendor, signed by the party who took title. While these notes were outstanding, said party conveyed the land, taking notes in his name for the price, secured by liens. Before such notes were collected there was a settlement between the original purchasers, in which there was a division of the notes received from the subpurchasers, with an agreement that the party in whose name title had been taken should, out of the notes allotted him, pay those given by him to the original vendor. *Held*, that said transaction constituted a partnership, from which authority could be inferred for the purchaser who took title to bind his co-purchaser in the negotiation of the notes allotted to the former in the settlement.

2. An assignment of error reading, "If the evidence shows such a partnership, and if the agreements between C. and S. constitute a partnership, it is clear from all the evidence that the partnership was dissolved prior to the time plaintiff bought the notes sued upon," is insufficient, as it does not complain of any proceeding in the trial court.

3. An assignment of error reading, "Plaintiff could acquire no higher interest in the land than C., and C. could not ask that this defendant should pay the notes due to Z.," is insufficient, as being a mere argument.

4. A sale under which the seller reserves the privilege of buying back the property is not a pledge.

Appeal from district court, Erath county; J. S. Straughan, Judge.

Action by M. G. Jones against A. A. Chapman, R. B. Spencer, G. W. Simpson, and William C. Vowell. From a judgment in favor of plaintiff, defendant R. B. Spencer appealed. Affirmed.

Frank & Young, for appellant. Martin & George, for appellee.

<sup>1</sup> For opinion on motion for rehearing, see 47 S. W. 665.

STEPHENS, J. This suit was brought by M. G. Jones against A. A. Chapman, R. B. Spencer, G. W. Simpson, and William C. Vowell, to recover of Simpson as maker and Chapman as indorser the amount of three negotiable promissory notes executed August 2, 1892, by Simpson to Chapman, to pay for a tract of 105 acres of land, a part of the G. Rockfeller survey, in Erath county, conveyed by Chapman to Simpson, by deed of even date with the notes, in which the vendor's lien was expressly retained upon the 105 acres of land so conveyed. The main purpose of the suit, however, was to subordinate a prior lien claimed by R. B. Spencer upon said Rockfeller survey, arising out of a sale and conveyance made April 21, 1890, from Z. Bartlett to A. A. Chapman, of 420 acres of said survey, including the 105 acres upon which Jones sought to foreclose his lien. Vowell was made a party, as vendee of Simpson. The conveyance from Bartlett to Chapman was made in pursuance of an agreement between Chapman and Spencer that the title should be taken in the name of Chapman for their joint benefit, it being the agreement that they would divide equally the profits of the venture. Besides a cash payment, five notes of \$420 each were executed, secured by a lien on the land. While these notes were outstanding, Chapman conveyed the land in four several tracts of 105 acres each to the following persons, respectively: Simpson (G. W.), Hayden, Clardy, and Petty,—taking their several notes for the deferred payments in his own name, with liens reserved on the land, that conveyed to Simpson being the tract involved in this suit. Thereafter, and before the Simpson, Hayden, Clardy, and Petty notes had been collected, in the latter part of the year 1892, the evidence tended to show that Chapman and Spencer had a settlement, in which the notes of Simpson and Hayden were allotted to Chapman, and those of Clardy and Petty to Spencer, with the further agreement that Chapman should pay out of the notes allotted to him those held by Bartlett. In the spring following, Chapman sold and assigned, for a valuable consideration, the Simpson and Hayden notes to Jones, falsely representing at the time, and thereby deceiving Jones, that the Bartlett notes had been paid off, and that lien extinguished. The evidence tended further to show that, in the transaction between Chapman and Jones, Chapman promised Jones to redeem these notes in the fall of that year if Jones should desire him to do so. After Jones acquired these notes, Spencer, who still held the other notes (Chapman having become insolvent), paid off the Bartlett debt, and took an assignment thereof to himself, under which, pending this suit, he became the purchaser at execution sale of the 420 acres, under a judgment foreclosing the Bartlett lien. On the first trial Jones was denied any recovery against Spencer; but upon appeal to this

court that judgment was reversed, and the cause remanded. See 41 S. W. 527. But upon the last trial he prevailed, and Spencer now appeals.

The first error is assigned to the verdict, upon the ground that the evidence failed to show a partnership between Chapman and Spencer; but, as we read the record, the evidence did not admit of any other conclusion than that Chapman and Spencer bought the Rockefeller land from Bartlett in partnership, and that, in disposing of the notes assigned to Jones, Chapman was acting within the scope of this partnership. This assignment must consequently be overruled.

What is copied in the brief as the second assignment of error reads: "If the evidence shows such a partnership, and if the agreements between Chapman and Spencer constitute a partnership, it is clear from all the evidence that the partnership was dissolved prior to the time plaintiff bought the notes sued upon." We are of opinion that, as this statement does not complain of any proceeding in the trial court, we cannot consider it as an assignment of error. But, if so treated, we are of opinion that it would not necessitate a reversal of the judgment, since, in assigning the notes sued upon to Jones, Chapman was acting in pursuance of an understanding with Spencer to the effect that he should use the proceeds thereof in the liquidation of the original partnership liability. Jones had no notice of any dissolution, but, according to his testimony, understood when he acquired the notes that Spencer was still interested with Chapman; and, whatever private dissolution may have taken place between Chapman and Spencer, it is clear that Spencer was still liable to Bartlett for the original partnership debt, though his name did not appear in any deed or note. It is also clear that Spencer in the first instance had clothed Chapman with the apparent ownership of the notes. See the latter part of our opinion on the former appeal.

The third and fourth assignments are not copied in the brief, and are consequently waived. What is submitted as the fifth assignment is similar to the second, quoted above, and reads: "Plaintiff could acquire no higher interest in the land than Chapman, and Chapman could not ask that this defendant should pay the notes due to Z. Bartlett." This complains of no proceeding in the court below, and is but an argument. What is submitted as the sixth assignment is of like import. The seventh complains of the court's failure to instruct the jury upon a given point, but it does not appear that any such instruction was requested.

This brings us to the eighth and last assignment found in the brief, which complains of the court's refusal to give special instruction No. 1 requested by appellant, reading: "If from the evidence you find that there was a partnership between A. A. Chapman and R. B. Spencer, as herein defined,

and if you find from the evidence that M. G. Jones, the plaintiff, loaned money to A. A. Chapman, and took as security therefor, then you are instructed to find for the defendant Spencer, unless you find that the contract of co-partnership extended to and included an agreement to borrow money upon the security of the notes, of the contract of partnership, if one existed, did not extend to and include an agreement to borrow money upon the notes as collateral, then Chapman, as a partner, was not authorized to borrow money upon them as security." The charge, as copied in the transcript, is hardly intelligible, and perhaps should have been refused on that ground. We infer from the brief that in requesting it appellant sought to have the jury instructed that in the event they found that Chapman had not sold the notes to Jones, but had only pledged them as collateral security for a loan, they would find in favor of Spencer, unless they should further find that the partnership included an agreement to borrow money upon these notes as collateral security. We are, however, of opinion that, if sufficient in form, the charge should not have been given, because the evidence did not tend to prove that Chapman had borrowed money from Jones, and pledged the notes as security therefor. It is true. Jones testified that Chapman promised him at the time he purchased the notes from him that he would redeem them in the fall if Jones so desired; but there was no evidence that Chapman had obligated himself to pay to Jones at any future time any particular sum of money. In fact, it is clear from the evidence that the relation of debtor and creditor did not at any time exist between them, and it is also clear that Jones did not obligate himself to surrender these notes to Chapman upon the repayment to him of any sum of money. The most that could be claimed is that Jones bought the notes from Chapman, with the privilege of a resale to him.

These conclusions dispose of all the assignments of error. Independent reasons might be given, we think, why this judgment, upon the whole record, should be affirmed; but we deem it unnecessary to do so. Judgment affirmed.

TARLTON, J., not sitting.

HARDEMAN COUNTY v. FOARD COUNTY.<sup>1</sup>  
(Court of Civil Appeals of Texas. June 18, 1898.)<sup>2</sup>

COUNTIES CREATED OUT OF OTHERS—BONDS—ISSUANCE—VALIDITY—REGISTRATION—CORRECTION OF TAX ROLLS—BACK TAXES—LIMITATION—PARTIES.

1. Rev. St. 1895, tit. 23, art. 764, makes a county created in part out of another county liable for its proportionate part of the indebtedness of the parent county. *Held*, that the

<sup>1</sup> For opinion on rehearing, see 47 S. W. 536.

<sup>2</sup> Writ of error denied by supreme court.

taxpayers of the portion of the new county taken from the old, in a suit for such proportion, were not necessary parties.

2. In an action by a county to recover of a new county, formed partly out of it, the latter's proportion of indebtedness accrued prior to its formation, the latter pleaded limitations of two years. The new county had paid on its proportion of the indebtedness to within two years of the filing of the suit. *Held* no defense, since the cause of action did not arise until the discontinuance of payment.

3. The commissioners' court of a county, in issuing bonds, failed to make provision for their payment. The legislature, however, in authorizing the issuance of such bonds, provided for the levy and collection of the necessary taxes. *Held*, that the bonds were valid.

4. Sayles' Rev. Civ. St. 1888, art. 986b, prescribes a limit within which a county already indebted shall issue bonds. A county already indebted issued bonds in excess of such limit. *Held*, that they were void as to the excess.

5. Bonds described in their registration as being payable to the "State of Texas" were payable "to bearer." *Held* not to invalidate them, since the statute does not prescribe what the registration shall contain.

6. Rev. St. 1895, art. 765, provides that in an action by a county to recover of another, created out of it, its proportion of the indebtedness of the original county, the tax rolls shall be conclusive evidence of the property therein. *Held* that, in order to ascertain whether a given survey appearing in such rolls is in that territory, its locality would be looked to, and the map of the county was admissible to determine where it was situated; and where the tax rolls, together with such map, show that the same land had been twice listed, the rolls were not conclusive.

7. A county created out of another, in an action by the latter for its proportion of the indebtedness that accrued prior to the creation of the new county, was not entitled to a credit for the back taxes collected by the parent county in the excised territory after the organization of the new county.

Appeal from district court, Hardeman county; G. A. Brown, Judge.

Action by Hardeman county against Foard county to recover the latter's proportion of their indebtedness incurred prior to their separation. From a judgment, plaintiff appeals. Reversed and rendered.

S. J. Osborne, Co. Atty., B. E. Green, and Duncan G. Smith, for appellant. Huff & Hall and M. M. Hankins, for appellee.

STEPHENS, J. Bonds to the amount of \$10,000 were issued by Hardeman county in the year 1886, to pay for the construction of a jail at Margaret, then the county seat. In the year 1890 the county seat having been moved from Margaret to Quanah, bonds to the amount of \$18,000 were issued to build a court house; and afterwards, during that year, bonds were also issued to the amount of \$43,000, to build bridges across Pease river and Groesbeck creek, in Hardeman county; and in the early part of the year 1891 still other bonds, to the amount of \$10,000, were issued to build a jail at Quanah. On March 3, 1891, an act of the legislature was approved creating the county of Foard out of parts of the territory of Hardeman, King, Cottle, and Knox counties, but largely out

of the territory of Hardeman; and in the following month the county of Foard was duly organized. All of the bonds above referred to were issued prior to the creation of Foard county, though the jail at Quanah, for which the last issue of jail bonds was made, was not accepted until March 23, 1891, which was after the creation and before the organization of the new county. Up to April 10, 1896, Foard county made regular annual payments to the treasurer of Hardeman county of her proportionate part, as agreed upon by the county judges of the two counties, of the interest and principal of all the bonds of Hardeman county in existence at the date of the creation of Foard county, which money was regularly applied by the treasurer of Hardeman county, together with the corresponding payments of the latter county, to the extinguishment of the annual interest in full, as well as to the principal, of certain of the bonds so paid off. Hardeman county had already paid a portion of the Margaret jail bonds when Foard county was created, and the rest of those bonds were thereafter extinguished by the conjoint payments of the two counties, made in the manner above stated, leaving outstanding against Hardeman county the court-house bonds, bridge bonds, and Quanah jail bonds. Of these, Hardeman county, between April 10, 1896, and April 10, 1897, besides paying the annual interest, amounting to \$3,960, redeemed three of the court-house bonds, aggregating \$3,000, and four of the bridge bonds, aggregating \$4,000. Foard county refused to make any further payments after April 10, 1896. This suit was consequently brought by Hardeman county, August 16, 1897, against Foard county, to recover of the latter its proportionate part of the indebtedness and liabilities of the former. The defenses interposed were (1) that the people and taxpayers residing in the territory taken from Hardeman county, rather than Foard county, were necessary parties defendant; (2) the statutes of limitation of two and four years; (3) the invalidity, upon various grounds, of the bonds; (4) a mistake or double assessment in the tax rolls of Foard county for the year 1891, to the amount of \$131,150; and (5) an offset claimed not only on account of payments made by Foard county upon void bonds and in excess of her share, but also an offset or counterclaim of \$553.56 for back taxes collected by Hardeman county after the creation of Foard county, upon renditions made by citizens of the excised territory prior to the creation of Foard county.

The case was submitted to the court, without a jury; and upon conclusions of law and fact, printed in appellant's brief, judgment was entered to the effect that the original issue of jail bonds made in 1886, to build the Margaret jail, were void; that the bridge bonds issued in 1890, for \$43,000, were excessive to the amount of \$16,557, and hence illegal and void to that extent; and that as

to these jail bonds, and as to this excess in the bridge bonds, Hardeman county take nothing. But upon the finding that there was still outstanding \$47,443 of valid indebtedness against Hardeman county, with interest at 6 per cent. per annum from April 10, 1897, and upon the further finding that the sum of \$12,080.85 was the proportion of the principal for which Foard county was liable, it was decreed that Hardeman county recover from Foard county that sum, with interest at 6 per cent. per annum from April 10, 1897, according to the terms of payment provided in the bonds; "and in case any part of said sum, principal or interest, is not paid when so due, the amount so due shall bear interest from the date so due at six per cent. per annum until finally paid." The judgment then proceeds: "It appearing that Foard county has heretofore paid to plaintiff \$3,242.50 more than Foard county's proportion of the valid debt which has been paid since the creation of defendant county, ordered that defendant have, and is hereby given, credit for said sum of \$3,242.50, which shall be applied on the amount first coming due from Foard county on the unpaid bonds herein mentioned, said bonds being as follows: 15 court-house bonds, for \$1,000 each, dated May 15, 1890, due May 15, 1906, with interest from April 10, 1897, at six per cent. per annum, interest payable April 10th each year; 39 bridge bonds, for \$1,000 each, dated December 2, 1890, due April 10, 1910, with interest from April 10, 1897, at six per cent. per annum, payable April 10th each year (the amount valid of said bridge bonds is \$22,443); 10 jail bonds, for \$1,000 each, dated February 12, 1891, due February 12, 1906, with six per cent. per annum from April 10, 1897, payable April 10th of each year. Territory taken from Hardeman, and now included in Foard, same as described in plaintiff's petition. Commissioners' court of Foard county ordered to annually levy and collect, from taxpayers and property owners in said excised territory, a tax sufficient to pay the interest annually accruing on said principal sum of \$12,080.85, and to create a sinking fund sufficient to pay said principal at the time the same shall become due, according to the terms of said bonds, respectively; which sum so collected shall be paid and delivered by Foard county or its authorized officers to the county treasurer of Hardeman county, as the said payments shall become due as herein stated; provided that the taxes so levied and collected shall not for any one year exceed the constitutional limit, and provided, further, that, if the sum so levied and collected for any year shall be insufficient to pay the sum due for that year, then such levies and collections and payments shall be continued annually until this judgment is fully paid off, together with all costs by plaintiff in this behalf incurred." To this judgment, both parties (Hardeman county having perfected an appeal therefrom) assign errors. Inasmuch

as the decision does not turn upon conflicting evidence, and the material facts are fully and methodically stated in the printed briefs, together with the findings of the court, we proceed at once to state our conclusions upon the issues involved.

1. We agree with the district judge in overruling the contention that the people and taxpayers of that portion of Foard county taken from the territory of Hardeman county were not necessary parties defendant. It is true, the constitution (article 9, § 1) provides in such cases that "the part stricken off shall be holden for and obliged to pay its proportion of all the liabilities then existing of the county from which it was taken"; but it further provides that this shall be done "in such manner as may be prescribed by law." Turning to the Revised Statutes of 1895 (title 23, arts. 764, 765, 765a), we find that provision is made for suit by the old county against the new, and not against the taxpayers of the excised territory, to enforce the provision of the constitution above quoted; and, when suit becomes necessary to enforce the provision, we know of no other manner prescribed by law in which it may be done.

2. We also agree with his honor in overruling the limitation defense. As long as Foard county continued to pay, as it matured, her proportion of the indebtedness of Hardeman county existing at the date of the creation of the former county, which was done up to within less than two years of the institution of this suit, Hardeman county had no cause of action. We do not understand this conclusion to be essentially at variance with the decision of our supreme court in *Mills Co. v. Lampasas Co.*, 90 Tex. 603, 40 S. W. 403, in which it was held that claims of this character are not such claims against a county as must be presented to the commissioners' court for approval or rejection before suit can be instituted to collect them, as provided in article 790, Rev. St. True, in order to strengthen the ruling there made, some expressions were employed in the opinion of Chief Justice Gaines which may not be in accord with our interpretation of Act 1893, p. 124 (Rev. St. 1895, tit. 23, supra), entitled "An act to provide for the payment by new counties of their proportionate share of the indebtedness of the older counties from which they were created." This act was passed, as appears from its last section, to provide a remedy for the enforcement of the constitutional obligation imposed upon that part of a new county taken from the old to pay its proportion of the liabilities of the latter county. Since the constitution only imposed this obligation on "the part stricken off," and not on the new county, it became necessary for the legislature (as directed in the constitution) to prescribe the manner of enforcing the obligation. Consequently, the very first section of the act, as indicated in

the caption above quoted, provides for the enforcement of the obligation through the medium of the newly-organized county, declaring that such new county "shall be held liable for and bound to pay its proportion of all the liabilities of the county or counties from which it was taken, existing at the date of its creation of such new county, according to the proportionate value of the property in the excised territory and the value of the property remaining in the old county." It then provides that a suit to recover the same may be brought, etc.; but it does not provide that suit must be brought to establish same, and we are loath to construe an act of the legislature as intended to impose upon counties the expense of litigation where no necessity or occasion arises for suit. The act itself provides the means of arriving at the proportion of liability by an arithmetical calculation, based upon the tax rolls of the two counties, which are made "conclusive evidence of the property and value thereof remaining in the parent county and in the excised territory at the date of the creation of such new county." Since that is certain which may be made certain, it follows that the act itself establishes the proportion or extent of liability, leaving nothing for the new county to do but to perform a plain duty, and providing for suit in case of failure or refusal to perform such duty. It is true, the third section of the act expressly makes it the duty of the commissioners' court of the new county, where judgment is recovered, to levy a tax on the excised territory to pay off such judgment; but if, as already seen, the act of the legislature, by its provisions, in pursuance of the constitution, establishes the liability of the new county and the extent thereof, we see no reason why the commissioners' court of such new county would not be authorized and obligated, without this express provision, to so levy a tax to provide for its payment as that "the part stricken off shall be holden for and obliged to pay its proportion," etc., according to the constitution.

3. The Margaret jail bonds were held to be void, because the commissioners' court at the date of their issuance failed to make provision for their payment; but this ruling cannot now be sustained, since it has been held both by this court and the supreme court, in the case of *Mitchell Co. v. City Nat. Bank*, 39 S. W. 628, 43 S. W. 880, that the acts of the legislature had already sufficiently provided for the levy and collection of the necessary tax in such cases. Besides, as these bonds were voluntarily paid by the two counties, we doubt if Foard county could have recourse upon Hardeman county on account of the money so paid.

We agree with the district judge that the court-house bonds were valid, and we also agree with him that the bridge bonds were excessive in amount. When they were is-

sued, the county was already indebted, and consequently was subject to the limitation in the issue of bonds imposed by the third section of Act 1887, p. 135 (Sayles' Rev. Civ. St. 1888, art. 986b), which provides that "no county already indebted shall issue a larger amount of bonds than a tax of ten cents on the one hundred dollars valuation of property in the county will liquidate in ten years."

A further objection was made to the bonds, upon the ground that they had not been properly registered; but as the statute does not prescribe what the registration shall contain, and as we infer from the record that in this case it showed the dates and amounts of the bonds, and sufficient to identify them, we think the mere fact that they were erroneously described in the registration as being payable to the state of Texas, instead of to bearer, would not invalidate them.

4. We also approve the action of the court in allowing Foard county to show the double assessment on her tax rolls of 1891 of certain conflicting surveys. It was agreed on the trial that the Cundiff block of surveys covered lands located by the Houston & Texas Central Railroad Company to the extent of \$131,150, and that said Cundiff and railroad surveys so in conflict were situated in that part of Foard county taken from Hardeman county; so that, if the conflict be eliminated, and the double assessment be corrected, the amount of property in the excised territory, as shown by the tax rolls for the year 1891, would be reduced by \$131,150. While the tax rolls are made conclusive evidence of the property in the excised territory and the value thereof, in order to ascertain whether a given survey appearing in such rolls is in that territory, its locality in the county would have to be looked to; and we do not see how this could be determined by an inspection of the tax rolls alone. The identity and value of the survey are there given, but the map of the county must determine where it is situated. Because the tax rolls, read in the light of the map of the county, show that the same land, as in this instance, has been twice listed and enrolled, it does not follow that the tax rolls show two tracts of land in the excised territory, when the map shows only one. Nor could the mere footing of the tax rolls as to the value of the property in the excised territory be, in the nature of things, conclusive. Besides, it is just, equitable, and in furtherance of the constitutional provision itself to allow the correction.

5. We are of opinion that the court erred in allowing Foard county a credit of \$550.56 for back taxes collected by Hardeman county after the creation of Foard county, upon renditions previously made. Such back taxes, as they were collectible before the creation of the new county, belonged to the

parent county, as a part of its current revenues. Taking, then, the tax rolls of Foard county for 1891 as corrected and the tax rolls of Hardeman county for the same year as the basis of calculation, and accepting the court's finding of excess in the amount of the bridge bonds, we conclude that the judgment in other respects should be set aside, and here rendered in favor of Hardeman county, against Foard county, for the latter's proportion of the court-house and bridge bonds paid off by Hardeman county April 10, 1897, aggregating \$7,000, and for her proportion of the interest so paid (\$3,960), after deducting the amount (\$993.42) paid on the bridge bonds in excess of the lawful amount; Foard county to be credited with the total amount of principal and interest already paid in excess of her proportion, this excess aggregating \$1,906.29, and the remainder, after allowing this credit, to bear lawful interest from April 10, 1897. The judgment, according to our calculation, should be in the sum of \$620.63, with interest from April 10, 1897, to collect which the commissioners' court of Foard county should levy a tax, as provided by law, upon the property in the excised territory.

TARLTON, C. J., not sitting.

**CITY OF WEATHERFORD v. LOWERY.**<sup>1</sup>  
(Court of Civil Appeals of Texas. June 18, 1898.)

**OBSTRUCTIONS IN STREET — LIABILITY OF CITY — CONTRIBUTORY NEGLIGENCE.**

1. Where one of the workmen engaged by a city in digging a ditch along the side of a street leaves his scraper in the street at the close of his day's work, with its bright side exposed to the view of horses passing along the street, the city is liable for injuries sustained by one whose horse was frightened by the scraper, and backed into the ditch, although the unobstructed width of the street was between 50 and 60 feet.

2. Where a horse shies at a scraper left in the street by a city employé, and backs into an open ditch, and his driver is injured thereby, neither the fact that the horse had shied on previous occasions, nor an attempt to drive him by the scraper, constitutes contributory negligence on the part of the driver.

Appeal from district court, Parker county; J. W. Patterson, Judge.

Action by G. W. Lowery against the city of Weatherford. From a judgment for plaintiff, defendant appeals. Affirmed.

Boyle & Shannon and Henry W. Kuteman, for appellant. T. F. Temple, for appellee.

STEPHENS, J. Appellee recovered a verdict and judgment against the appellant in the sum of \$3,000, on account of personal injuries received by his wife April 17, 1895, on South Main street, in the city of Weath-

erford, and from that judgment this appeal is prosecuted.

She was traveling in a cart drawn by one horse at the time of the accident, which is thus described in her testimony: "Late that evening, about 6 o'clock, I suppose, I started home in the cart from Mr. Bailey's. Was passing down South Main street, nearly to where Mr. Vivrett lives, when my horse took fright at a scraper which was lying in the street, setting up, I might say, against a pile of dirt, gravel, or something, over towards the right-hand side of the street. I tried to make him go by it; struck him with the whip; but he just shied around from it, turning his head to the left, and backed the cart off into a ditch that had just been dug at the right-hand side of the street. When I saw that the cart was so near the ditch, and that the horse was about to back me off into it, I tried to get out. Got one foot out, but the other became entangled in the lap robe, and I could not get out. The cart and horse and all went into the ditch. The horse was standing almost straight up on his hind feet. He tried twice to pull out of the ditch, but failed; then fell over or slipped over into the ditch, with his head up the ditch in the opposite direction from the scraper, and ran off up towards town. I suppose he stepped on my leg. Anyway, my left leg was broken a short distance above the ankle. I was carried into Mr. Vivrett's house, and the next day the doctors amputated my left foot below the knee." She then describes her suffering and the other results of the injuries. From other testimony it appears that the city was engaged in cutting this ditch along the west side of South Main street to the depth of four or five feet, in order to provide an escape for water liable to accumulate in that locality in rainy weather, but had not quite finished the work at the time of the accident, though that day's work was then over, and the hands had gone home, one of them leaving his scraper so exposed as to frighten the horse appellee's wife was driving. He denied that he left it in the street, but admitted that he did not leave it in the ditch, according to the instructions of the street commissioner, but testified that it was in the "go-down" where they entered the ditch. The street commissioner, who had charge of the work, testified that he was about the last to leave on the evening of the accident, and that he "looked down the ditch and street, and did not see any scraper in the street after the men had quit work"; but from all the evidence it is apparent that, if he had looked closely, he would have found that the scraper was not left where he had directed the scrapers to be left, and that its position and exposure were such as might reasonably be expected to frighten horses passing the street.

Our conclusions from the evidence are (1) that the accident was due to the negligence

<sup>1</sup> Rehearing denied.

of the city in leaving a scraper with its bright side so exposed as to frighten the horse appellee's wife was driving, without providing any means of avoiding the danger to which travelers would be exposed under such circumstances, on account of the depth of the ditch, and this, too, notwithstanding the width of the street afforded an unobstructed passage of 50 or 60 feet; and (2) that the accident was not due in whole or in part to any contributory negligence of appellee's wife, either in driving the horse, which had on some previous occasions manifested a disposition to shy and back, or in the effort to force him by the scraper at the time of the accident. It follows from these conclusions that we approve the verdict, and hence overrule all the assignments of error complaining of the court's action in refusing a new trial. See *Railway Co. v. Bridges* (Tex. Civ. App.) 40 S. W. 536. The other assignments complain of the charge, and of the refusal to give other charges, several of which were requested, and some of which were not requested. We have carefully examined the charge given and those refused, and are of opinion that the court fairly and correctly submitted the issues to the jury, and that, in so far as the requested instructions stated correct propositions, and were not charges upon the weight of the evidence, they were sufficiently covered by the charge given. The judgment is therefore affirmed.

TARLTON, C. J., not sitting.

HUFFMAN et al. v. EASTHAM et al.<sup>1</sup>

(Court of Civil Appeals of Texas. June 23, 1898.)

EVIDENCE—ABSTRACT OF TITLE—DEEDS—DESCRIPTION.

1. An abstract of land titles, published by the comptroller, under Gen. Laws 1875, c. 56, p. 71, requiring him to compile and publish an abstract of titles and patented lands, is admissible without further authentication.

2. Where two parcels of land were of the same description, a deed using the common description, by one having an interest in one parcel only, conveyed the parcel to which grantor had title.

Appeal from district court, Tarrant county; W. D. Harris, Judge.

Trespass to try title by Delha Eastham. Albert Huffman and another intervened. There was a judgment against interveners, and they appeal. Affirmed.

Aldrich & Lipscomb, for appellants. Powell, Ball & Randolph, for appellees.

STEPHENS, J. The land in controversy is included in a tract of 13 labors patented August 31, 1857, to Theresa Tyler, and known as "Survey No. 51," situated in Eastland county, near the line of Comanche. Appellee

Delha Eastham, recovered of interveners Albert Huffman and John Jacob Huffman, heirs of Elizabeth Huffman, who was sole heir, through her father, Wash Tumlinson, of the original grantee, Theresa Tyler, an undivided interest of 275 acres in this survey, that being the share devolved by inheritance on Elizabeth Huffman. This recovery was had per force of a warranty deed made March 4, 1876, by Elizabeth Huffman and her husband, under which Delha Eastham deraigned title, which thus described the land conveyed: "All our right and title to one undivided interest in the survey of thirteen labors of land, patented to Theresa Tyler and located in Milam land district, now Comanche county, Texas." There were two surveys patented to Theresa Tyler, Nos. 50 and 51, each containing 13 labors, both patented on the same day, August 31, 1857, and each patent describing its land as being in Coryell county (to which Eastland was originally attached for judicial purposes), in Milam land district, on the waters of the North Leon. From the field notes of the two patents it appears that the survey in question, No. 51, was located next to and west of No. 50. It was shown on the trial that, at the date of the deed above quoted, March 4, 1876, the reputed boundary line between Comanche and Eastland counties was such as to throw the survey in question in Comanche instead of Eastland county, its true location. It was also shown, by maps of what was formerly Milam land district, that the land in controversy was situated during the life of those maps in that district. It was further shown that Wash Tumlinson had, on September 19, 1857, conveyed away, by deed recorded in Comanche county, survey No. 50, so that Elizabeth Huffman had no interest in that survey when she and her husband made the deed above quoted. By "Abstract of Texas Land Titles," a printed volume published by Stephen Darden, comptroller of Texas, as provided by act of March 9, 1875 (Gen. Laws 1875, c. 56, p. 71), it was shown that the only Theresa Tyler surveys in Texas were in Eastland county, and not in Comanche. This evidence was objected to, however, by interveners, but only upon the ground, as stated in the bill of exceptions, "that the said volume was not properly authenticated to be what it purported to be."

The only proposition submitted in the brief (proposition under third assignment), in effect, is that the printed abstract was inadmissible, because of the rule which requires testimony to be given under the sanction of an oath. We hardly think this is the precise ground of objection stated in the bill, but, if so, it was properly overruled. Besides, the admission of this evidence would not necessitate a reversal of the judgment, in view of other evidence, and of the fact that the case was tried without a jury. We conclude, from the facts above given, that the court was justified in the conclusion that the war-

<sup>1</sup> Writ of error denied by supreme court.



ranty deed of Elizabeth Huffman and husband, made March 4, 1876, should be construed, as intended by the makers, to apply to the survey in which alone Elizabeth Huffman then had an interest, which is the survey in question. This conclusion leads to an affirmation of the judgment.

HUNTER, J., disqualified, and not sitting.

**LOUISIANA WESTERN EXTENSION RY.  
CO. et al. v. CARSTENS et al.**

(Court of Civil Appeals of Texas. June 9, 1898.)

**INJURY TO EMPLOYEE—CONTRIBUTORY NEGLIGENCE—  
NEGLECT—FELLOW SERVANTS—ASSUMPTION  
OF RISK—MASTER'S FREEDOM FROM NEGLIGENCE—  
INSTRUCTIONS—GROSS NEGLIGENCE—MEASURE  
OF DAMAGES—APPEAL—STATEMENT OF FACTS—  
Costs.**

1. A brakeman was engaged, with a wrecking train, under direction of a division superintendent, in fastening a chain to the drawhead of a flat car at the end of the train when backed up to the disabled car, and was crushed in coupling the cars. In an action for his death, plaintiffs pleaded and there was evidence that both the conductor and superintendent ordered deceased to go between the cars, and assured him that they would stop the train in time to prevent his injury, and that, if signaled in time, the engineer could have stopped so as to allow it without danger. The defense was that he was ordered out from between the cars. *Held*, that a special charge that although the conductor and superintendent ordered deceased to go, and assured him they would prevent his injury, if they afterwards ordered him out in time to avoid the danger, no recovery could be had, was not on the weight of evidence, nor objectionable as selecting and laying stress on particular testimony.

2. If the order to get out was given when the danger was so imminent as to deprive deceased of capacity to act with ordinary prudence, or if the danger was due to the negligence of his superior in failing to use proper care in stopping the train, if he assumed that duty, failure of deceased to act prudently would not preclude recovery.

3. If the danger was so great and apparent that an ordinarily prudent person would not have exposed himself to it, no recovery could be had.

4. The defense pleaded that the accident was due to the negligence of the fireman and engineer, and the conductor testified that he signaled them in time to have stopped before injuring deceased, had his signal been heeded. *Held*, that a charge requested by the defendant that the engineer and fireman were fellow servants of deceased, and that, if his death was caused by their negligence, no recovery could be had, should have been given, qualified by an instruction that, if the superior's negligence in failing to do his duty in stopping the train concurred in causing the injury, it would not preclude recovery.

5. Charges as to the rules where an employé seeks to recover because of defective machinery, and as to the effect of or means of knowledge of defects, were inapplicable.

6. A brakeman went between a disabled car and a flat car attached to the rear end of a wrecking train to connect them with a chain as the flat car was backed up. The drawhead of the disabled car having been broken away, it permitted both cars to be moved close together. *Held*, that the danger incurred in going between them was as well known to him as to a division

superintendent and conductor standing by, and that if, against their orders, or without them or their assurance of protection in ordering the movements of the train, he went in to make the coupling, he assumed the risk; but not so if he went in by their orders and assurance that they would guard against his injury by regulating the movement of the train.

7. If the division superintendent and conductor assured the brakeman that they would guard against his injury by regulating the movement of the train, and they did all that was incumbent on them to stop it, and its failure to stop was not caused or contributed to by their negligence, no recovery could be had for his death.

8. Though a brakeman was ordered in between cars by a division superintendent and conductor, and not ordered out, and was crushed between them, yet, if he discovered or should have discovered his danger in time to have gotten out, recovery could not be had for his death.

9. In an action for the brakeman's death, on the ground of a conductor's and division superintendent's negligence in ordering him between the cars, and failing to guard against his injury while there, defended on the ground of contributory negligence, ordinary and not gross negligence would be sufficient for the cause of action or defense.

10. A charge should be directed to the particular facts on which a case depends, and not embodied in an abstract rule of law.

11. Where no recovery of exemplary damages was sought in an action for negligence, a definition of or allusion to gross negligence in the charge was improper.

12. In an action by the widow and children of a deceased for his death, the recovery is not what his earnings would have been, but a sum compensating plaintiffs for the loss of the pecuniary benefits they would have received had he not been killed.

13. Parties failed to agree on a statement of facts on appeal. The statement in the record which was presented by appellant to the presiding judge was unnecessarily voluminous, and motion was made to strike it out for non-compliance with the rules. *Held* that, as the material facts were condensed by the parties in their briefs so as not to delay a decision, the statement should not be struck out, but that the cost of copying the statement in the transcript should be adjudged against appellant, though the judgment was reversed.

Appeal from district court, Orange county; Stephen P. West, Judge.

Action by Alice Carstens and others against Louisiana Western Extension Railway Company and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Baker, Botts, Baker & Lovett, Votaw, Martin & Chester, and C. A. Teagle, for appellants. Holland & Link, A. C. Allen, Edgar Watkins, and Frank C. Jones, for appellees.

WILLIAMS, J. This was an action by the widow and child of William F. Carstens to recover damages for his death, which occurred October 18, 1896, while Carstens was in the employ of appellants as brakeman, and is alleged to have been caused by the negligence of two employes of appellants, a division superintendent and a conductor, both of whom had command, control, and superintendence of Carstens. Verdict and judgment were rendered for plaintiffs for \$7,128, from which this appeal is prosecuted.

Carstens was a brakeman in the crew of a wrecking train composed of engineer, fireman, and another brakeman, under the control of a conductor named Barbisch. On the occasion under consideration, the superintendent, W. B. Mulvey, was also present, directing the work, and exercising general control. The crew were engaged in removing from the track a car which had been wrecked. This was to be done by fastening the disabled car to a flat car at the rear end of the wrecking train, and pulling the former away. As the drawhead of the former car had been broken away, it was necessary to fasten a chain, first to some of the fixtures underneath it, and then to the drawhead of the flat car. The chain having been thus fastened to the wrecked car, the wrecking train, which was standing some distance away, was backed, in obedience to a signal from Barbisch or Mulvey, or both, and caught Carstens, who stood between the two cars, and killed him, the absence of the drawhead from the wrecked car allowing the two to come close together. The plaintiffs, by their pleadings and evidence, claim that before the train was backed, or as it was being backed, both Barbisch and Mulvey ordered Carstens to go between the cars for the purpose of fastening the chain to the drawhead of the flat car, and, upon his protesting that it was dangerous, peremptorily ordered him in, and, at the same time, assured him that they would have the train stopped in time to prevent injury to him. There is evidence that the chain was long enough to permit the coupling to be made while the cars were five feet apart. There is evidence, also, that, if the signal to stop had been given in time to the engineer, he could have stopped the flat car close enough to the other to allow the coupling to be made, and at the same time to leave a space of three or four feet between the cars. Carstens was out of sight of the engineer, who acted wholly upon signals from the conductor standing beside the track. The defendants, on the other hand, claimed and offered evidence tending to show that neither Barbisch nor Mulvey, nor any one else, gave the order or made the promise alleged by plaintiffs, but that Carstens went between the cars against their orders, and remained between them notwithstanding their remonstrances and orders to get out. There is an irreconcilable conflict of evidence on this point. Some of the testimony tends to show that, as the cars were moving back, both Mulvey and Barbisch ordered Carstens to come out, and that this was done in time to have enabled him, had he obeyed, to have escaped. Upon this point, also, the evidence conflicts.

Upon this state of the evidence, the appellants requested the following special charge, which was refused: "Although you may believe from the evidence that the conductor, J. W. Barbisch, or W. B. Mulvey, ordered Will F. Carstens to go between the cars and

make the coupling, and that they, or either of them, assured him that they would have the train stopped before it could or would hurt him, and that they, or either of them, told him afterwards, in time for him to have avoided the danger, to get out from between the cars, then the plaintiffs cannot recover, and you will find for the defendants." While the charge of the court contained general instructions upon contributory negligence, it gave no rule applicable to the state of facts supposed in the requested instruction. If those facts existed, they constituted a complete defense. The defendants had pleaded them, and offered evidence tending to establish them, and had the right to have the question submitted affirmatively. The requested charge was not upon the weight of evidence, nor was it objectionable as selecting and laying stress upon particular parts of the testimony. It sought simply to procure the submission of a substantive defense. To a complete submission of this issue, some further explanation would have been proper, as will be indicated further on; but the charge requested was sufficient to call the court's attention to the point, and require its submission.

Another charge requested sought to have the jury instructed that the engineer and fireman were fellow servants of Carstens; that, if his death was caused by their negligence, plaintiffs could not recover. The defendants pleaded this defense, and, if there was evidence tending to establish it, they were entitled to have an affirmative submission of it. The conductor, in one part of his testimony, says he gave the signal to stop in time to have enabled those on the engine, had they heeded it, to have stopped before injuring Carstens. The signal had to be received by the fireman, and by him repeated to the engineer. This was enough to require the court to leave the question to the jury. The charge requested, however, needed a qualification, which will be stated below.

The charges requested stating the rules applicable in cases where an employé seeks to recover because of defective machinery, and as to the effect of his knowledge or means of knowledge of the defects, had no application to the case. Others, on the subject of assumption of ordinary risks, and as to the effect of knowledge on the part of deceased of the danger, did not state the issues upon which a proper decision of the case depended, so as to aid the jury in coming to a verdict, and hence were calculated to mislead.

We can make our views plain by stating the rules upon which the decision of the case must depend. The right of plaintiffs to recover must depend upon proof of the facts alleged by them as constituting the negligence; that is, that Carstens' superior ordered him between the cars, to make the coupling, and undertook to have the car stopped in time to prevent injury to him. The

danger to be incurred was open to his observation, and was as well known to him as to the conductor and superintendent; and, if, against orders, or without the order or assurance of protection, he entered between the cars, he thereby took upon himself the risks resulting. But it does not follow that he assumed the risk or was guilty of negligence if he acted upon the order of his superiors, coupled with an assurance of protection, or upon such orders as implied such an assurance. The case is not like that of *Railway Co. v. Drew*, 59 Tex. 10, and others of that class, where an employé uses machinery, known to him to be dangerous, in obedience to orders of the master. By so doing, he incurs a risk while he is using the defective instrument which is at the time beyond the master's control. Here the evidence tends to show that it was in the power of the master, when requiring the servant to perform the particular service, to afford him protection against the danger arising from it. Consequently, it should not be held as matter of law that, in obeying an order accompanied by such an assurance, or of such a nature as to carry with it an implication that protection would be given, the servant assumes the risk or is guilty of contributory negligence. If, therefore, it should be found that the danger to be incurred by Carstens in taking his station was such that his superiors, by the use of such care as men of ordinary prudence would employ in like situations, could protect him against it, by causing the train to be stopped, and that either of such superiors ordered him to take such station, in such way and under such circumstances as to reasonably justify Carstens in believing that such protection would be given, and if such superiors failed to use such care, as is just defined, to cause the train to be stopped in time to save Carstens from injury, and as a result of such want of care he was killed, defendants would be liable, unless, notwithstanding such order and promise, the danger to be incurred by Carstens was so great and apparent that a person of ordinary prudence, acting in his situation, would not have exposed himself to it, or unless, after having thus induced him to go in, one or both of his superiors ordered him to come out, at such time and under such circumstances that, with ordinary care, he could have escaped. If, however, the order to come out, if given at all, was given when his danger was so imminent as to deprive him of the capacity to act with that circumspection that ordinarily guides the conduct of men of ordinary prudence, and if this danger had been brought upon him by the negligence of the superior who had assumed the duty of stopping the train, if such duty had been assumed, in failing to use proper care to stop it, then the fact that under such circumstances Carstens did not act prudently, if it be a fact, would not preclude recovery. *Railway Co. v. Neff*, 87 Tex. 303, 28 S. W. 283;

*Railway Co. v. Watkins*, 88 Tex. 26, 29 S. W. 232. If the superior who gave the assurance of protection, as above specified, if one was given, did all that was incumbent on him to stop the train, and its failure to stop was not caused or contributed to by any failure on his part to exercise ordinary care, then there could be no recovery. If the coming together of the cars resulted from negligence of the engineer and fireman, or either of them, in failing to heed signals, and was not contributed to by negligence of Carstens' superior in failing to do what he should have done to have the train stopped, defendants are not liable. But if the engineer and fireman were guilty of negligence which helped to cause Carstens' death, and the superior was also guilty of negligence without which such death would not have occurred, so that the negligence of both concurred in producing the result, then defendants would be liable.

A special charge was asked by defendants submitting the proposition that if Carstens, though ordered in with assurance of protection, and not ordered out by his superiors, discovered or should have discovered the danger from the approaching train in time to have gotten out, this would prevent a recovery. The proposition is substantially true in theory, but we discover nothing in the evidence presented in the briefs to make it applicable. If the circumstances justified him in going in, relying on the duty assumed by the superior of stopping the train, he could continue to rely upon it until it became or should have been apparent to him that the superior would not perform such duty. But if it so became apparent in time for him to act with ordinary prudence, and to get out with ordinary diligence, plaintiffs could not recover. As we have said, we do not see that the evidence raises this question; but, if it should do so upon another trial, of course proper instructions should be given concerning it.

Complaint is made of the instruction in the charge that "the acts or omissions or negligence of their agents, servants, or employés are the acts of corporations." It was probably harmless, but it is a pure abstraction, which might properly be omitted. A charge should be directed to the particular facts upon which the case depends.

No other portions of the charge are assigned as error, but we deem it proper, in view of another trial, to notice some other instructions, the repetition of which might occasion trouble.

It is not necessary that plaintiffs, in order to recover, should show that the conductor or superintendent was guilty of gross negligence, or that, to defeat the action on the ground of contributory negligence on the part of Carstens, if such there was, it should have been gross. Ordinary negligence would be sufficient for either purpose. As no recovery of exemplary damages is sought, no def-

nition of or allusion to gross negligence is proper, since it would only serve to complicate the subject, and possibly to confuse the minds of the jurors. General rules are also given as to the duty of railroad companies to exercise proper care in operating their cars and trains, which are entirely inapplicable to the case. We have endeavored to state the questions upon which the submission should be made. The part of the charge just referred to should be omitted. The duties of both parties arose out of the particular facts existing at the time of the transaction in question, and have already been indicated, and the instructions should be directed to these. In one part of the charge, allusion is made to the earnings of Carstens, as if they constituted the measure of damages. This may be corrected in another part of the charge, but it is likely to produce an incorrect impression on the jury. The recovery is not, of course, to be equal to what the earnings would have been, but is to be a sum which will compensate plaintiffs for the loss of the pecuniary benefits they would have received from Carstens had he not been killed.

A motion has been made to strike out the statement of facts, on the ground that it was not made out in accordance with the rules. It is made to appear that the parties failed to agree, and that the statement in the record is that which appellant presented to the presiding judge. It is far more voluminous than there is any necessity for it to be, as is apparent from the comparatively small space in which the parties, in their briefs, have stated all the facts considered material. The facts having been so condensed in the presentation of the case that the failure to comply with the rules in making the statement has not delayed a decision, we do not think it proper to strike out the statement. But as its unnecessary length is attributable to the fault of appellants, which has caused unnecessary expense in copying it into the record, we think appellants should be charged with such expense. While the judgment is reversed at the cost of appellees, the cost of copying the statement in the transcript will be adjudged against appellants. Reversed and remanded.

### SHOTWELL v. MCCARDELL et al.

(Court of Civil Appeals of Texas. June 9, 1898.)

APPEAL—AFFIRMANCE—SALE OF LAND—EXECUTORY CONTRACT—RECOVERY OF LAND—PAYMENT—PRESUMPTIONS—ADVERSE POSSESSION—VENDOR'S LIEN.

1. A judgment of dismissal based upon a fundamental defect in the cause of action cannot be affirmed because of a defect in the pleadings, curable by amendment.

2. A deed by an administrator of land sold under order of the court, which contains a reservation of a lien to secure unpaid purchase

money, is an executory contract, entitling the vendor, upon default of payment, to recover the land, unless the vendee has secured title through adverse possession, although the recovery of the purchase money be barred by limitation.

3. The presumption that a debt long overdue has been paid is rebuttable, and cannot be taken advantage of by exceptions to a petition.

4. Possession under a deed reserving a lien for unpaid purchase money is not ordinarily adverse to the vendor.

5. The lien reserved in a deed for unpaid purchase money extends only to that part of the price for which the lien is expressly reserved.

Appeal from district court, Polk county; L. B. Howtower, Judge.

Action by J. H. Shotwell, administrator de bonis non of the estate of A. P. Garner, deceased, against Davis McCardell and others. The action was dismissed, and plaintiff appeals. Reversed.

Hill & Hill, for appellant. Adams & Campbell, for appellees.

WILLIAMS, J. Appellant, as administrator de bonis non of the estate of A. P. Garner, deceased, brought this suit against Davis McCardell, W. K. McCardell, and A. M. Paschal, formerly A. M. Garner, to recover a tract of 268 acres of land. The petition alleged that in 1877 the estate owned the land, and that W. H. Garner and F. T. Garner were then the administrators; that during that year the administrators, under an order of sale made by the probate court, sold the land to A. M. Garner, and that the sale was duly confirmed by the court; that the deed made to the purchaser recited that the consideration paid for the land was \$670, of which \$223.33 was paid in cash, and that the remainder, \$446.67, was secured by a note executed by the purchaser to the administrators; that the deed, on its face, recited this note, and reserved a lien upon the land to secure its payment, and that both the deed and the order of confirmation showed that the sale was executory, and that the legal title remained in the estate until the note should be paid; that in fact neither the money recited to have been paid nor the note or any part of it, had ever been paid; that on July 26, 1886, A. M. Garner conveyed the land to W. K. McCardell, in trust to secure an indebtedness of herself to him; that on February 13, 1888, A. M. Garner conveyed the land to W. K. McCardell, in trust to secure her indebtedness to Davis McCardell; that on the 16th day of November, 1889, A. M. Garner conveyed the land by deed to Davis McCardell; that on January 16, 1890, Davis McCardell, by bond for title, obligated himself to convey the land to W. K. McCardell; that on the 21st of December, 1891, Davis McCardell, by deed, for the recited consideration of \$1,300, paid and secured, conveyed the land to W. K. McCardell. At the time of this transaction both the McCardells knew of the fact that the

purchase money had not been paid to the estate of A. P. Garner, and that the sale thereof by said administrators was executory. The petition stated that, because the purchase money had not been paid, the plaintiff rescinds the deed of conveyance to A. M. Garner, unless the defendants will tender in court the purchase money and interest; and, in case the defendants should plead the statute of limitations or refuse to tender the purchase money, then plaintiff rescinds the contract, and asks for a decree for the possession of the property. The petition also asks for writ of possession in case the defendants refuse to pay the purchase money, and, in case they should pay the money, that title should be invested in the one entitled. The defendants filed many exceptions to the petition, of which those raising the issues of limitation were sustained, because, as stated in the judgment, "the title did not remain in the estate of A. P. Garner, deceased, and his administrators, acting under an order of the probate court, sold and conveyed the land in question to A. M. Garner, though a lien was reserved in the deed for the purchase money of the land, and plaintiff's claim is barred by the statute of limitations as a moneyed demand." The action was therefore dismissed, and plaintiff appealed.

One of the exceptions objected to the petition, because the terms of the note given for the purchase money were not sufficiently alleged; and this, perhaps, ought to have been sustained; but, as the petition could have been amended so as to meet this objection, the judgment cannot be affirmed because of this defect, when the judgment is based upon propositions which went to the foundation of the action, and defeated the suit. If the ruling, as stated in the judgment, was erroneous, it must necessarily follow that the judgment should be reversed.

That, in sales of land between parties, a reservation in the deed of a lien to secure unpaid purchase money renders the contract executory, and entitles the vendor, upon default of payment by the vendee, to reassert his title and reclaim the land, is a proposition which has long been settled by the decisions in this state, and one which is not denied. The fact that the claim for recovery of the purchase money is barred by limitation does not preclude the vendor from recovering the land, where the recovery of the purchase money is defeated by plea of the statute of limitations. *White v. Cole*, 87 Tex. 500, 29 S. W. 759; *Hamblen v. Folts*, 70 Tex. 133, 7 S. W. 834. Serious doubt might be entertained whether or not these rules apply in the case of judicial sales of lands by administrators, etc., made under orders of court, if the question were an open one. Such a doubt is expressed by Judge Stayton in the case of *Weems v. Masterson*, 80 Tex. 45, 15 S. W. 590. The question is not,

however, authoritatively decided or discussed in that case, nor is any reference made to the decision of the supreme court in the case of *Burgess v. Millican*, 50 Tex. 397. In the last-named case a sale of land by an administrator, in which a deed had been made to the purchaser, and a mortgage taken to secure the purchase money, was under consideration; and Judge Moore, after a discussion of the question, held that the same rule applicable to similar transactions where they are had between individuals applies to sales by administrators. The question was also in a measure involved in the case of *Wright v. Wooters*, 46 Tex. 380, and nothing is there said to indicate that there is any difference in this respect between conveyances by administrators and those by individuals. The reservation of the lien in the deed of conveyance, by all the decisions, has the same effect in rendering the contract executory as the taking of a mortgage to secure the purchase money; and this difference between the facts of this case and those of *Burgess v. Millican* can therefore make no difference in the principle applicable. In this state of the authorities, we do not feel authorized to treat the question as an open one, and must therefore hold that the fact that the deed set up in plaintiff's petition was made by an administrator under orders of the court does not defeat the claim that the contract was executory, and that those representing the estate were entitled to the same remedies for the enforcement of its rights that an individual would have had under a similar transaction.

We have already said that the fact that the debt was barred by limitation would not preclude the vendor from recovering the land, where the purchaser or those responsible for the debt set up limitation against it. That is all the plaintiff asks to do. The defendants can defeat the action if the debt has been paid, and it would seem that the long lapse of time since the transaction occurred would give rise to the presumption of payment, which the plaintiff would have to rebut. *Weems v. Masterson*, supra; *Johnson v. Lockhart* (Tex. Civ. App.) 40 S. W. 640. The case of *Weems v. Masterson* cited was tried upon the facts, and the court concluded that, from lapse of time and other circumstances, it should be held that the debt had been paid, and the right of the vendor to rescind the contract lost. It was proper to do this where the court had heard the evidence, and the presumption of payment was consistent with all the facts; but such a presumption is not an absolute, but a rebuttable, one, and hence it cannot be indulged, on exceptions to a petition, against its direct allegation that the debt had not been paid. Nor can the ruling be upheld on the ground that plaintiff's action for the land was barred by limitation. The bar of limitation to such action could only

arise from adverse possession, and the petition does not on its face state facts enough to establish such defense. If it exists, the burden rests upon the defendant to plead and prove it. A possession held under an executory contract, such as that in question, where the purchase money has not been paid, is not ordinarily adverse, but circumstances may exist to show that a particular possession was in fact of that character.

In what we have said concerning plaintiff's right to recover in default of payment of the purchase money, we have reference to that part of the purchase money for which the lien was expressly retained in the deed. It is only from default in payment of that, that the plaintiff has a right, if at all, to rescind the contract. While the recital of payment of part of the purchase money in the deed would not have prevented a recovery of such part, if in fact unpaid, by suit before the debt was barred, yet the terms of the deed gave to the administrators no right to rescind the conveyance upon default of this payment. Their sole remedy as to that part of the purchase money was a suit to recover it; and, such suit being barred by limitation, they had no remedy left them to enforce collection of it. Reversed and remanded.

# INTERNATIONAL & G. N. R. CO. v. SATTERWHITE.<sup>1</sup>

(Court of Civil Appeals of Texas. June 9, 1898.)

CARRIERS — ESCORTS OF PASSENGERS — NEGLIGENCE — EVIDENCE — INSTRUCTIONS — PROVINCE OF JURY.

1. The refusal of a requested charge is not error where the same matters are embraced in the general charge.

2. In an action for injury occasioned by starting a train before plaintiff, who had assisted his sister aboard, could get off, an instruction that the company was not liable for any statement made by the brakeman as inducing him to get off the train in motion is properly refused, as irrelevant to the issues.

3. Whether it is contributory negligence to alight from a moving train depends on the particular circumstances, and it is not always a question of law.

4. Refusal of an instruction that the company was not negligent if the trainmen started the train before they knew of plaintiff's desire to get off, and that he assumed the risk of injury in attempting to alight without requesting them to stop the train, if error, is harmless, where the general charge was that plaintiff could not recover if the trainmen were ignorant of his desire to get off when they started the train.

5. The opinion of a witness as to time, space, or distance is admissible.

6. Where plaintiff was charged with contributory negligence in alighting from a train in motion, his testimony that he thought it safe to attempt it, and that the platform was lighted and the place smooth, is admissible as showing his reasons for so doing.

7. Where a man boarded a train at 4 a. m. with an aged lady, leaving another lady who had ap-

proached the train with them standing alone beside the track, such facts tend to affect trainmen who observed them together with notice that the man intended to leave the train after assisting the lady aboard.

Appeal from district court, Houston county; W. H. Gill, Judge.

Action by F. M. Satterwhite against the International & Great Northern Railroad Company. There was a judgment for plaintiff, and defendant appealed. Affirmed.

G. H. Gould and John I. Moore, for appellant. Nunn & Nunn, for appellee.

PLEASANTS, J. The appellee sued the appellant for damages for injuries sustained by him while alighting from appellant's train of cars, in the town of Crockett, on the morning of the 6th of September, 1894. The plaintiff had boarded the train about the hour of 4 a. m. with his sister, Mrs. Fambrough, who took passage on the train at that hour; and the plaintiff assisted her upon the cars, and, before he could conduct her to a seat, he was called to by another sister, who had accompanied him and Mrs. Fambrough to the depot, and who was awaiting his return from the car, that the train was leaving; and he then requested one of the trainmen, who was either the conductor or brakeman, to find a seat for Mrs. Fambrough, and was proceeding to the platform of the car when he was admonished by this same servant of defendant that he had better get off the train; and, in attempting to descend the steps while the train was moving slowly, he fell, and was injured in his left hand, arm, and shoulder. The acts of negligence charged by the plaintiff were (1) that the defendant did not stop the train for a time reasonably sufficient to enable passengers to get on and off; (2) that the train was not stopped as long as was usual at that station; and (3) that the defendant's agents knew that plaintiff boarded the car as Mrs. Fambrough's assistant, with the intention to get off before the departure of the train, and that sufficient time was not allowed plaintiff to do this. Defendant answered by general denial, and charged plaintiff with contributory negligence (1) in not informing the defendant's agents that his intention in boarding the car was only for the purpose of assisting Mrs. Fambrough; (2) in failing to notify the trainmen, after the train started, of his desire to get off, and requesting them to stop the train; (3) in jumping from the train while it was in motion, from the second step of the coach, and at right angles with the coach; and (4) in failing to have himself properly treated for his injuries. Upon trial of the cause, a verdict and a judgment were rendered for plaintiff for \$1,000; and, motion for new trial being refused, defendant appealed to this court for the second time. The former appeal was decided by the court of civil appeals for the Fourth supreme district, and the judgment was reversed, and the cause remanded for

<sup>1</sup> Writ of error denied by supreme court.

another trial. The decision is reported in 38 S. W. 401.

Appellant assigns as error the refusal of the court to charge the jury, at request of defendant, as follows: "Gentlemen of the jury, you are charged that if the plaintiff was guilty of negligence in getting off the train while it was in motion, or in his manner of getting off, or in failing to give notice of his intention to get off (if he did not give notice), then he cannot recover, and you will find for defendant." This assignment is not well taken, for the reason that the court, in its general charge, properly and sufficiently submitted to the jury the matters of defense embraced in the requested instruction. Whether or not this instruction is itself a correct presentation of the law need not be determined.

The next error assigned is the refusal of the court to instruct the jury that the defendant company would not be responsible for any statement made by the brakeman to plaintiff in reference to his getting off the train. Such an instruction would have been irrelevant to the issues joined between the parties. The plaintiff was not seeking to recover of defendant on the ground that he was induced to leave the train while in motion, by the words spoken to him by the brakeman. These words were offered in evidence as tending to show knowledge on part of the trainmen of plaintiff's purpose and intention to alight from the train as soon as he had rendered proper assistance to Mrs. Fambrough. We think there was no error in refusing this instruction.

The fifth assignment is that the court erred in refusing the following requested charge: "If the train had started before the trainmen learned that plaintiff desired to get off (if they did learn that fact), then it was not negligence to start the train before he got off. And if he then got off the train, without requesting that the train be stopped, he assumed the risk of such an act, and cannot recover for any injury received thereby." This charge assumes that the failure of the plaintiff to request the trainmen to stop the train, to enable him to alight therefrom, would deprive him of the right to recover, regardless of the question whether or not, under the circumstances, the act of attempting to alight from the cars while the train was in motion was one consistent with ordinary prudence. This is not correct, we think; and the charge was calculated to divert the minds of the jury from the real issues of the case. But, if we assume that the charge was a correct and proper exposition of the law, yet its refusal, if error, was harmless error, inasmuch as the jury had been expressly instructed in the court's charge that the plaintiff could not recover if the trainmen were ignorant of the plaintiff's intention to leave the train when it was put in motion by them.

The objection to the testimony of Mrs. Fambrough, on the ground that it was only the

conclusion or opinion of the witness, is not good. The opinion of a witness as to time, distance, and space is legitimate. Nor is the testimony objectionable on the ground that it was immaterial and irrelevant. It was relevant and material on the issue whether or not the plaintiff was allowed a reasonably sufficient time to board the train, and to alight from it, before it was put in motion.

The ninth error assigned is the admission in evidence, over the objection of the defendant, of the testimony of the plaintiff to the effect that he thought it was safe for him to get off the train, as the yard was lighted, and the platform on which he purposed to alight was smooth and even. We are of the opinion that it was not error to admit this testimony. The defendant charged the plaintiff with negligence in attempting to step from the train while it was moving, and it would seem but reasonable and proper to permit the plaintiff to explain the reasons for making the attempt. See *Bridge Co. v. Cartrett*, 75 Tex. 628, 13 S. W. 8. And, besides, the opinions of witnesses, other than experts, are often admissible as evidence when, as was done by this witness, the facts upon which their opinions are based are testified to by the witnesses.

Under appellant's eleventh assignment of error, it objects to that section of the court's charge which instructs the jury that if the evidence shows that facts and circumstances occurred at the time, and were known to the brakeman and conductor, of such nature and character as there and then brought knowledge to these trainmen, or either of them, that plaintiff was getting on board the train to assist his sister, and intended to get off, such evidence would be as effectual to show notice to the defendant's servants as would evidence of verbal notification of such purpose of the plaintiff. The objection to this charge is that it is not authorized by the evidence. Such objection, we think, is not tenable. The evidence is that it was customary for male relatives or friends of female passengers to escort the latter into the cars, for the purpose of rendering them appropriate assistance; that Mrs. Fambrough, an aged sister of plaintiff, was accompanied to the depot by plaintiff and another of his sisters, and, when the train stopped, the three were standing at the proper place on the platform for embarking upon the train; and that, just opposite that place, the conductor and brakeman alighted within a few feet of the three, and in full view of them, and they were observed by the conductor at this time. The plaintiff and Mrs. Fambrough, leaving the other sister on the platform, without delay ascended the steps of the car, attended by the brakeman or conductor. This occurred at about 4 o'clock a. m. When a gentleman is seen on the platform of a railway station accompanied by two ladies at the hour of 4 o'clock in the morning, awaiting the arrival of a train, and, as soon as it arrives, he con-

ducts one of the ladies into the coach, and leaves the other all alone on the platform, the reasonable conclusion from these facts, it seems to us, would be that, as soon as he could discharge his duties to the lady taking passage upon the train, he would return to the lady left unattended on the platform. We are of the opinion that this evidence was ample to warrant the court in giving the instruction complained of.

The other assignments assail the verdict as not warranted by the evidence, and as contrary to the law and the evidence. It is sufficient, in discussing these objections, to say that the trial court seems to have announced the law to the jury correctly, and in accordance with the decision of the court of appeals rendered upon the former appeal of this case. The jury were expressly instructed that, if the train was put in motion without knowledge of the conductor and brakeman of the intention of the plaintiff to leave the car as soon as he had rendered the customary and proper assistance to the lady he was escorting into the coach, the plaintiff could not recover, and the verdict should be for the defendant; and that, while the evidence is conflicting on several of the issues presented by the pleadings, there is evidence sufficient to sustain a finding that the servants of defendant had notice of the plaintiff's purpose in boarding the cars; and that he was not allowed a reasonable time to accomplish this purpose before the train was put in motion; and that, in attempting to get off the train while it was in motion, plaintiff, under the circumstances, was not guilty of negligence, either in making the attempt or in the manner in which the attempt was made. The judgment is affirmed. Affirmed.

#### PETRUCIO et al. v. GROSS et al.

(Court of Civil Appeals of Texas. June 23, 1898.)

#### BOUNDARIES—EVIDENCE—TERMS OF GRANT—POSSESSION.

1. In a suit to establish a boundary, a certificate of the commissioner of the land office, the essential portions of which were pertinent, was admissible in evidence, though a portion thereof was but the opinion of the commissioner.

2. Where the boundary between two leagues of land, owned respectively by plaintiffs and defendants, was in controversy, the field notes and plat of a resurvey of the league owned by defendants, corresponding with the original survey thereof, and made by the same surveyor, under the belief that such land was vacant by reason of certain acts of the grantee, and for the purpose of locating another tract, in which field notes was a call for the land in controversy as a part of the league belonging to plaintiffs, were properly admitted in evidence.

3. A finding that the land in controversy, consisting of an island, was embraced within the boundaries of a certain grant, by fixing the extreme northern point of the islands comprising such grant at over three leagues from the mouth of the river, was not erroneous, as being in conflict with the terms of the grant, where

such grant, which conceded one league of land bounded by the east and west forks of the river, definitely located its extreme southern point at about one-half league from the mouth of the river, and the maps and sketches in evidence showed that the width thereof was greatly less than the length of a side of a square league.

4. Where, by the terms of a grant of islands, the entire area was bounded by the east and west forks of the river, such fact did not preclude the idea that some of such islands, as shown by the maps, were divided from others by smaller streams flowing from such forks.

5. A finding that defendants had been in possession of certain land in controversy since 1895 was not erroneous, where one of them testified that they had paid rent therefor to plaintiffs in 1888, and that they had never claimed the land until they obtained a deed for it, in 1895, and there was no evidence that they had ceased to occupy it in the meantime.

Appeal from district court, Matagorda county; T. S. Reese, Judge.

Action in form of trespass to try title, by James H. Gross and others against Thomas Petrucio and others, to establish a boundary. From a judgment for plaintiffs, defendants appeal. Affirmed.

Galves, Hamilton & Carpenter, for appellants. Linn & Mitchell, for appellees.

PLEASANTS, J. This is a suit in form of trespass to try title, but in fact a suit to settle and establish the boundary between the William Selkirk and the F. W. Dempsey leagues of land; the former title being extended August 10, 1824, and the latter in the year 1830. The case was tried by the court without the interposition of a jury, and judgment was rendered for the plaintiffs, establishing their claim to the land in controversy as one of the islands comprehended in the grant to William Selkirk; and judgment was also rendered for the plaintiffs against the defendants for rents, in the sum of \$78.75. The defendants appealed to this court, and have assigned several errors in the rulings and findings of the trial court.

The first two assignments presented in the brief of the appellants assail the action of the court in admitting in evidence, over objections of defendants—First, a certificate of the commissioner of the land office of date March 1, 1888; and, second, the field notes and plat of a survey of the Dempsey league made in 1838, as shown by sketch, which, in the statement of facts, is designated as sketch No. 4. The certificate should not have been excluded because a part of it was but the opinion of the commissioner, the other and essential portions thereof being pertinent and unobjectionable; and the court did not err in admitting the paper in evidence. The field notes and plat of a resurvey of the Dempsey league were, we think, properly admitted in evidence. This resurvey, which seems to correspond with the original survey of the league, was made by E. R. Wightman, the county surveyor, for the purpose of locating 25 labors of land to which Jane E. Calder was entitled; the surveyor believing, as he



recites in his return of the field notes to the land office, the land to be vacant, by reason of certain acts of the grantee, Dempsey. Wightman surveyed this land for Dempsey in 1830, just six years after the survey of the Selkirk league was made; and it is but reasonable to conclude that he knew the location and boundaries of that league; and hence his call, in the field notes of the Calder survey, for the land in controversy as one of the Selkirk islands, is at this date a circumstance tending to sustain the claim of the plaintiffs to the land. The fact that the Selkirk league was surveyed by Ingraham, and not by Wightman, does not render the call inadmissible. Such fact affects the weight of the evidence only. The issue in this case being whether the land in dispute was a part of the Selkirk league, or a part of the Dempsey, the declaration of the surveyor who located the latter league, made while making the survey, that said land was one of the Selkirk islands, is, it seems to us, clearly pertinent evidence for the plaintiffs.

The appellants insist that the finding of the court that the land in controversy, called "Dick's Island," was embraced within the boundaries of the William Selkirk grant, is erroneous—First, because the terms of the grant show that the initial point of the survey, or the upper and most northerly boundary of the grant, was not more than  $1\frac{1}{2}$  leagues, more or less, above the mouth of the river, while the court fixes this point at over 3 leagues from the mouth of the river; and, second, because, by the terms of the grant, said islands are embraced between the East and West branches of the Colorado river, from the upper to the lower point of same, without any intermission of said streams or branches,—that is, without the confluence of said branches from the beginning to the end of said islands. Each portion of a grant should be read in connection with its entire context. The grant concedes to Selkirk one league of land, equal to 25,000,000 of square varas, and it definitely locates the extreme southern point of the land granted at about one-half league from the mouth of the river; so that, if we fix, as the appellants insist should be done, the extreme upper or northern point of the islands, comprising the grant, at one league and a half from the mouth of the river, the entire length north and south of the grant will be not greater than one side of square league of land; and, while the width of these islands is not given in the statement of facts, an inspection of the maps and sketches in evidence makes it clear, we think, that the width of these islands is greatly less than 5,000 varas. And, this being so, we are of the opinion that the contention of appellants, that the finding of the court fixing the beginning or the upper part of the Selkirk league at over three leagues from the mouth of the river is erroneous, is not sustained by the evidence. And we are further of the opinion that, by the terms

of the grant, the islands composing the league are not necessarily, as appellants contend they are, embraced between two streams only,—the East and West forks of the river. We see nothing in the language of the grant to warrant this conclusion of the appellants, and the maps and sketches in evidence are in conflict with such contention. By the terms of the grant, the entire area granted is bounded on all four sides by the East and West forks of the river; but this does not preclude the idea, which the maps show to be the fact, that there were smaller streams of this river than either its East or West fork, dividing some one or more of these islands from others. In other words, while the East and West forks of the river embraced all of the islands, yet some of them might be bounded on one of their sides by a smaller stream flowing from the East or West forks.

The next assignment of error is that the court erred in its finding that defendants had been in possession of the land sued for since August 28, 1895. There is in the record the testimony of one of the defendants to the effect that they had paid rent for the land to the plaintiffs for the year 1888, and that they never claimed the land until they obtained a deed for it, in 1895. From this evidence we cannot say that the court erred in finding that the defendants had been in possession of the land since 1895. When the defendants were paying rent for the land, they doubtless were in possession. It is not reasonable to suppose that they should pay rents for the premises, and not occupy them; and there is nothing in the evidence to show that they had ceased to occupy the land when they purchased it. Neither the testimony of the witnesses for the plaintiffs nor for the defendants is of much weight. Not one of these witnesses was present when the Selkirk league was originally surveyed. Not one of them testified to any declaration as to the boundary of this land made by any one who assisted in the survey, or of any one who, from his relation to the land, it would be presumed, knew its boundaries; nor was there any testimony as to the general reputation of the boundary in dispute. Therefore the issue could only be determined from the records put in evidence; and, from these, we are not prepared to say that the judgment of the court is not supported by the weight of the evidence, and the judgment must therefore be affirmed. Affirmed.

#### SUPREME LODGE NAT. RESERVE ASS'N v. TURNER.

(Court of Civil Appeals of Texas. June 25, 1898.)

MUTUAL BENEFIT ASSOCIATIONS—SUSPENSION OF  
SUBORDINATE LODGE—WAIVER—ESTOPPEL  
—REINSTATEMENT—NUNCUPATUM.

1. The by-laws of a fraternal benevolent association provided that the failure of a sub-

ordinate lodge to remit assessments to the supreme lodge within a certain time should suspend the subordinate lodge, and that in such case the supreme president could deprive the members of the subordinate lodge of all benefits from the death benefit fund. *Held*, that the suspension of the lodge did not suspend its members so as to require an application by them for reinstatement, but its only effect was to deprive the members of the death benefit fund during the period of suspension, especially where other sections provided explicitly as to suspension and reinstatement of members for failure to pay assessments.

2. The officers of the supreme lodge of a benevolent association have the authority to waive a by-law suspending a subordinate lodge for failure to remit an assessment within a certain time, and also, if suspended, to waive the payment of a fine for each member fixed by the by-laws as a penalty against said lodge, to be paid before its reinstatement.

3. The acceptance of subsequent assessments by the supreme lodge of a benevolent association from a subordinate lodge, after knowledge that a cause of suspension exists, where the members paid the same believing the suspension was not to be enforced, estops the supreme lodge from setting up such cause of suspension to defeat a recovery by a member of said subordinate lodge.

4. Where an application for reinstatement by a member of a benevolent association, as required by the association, was without authority, statements or promises in such application are nudum pactum, and hence not binding on the applicant.

Appeal from district court, Hunt county; Howard Templeton, Judge.

Action by Hattie B. Turner against the Supreme Lodge National Reserve Association. From a judgment for plaintiff, defendant appeals. Affirmed.

Matlock, Cowan & Burney, for appellant. Craddock & Looney, for appellee.

**BOOKHOUT, J.** This suit was brought by Hattie B. Turner, wife of L. C. Turner, deceased, against Supreme Lodge National Reserve Association on death benefit certificate No. 1,224, issued by the Railway Employés' Fraternal Beneficial Association. Plaintiff alleged, in substance, as follows: That on December 14, 1892, the said Railway Employés' Fraternal Beneficial Association executed and delivered to L. C. Turner the following death benefit certificate: "This certificate, issued by and under the authority of a charter granted by the state of Missouri to the Supreme Lodge of Railway Employés' Beneficial Association, witnesseth: That Lewis C. Turner, a member of Greenville Lodge, No. 53, of said order, located at Greenville, in the state of Texas, is entitled to all the rights and privileges of membership in the Railway Employés' Fraternal Beneficial Association, and to participate in the death benefit fund to an amount not to exceed the sum of two thousand dollars, according to the by-laws of said supreme lodge, now or hereafter in force, which sum shall, at his death, be paid to Hattie B. Turner, bearing relationship of wife. This certificate is issued upon the express condition that said L. C. Turner shall, in every particular, while a

member of this order, comply with all the laws, rules, requirements now in force, or that may at any time hereafter be enacted, and, in case of any failure or default, will at once lapse and become void. The said member's age is 56, and his rate of assessment is one dollar and seventy-six cents. In witness whereof the said Supreme Lodge of Railway Employés' Fraternal Beneficial Association has caused their certificate to be signed by its supreme president, attested by its supreme secretary, and its corporate seal to be hereto affixed, at Kansas City, Missouri, this 14th day of December, 1892. [L. S.] F. W. Sears, Supreme President. Attest: J. C. Hennessy, Supreme Secretary." That, after the execution and delivery of said certificate, the name of the association was changed from the "Railway Employés' Fraternal Beneficial Association" to the "Supreme Lodge National Reserve Association." That L. C. Turner died on January 2, 1895, and that until the time of his death he paid all dues and assessments due by him to the association, according to its by-laws, and in all respects complied with the by-laws. That at the time of his death he was a member of said association in good standing. That due notice of the death of said L. C. Turner had been presented to the appellant's association, and that it had failed and refused to approve said proofs, and had wrongfully and illegally rejected the same, and failed to levy any assessment for the amount due plaintiff, and failed to pay the same or any part thereof. Plaintiff asked for judgment for \$2,000, costs of suit, and general relief. Defendant answered by denial and special answer, in substance, as follows: That it was a fraternal benevolent association, and had no capital stock, and that its relief fund was created and sustained by assessments made upon its members. That its association, when first organized, was called the "Railway Employés' Fraternal Beneficial Association," and was afterwards, by amendment of its charter, changed to that of the "Supreme Lodge National Reserve Association." That said association, on December 14, 1892, executed and delivered to L. C. Turner death benefit certificate No. 1,224, for a sum not to exceed \$2,000, as stated in plaintiff's petition. That said certificate was issued to said L. C. Turner upon the faith of certain statements and representations contained in his application for membership in defendant's association, setting up what said representations were, and that the same were not true. That said Turner was a member in good standing in defendant's association until October 10, 1893, when he was suspended for nonpayment of assessment No. 14, and was reinstated upon his application on November 1, 1893. That he was again suspended on August 22, 1894, for nonpayment of assessment No. 7, series 1894, and that he was again reinstated on his application, on Au-

gust 27, 1894. That in his application for reinstatement he made certain statements and representations, setting out what they were, which statements defendant alleged were untrue, setting out in detail in what particular the representations were untrue; and that the death of Turner resulted from the excessive use of intoxicating liquors, which was warranted against in his application for reinstatement. That, upon defendant's learning that Turner did not make truthful statements in his application for reinstatement, defendant offered to return to plaintiff the six assessments paid by Turner subsequent to his suspension, on August 22, 1894. Plaintiff filed her first supplemental petition, in which she alleged that if L. C. Turner was suspended at all in August, 1894, it was only by a temporary suspension of subordinate lodge at Greenville, Tex., of which Turner was a member, and that, under the laws of defendant's association, neither L. C. Turner nor said subordinate lodge were ever legally suspended, but that if said lodge was suspended such suspension only existed for a day. Said supplemental petition set up in detail the law under which the supreme lodge purported to act, and set up that under said law said Turner was not legally suspended. Defendant replied to said first supplemental petition by general denial, and special answer setting up different by-laws of the defendant association, alleging that said Turner was legally suspended in August, 1894.

There was a trial of the cause before the court without a jury. The court made special findings of fact and conclusions of law, and rendered judgment against the defendant in the sum of \$2,300, with interest from date at 6 per cent. per annum and costs of suit; to which conclusions of law and findings of fact, and the judgment of the court thereon, the defendant then and there excepted and gave notice of appeal, and has duly perfected its appeal to this court.

#### Opinion.

Appellant's first assignment of error complains of the following finding of fact filed by the trial judge: "I find that the supreme officers, because of the technical suspension of Greenville Lodge, No. 55, required the individual members to make application for reinstatement, as though they had each been individually suspended; but, as I find it was not such a suspension under the laws of the defendant as to require or call for an individual application for restoration, I believe that any other finding on that point is immaterial. I find that all during the months of August and September, 1894, L. C. Turner was alive and in good health, within the meaning of the terms as used in the by-laws of defendant." The grounds of the objection are "that the suspension of Greenville Lodge, No. 55, of which L. C. Turner was a member, was not a technical

suspension of said lodge, but a legal and proper suspension of said lodge under the laws of defendant's association, and the suspension of Greenville Lodge, No. 55, under law No. 111 of said association, suspended each member thereof, and deprived them of the benefits of the death benefit fund during the suspension of said lodge. The only way that a member thereof could be reinstated was either by the reinstatement of the suspended lodge within 30 days after its suspension, or by the application for reinstatement by the individual members thereof within 90 days. The suspension of the lodge suspended each member thereof, and was such a suspension of L. C. Turner as to require or call for his application for reinstatement."

The laws regulating the assessment, reports, remittances, and penalty for failing to make remittances by subordinate lodges are found in defendant association's by-laws Nos. 50, 51, and 111, which read:

"Law 50. The secretary of a subordinate lodge shall forward to the supreme secretary the amount of the assessment, together with his report, so as to reach the office of the supreme secretary not later than the 17th of the month following that in which the assessment was issued; such report to be made out upon blanks furnished by the supreme lodge for that purpose, all remittances for assessments to be made by draft or money order, made payable to such bank as may be designated by the supreme lodge or executive committee.

"Law 51. Should any lodge fail to have the amount of each assessment in the hands of the supreme secretary within the time specified by law 50, it shall be notified by the supreme secretary, through their president and secretary, that such lodge is delinquent, and, if report and remittance are not received within ten days from the date of such notice, said lodge shall stand suspended, without any further action being necessary, and shall stand suspended until all arrearages are paid, together with a fine equal to ten cents for each member of the lodge suspended on said report, provided that such lodge must be reinstated within thirty (30) days next succeeding such suspension, if at all."

"Law No. 111. To suspend or dissolve a subordinate lodge, a two-thirds vote of all the members present at any session of the supreme lodge shall be required: provided, that any subordinate lodge may be suspended, and the members under its jurisdiction deprived of all benefits from the death benefit fund by the supreme president, whenever such subordinate lodge shall refuse or neglect to make its returns, or fail to pay its assessments, to the general or death benefit fund within the legal time."

Did the failure of Greenville Lodge to remit assessment No. 7, series 1894, within the time fixed by the by-laws, operate as a

suspension of each member of the lodge, and was each member required to make an individual application for reinstatement after such failure? The secretary of Greenville Lodge, No. 55, failed to remit assessment No. 7, series of 1894, within the time required by law 51, above; and on August 12, 1894, the supreme secretary at Kansas City wrote to the secretary of Greenville Lodge, No. 55, that the remittance had not been received, and, unless the same was received by August 22d, the lodge would stand suspended. On August 22d, the secretary of Greenville Lodge forwarded his report and collection for assessment No. 7, amounting to \$10.31, the same being collection of assessments for nine members of said lodge, including L. C. Turner, said report and money being received by the defendant association on August 25, 1894, and retained by it. By the terms of law 51, above quoted, on failure to forward an assessment by a subordinate lodge to the supreme lodge within 10 days from the time prescribed by law 50, said lodge shall stand suspended until all arrearages are paid, together with a fine of 10 cents for each member of the lodge suspended on said report, provided that such lodge must be reinstated within 30 days next succeeding such suspension, if at all. This law has reference to the suspension of the lodge, as a lodge, and not the individual members of the lodge.

Appellant insists that under law 111, above quoted, the suspension of Greenville Lodge, No. 55, suspended each member of the lodge. It is provided by this law that a subordinate lodge may be suspended or dissolved by a two-thirds vote of all the members present at any session of the supreme lodge. It is not claimed that any such vote was ever had. By the terms of law 111, any subordinate lodge may be suspended, and the members under its jurisdiction deprived of all benefits from the death benefit fund by the supreme president, whenever such subordinate lodge shall refuse or neglect to make its returns or fails to pay its assessments to the general or death benefit fund within legal time. The obvious meaning of this law is that the supreme president, when the subordinate lodge refuses or neglects to make its returns or fails to pay its assessments to the death benefit fund, may suspend such lodge, and, when so suspended, the members would not be entitled to participate in the death benefit fund during such suspension. *Supreme Lodge v. Abbott*, 82 Ind. 1; *Nibl. Ben. Soc. & Acc. Ins.* § 276. This law does not suspend the member, but suspends the lodge, and fixes a penalty upon the members of a suspended lodge by refusing to permit a member of such lodge to participate in the death benefit fund during such suspension.

The law of the defendant association regulating the collection of assessments from members, and fixing a penalty for failure to pay the same, is law 49, which, after pre-

scribing how an assessment shall be levied and notice thereof given to the subordinate lodge, reads: "Any member who fails to pay an assessment within the time specified above shall stand suspended, and be so reported, without any action of the lodge being necessary, thereby causing an immediate suspension of his certificate, and a forfeiture of all rights and benefits thereunder until reinstated. Any member who may become suspended through failure to pay his assessments within the time required may, if living and in good health, make application for reinstatement any time during the next succeeding ninety days after such suspension, by paying personally to the secretary of his lodge the amounts due and accrued during his suspension, and filing his application for reinstatement upon the blank furnished by the supreme lodge with the secretary; such application, together with all assessments, to be forwarded immediately by the secretary to the supreme secretary. If the application for reinstatement is approved by the supreme medical director, the supreme secretary shall so notify the secretary of the subordinate lodge to which the member belonged, and shall record the member as in good standing upon the books of the supreme lodge. A suspended member shall furnish a new medical examination, if the same is required by the supreme medical director. No suspended member shall, under any circumstances, be reinstated or entitled to participate in the funds of the death benefit department until his application for reinstatement has been approved by the supreme medical director. Any member who fails to reinstate himself within ninety (90) days from the date of his suspension shall make a new application, be re-examined, and, if accepted, shall have a new certificate issued. No certificate that has been suspended for ninety days can be revived."

This law relates to and controls the manner of suspension of members for failure to pay an assessment. Laws 50, 51, and 111 relate to the suspension of a subordinate lodge for failure to forward an assessment to the supreme lodge. When a lodge has been suspended, it must comply with law 51, and be reinstated within 30 days next succeeding such suspension. When a member is suspended he must comply with law 49, and make application for reinstatement within 90 days from the date of his suspension. The suspension of Greenville Lodge, No. 55, did not, under the by-laws of the association, suspend the members thereof.

Appellant complains of the ninth finding of fact by the trial court, which reads: "I find that the nine members each made application for restoration according to the request of the supreme secretary, and were reinstated; that is to say, their applications were received and approved,—for, in my opinion, they had not been individually suspended, and were not required to make the applica-

tions." The objection to this finding is that Greenville Lodge, No. 55, having failed to remit the amount of the assessment due the supreme lodge, was suspended, thereby suspending each member thereof, and depriving them of the benefits of the death benefit fund until such lodge should be reinstated. The objection to this finding is disposed of in what we have said in discussing the first assignment. The suspension of Greenville Lodge, as a lodge, did not have the effect of suspending the members. It is true, as before stated, if Greenville Lodge was properly suspended by the terms of law 111, the members thereof could not participate in the death benefit fund during such suspension. *Supreme Lodge v. Abbott*, 82 Ind. 1.

Appellant also complains of the following finding: "I find that after this Greenville Lodge, No. 55, continued to exist, and was recognized and treated by defendant as a lodge, as before, although it did not pay ten cents per head for each member as a penalty, as prescribed in law 51, but did pay the assessment No. 7. I find that defendant regularly levied upon the membership of Greenville Lodge, No. 55, after the suspension, as claimed, assessments Nos. 8, 9, 10, 11, and 12, series of 1894; that these assessments were duly collected by the subordinate officers of said lodge, and remitted to and received by defendant. I find that L. C. Turner paid all assessments levied against him up to the time of his death, and that he was a member in good standing at such time, and that Greenville Lodge, No. 55, was in good and regular standing, and was so treated and recognized long after the death of said Turner." Assessment No. 7, series of 1894, should have been received by the supreme secretary on or before August 22, 1894. It was not received until August 25, 1894. On the same day the supreme secretary wrote the secretary of Greenville Lodge that, inasmuch as the report was not received until after the suspension of the lodge, it would be necessary for Greenville Lodge to comply with rule 51, and remit to the office of the supreme secretary the fine of 10 cents for each member, as required therein. "This," he says, "would amount to \$1.10. Pending the receipt of such remittance, your report and remittance for assessment No. 7 will be held subject to your order. Should your members prefer to comply with the provisions of my letter of the 24th inst., and have their membership transferred to any of the Kansas City lodges pending a reorganization of your lodge, they may do so." The fine called for, of 10 cents for each member, was never forwarded by Greenville Lodge. On September 20, 1894, the supreme secretary wrote to the secretary of Greenville Lodge acknowledging receipt of assessment No. 8, series 1894. And again, on October 22, 1894, he wrote said secretary of Greenville Lodge acknowledging receipt of assessment No. 9. On November 3, 1894, he in the same manner

acknowledged receipt of assessment No. 10. On November 26, 1894, the supreme secretary and treasurer issued a receipt to Greenville Lodge for \$8.70 to J. F. Pruitt, acting secretary, "account assessment of Greenville Lodge, No. 55, assessment No. 10, \$3.35; assessment No. 11, \$3.35." These letters were addressed to the secretary of Greenville Lodge in his official capacity, and signed by the supreme secretary and treasurer in his official capacity, and the receipt is for assessments against Greenville Lodge, No. 55, and we think clearly authorize the above finding of the trial judge.

Appellant's fourth assignment complains of the following finding of the trial judge: "I find that the supreme secretary of defendant claimed after this suit was filed that Greenville Lodge, No. 55, as a lodge, had not been reinstated, but the members each having made application for reinstatement, and Greenville Lodge having been reorganized, they became members of the lodge as reorganized. I find that this is but a play upon words, as it would be immaterial whether Greenville Lodge was reinstated as such or was reorganized. The material questions are, and I so find, that the lodge was in good and regular standing at the time of Turner's death, and that he was a member thereof in good and regular standing, and entitled to all the benefits as such." The supreme officers, upon the failure of Greenville Lodge, No. 55, to remit assessment No. 7 to the office of the supreme secretary within the time required in by-law No. 51, required each of the members of said Greenville Lodge to make an application for reinstatement, upon the theory that they had each been individually suspended. Nine members did fill out applications furnished by the supreme secretary, and forwarded the same to the supreme secretary, and said applications were approved by the supreme medical director. We have above held that the failure of the Greenville Lodge to remit assessment No. 7 to the supreme secretary within the time required by the by-laws did not suspend the members individually, and, this being so, the officers of the supreme lodge were without authority to require a new application from the individual members of Greenville Lodge as a condition precedent to the reinstatement of said lodge or its members. Such a requirement being without authority, any statement or promise contained in such application was a nudum pactum, and not binding upon the applicant. *Davidson v. Society*, 39 Minn. 303, 39 N. W. 803; *McDonald v. Chosen Friends*, 78 Cal. 49, 20 Pac. 41; *Nibl. Ben. Soc. & Acc. Ins.* § 293.

The supreme lodge, having retained assessment No. 7, and afterwards called for and received assessments Nos. 8, 9, 10, 11, and 12, series 1894, and treated and recognized Greenville Lodge, No. 55, as a lodge, waived its right to insist that said lodge had been suspended by its failure to pay the fine of 10

cents for each member, growing out of the failure to remit assessment No. 7 within the time prescribed by the by-laws. It was within the authority of the association, acting through the officers of the supreme lodge, to waive by-law 51 suspending Greenville Lodge, No. 55, for its failure to have assessment No. 7, series of 1894, at the office of the supreme secretary on or before August 22, 1894, or, if suspended, to waive the payment of 10 cents for each member fixed by said law as a penalty against said lodge, to be paid before its reinstatement. *Splawn v. Chew*, 60 Tex. 532; *Insurance Co. v. Keyser*, 32 N. H. 313; 1 *Joyce, Ins.* §§ 394, 397. When the association has knowledge that a cause of forfeiture exists, and fails to take advantage thereof, but proceeds to levy and collect assessments from a subordinate lodge, and the members pay the same believing that the forfeiture is not to be enforced, the association, after loss, is estopped from setting up such cause of forfeiture to defeat a recovery. *Insurance Co. v. Hanna*, 81 Tex. 487, 17 S. W. 35; *Insurance Co. v. Raddin*, 120 U. S. 183, 7 Sup. Ct. 500; *Nibl. Ben. Soc. & Acc. Ins.* § 300; *Association v. Beck*, 77 Ind. 203; *Schwarzbach v. Protective Union*, 25 W. Va. 666. The supreme lodge, having continued to recognize Greenville Lodge as a lodge for nearly six months, and having demanded and collected assessments from it and its members during such time, is estopped from denying that Greenville Lodge and L. C. Turner were in good standing at the time of Turner's death.

The evidence was sufficient to support the finding that L. O. Turner did not die from the excessive use of intoxicants, and hence we overrule appellant's fifth assignment of error.

We do not think there is error in the court's conclusions of law, as complained of in appellant's sixth assignment of error. One of the conclusions of law complained of under this assignment reads: "Should it be held, however, that L. O. Turner in August, 1894, under the contract, was required to make formal application for reinstatement, yet, under law 49, he was, as a matter of contract and right, entitled to such if he was then living and in good health," and defendant could not, by requiring written application to be made on blanks furnished by defendant, impose any other conditions, and any such would be a mere nudum pactum." L. C. Turner died in 1895 from valvular heart trouble. There is evidence in the record from which it can be fairly inferred that the immediate sickness from which the death of L. C. Turner resulted was not of long standing. The evidence fairly shows that Turner was alive and in good health, within the meaning of law 49, in the months of August and September, 1894. Such being the condition of the record, he was entitled to be reinstated under law 49 of defendant association, even had he been properly suspended.

*ed. Lovick v. Association*, 110 N. C. 93, 14 S. E. 506. We find no error in the record, and the judgment of the court below is affirmed.

### GOLDBERG et al. v. BUSSEY et al.

(Court of Civil Appeals of Texas. June 25, 1896.)

SALES — HEARSAY EVIDENCE — TITLE — WHEN PASSES.

1. A claimant of property levied upon was allowed to testify as to a statement made to him by the constable after the levy. Such statement was not shown to be *res gestæ*. *Held* hearsay, and inadmissible.

2. The court instructed the jury that a bill of sale was valid, and carried title to property, and also that, if there remained anything material to the sale to be performed, the contract was executory, and did not pass title. *Held* erroneous, since tending to confuse the jury.

3. An instrument on its face imported an absolute sale of a quantity of shingles, but did not definitely describe them. Part of the consideration was paid. *Held*, that if the parties designated the particular shingles so that delivery could be made, the title passed, but, if they were to be taken from a greater number, the title to any particular shingles did not pass.

Appeal from Upshur county court; T. H. Briggs, Judge.

Action by Goldberg Bros. and others against Bussey & Phillips, as claimants of property levied on under attachment. From a judgment, plaintiffs appeal. Reversed.

W. R. Heath and Eberhart & McGill, for appellants. R. W. Simpson, for appellees.

FINLEY, C. J. On July 10, 1894, Goldberg Bros., appellants, sued out a writ of attachment from the justice's court of precinct No. 6 of Upshur county, Tex., against J. C. Jarvis, which writ was levied upon 85,000 heart dimension shingles as the property of said Jarvis. The value of said property was assessed at \$106.25 by the officer making the levy. On the same day—July 10, 1894—Bussey & Phillips, appellees, presented to the officer levying said writ of attachment their affidavit claiming said shingles, and their bond conditioned as the law requires in cases of the trial of the right of property, whereupon said officer delivered said shingles to the claimants, Bussey & Phillips, appellees, and returned said oath to the justice's court, precinct No. 6, Upshur county, Tex. O. D. Holland intervened in said suit, claiming part of the shingles in controversy. J. R. Welborn also intervened in said suit, claiming part of the shingles in controversy. Issues were made up and filed under direction of the court. On February 2, 1895, the case was tried in the justice's court, and, upon motion of interveners, plaintiffs Goldberg Bros. and defendants Bussey & Phillips were nonsuited, and judgment went for interveners. Plaintiffs Goldberg Bros. carried the case to the county court of Upshur county by certiorari. On September 3, 1895,

plaintiffs and defendants joined in a motion to dismiss the intervention of Holland and Welborn, which was sustained, and both of said interveners were dismissed from said cause, leaving the contest between the plaintiffs Goldberg Bros. and the claimants Bussey & Phillips. After the cause was carried to the county court, and before judgment, Mrs. M. J. Bussey, one of the claimants, died, and her executor, E. H. Bussey, made himself a party to said suit. On November 17, 1897, at a regular term of the county court of Upshur county, judgment in behalf of the claimants Bussey & Phillips was rendered on the verdict of a jury for the shingles in controversy. From an order of the court overruling appellants' motion for new trial, appellants have duly perfected their appeal to this court.

Appellants' statement of the facts proven is not objected to by appellees, and is as follows:

Plaintiffs produced in evidence a copy of the judgment from the justice's court precinct No. 6, Upshur county, Tex., rendered January 5, 1895, in favor of plaintiffs and against J. C. Jarvis for the sum of \$97.01, with a foreclosure of the attachment lien on the shingles in controversy. Plaintiffs then introduced in evidence the affidavit and bond of claimants, in which they claimed the shingles in controversy. I. T. Pilgrim testified as follows: "In July, 1894, I was working at the shingle mill of J. C. Jarvis, in Upshur county, Texas, about four miles from Cannon switch on the line of the Cotton Belt Railway. On the 1st or 2d of July, 1894, Jarvis went to Gilmer to see Bussey & Phillips to make arrangements to get some money. I went with him, and heard him make the trade in the store at Gilmer, Texas. Jarvis agreed to sell them 500,000 heart pine shingles, and to take part pay in money and part in merchandise. On the 3d day of July, 1894, J. W. Bussey came to Jarvis' Mill, and paid Jarvis some cash. There were 360,000 pine shingles on the mill yard at that time. Jarvis agreed to sell Bussey & Phillips 200,000 shingles from this pile. The shingles to be received by Bussey & Phillips were not pointed out, marked, or tagged, but were left in the large pile just as they were before the trade was made. If Bussey had marked the shingles, I would have seen him do so. The shingles were placed from six to fifteen packages high, some of the stacks being fifteen feet high. Bussey did not get on the pile to mark the shingles. When Bussey objected to the way in which the shingles were packed, Jarvis told him he would pack the others, when cut, as he desired. At that time Jarvis had on hand only 160,000 shingles. He had previously sold 100,000 to a Mr. Wood, at Pittsburg, and they were tagged. He had also sold 100,000 to Goldberg Bros., but they had not been tagged. This left only 160,000 shingles belonging to Jarvis in the pile. Heard Jarvis tell Bussey & Phil-

lips there was nothing against the shingles on the yard." Plaintiffs then introduced in evidence the following written instrument, upon which the claimants relied to prove their title to the shingles in controversy, to wit: "Gilmer, Texas, July 3rd, 1894. I, J. C. Jarvis, have this day sold to Bussey & Phillips two hundred thousand shingles, to be delivered free on board cars at Cannon, Texas. The said station is situated on the St. Louis & S. W. R. R. I do further agree, if this shingle falls to give satisfaction, that I will stand to any or all loss caused by bad manufacture or bad packing, or any other deficiency that can be caused by my neglect. I hereby warrant and defend said title of these two cars, or the value of \$220.00, in either heart or saps shingles against any person, in part or in whole. Witness my hand, this July 3rd, 1894. J. C. Jarvis." The above instrument was recorded in Upshur county, Tex., on August 30, 1894, in Mortgage Record, vol. 1, p. 582. None of said shingles were ever delivered at Cannon on board the cars, but remained at Jarvis' Mill, four miles from said railroad. J. C. Bates testified as follows: "The shingles at Jarvis' Mill in July, 1894, had no marks on them to distinguish them from other shingles." W. J. Hayes testified as follows: "Was at Jarvis' Mill on July 3, 1894, when J. W. Bussey was there. Saw Bussey and Jarvis all the time they were talking. Did not see Bussey mark any of the shingles. The shingles were piled from ten to fifteen feet high, and he could not mark the top bunches without climbing the pile. He did not climb on the pile. I heard J. W. Bussey, while at the mill, tell Jarvis how he wanted the shingles packed. Jarvis told the boys at the mill to pack the balance of Bussey & Phillips' shingles in the way Bussey said." Harris Goldberg, one of the plaintiffs, testified: "The shingles in the large pile were scattered all over the country by the hands claiming wages for work at the mill. The shingles in controversy were at J. C. Bates' when the levy was made. Attachments were issued in two suits in the justice's court, precinct No. 6, in favor of Goldberg Bros. against J. C. Jarvis, and both writs were levied on shingles. There were 80,000 shingles at Bates' house." O. D. Holland testified to the same facts detailed by W. J. Hayes, and, further, that he got 29¾ thousand heart shingles out of the large pile at Jarvis' Mill, and hauled them to J. C. Bates' house, and that he claimed same. The above is substantially all of the testimony in favor of the plaintiffs.

J. W. Bussey testified for defendants as follows: "J. C. Jarvis and I. T. Pilgrim were in the store of Bussey & Phillips in Gilmer, Texas, on the 1st or 2d of July, 1894. Jarvis agreed to sell Bussey & Phillips 200,000 shingles for \$220,—part in cash and part in merchandise. Jarvis said there was no claim on the shingles at the mill, except that a Mr. Wood of Pittsburg owned 100,000 of

same. On July 3, 1894, I, as agent of Bussey & Phillips, went to Jarvis' Mill and consummated the trade. I bought for Bussey & Phillips 200,000 shingles from Jarvis, and paid him some cash. There was a large pile of heart shingles on the yard, containing about 360,000 shingles. I was standing with one arm leaning on the shingles. I marked some of the shingles by making a cross mark on the band with a lead pencil. Never did see Jarvis again. Was at his mill on July 10, 1894. The shingles were scattered all over the country. Some of them were at the house of J. C. Bates, and I recognized them as the ones I bought from Jarvis. After seeing a bundle of shingles once, I would recognize that same bundle of shingles two months afterwards if I should meet them in the road. After having seen a bundle of shingles in a large pile, I can recognize the same bunch if I should meet them elsewhere. That is the way I recognized the shingles at J. C. Bates' house on July 10, 1894. I marked only sixty-seven bundles of shingles, while Bussey & Phillips bought in all 800 bundles. I wrote the bill of sale. Under the contract the shingles were to be delivered on board the cars at Cannon switch on the Cotton Belt Railroad. None of the shingles were delivered there." A. H. Phillips, one of the claimants, testified: "J. C. Jarvis and I. T. Pilgrim were in our store on July 2, 1894. We agreed to buy 200,000 shingles from Jarvis, and pay him \$220 for same, to be paid part cash and part goods. Mr. J. W. Bussey and I talked the matter over, and he went to Jarvis on July 3, 1894, to close the trade. Our instructions to J. W. Bussey were to count out the shingles and pay Jarvis the money. When he returned from Jarvis' Mill he showed me the written instrument he had taken from Jarvis, and I was satisfied, and accepted the instrument as correct." R. W. Simpson testified for defendants as follows: "On July 10, 1894, T. J. Darby, constable of precinct No. 6, Upshur county, Texas, told me that at the instance of Goldberg Bros. he had levied on part of the shingles at Jarvis' Mill, and in the large pile out of which Bussey & Phillips were to get their shingles." In rebuttal to the testimony of J. W. Bussey, the witnesses I. T. Pilgrim, J. C. Bates, W. J. Hayes, and O. D. Holland testified that they had been in the shingle business for quite a while; that they could not recognize a bunch of shingles from a large pile, two or three weeks after having first seen same, if they were not in the same pile, unless there was some distinguishing mark on same; that the shingles at Jarvis' Mill had no such mark on them.

#### Opinion.

1. It is claimed there was error in permitting the witness Bussey to testify that "about the 10th or 11th of July, 1894, T. J. Darby, constable of precinct No. 6, Upshur county, Texas, told me that a short while before he

had, at the instance of plaintiffs Goldberg Bros., in a suit against J. C. Jarvis, levied on certain shingles at the mill of J. C. Jarvis, and at the same place as were the shingles claimed by Bussey & Phillips." This statement by the constable was not shown to be *res gestæ*, and was purely hearsay, and inadmissible. The testimony of R. W. Simpson, of the same character, was subject to the same objection, and should not have been admitted.

2. The court gave in charge to the jury, at the instance of the defendants, this instruction: "You are charged that it is the duty of the courts to construe all instruments introduced in evidence, and you are charged that the written instrument relied on by Bussey & Phillips to show a sale of the shingles in controversy is a valid bill of sale, and carried title to the shingles sold." At the instance of the plaintiffs, the court gave this instruction: "If you believe from the evidence that anything remained to be done by Jarvis on the 3d day of July, 1894, which was material or important, before Bussey & Phillips could identify or possess the shingles in controversy, or before same should become deliverable, the sale was executory and incomplete, and the shingles, under such circumstances, did not pass absolutely to Bussey & Phillips; and if you so find you will find for plaintiffs." The giving of these two charges, apparently contradictory, in all probability confused and misled the jury. One charges that the bill of sale was valid, and carried title to the shingles; while the other charges that, if there remained anything material to the sale to be performed, the contract was executory, and did not pass title to the shingles. The instrument, upon its face, imports an absolute sale of 200,000 shingles, and the evidence shows payment of consideration; but the bill of sale does not definitely describe them. If the parties to the contract agreed upon and designated the particular shingles which were the subject of the contract, then the sale was complete; in other words, if the parties agreed upon the particular shingles, so that actual delivery thereof could afterwards be made without any further agreement or act of designation as to the shingles involved, then the sale was complete, and the title passed. If, however, the parties did not agree upon any particular 200,000 shingles, but it was merely understood that that number of shingles out of a greater number was sold, and thereafter to be taken out of the greater quantity, the title to any particular shingles did not pass to the purchasers. It is not a question of whether there was such a designation as would put other parties on notice of the sale, but the question is whether the parties to the contract agreed upon the particular shingles in regard to which they were dealing. The case should have been put before the jury in this light. *Cleveland v. Williams*, 20 Tex. 204. Judgment reversed, and cause remanded.



**BOWMAN et al. v. RUTTER.**

(Court of Civil Appeals of Texas. June 25, 1898.)

**HOMESTEAD—DEED OF TRUST—ESTOPPEL—LIMITATION.**

1. Husband and wife made a written application for a loan, stating therein that the land offered as security was not their homestead. They did not reside on the land. In a suit against their heirs to foreclose, the application was offered in evidence. *Held* admissible, as a declaration tending to show that, if the land was ever a homestead, it had been abandoned.

2. Husband and wife, in borrowing money on land on which they did not reside, made a written statement that the land was not their homestead. In a suit against heirs to foreclose, the written instrument was offered in evidence. *Held* admissible, as establishing an estoppel against their claim of homestead.

3. In action to foreclose mortgage, the undisputed testimony showed that the land in controversy was not the homestead of the party claiming it. *Held* not error for the court to fail to charge in reference thereto.

4. A note contained a provision that, if accrued interest was not paid within 10 days after becoming due, the payee might elect to declare principal and interest due. Such default was made, but payee did not so elect, but allowed it to run until after the date of maturity of the note therein specified, which was more than four years after such default. *Held*, that limitations did not commence to run at the time of such default.

5. A deed of trust provided that, if any interest after becoming due should remain unpaid for 10 days, the whole debt shall become due immediately. The note provided that on such default the payee might elect whether he would declare the same due or not. *Held*, that limitations would be governed by the provisions in the note, and not the deed, and did not begin to run until such election.

Appeal from district court, Red River county; Don A. Bliss, Judge.

Action by Clarence E. Rutter against R. C. Bowman, guardian, and others. From a judgment for plaintiff, certain defendants appeal. Affirmed.

S. W. Harmon and E. S. Chambers, for appellants. Lennox & Lennox, for appellee.

**RAINEY, J.** On November 1, 1889, John C. Perot and wife, Sarah M. Perot, executed and delivered to Clarence E. Rutter their certain promissory note or bond for the sum of \$2,500, payable five years after date, with interest at 6 per cent. per annum, payable semiannually; and it was further provided that, in the event the interest on said note or bond was not paid within 10 days after maturity, an option was given the payee to declare the whole amount, principal and interest, to be due. There were also certain coupons executed in the same manner, payable to J. B. Watkins, amounting to the sum of \$428, which represented commissions, etc., due to said Watkins for negotiating the loan. To secure the payment of said note or bond and said coupons said Perot and wife executed a deed of trust on certain lands therein described. Subsequent to the

execution of this instrument the said Perot and wife died, leaving certain heirs. This suit was instituted March 18, 1896, by said Clarence E. Rutter against J. B. Watkins and the other defendants herein, which latter were the children of said John C. Perot and wife, to subject the land in said deed of trust described to the payment of said note and interest due to said Rutter. J. B. Watkins filed his cross bill, in which he sought judgment against the defendants, heirs of said John C. Perot and wife, on six notes, for \$50 each, and a foreclosure of a deed of trust on the same land described by plaintiff. The plaintiff's petition and Watkins' cross bill defendants pleaded general denial and the statute of limitation of four years, and that said land was the homestead of said John C. Perot and wife at the time said mortgage was executed, and that the same was therefore void. Rutter replied to said answer, and pleaded estoppel, etc. Trial was had and judgment rendered for plaintiff, subjecting the land to the payment of his debt, and that defendants recover against J. B. Watkins on the ground of limitation. From the judgment of the trial court this appeal has been prosecuted by the Perot heirs.

Appellants' first assignment of error is: "The court erred in admitting in evidence, over the objection of the defendants, the written statement of J. C. Perot and Sarah M. Perot, purporting to be an application to borrow money on the land therein designated, because said application attempts to point out the homestead of said J. C. Perot and Sarah M. Perot, but fails to do so, or show their homestead thereby, for the reasons shown in and assigned in defendants' bill of exceptions No. 1." The evidence shows that there was a written application made by John C. Perot and Sarah M. Perot to borrow money, for which this suit is brought, and that they stated in said application that their homestead consisted of 2½ acres in the village of Manchester, and did not include the land in controversy. It is insisted by appellants that this was a mere designation of the homestead, and that such designation was not in compliance with the statute, and therefore void, and, further, that the declarations of the parties as to homestead were not admissible in evidence. We are of the opinion that the objections here urged to the admission of said evidence are not tenable. There was no attempt made to designate any particular place as their homestead in the manner as pointed out by the statute, and, as the parties were not occupying this land as a home at the time the application for the loan was made, the rule stated in *Jacobs v. Hawkins*, 63 Tex. 1, and other decisions of like character, have no application to the statements here under discussion. The Perots did not live on this land at any time for a number of years. Since living on it they had lived at Tomaha, at Manchester,—a village where they had a homestead,—

and at Paris, Tex.; and the statement made by them as to their homestead was pertinent to show that, if the land in controversy was ever their homestead, the same had been abandoned by them, and was also pertinent for the purpose of establishing an estoppel against their claim of homestead to this land. *Haswell v. Forbes* (Tex. Civ. App.) 27 S. W. 566; *Mortgage Co. v. Scripture* (Tex. Civ. App.) 40 S. W. 215; *Mortgage Co. v. Norton*, 71 Tex. 683, 10 S. W. 301. In this connection, we will say that the undisputed evidence shows that the land in controversy was not the homestead of said parties at the time said loan was made, and there was no error in the court's failing to charge the jury in reference thereto.

The only other assignments of error we deem it necessary to consider relate to the question of limitation. It is contended by appellants that, by reason of the failure to pay the semi-annual installments of interest falling due November 1, 1891, until more than 10 days had elapsed thereafter, the full amount of principal and interest that had not been paid on said bond and coupons then and there became due, and that said suit was not brought within four years thereafter, and that the same is therefore barred by the statute of limitations. We do not think there is any force in this contention. As before stated, the obligation was executed November 1, 1889, and was not payable until five years thereafter. There was a provision, however, that if said interest, or any installment thereof, was not paid within 10 days after the same fell due, at the election of the holder thereof, the whole debt should become due and payable thereafter, without any notice whatever. This suit was not brought until March 18, 1896, and if this debt became due by reason of the interest not having been paid November 1, 1891, as claimed, then more than four years elapsed from that time until the bringing of the suit, and the same was barred by limitation. But we are of the opinion that said debt did not mature at that time if the holder thereof did not elect to declare it due, which election was necessary to mature the debt. The holder of the indebtedness had the right to exercise that option by the terms of the contract, and, in order for the debt to become due on the failure to pay said interest within 10 days after its maturity, it was incumbent upon the holder thereof to declare it due, which he did not do.

Another proposition made by appellants is: "Mrs. Sarah M. Perot being a married woman at the time the note and deed of trust were executed, she is not bound by the conditions of the note, but her separate property, included in the deed of trust, being bound by it alone, the statute of limitation

commenced to run against the deed of trust when by its terms it could have been foreclosed." The evidence shows that the land included in the deed of trust was the separate property of Mrs. Sarah M. Perot, and that she was not personally liable on the bond, although having signed the same. The deed of trust provided that, if any installment of interest or any part thereof should remain unpaid for 10 days after the maturity of such interest, the whole debt secured by the deed of trust should become due and payable immediately thereafter, without any notice whatever. It is to be noted that this clause in the deed of trust does not give the holder any election in reference to the debt becoming due on default in the payment of interest; and it is insisted by appellants that by reason of this provision, and the wife only being bound by the deed of trust, that, as to her at least, the claim is barred. We are of the opinion that this clause just mentioned contained in the deed of trust in no way relieves appellants. We think it clear that, from the position of said clause in the trust deed, it was a part of the description of the note attempted to be described in the trust deed, and was not intended as a separate and distinct condition from that contained in the bond or note. The deed of trust being given to secure the payment of said note or bond. It was but an incident thereto, and is governed by the terms thereof. But, if it were conceded that said clause in said deed of trust should be given controlling effect, then said claim would not be barred by limitation. Rev. St. 1895, art. 3369, provides: "In case of the death of any person against whom there may be a cause of action, the law of limitations shall cease to run against such cause of action until twelve months after such death, unless an administrator or executor shall have sooner qualified according to law upon such deceased person's estate; then and in that case the said law of limitation shall only cease to run until such qualification." The evidence in this case shows that Mrs. Sarah M. Perot died in July, 1895. At that time four years had not elapsed since November 13, 1891, the time, according to appellants' contention, when said debt became due. No administration was had upon her estate, and this suit was brought within 12 months next succeeding her death. At her death limitations ceased to run, and, the suit having been brought before the 12 months expired, the said claim was a valid and subsisting debt, and the land embraced in said trust deed was subject to the payment of such debt, and there was no error in the court's foreclosing the lien thereon. There are several other assignments of error, but none we consider of merit, and the judgment of the court below is therefore affirmed.

CASWELL v. HOPSON.<sup>1</sup>

(Court of Civil Appeals of Texas. April 2, 1908.)

## TRIAL—PLEA OF PRIVILEGE—APPEAL—REVIEW—HARMLESS ERROR—LIMITATIONS—COMMENCEMENT OF ACTION—AMENDMENT OF COMPLAINT.

1. It is discretionary with the court to submit a plea of privilege to the jury along with the main case, instead of separately before a trial on the merits.

2. Where the record contains no statement of facts showing any evidence to sustain a plea of privilege, the submission of such plea in connection with the main case, instead of separately before trial on the merits, will not be treated as reversible error.

3. Where the original petition alleged that the injury was sustained through the falling of a derrick, which fell through a negligently defective screw, and the amended petition extended the negligence to other defects in the machinery and to the carelessness of defendant's foreman, no new cause of action was stated which was barred, limitations having run in the meantime.

4. Where an issue raised by a portion of a pleading was not submitted to the jury, no error can be assigned to the court's overruling an exception thereto.

Appeal from district court, Ellis county; J. E. Dillard, Judge.

Action by A. H. Hopson against D. H. Caswell. There was a judgment for plaintiff, and defendant appeals. Affirmed.

This is a suit to recover damages for personal injuries, alleged to have been received by appellee, proximately caused by the negligence of appellant. The plaintiff was alleged to be a resident of Ellis county, and it was alleged that the residence of the defendant was unknown at the time of the institution of the suit, and notice was had by publication. Appellant appeared, and in due order of pleading filed his plea of privilege to be sued in the county of his residence, and further answered to the merits, subject to this plea. The case was tried, and resulted in a verdict and judgment against defendant upon his plea of privilege and upon the merits of the case. The defendant appealed to this court. At a former day of this term the statement of facts appearing in the record was stricken out, because it was not prepared in accordance with the rules, as will more fully appear from the written opinion of this court in relation thereto. 43 S. W. 547. In this condition of the record the cause has been submitted for our decision.

Lancaster, Beall & Gammon and West & Cochran, for appellant. F. M. Cunyus and Templeton & Harding, for appellee.

FINLEY, C. J. (after stating the facts).

1. Appellant assigns as error the action of the court in submitting his plea of privilege to the jury along with the main case upon its merits, and refusing to submit it separately before the trial upon the merits. This assignment does not present reversible error.

This matter is held to be largely within the discretion of the court. *Tynberg v. Cohen*. 76 Tex. 413, 13 S. W. 315; *Pryor v. Jolly* (Tex. Sup.) 40 S. W. 959. Were this not true, there being no statement of facts from which to ascertain whether there was any evidence to sustain the plea, we should not treat it as reversible error.

2. The fifth, sixth, eighth, ninth, tenth, eleventh, and fourteenth assignments complain of the action of the court in overruling defendant's special exceptions, numbered, respectively, 3, 5, 6, 7, 8, and 11, contained in his amended original answer. The assignments are no fuller than the above statement, and the single proposition urged under them is: "The second amended petition shows a new and distinct cause of action from that originally instituted,—one barred when the same was filed." Under such a presentation we can only consider whether the main cause of action disclosed by the amended petition is a different one from that set out in the original pleading. The original pleading alleged personal injuries received by the plaintiff, proximately caused by the negligence of the defendant, while plaintiff was in the employ of the defendant in the erection of an oil mill in Caldwell, Burleson county, Tex. The injury was alleged to have been occasioned by the falling of a derrick used in erecting a smokestack, and that the derrick was caused to fall by the breaking of an eyebolt, which was alleged to be defective. Damages, both actual and exemplary, were alleged and prayed for. The amended petition charged substantially the same facts, but extended the grounds of negligence to other defects in the appliances used and to the carelessness of the foreman in the use of such appliances. The subject-matter of the two pleadings was the same, and the enlargement of the allegations as to negligence did not change the cause of action. *Cotton Co. v. Stewart* (Tex. Civ. App.) 42 S. W. 241; *Railway Co. v. Davidson*, 68 Tex. 370, 4 S. W. 636; *The Oriental v. Barclay* (Tex. Civ. App.) 41 S. W. 123; *Railway Co. v. Flannagan* (Tex. Civ. App.) 40 S. W. 1043; *Railway Co. v. Eberhart* (Tex. Civ. App.) 40 S. W. 1060.

The nineteenth assignment complains of the overruling of exception No. 2 in the supplemental answer. The exception is directed at that part of the petition which charges that plaintiff worked under one Reagan as foreman, and that defendant held said Reagan out to the public and to plaintiff as foreman, and knowingly permitted said Reagan to so hold himself out, and that the acts, words, and conduct of defendant induced plaintiff to so believe, etc. The petition was good in the respect complained of. Besides, this phase of the case was not presented to the jury by the charge of the court, and no injury could have resulted from the action of the court.

The twentieth and twenty-first assign-

<sup>1</sup> Writ of error denied by supreme court.

ments relate to the admission of testimony, and cannot be considered in the absence of a statement of facts. The twenty-third, twenty-eighth, twenty-ninth, and thirty-first assignments relate to errors in the main charge, and cannot be determined hurtful error, in the absence of a statement of facts. The thirty-fifth, thirty-sixth, and thirty-seventh assignments are directed to the charge of the court on the plea of privilege, and are in the same attitude as the last preceding assignments. The thirty-eighth and thirty-ninth assignments complain of the refusal of special charges, and must be treated as the assignments just considered above. All the other assignments are in the same attitude, and present no reversible error.

On examination, we find that the pleadings fully support the verdict and judgment, and the judgment must be affirmed. Affirmed.

#### WILLIS & BRO. et al. v. SIMS' HEIRS.

(Court of Civil Appeals of Texas. June 25, 1898.)

##### ORAL STIPULATION—VALIDITY.

Rule 47 (20 S. W. xv.), governing the practice in district and county courts, provides that no agreement between attorneys touching a pending suit will be enforced unless in writing, and filed as a part of the record, or made in open court, and entered of record. *Held*, that where attorneys orally agreed that a pending case should be governed by the result of one on trial, but not in open court, nor entered on the record, it was error to admit evidence thereof, and give an instruction permitting a recovery thereon.

Appeal from Navarro county court; J. F. Stout, Judge.

Suit by W. F. Sims, and continued after his death by his heirs, against P. J. Willis & Bro. and another, for a wrongful seizure of goods on execution. From a judgment in favor of plaintiffs, and an order denying a new trial, defendants appeal. Reversed.

This suit was instituted by W. F. Sims, the husband and father of appellees, against the appellants, P. J. Willis & Bro., in the county court of Navarro county, February term, 1892, complaining, in substance, that plaintiff was a retail merchant doing business in the town of Dawson, in Navarro county, having in his possession as his stock in trade merchandise of the value of \$2,000; that the defendants, P. J. Willis & Bro., a private corporation, and H. L. Fullerton, on May 26, 1891, unlawfully entered his storehouse, seized and took from his possession and converted certain described goods of the reasonable value of \$500, for which he prays damages, etc.; and, specially, that on February 27, 1891, P. J. Willis & Bro. recovered a judgment in the county court of Navarro county against Frank T. Sims for \$210; that they procured execution to be issued on said

judgment on May 6, 1891, which was placed in the hands of H. L. Fullerton, who was then constable at Dawson; that levy was made on the goods described in the plaintiff's petition, and that the property so levied upon was not the property of W. F. Sims, but was owned by Frank T. Sims; that the goods were used in a business run in the name of W. F. Sims, but the business in fact was that of Frank T. Sims, and was conducted in the name of W. F. Sims for the sole purpose of hindering and defrauding the creditors of Frank T. Sims in the collection of their just debts against him. Pending the suit, in March, 1892, W. F. Sims died, and his surviving widow and children came in on September 7, 1897, and made themselves parties plaintiff, adopting the pleading formerly filed by their ancestor. The cause went to trial on December 14, 1897, resulting in a verdict and judgment for plaintiff against the defendants in the sum of \$376. Defendants in due time filed their motion for new trial, which being overruled they have duly perfected their appeal to this court.

Frost, Neblett & Blanding, for appellants.

BOOKHOUT, J. (after stating the facts). Appellants' first assignment of error reads: "The court erred in that part of the general charge to the jury wherein the jury are instructed, in effect: 'That if an agreement had been made by the attorneys of plaintiffs and defendants that this case should abide the final result of the suit of Sims against Sanger Bros., that then the only question for the jury to consider is the amount of damages to be assessed against the defendants,'—when it was not shown that any such agreement existed, if at all, in a manner such that the court could take cognizance of it." After the parties had announced ready for trial, the plaintiffs filed an affidavit alleging that on the trial of the case of W. F. Sims against Sanger Bros.—a suit in all respects similar to this—the attorneys in this suit, who were the attorneys in the case of Sims against Sanger Bros., made an agreement that this case should abide the final result reached in that case, except as to the amount of damages. Evidence was admitted that such an agreement was made between the attorneys in this case while the jury were out in the case of Sims against Sanger Bros.; that said agreement was oral, and was not entered of record. The trial court, after stating the issues made by the pleadings, instructed the jury as follows: "If you believe from the evidence in this case that counsel for plaintiffs and defendants entered into an agreement during the trial of the cause of W. F. Sims against Sanger Bros. et al. to the effect that this suit should abide the result of the suit against Sanger Bros., and you further believe that said suit of W. F. Sims against Sanger Bros. et al. was final—

ly decided in favor of plaintiff W. F. Sims, and you further believe that by the terms of said agreement the only issue to be submitted was the amount of damages, then you will find for plaintiffs the amount that W. F. Sims paid for the goods at the time they were sold by the officer, with 6 per cent. interest from the date that said goods were sold to W. F. Sims, if you believe from the evidence that said goods were levied on by defendants, and sold to W. F. Sims." "If you believe from the evidence that counsel for plaintiffs and defendants did enter into an agreement that this suit should abide the result of the suit of W. F. Sims against Sanger Bros. et al., except as to the amount of damages, and you further believe from the evidence that the defendants seized and levied on the goods of plaintiff W. F. Sims, and you further believe that said goods at the time of said levy and seizure belonged to W. F. Sims, then you will find for plaintiffs the amount that W. F. Sims paid for said goods at the time they were sold by the officer making the levy, with 6 per cent. interest from the date of said sale." Defendants requested a special charge, which was refused by the court, as follows: "You are instructed that plaintiffs cannot recover under any agreement made between the attorneys in the suit, unless said agreement was in writing. If it was not in writing, then it is not binding, and you will disregard it."

It is provided by rule 47 (20 S. W. xv.), governing the practice in the district and county courts, that "no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record; or unless it be made in open court and entered of record." It is not contended in this case that the agreement was in writing, or that it was made in open court, and entered of record. We think this rule clearly prohibited the enforcement of such an agreement as was alleged to have been made between the attorneys, and that the court erred in admitting the evidence to show such an agreement, and in charging the jury as above complained of, and in refusing the special charge requested by defendants. *Wootters v. Kauffman*, 67 Tex. 495, 3 S. W. 465. It follows that appellants' first assignment of error is well taken.

Appellants' sixth assignment complains of the action of the court in refusing to strike out the affidavit filed by plaintiffs, setting up the verbal agreement between the attorneys to the effect that this suit should abide the result of the case of Sims against Sanger Bros. It follows from what we have said under the first assignment of error that this assignment is also well taken.

Appellants' third assignment of error complains of the action of the court in suppressing a part of the answer to the tenth interrogatory of the witness G. W. Younger. We

think there was no error in the action of the court in this respect, and said assignment is not well taken.

Appellants' fifth assignment complains of the court's refusing to admit the testimony of the witness R. B. Marsh in reference to certain arbitration proceedings between W. F. Sims and F. T. Sims. We have carefully examined the record, and are of the opinion that there was no error in the action of the court in refusing to admit the testimony offered. For the errors above indicated in the first and sixth assignments of error, the judgment of the court below is reversed, and the cause remanded.

#### MISSOURI, K. & T. RY. CO. OF TEXAS v. WRIGHT.<sup>1</sup>

(Court of Civil Appeals of Texas. April 9, 1898.)

CONTINUANCES — EXPERTS — PHYSICIANS — EVIDENCE — RAILROADS — PERSONAL INJURIES — HARMLESS ERROR — BURDEN OF PROOF — INSTRUCTIONS.

1. In an action for personal injuries, a motion for continuance set forth that a certain doctor was a material absent witness, by whom the defense could prove that he went to the wreck where plaintiff was alleged to have been injured to give medical aid, and that plaintiff did not ask for aid; that he examined plaintiff at his home on the next day, when he found no objective signs of injuries. Plaintiff, however, testified that no symptoms of injury developed until the next day. The injury was to the spine, which did not appear externally. It did not appear that an examination the day after the injury was more likely to develop the true condition of plaintiff than examinations within two weeks, four of which were made by different physicians who were witnesses for defendant. *Held*, that the trial court did not abuse its discretion in refusing a continuance.

2. A physician may testify that plaintiff, whom he examined for the purpose of testifying in the case, "was confined to his bed and unable to walk without aid," since it is a pure statement of fact.

3. A physician who had examined plaintiff may testify, as an expert, that plaintiff could not very well have feigned his injuries, and that he also could not have stood an operation which was performed without the aid of chloroform.

4. A train was wrecked, but the rear coach, in which plaintiff was a passenger, was not derailed or overturned. Plaintiff claimed his injuries had been caused by the shock. Defendant pleaded a general denial. *Held*, that evidence was admissible that persons riding in the other coaches were injured, and that the engineer was killed.

5. Plaintiff elicited from several of defendant's witnesses, over objection, that the engineer had been killed in the wreck which injured plaintiff, and that they had testified for defendant in the case brought by his estate against defendant. *Held* that, while the evidence in regard to the witnesses having testified in said case was irrelevant and inadmissible, it could not have injured defendant, and hence was not ground for reversal.

6. In an action for personal injuries, the jury were charged to find for plaintiff, if they believed, from a preponderance of the evidence, that he was injured as alleged while a passenger on defendant's road, and that the burden

<sup>1</sup> Writ of error denied by supreme court.

of proof was on plaintiff to show, by a preponderance of the evidence, that he received the injuries complained of through the negligence of defendant's agents. *Held*, that a charge to find for defendant, if the jury believed, from a preponderance of the evidence, that plaintiff did not receive the injuries complained of while a passenger, was not misleading, as placing the burden of proof on defendant, when considered with the other portions of the charge.

Appeal from district court, Ellis county; J. E. Dillard, Judge.

Action by W. C. Wright against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

T. S. Miller and G. C. Grace, for appellant.  
A. A. Kemble & Son and Wm. H. Allen, for appellee.

**FINLEY, C. J.** This is a suit for damages on account of personal injuries alleged to have been sustained by appellee, while a passenger upon appellant's road, in a derailment and wreck of its train of cars, upon which he was traveling, caused by the negligence of appellant. The answer was by general demurrer and general denial. A trial was had July 7, 1897, and resulted in a verdict and judgment for appellee in the sum of \$5,000, from which this appeal is prosecuted by the defendant railroad company.

#### Conclusions of Fact.

(1) It is unquestioned that appellee was a passenger upon appellant's train of cars, and that the train was derailed and wrecked through the negligence of the defendant company.

(2) The only contested issues of fact are these: Was the appellee injured in said wreck? and the extent of such injury. The evidence was conflicting upon the point whether appellee received any injuries at all in the wreck. His own testimony showed that he was seriously injured in said wreck, and his evidence was strongly supported by the testimony of several doctors and other witnesses. There were several doctors whose testimony tended strongly to show that appellee was not injured at all in the wreck. It was the province of the jury to settle this conflict, and we cannot disturb their finding upon the issue. In support of the verdict, we conclude that appellee was injured in the wreck. There is no special question made as to the extent of his injuries. The evidence justified the jury in finding that appellee's injuries were serious and permanent in their character, and we so conclude, and find that appellee was injured to the extent of the damages awarded.

#### Opinion.

Appellant's first complaint is directed at the action of the court in overruling its application for a continuance. The application was based upon the absence of the witness Dr. H. M. Mathews. It set forth that it was

desired to be shown by the witness that he went to the wreck to give medical aid and attention, and that he was not called on while there to give attention to appellee, and his attention was not directed to him in any way as one of the injured, and, further, that he examined appellee, on the next day after the wreck, while at home in his bed, and that he found no objective signs of any injuries sustained by him. The record shows that this suit was filed November 7, 1895, and it shows that at the December term, 1896, the cause was continued by the defendant on account of the absence of the witness Dr. Simpson. The application does not disclose the number of the application, and the record is silent as to the disposition of the cause at the various other terms after the filing of the suit and before its final trial in July, 1897. In this condition of the record we must regard the application as one addressed to the discretion of the court, and an abuse of this discretion must be made to appear in the action of the court to constitute error. *Arnold v. Hockney*, 51 Tex. 46; *Railway Co. v. Hall*, 83 Tex. 679, 19 S. W. 121. So far as the question of diligence is concerned, we think the application was sufficient. The witness was shown to have been subpoenaed, and to have previously rendered obedience to that process, and it was not necessary to show that witness fees had been paid or tendered to him. Let us examine the matters to which the witness was expected to testify, with the view of determining whether the court abused its discretion. As to the fact that the witness was at the place of the wreck to give medical aid to the injured, and that appellee did not apply for such aid, and was not called to witness' attention as one of the injured, the evidence in the case shows that this testimony would have been utterly immaterial and without effect upon the trial. The plaintiff himself testified that his injury did not manifest itself until the next day, and that he did not receive or call for a doctor's attention until the day after the wreck. There was no evidence to a different effect on this point. The fact that the witness examined appellee the next day, and found no objective signs of injury, is urged as being of material importance. The injury complained of, it is contended by appellee and shown by his witnesses, resulted from a shock. It is not contended that there were any bruises, lacerations, or other outward visible indications of the injury to the spine, immediately following the infliction of the injury. It is not made to appear that an examination had on the day after the injury was more likely to develop the true condition of appellee, with reference to the injuries complained of, than examinations conducted at later dates. So far as the record enlightens us, an examination conducted on the day after the wreck would throw no more light upon the issue of injury *vel non* than the examinations

which were subsequently conducted. There were seven doctors who testified in the case upon this issue, and four of them were appellant's witnesses. Two of them, Drs. Sweat and Allen, examined appellee with Dr. Mathews, within two weeks from the time of the alleged injury; and appellant introduced their testimony before the jury. So far as we can see, Dr. Mathews' testimony would have been no stronger or clearer than that of the other doctors. It would have been merely cumulative, and it is not probable that the result of the trial would have been changed by it. We cannot say that the discretion of the trial court was abused. On the contrary, we think the court properly overruled the application for a continuance of the cause.

The appellant's counsel upon the trial objected to the testimony of Dr. Dumas, to the effect that plaintiff "was confined to his bed and unable to walk without the aid of a stick or crutch, or help of some kind"; and, after stating that his diagnosis of plaintiff's condition was based in part on his manner, movements, and actions, the witness added, "Which I think he could not very well have feigned;" and also, after testifying as to the manner of his examination of plaintiff, after the administration of chloroform, the witness stated, "He could not have stood it without it," meaning the chloroform. The objection urged to these statements of the witness is that the witness was not the regular attending physician treating the plaintiff, but was only called in after the institution of the suit, with the view of obtaining his testimony in the case, and the matters testified to were all matters of opinion upon issues which were purely for the determination of the jury, and, if admissible at all, they were only so after the facts upon which such opinions were based had been disclosed, which in this instance had not been done. As to the first statement, that plaintiff was confined to his bed and could not walk without aid, that was purely a statement of fact, relating to the physical condition of the plaintiff at the time of the examination. The defendant had the privilege of cross-examining the witness as to how he knew the fact, and also of offering controverting evidence on the point. The evidence was not subject to the objection presented. As to the other two statements, that the plaintiff could not have feigned his manner, movements, and actions, and that he could not have undergone the examination without taking chloroform, these were matters clearly within the domain of expert medical testimony, and the court did not err in admitting the evidence.

Proof was permitted, over the objection that it was irrelevant and prejudicial, that persons other than appellee were injured in the derailment and wreck, including the death of the engineer, Murphy. Appellant's contention is that, as appellee was upon the rear coach, which did not leave the track and

was not overturned, evidence as to the injury of other persons should be confined to the particular coach in which appellee was riding. We do not think this proposition sound. Appellant's general denial put upon appellee the burden of proving the derailment of the train and his injuries. His injuries were claimed to have been produced by a severe shock, and it was pertinent to show the character and consequences of the wreck, in a general way, as tending to throw light upon the truth of his contention that he was injured by a shock in a car which did not leave the track. We know of no rule of evidence which would justify such a limitation and confinement of the proof.

Witnesses Gazier, Sanders, Bryant, and Metcalf, who testified by deposition for defendant, upon cross-examination were permitted to testify, over defendant's objection, that the engineer, Murphy, was killed in the wreck, and that they had testified in the case of Murphy against this defendant in the district court of Grayson county, growing out of this wreck. As to the fact of the killing of the engineer, the evidence was unobjectionable. As to the simple fact that they had previously testified in the Murphy suit against the company, it had no relevancy, and was improper. We cannot see, however, any way in which it could have injured appellant in this case. As before stated, the only really contested issues were the fact of appellee's injuries and their extent. The fact that these witnesses testified in the Murphy suit had no bearing upon either of these points, and could not have influenced the conclusion of any reasonable mind upon them. In the light of the facts of the case, the admission of this evidence was purely technical error, without possible harmful results, and should not cause a reversal of the judgment.

The thirteenth paragraph of the court's charge is complained of as placing the burden of proof upon the defendant. This paragraph of the charge is as follows: "The jury are instructed, if they believe, from a preponderance of the evidence, that the plaintiff did not receive any of the injuries to his person while being transported upon the defendant's car, complained of in his petition, or that the injuries complained of are fictitious and simulated, they should find for the defendant." This charge, it will be seen, does not purport to place the burden of proof. If it stood alone, its form might cause the jury to be misled upon that point; but, when taken in connection with paragraphs 10 and 15, we see no occasion for confusion or doubt by the jury upon the subject of the burden of proof. Paragraphs 10 and 15 of the charge read: "(10) The jury are instructed, in connection with the preceding general charge, if they believe, from a preponderance of the evidence, that on or about the 3d day of November, 1895, plaintiff was received on board defendant's car at Waxahachie, to be transported as a passenger to the city of Dallas,

Texas, and that while being carried on defendant's car he received some one or all of the injuries to his person described in his petition, then it would be the duty of the jury to find a verdict for the plaintiff." "(15) The jury are instructed that the burden of proof rests upon the plaintiff to show by a preponderance of the evidence that he received the injuries to his person complained of, and that said injuries were caused by the negligence of defendant's agents, servants, or employes; and, if he has failed to establish either or both of these propositions, then your verdict should be for the defendant." The charge must be considered as a whole, and, when taken as such, if it is not misleading, isolated portions, which would be error standing as independent propositions, will not be treated as reversible error. *Moore v. Moore*, 73 Tex. 383, 11 S. W. 396.

The last assignment presented complains that the court should have granted a new trial upon the ground of newly-discovered evidence. This evidence was to the effect that appellee, on the very evening of the accident, stated to one J. A. Rogers, in substance, that he was not injured in the wreck. This evidence was of such a character that it would not probably have changed the result. Appellee does not claim to have realized that he was hurt until the next day after the accident, and it would not be inconsistent with his evidence to show that he made such statement on the day of the accident. We find no reversible error in the proceedings below, and the judgment is affirmed.

# HOUSTON & T. C. R. CO. v. LASKOWSKI et al.<sup>1</sup>

(Court of Civil Appeals of Texas. April 9, 1898.)

**RAILROADS—INJURY TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY—TRAIN ON PUBLIC STREET—OPERATION—REVIEW—ISSUE OF NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.**

1. One who stood on a railroad track in a public street, on hearing an approaching train, waiting to see from what direction it was coming, and was struck by it, is not necessarily guilty of contributory negligence.

2. It is not per se contributory negligence for one, on seeing an approaching train, to cross the track in front of it.

3. As great care is incumbent on operatives of a train passing along a public street as at a crossing.

4. Where the evidence is conflicting, the judgment will not be reversed, though the preponderating evidence seems to favor the appellant.

5. Plaintiffs' decedent was struck and killed at night on defendant's track by an engine running along a public street. The only evidence of his negligence was declarations he made before he died. According to witnesses, he said, variously, that he did not know how it happened; that he started to cross the track, and the train struck him; that he was standing on the track, and heard the train, but thought

it was on a cross track near by, and, before he could avoid it, it struck him; and that he did not know whether he was standing still or going across. *Held* that, in view of these statements and the burden of proof, contributory negligence could not be conclusively presumed so as to warrant a reversal of a judgment for plaintiff.

Appeal from district court, Dallas county; Edward Gray, Judge.

Action by Leonora Laskowski and others against the Houston & Texas Central Railroad Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

R. De Armond, for appellant. Parks & Carden, for appellees.

RAINEY, J. On July 27, 1895, Alex Laskowski was killed by being struck by an engine operated on appellant's road. This suit was brought by his wife and children and his father and mother to recover damages, alleging negligence on the part of appellant's servants in operating said engine. The defendant pleaded general denial, contributory negligence, and that deceased was drunk, and employed no care whatever for his protection. Judgment was rendered in the court below in favor of the wife and children, but against the father and mother. From the judgment in favor of the wife and children, the railroad company appeals.

## Conclusions of Fact.

On the morning of July 27, 1895, about 2:10 a. m., Alex Laskowski, while crossing appellant's track running along Central avenue, a public thoroughfare in the city of Dallas, was struck by an engine pulling a freight train, which caused the death of said Laskowski several hours later. At the time the accident, an ordinance of the city of Dallas was in force prohibiting trains being run within the city limits at a greater speed than six miles per hour. The place where Laskowski was struck was between Elm street on the south, and Pacific avenue on the north. Said streets run east and west, and Central avenue runs north and south. The distance between Elm street and Pacific avenue is one block, about 250 feet in width. The Texas & Pacific Railroad runs along Pacific avenue. On Elm street is a street-car line. North of, and running very near parallel with, Pacific avenue is Swiss avenue, distant about 100 feet, and on which is a street-car line. Just north of Swiss avenue, about 192 feet from the crossing, is the usual place for trains going south on the Central Railroad to stop and signal for the Texas & Pacific crossing. South of, and running parallel with, Elm street is Main street, one block distant, along which a street-car line runs. In the angle formed by the crossing of the Central and Texas & Pacific Railroads was situated a depot building, being south of the Texas & Pacific, and east of the Houston & Texas Central, which is used by both

<sup>1</sup> Writ of error denied by supreme court.



roads. Just south of said depot building was an express office. Along the east of the Houston & Texas Central track plank platform about 20 feet wide, was used by the Houston & Texas Central Railroad Company for the ordinary passenger incident to a depot. On the west side appellant's track, between Pacific and Elm street, there are some 10 used for saloons, restaurants, and on These houses were located about from appellant's track, and fronting and the galleries of same extended as 4 feet from the track. There was a platform along the west side of it. Some of these houses closed about 1 and some kept open all night. Last saloon was situated on the west side about 10 feet from the track. Central was not used by vehicles, but was used by pedestrians in traveling across it, and especially those going from the houses on the west side. was going south, and struck deceased 159 feet from the Texas & Pacific. The evidence was conflicting as to negligence of appellant's servants in operating train. The evidence of appellees inclined to warrant the jury to find, and hence to their verdict, we so conclude the train was running at the rate of miles per hour, that the bell was rung, nor were the necessary signals and that such was negligence, and proximate cause of the injury. deceased was doing at the time the occurred can only be surmised from many of witnesses who purport that his statements were in relation made after the accident. There was variance in his statements as detailed witnesses, but none of the state such as that contributory negligence was necessarily shown, and, also in deference to the verdict of the jury, we conclude that deceased was not guilty of contributory negligence, and that the jury were warranted in so finding.

#### Conclusions of Law.

The appellant requested a charge, which was refused by the court, to the effect that Laskowski was guilty of contributory negligence if he was standing "on defendant's track, and that he heard a train approaching, and waited to see from where it was coming, and was struck and injured by defendant's train while so waiting," although the train was being negligently run. It would have been improper for the court to have given this charge, for such conduct on the part of Laskowski would not, under the circumstances, necessarily have constituted contributory negligence. The evidence clearly shows that the place where the accident occurred was a public thoroughfare, and was constantly used by the public generally, and especially by those whose places of business

if Laskowski was struck and injured at a place other than a public crossing, plaintiffs could not recover unless defendant's employees actually saw him on the track, and failed to use the means in their power to prevent injuring him. This was an improper charge. Laskowski, when struck by the engine, was not at a crossing, but was at a place where as great care was incumbent upon the operatives of the train as at a crossing. The giving of such a charge, under the evidence, would have been equivalent to instructing the jury to return a verdict for the defendant.

Appellant's requested instruction No. 5 was to the effect that Laskowski was guilty of contributory negligence, and plaintiffs were thereby precluded from a recovery. The same question is raised by appellant's assignment of error that the verdict of the jury is contrary to the evidence. It is urged by counsel for appellant that the evidence shows the want of negligence on the part of appellant's employees, and that the conduct of Laskowski contributed proximately

to his own injury, and therefore plaintiffs are not entitled to recover.

As to the negligence on the part of appellant's employes, the evidence was conflicting. A number of plaintiffs' witnesses testified that the speed of the train was from 12 to 20 miles an hour; that no bell was ringing, etc. There was evidence introduced by appellant tending to discredit the testimony of plaintiffs' witnesses. Besides, quite a number of witnesses testified to the absence of negligence on the part of appellant's employes. But, under the law, it is the peculiar province of the jury to pass upon the weight of the evidence and credibility of the witnesses. They have done this, and found against the appellant. If the testimony of appellees' witnesses be true, and the jury by their verdict have so said, it was amply sufficient to support their finding. The mere fact that the preponderance of the evidence might seem to be in favor of appellant would not authorize us to set aside the verdict.

The remaining question is, was Laskowski guilty of contributory negligence? Unless we can say that the evidence necessarily shows that he was guilty of contributory negligence, we must hold in favor of the finding of the jury. No witness saw how the accident happened, and the only evidence on that point is the testimony of witnesses as to what deceased said in regard thereto. Some of the witnesses said that he stated he did not know how it happened; others that he started to cross the track, and the train struck him; and others that he was standing on the track, and heard the train, but thought it was on the Texas & Pacific track, and before he could get out of the way it struck him. What credence the jury gave the last testimony we cannot tell. It seems one of the witnesses made different statements in reference to this matter; one being that he did not "know whether he said he was standing still or going across." Taking the statements of all the witnesses on this point, and the circumstances surrounding the transaction, the burden being upon appellant to establish contributory negligence, we are not prepared to say that the evidence is of such probative force as would warrant us in holding that contributory negligence on the part of Laskowski necessarily existed. A case in point on this issue is *Railway Co. v. Wagley* (Tex. Civ. App.) 40 S. W. 538, and what is there said along this line is applicable here. Judgment affirmed.

#### GOAR et al. v. THOMPSON et al.

(Court of Civil Appeals of Texas. May 21, 1898.)

DEEDS — BROTHERS AND SISTERS — CONFIDENTIAL RELATIONS — CANCELLATION — TAKING PAPERS TO JURY ROOM.

1. A deed by the married sisters of decedent conveying their interest as heirs of his estate

to the brothers, procured on their representations, is not prima facie procured by fraud from the fact that the parties are near relatives.

2. Decedent left as heirs three married sisters, living in distant states, and three brothers who were in business with him. One of the brothers procured a deed from the sisters, conveying to him their interests in decedent's estate as heirs, for a certain consideration. *Held*, that if such brother fully disclosed all the facts in his possession with respect to the condition and value of decedent's estate, and if the sisters received the reasonable value of their interests, taking into consideration the evidence as to decedent's sickness for a long time before his death, and his consequent inability to attend to the firm's business and as to his having received more than his proportion of the firm's money, they (the sisters) could not have the deed set aside.

3. On an issue as to whether decedent's brothers had paid the sisters a fair consideration for a conveyance of their interests as heirs in his estate, where the evidence was conflicting, the jury, after retirement, were permitted to take to the jury room the invoice book of the firm in which the brother and decedent had been partners, which showed the firm's assets and liabilities. Counsel for plaintiff, on learning of the action of the court while the jury were still out, objected, but the court refused to withdraw the book from the jury. *Held*, that where the book had not been admitted in evidence, though defendant had been fully examined in reference thereto, the action was prejudicial error.

Appeal from district court, Dallas county; Edward Gray, Judge.

Suit by R. L. Goar and others against T. W. Thompson and others. From a judgment for defendants, plaintiffs appeal. Reversed.

This suit was instituted September 20, 1893, by Mrs. R. L. Goar, Mrs. Mary A. Pence, and Mrs. Lucy B. Wycoff, joined by their husbands, against T. W. Thompson, W. M. Thompson, and David D. Thompson, who were the brothers of the plaintiffs, to set aside and cancel a deed dated September 22, 1894, by which the plaintiffs conveyed to T. W. Thompson their interest as heirs at law in the estate of James D. Thompson, a brother of the female plaintiffs and the defendants. The said James D. Thompson died intestate in Dallas county, Tex., on September 6, 1894, leaving a large estate, consisting of real estate and personal property situated in the state of Texas, and principally in the city of Dallas; and plaintiffs also prayed for a partition of said estate.

Plaintiffs charge that their five brothers, James D., John B., William M., David D., and Thomas W. Thompson, came to Texas from the state of Iowa in 1876 and went into the mercantile business in Dallas, under the firm name of Thompson Bros., each having an equal interest in the business. That the business continued so until September 6, 1894, when James D. Thompson died intestate, leaving his four brothers surviving partners and his three sisters, the plaintiffs herein, his heirs at law. That the estate of the Thompson Bros. was at the date of the death of James D. Thompson of the value of more than \$150,000. That at the death of James D. Thompson his partners and brothers had full and accurate knowledge of the

location, extent, and value of his estate. That his sisters Mrs. Goar and Mrs. Pence lived in Iowa, and his sister Mrs. Wycoff lived in the state of Colorado. That they were married women, in feeble health, and unacquainted with business, and were ignorant of the character and value of the estate of their deceased brother, James D. Thompson, and of their interest in the same. That the sisters had always been friendly and affectionate with their brothers, and relied on them implicitly. That immediately after the death of James D. Thompson the surviving partners of the firm, the brothers of the plaintiffs, entered into a conspiracy and agreement to defraud the plaintiffs out of their interest in the estate of their deceased brother, and to acquire the same for much less than its actual value. Immediately after the death of James D. Thompson the plaintiffs were advised of the fact by letter, written by T. W. Thompson to Mrs. Goar at Van Meter, Iowa, and in a few days thereafter defendants procured the deed to be written which is sought to be set aside in this suit. This deed recites the death of James D. Thompson, the heirship of the plaintiffs and defendants, and in consideration of \$1,000 paid by T. W. Thompson to each of the grantors purports to convey to said T. W. Thompson all of their interest in the estate of James D. Thompson, deceased. That it was not the purpose of the brothers to convey anything to Thomas W. Thompson by this deed, but was an artifice on their part to induce the sisters to execute it. That after this deed was prepared in Dallas, Thomas W. Thompson took it to Iowa, and there, on September 21, 1894, he represented to Mrs. Pence that it was a paper that he wished all of them to sign, placing the title to the storehouse on Elm street in him, that he might sell it if an opportunity presented. That the deed was not read by Mrs. Pence or her husband, and, relying upon the fairness and integrity of T. W. Thompson, they signed the deed, believing it to be but a formal paper to enable him to sell a house and lot in Dallas. It was not intended by Mrs. Pence to convey her interest in the estate of James D. Thompson. Mrs. Pence at the time was, and had been for five years, an invalid. Mrs. Pence resided at Creston, Iowa, and from that place T. W. Thompson wired Mrs. Goar at Van Meter that he would be over to see her. September 23, 1894, at Van Meter, Iowa, he made to Mrs. Goar substantially the same statements as those made to Mrs. Pence, with the addition that James D. Thompson had only a working interest in the firm of Thompson Bros. That he had no interest in the firm property, and that he desired Mrs. Goar to execute the paper to quiet Lizzie, who was the wife of W. M. Thompson, and, relying upon the truth of the statements made to her, Mrs. Goar signed the paper without receiving any consideration therefor. From Van Meter,

T. W. Thompson went to Walsenburg, Colo., to see Mrs. Wycoff, and gave her substantially the same reasons why all parties wanted the title in his name. He further stated to Mrs. Wycoff that, after deducting the expenses of the long illness of James D. Thompson, her interest in his estate was only worth \$1,000. Relying upon these representations, and being ignorant of the value of her interest in the estate, she executed the deed and received the \$1,000. T. W. Thompson returned to Iowa, paid Mrs. Goar \$1,000, and paid \$1,000 for a house and lot in Creston, and had the deed made to a daughter of Mrs. Pence. No statement was made that this money and real estate was in satisfaction of the interest of Mrs. Goar and Mrs. Pence in the estate of their deceased brother. T. W. Thompson stated to Mrs. Goar and Mrs. Wycoff that the estate of Thompson Bros. was not worth over \$65,000. After the execution of the deed as stated, the Thompsons executed their wills, each making the surviving brothers their sole legatees.

Defendants (appellees) answered by general and special exceptions, and by general and special denial. They denied that they intended to defraud appellants, but paid to each of them \$1,000, which was largely in excess of their respective interests in the estate of James D. Thompson. That each of the appellants thoroughly understood the nature and effect of the instrument she executed, and that the same conveyed to defendants all of their interest of every kind in the estate of James D. Thompson. That the appellants, at the time they executed said deed, were informed that the value of the estate of Thompson Bros. was \$65,000, which was largely in excess of its real value. That for four years immediately preceding the death of James D. Thompson he was unable to give his attention to the business of said firm, or in any way render any assistance in carrying on said business, on account of which they were forced to employ an additional clerk at \$60 per month for said four years. That for two years and six months immediately preceding the death of James D. Thompson he was stricken with paralysis, and from that time until his death he was utterly helpless, and wholly deprived of reason and of the power of motion, requiring constant watching both day and night during the whole of said time. That during the whole of said two years and six months one of the appellees herein sat up and remained with him during the night, and during the daytime they kept with him a hired nurse during the whole of said period or time, for which they paid the nurse \$8 per week. That, never suspecting that their sisters would object to their brother receiving the attention that his condition required, appellees expended large sums of money during his sickness in properly caring for and attending to him, an itemized account of which expense was not kept by them. Appellees, however, did pay for nurse hire the

sum of \$960 during the time their brother was paralyzed, and they also paid out for medicines, physician's attendance, and for other necessities during said time, not including nurse hire, at least \$3,000. That both before and after he was stricken down with paralysis they traveled a great deal with him, expecting thereby to benefit his health. The various trips taken by and on account of their said brother are specifically set up in their answer, the total cost of which, including traveling expenses of every kind, amounts to \$2,500; making the total amount expended on account of his sickness at least \$6,000. That at the time of the execution of said deed by each of appellants she was informed of the nature and character of her brother's sickness, and at the large outlay and expenses necessarily caused thereby, and each of them agreed on account thereof to accept, and she was paid, \$1,000 in full payment for her interest in the estate of their said brother, which was largely in excess of her share. That the firm of Thompson Bros. was formed in 1876, T. W. Thompson, one of the appellees herein, contributing \$3,500, which was all the property or money originally invested in the business; and at no time since has any of the other members contributed anything to the assets of the firm aside from his labor and attention. That the firm owned only a two-thirds interest in their store building and lot, the brother W. M. Thompson having paid one-third of the purchase money therefor, and that one-third of said building and lot is his separate, individual property. Appellees, in their said answer gave a specific statement and description of the assets and liabilities of the firm of Thompson Bros. at the time of the death of their brother James D. Thompson, from which it appears that the total value of the property of said firm at said time, after deducting their liabilities, was about \$32,000. The trial of the case resulted in a verdict and judgment for defendants, from which judgment the plaintiffs have appealed.

Crawford & Crawford, for appellants.  
Leake, Henry & Greer and Frank Reeves, for appellees.

FINLEY, C. J. (after stating the facts). The first assignment complains of the charge of the court because it placed the burden of proof upon the plaintiffs. The contention of appellants is thus stated in their brief: "Said charge is erroneous, because the testimony was undisputed that the three female plaintiffs were the sisters of the defendants, and that the plaintiffs resided in distant states, and were not familiar with the character or value of the estate of their deceased brother, which estate had been purchased from them by the defendants. The proof showed that all the defendants, as well as the deceased brother, James D. Thompson, resided at Dallas, Texas, and that all the defendants were

perfectly familiar with the character and value of the estate, and that the plaintiffs were ignorant of such value and character, and the court should have instructed the jury that the burden was upon the defendants to show that the transaction was fair." The effect of the contention is that the deed from the sisters to their brother T. W. Thompson is prima facie void, it being shown that they knew nothing of the condition of their deceased brother's estate, while the purchasing brother possessed full knowledge and information; and that the burden rested upon the brother to show that the transaction was in all respects fair. The general rule is that the burden of proof rests upon the party who seeks to set aside and avoid a conveyance upon alleged grounds of fraud, and this proposition is not brought in question by appellants. There is a well-established exception to this rule, to the effect that where a confidential or fiduciary relation exists between parties to a transaction, and the person occupying the position of influence or trust obtains an advantage thereby in the dealing had between them, the burden rests upon him to show its fairness when it is attacked for fraud by the other party. Under such conditions, equity indulges the presumption of unfairness, and requires proof at the hands of the party claiming the validity and benefits of the contract that it is fair and reasonable. This rule does not apply to every case where confidence is reposed by one party in the other, nor to every case where the parties are closely related to each other by ties of blood. It has proper application to fiduciary relations, such as guardian and ward, trustee and cestui que trust, attorney and client, and principal and agent. It should also be applied whenever the parties stand in such relation to each other as to make it manifest that the one has acquired controlling influence and dominion over the other. It is the influence, power, and control of one over the other that brings the transaction between the parties under the suspicion of fraud, and which evokes the rule of equity requiring proof of good faith and fairness to sustain contracts between them. The fact that the parties are near relatives,—such as brother and sister,—and that the sister believes in the integrity of the brother, is not believed to be sufficient to render a contract between them prima facie fraudulent and illegal. We have been cited to no authority sustaining such a proposition, nor have we been able to find any reaching to that extent. *Safley v. Jackson*, 16 Tex. 579; *Jenkins v. Pye*, 12 Pet. 241; *Taylor v. Taylor*, 8 How. 183; 2 Pom. Eq. Jur. §§ 955, 956.

The rule is stated by an elementary writer upon evidence as follows: "When a question arises between a trustee and a beneficiary, or between other parties who are in a fiduciary relation, as to the good faith of a transaction between them, a peculiar burden is imposed upon the one in whom the trust

is reposed. When the complaining party proves such a relation, the burden of proof is cast upon the trustee or other person holding the relation of trust to show that the transaction is fair and reasonable, and that all proper information had been given to the other party. To state the rule more broadly, when confidential relations exist between two persons, resulting in one having an influence over the other, and a business transaction takes place between them, resulting in a benefit to the person holding the influential position, the law presumes everything against the transaction, and casts the burden of proof upon the person benefited to show that the confidential relation has been, as to that transaction at least, suspended, and that it was as fairly conducted as if between strangers. This rule applies, for examples, to agents, attorneys, physicians, partners, trustees, guardians, and to executors and administrators. A similar rule is applied in the dealings of a parent with his child, when the circumstances are such that an undue influence may naturally be inferred, and to the dealings of a child with an old or infirm parent, when the circumstances are such that the former assumes a fiduciary relation. And generally, when contracts are executed by persons of very weak minds arising from age or sickness, intoxication, or any other cause, although not amounting to absolute disqualifications, undue influence by the person benefited by the transaction will be readily inferred; and the burden of showing that the transaction is fair is placed upon the one so benefited." Jones, Ev. § 188. These sisters, the plaintiffs, were married women, living in states different from the brother; were in no way dependent upon him; were not shown to be weak-minded; and it does not appear that the brother had any unusual influence or control over them. Under these conditions, the general charge to the effect that the burden of proof was upon plaintiffs to show their right to recover we do not regard as error.

The second assignment is directed at the refusal by the court of these special charges: (1) "The plaintiffs in this case are entitled to recover, unless you find from the evidence that Thomas W. Thompson, at the time he procured the deed from plaintiffs, heretofore read in evidence, fully informed plaintiffs of the character, situation, and value of their interest in the estate of James D. Thompson, deceased, and fully advised them of every fact and circumstance tending to affect the value of their interest in said estate." (2) "Before the fact of the sickness of James D. Thompson could be considered as affecting the value of the interest of the plaintiffs in said estate, it must be shown by the defendants that the plaintiffs were fully advised of the nature and duration of the illness of J. D. Thompson, and with reasonable certainty of the amount expended by the defendants in the care and attention bestowed

upon James D. Thompson during his illness." The evidence fairly showed that the sisters' interest in their deceased brother's estate, not considering the deductions which the brothers claim should have been made in their favor on account of the long illness of the deceased, the consequent loss of time from the business, and heavy expenses incident to his illness, were greater than the sums paid as a consideration for the conveyance of their interests to their brother. Upon the point whether the condition of the estate, and the facts in relation to the claimed deductions on account of the long illness of the deceased, are fully disclosed to appellants, the evidence was conflicting. In the general charge, the court instructed the jury as follows: "Now, under this condition of facts, you are instructed as a matter of law, that upon the death of Jas. D. Thompson his estate vested in his brothers and sisters, each inheriting an individual (undivided) one-seventh of such estate, and that it was the duty, at the time Thos. W. Thompson visited his sisters, and proposed to purchase their interests in said estate, to make to them, and each of them, a full disclosure of all the facts in his possession material to plaintiffs' rights with respect to the condition and value of said estate of James D. Thompson, and it was his duty then to not deceive or misinform them, and to not conceal or withhold from them any information or knowledge material to their rights which he had regarding the said estate; and, further, to not make a purchase from them without their receiving what was reasonable and fairly the value of their interests in said estate under all the circumstances. Now, if you find and believe from the evidence that said Thos. W. Thompson failed in his duty to the plaintiffs as above set out and expressed,—that is, that he deceived his sisters, or withheld information in his possession material to their rights, or that he obtained their interests in said estate for a price less than the same were reasonably and fairly worth, under all the circumstances,—then, and in the event you so find, you will find for plaintiffs, setting aside the conveyance by them to Thos. W. Thompson, and for their interest in James D. Thompson's estate. If you find that the said Thos. W. Thompson made to his sisters a full disclosure of all the facts, and withheld nothing within his knowledge material to their rights, and that they, acting upon such information, and joined by their husbands, executed the conveyance and receipts above referred to, and received what was, under the circumstances, reasonably and fairly the value of their said interests, then, and in this event, you will find for defendants. In determining whether or not the plaintiffs received what was, under the circumstances, the reasonable and fair value of their interests, you can take into consideration whether or not, by reason of his long sickness before his death, in September, 1894,

James D. Thompson had drawn or received more than his just proportion of the moneys of the firm of Thompson Bros., and consequently whether or not any sum on this account and the absence of James D. Thompson during his sickness from the business of the firm should be charged against his interest in said business upon a division of said estate among his heirs; and it is for you to determine whether any such charge should have been made, and whether or not such facts entered into the matter of the purchase by Thos. W. Thompson of his sisters' interests in said estate; and you will also, in determining such issue, take into consideration the indebtedness of Thompson Bros. in September, 1894, as well as the property they owned." Upon a careful examination of the main charge, we have reached the conclusion that the issues involved were sufficiently and fairly presented.

The third assignment complains of improper matter being permitted to go to the jury after its retirement. After the jury had been instructed, and had retired to the jury room to consider the case, the jury requested that the invoice book of Thompson Bros. be sent to the jury room for its inspection. This book contained the invoices of the firm for the years 1892, 1894, 1895, and 1897, and covered 239 pages of a journal 9 inches wide and 13 inches long. The book had not been offered in evidence, and was sent to the jury room without the consent of plaintiffs or their attorneys, and while the attorneys were absent from the court house. As soon as the attorneys came into the court house, and were notified of the action of the court, they objected, the jury being still out, and considering their verdict. The court refused to withdraw the book from the jury, and the book remained in the possession of the jury during their deliberations, and until the verdict had been returned. The plaintiffs objected because the book had not been offered in evidence, and was sent to the jury room after the evidence and argument were closed, and the jury had retired. The judge, in his explanation, says that T. W. Thompson testified that the book contained the invoices of the firm for the years mentioned, showed the assets and liabilities of the firm, that Thompson had the book in his hand while on the witness stand, and was fully examined in reference thereto, and that it was commented upon in the argument. This was clearly error. The jury has no concern with matters which have not been introduced in evidence before them upon the trial. *Faver v. Bowers* (Tex. Civ. App.) 33 S. W. 132. It is contended by appellees that no injury could result from an inspection of the book, because the evidence was all one way as to the value of the business of the firm. The jury called for this book after their retirement, and manifestly deemed it important in deciding the issues involved. This book may have served to

strengthen their estimate of the truthfulness and value of the testimony of T. W. Thompson, between whom and the sisters there was conflict upon the material issue, whether he made a full disclosure of the material facts to them. If they found, on examination of the book, that it accorded with the testimony of the witness, that fact was calculated to favorably impress the jury in relation to the credibility which should be attached to his evidence generally. In *Beeks v. Odom*, 70 Tex. 189, 7 S. W. 702, as in this case, improper matter was taken out by the jury in its retirement, and the court treated it as error, but held it harmless. This holding, however, was based on the idea that no other verdict could have been properly rendered, independent of the improper matter considered by the jury. No such condition exists in this case. In *Hilliard on New Trials* (page 175, § 22) it is said: "It has been often held that the delivery to the jury of an unauthorized book or paper is ground of new trial. Thus, although the paper is said to be a mere estimate, shown to the jury by way of calculation, the court remark, 'We know not what effect this paper may have produced.' And where a material paper was given to the jury by mistake, the court would not hear a juror to show either that it did influence them or did not. So where a paper, calculated to mislead the jury, and influence their finding, was found in their room on retiring, and read by them, held sufficient ground for new trial." Judgment reversed, and cause remanded.

#### CAFFEY'S EX'RS et al. v. COOKSEY.

(Court of Civil Appeals of Texas. May 28, 1898.)

HUSBAND AND WIFE—GIFTS—PRESUMPTION—ADVERSE POSSESSION—BEGINNING OF POSSESSION—LIFE ESTATES—EVIDENCE—DEPOSITIONS—WAIVER—WITNESSES—COMPETENCY—COSTS—HARMLESS ERROR.

1. From the sole fact that the deed to property acquired during the marriage relationship is taken in the wife's name, no presumption arises that it was intended that she should take it as her separate property, and as a gift.

2. On an issue whether land deeded to the wife during marriage was community or separate property, or was purchased out of an estate in which she had only a life interest, whereby she took only a life estate, each of which claims was supported by evidence, an erroneous instruction that a gift to her was presumed from the taking of the deed in her name is reversible error.

3. Where the recovery of mesne rents was sought merely as incident to an action to recover lands, and did not necessitate additional costs, a recovery of the land, but not the rents, does not entail costs on plaintiff, and they are properly taxed with the judgment for the land.

4. A widow, under her husband's will, took a life estate in his property, and at her death it was to go to their son. Having remarried, she purchased lands out of such estate, and, taking title in herself, afterwards by intermediate conveyances deeded it to her second husband, who knew that she had only a life estate. *Held*,

that she took and conveyed a life estate only, and hence her son's right of action to recover such lands accrued only on her death.

5. Rev. St. 1895, art. 2302, making testimony of transactions with a decedent inadmissible against his legal representatives, does not apply to testimony by one claiming as reversioner to the separate life estate of decedent's wife, as to decedent's acts and conversations with his wife, tending to show that land conveyed by her to decedent belonged to her separate estate.

6. The filing of a plea of intervention, and the raising of new issues thereby, does not render previously taken depositions incompetent.

7. In an action against decedent's executors and an Odd Fellows Lodge, which was residuary legatee, to recover a reversionary interest in lands in which it is claimed testator had only a life estate, evidence that he was not an Odd Fellow is not admissible.

8. Where parties, after the reversal of a former judgment, and before the filing of the mandate, accepted service of notice to take depositions to be used on the new trial, reserving objections to the manner, form, or substance of the interrogatories and answers, and to the manner and form of the taking or of the return thereof, they waived objections that the mandate had not been filed.

Appeal from district court, Navarro county; L. B. Cobb, Judge.

Trespass to try title, originally begun by Lavinia Caffey against James L. Autry and another, as executors, and another, resulting in a judgment for plaintiff, which was reversed. 35 S. W. 738. Thereafter, plaintiff having died, J. B. Cooksey intervened, and had judgment, and defendants appealed. Reversed.

McKie & Autry, for appellants. W. W. Ballew, Frost, Neblett & Blanding, and Stone & Lee, for appellee.

BOOKHOUT, J. This was a suit originally instituted March 29, 1894, by Lavinia Caffey, as sole plaintiff, in plain form of trespass to try title, against the executors of R. W. Caffey, her deceased husband, and the Grand Lodge of Odd Fellows. By amendment, filed October 9, 1894, plaintiff alleged that the 220 acres of the J. M. Campbell survey in controversy was (1) purchased by her separate funds, and (2) that, although the land was conveyed to R. W. Caffey, he had made plaintiff a verbal promise to reconvey or devise all but a life estate in the land. On these issues a trial was had, resulting in a judgment for plaintiff, which judgment, upon appeal, was reversed by this court on February 22, 1896. See 35 S. W. 738. On February 27, 1896, the sole plaintiff died. On October 16, 1896, the intervenor, J. B. Cooksey, filed his plea of intervention, in which he alleged that the 220 acres of land in dispute was purchased by his mother with separate funds belonging to his father, J. K. Cooksey; and that his mother, Mrs. L. Caffey, by virtue of the will of J. K. Cooksey, took a life estate in said land, and that upon the death of Mrs. L. Caffey the land went to him, intervenor. Intervenor asked judgment for the land, and also prayed for rents from February,

1894, to the time of the death of his mother; he alleging that he was her sole heir. The defendants James L. Autry and Frank S. Kerr, executors of R. W. Caffey, deceased, and the Independent Order of Odd Fellows, answered by general and special exceptions, plea of not guilty, by special answers, and the statutes of limitation of three, five, and ten years. There was a trial with the aid of a jury, and verdict for intervenor, upon which judgment was duly entered. Defendants' motion for new trial being overruled, they have duly perfected their appeal to this court. The facts are more fully stated in the opinion on the former appeal of this case, to the report of which reference is here made. 35 S. W. 738.

Appellants' first contention is that the court erred in the sixth and ninth clauses of its general charge, and in giving a special charge requested by intervenor. The charges complained of are: "(6) All property held by R. W. and Lavinia Caffey at the time of their separation is, in the absence of evidence to the contrary, to be presumed to be their community property. This instruction is to be read in connection with paragraph 9 hereof." "(9) If the money, or part thereof, paid for such 454 acres, was common funds of R. W. and L. Caffey, it is to be presumed from the fact that the deed was in the name of L. Caffey; that said R. W. Caffey made a gift to his wife of his money that went into said land; and, unless some of the funds of J. K. Cooksey went to the purchase of said land, the same was the separate estate of Mrs. L. Caffey, and in that case she might convey the same to R. W. Caffey through the trustee, Hodge, provided she did not act under duress, and there was a valuable consideration for the same." Special charge asked by plaintiff, and given: "You are charged that, as between husband and wife, when the land is negotiated for by the husband, and at his instance is deeded to his wife, the law presumes that such conveyance was intended as a gift or donation to the wife by the husband, and such property would be considered the separate property of the wife, and the burden of proving otherwise is upon the husband, or those claiming under him, except innocent purchasers for value." Our supreme court has passed upon the construction to be given a deed to property taken in the name of the wife during the existence of the marriage relation in numerous cases. The leading case seems to be the case of Higgins v. Johnson, 20 Tex. 389. In that case Chief Justice Hemphill, speaking for the court, in a very able opinion lays down the law governing this question, from which we deduce the following rules: (1) Where, during the existence of the marriage relation, a deed to property is taken in the name of the wife for an onerous consideration, and there is no recitation in the deed as to what estate furnished the considera-

tion, the presumption is that it was purchased with community funds, and that such property so purchased is community property. This presumption may be rebutted by proof that it was the intention of the husband, in taking the deed in the wife's name, to make the property her separate property. (2) If the evidence shows the consideration was the separate property of the husband, then it will be presumed that in taking the deed in the wife's name the husband intended to make a gift of the property to the wife. (3) If the evidence shows the property was purchased with the separate estate of the wife, and the deed is taken in her name, the property remains her separate property. These rules are applicable to a case arising between husband and wife, or their heirs, legatees, or representatives, and are sustained by the following authorities: *Higgins v. Johnson*, 20 Tex. 389; *Smith v. Strahan*, 16 Tex. 321; *Dunham v. Chatham*, 21 Tex. 244; *Story v. Marshall*, 24 Tex. 307; *Baldrige v. Scott*, 48 Tex. 189; *Smith v. Boquet*, 27 Tex. 513; *Johnson v. Burford*, 39 Tex. 248. It is not true that from the sole fact that the deed to property acquired during the existence of the marriage relation is taken in the name of the wife, the presumption arises that it was intended as a gift to her. As before stated, it may be shown that such was the intention of the husband in having the deed so made. It follows that paragraph 9 of the court's charge, and the special charge given at plaintiff's request, were error. If the deed made by Mrs. Caffey to the trustee, Hodge, was made under duress, then the question as to whether the land in dispute was the community property of R. W. Caffey and Lavinia Caffey or whether it was the separate property of Mrs. Lavinia Caffey was a material issue in the case. If the land was the community property of R. W. and L. Caffey, then R. W. Caffey was authorized to dispose of one-half of it by will. If it was purchased with funds belonging to the estate bequeathed by the will of J. K. Cooksey, then it became subject to the terms of said will, and upon the death of Mrs. Caffey Intervener became entitled to the same. There was evidence tending to support each of these contentions. The charge of the court as to the presumption arising from the fact that the deed was taken in the name of Mrs. Caffey, under this condition of the record, became material, and is reversible error.

Appellants present the proposition, under their second, seventh, and thirty-seventh assignments of error, that when there are two causes of action set up, and the plaintiff recovers only upon one of them, the cost of the other should be charged against plaintiff. The intervener in this suit sought to recover the land described in his plea of intervention, and also sought to recover from the appellants, as executors of the will of

R. W. Caffey, the rents of the land since said executors took possession of the same. The jury found for intervener for the land, but did not find rents. It appears that the rents were sought to be recovered as an incident to the recovery of the land. It does not appear that any additional costs were made necessary by reason of intervener's seeking to recover rents. The costs were properly taxed against appellants.

Appellants, under their sixth and thirty-fifth assignments of error present the following proposition: "The sale by a trustee of the property held is a repudiation of the trust, and at once sets in motion limitation against the beneficiary." The intervener alleged that the property in dispute was purchased with money belonging to the estate of his father, in which his mother, under the will, took a life estate; that his father died in 1870, leaving a will, under which the wife was to take a life estate in the property, and at the wife's death it was to go to the son, intervener herein. He further alleged that in 1882 the land in dispute was purchased with money belonging to the estate of J. K. Cooksey, deceased, and the deed to the same was taken in the name of Mrs. Caffey (formerly Mrs. Cooksey). The proof shows that in 1884, Mrs. Caffey, in the division of the property between herself and R. W. Caffey, deeded the property in controversy to a trustee, who deeded it to R. W. Caffey. Intervener became of age April 26, 1886. He filed his plea of intervention in this suit on October 16, 1896. Under the will of J. K. Cooksey, his wife, Mrs. Cooksey, took a life estate in all his property, and at her death the property went to the son, James B. Cooksey, appellee. If the land involved in this suit was purchased with the funds belonging to the estate bequeathed by the will of her former husband, then said land became subject to the terms of the will. When she (Mrs. Caffey) conveyed the land to the trustee, to be conveyed by said trustee to R. W. Caffey, said Caffey, having knowledge that the land was purchased with funds belonging to her first husband, took only such estate in the same as Mrs. Caffey had, which was a life estate. No right of action accrued to the intervener until after the death of his mother.

Appellants' fourteenth, fifteenth, and sixteenth assignments of error complain of the action of the court in admitting in evidence, over defendants' objections, the answers of Mrs. Caffey in reference to her treatment by R. W. Caffey, and showing the circumstances under which the partition between herself and R. W. Caffey was made. This evidence was passed upon by this court on the former appeal of this case, and held admissible. We do not deem it necessary to add anything to what was there said. 35 S. W. 740.

The court did not err in admitting the testimony of the intervener as to conversations between Mr. and Mrs. Caffey had in his hear-



ing, and as to threats made by Mr. Caffey against Mrs. Caffey in such conversations. The intervener was not seeking to recover either as an heir or legal representative of R. W. Caffey, and hence the statute (Rev. St. 1895, art. 2302) does not make his testimony incompetent. *Wootters v. Hale*, 83 Tex. 564, 19 S. W. 134.

Appellants' tenth assignment of error complains of the court's action in admitting in evidence, over defendants' objections, the depositions of Mrs. Lavinia Caffey, T. J. Saxon, and M. S. Finch, Sr. It is insisted that these depositions were all taken before the appellee's plea of intervention was filed herein, and when the issues raised by the pleadings were different from what they were after the intervention was filed; and that the interrogatories upon which said depositions were taken were crossed by defendants upon the theory that the true issues were then presented by the pleadings, and defendants, not then having any notice of the claim asserted by the intervener, did not cross the interrogatories with the view of adducing evidence on the issues presented by said plea of intervention; and, further, the intervener was not then a party to the suit. We do not think there is merit in this contention. The pleadings in a cause are often amended, and new issues made, after the taking of depositions; but this does not render the depositions on file incompetent. The court did not err in admitting the depositions in evidence.

Appellants' thirty-fifth assignment of error complains of the action of the court in admitting, over defendants' objections, evidence to the effect that R. W. Caffey was not an Odd Fellow. We do not think this evidence was competent, and it should not have been admitted.

Appellants complain of the action of the court in admitting in evidence, over objections thereto, the depositions of the witnesses H. F. Tarer, A. P. Haynes, A. T. Haynes, and Mrs. A. P. Haynes; the objection being that the depositions were taken in June, 1896, while the case was pending under the pleadings of the original sole plaintiff, and prior to the filing of the plea of intervention, in October, 1896, and while the case was pending on appeal in the court of civil appeals, and before the mandate of that court had been issued or filed in the district court. The original suit was filed by Mrs. Caffey, the mother of intervener, Cooksey. Mrs. Caffey alleged that the property in dispute was purchased with her separate funds. The case was tried, and an appeal taken to this court, and on February 22, 1896, the former judgment for plaintiff was reversed, and the cause remanded. 35 S. W. 738. The mandate was not filed in the district court until October 9, 1896. The interrogatories were delivered to appellants' attorneys to accept service and cross on May 26, 1896. Said attorneys accepted service, "reserving the

right now and at all times hereafter to object and except to the manner and form and substance of said interrogatories, and the answers that may be made to them, and to the manner and form of taking, or the return thereof, should any irregularity appear; and agree, upon such conditions, that a commission may issue at once," etc. We think that the effect of this acceptance was to waive the objection that at the time the commission issued and the depositions were taken the mandate from this court on former appeal had not then been filed in the district court. We do not think that the depositions were incompetent on behalf of the intervener by reason of the same having been taken before the plea of intervention was filed, and after the issues, to some extent, were changed thereby. For the error in the charge, the judgment is reversed, and the cause remanded.

#### FIRST NAT. BANK OF GREENVILLE v. PENMAN et al.

(Court of Civil Appeals of Texas. June 18, 1898.)

##### DEFENSE OF USURY—PLEADINGS.

The defense of usury is not available unless specially pleaded, and verified by the party seeking to avail himself of it, as required by Rev. St. 1895, art. 3107.

Appeal from district court, Hunt county; Howard Templeton, Judge.

Action by First National Bank of Greenville against G. W. Gamble. From a judgment in favor of William Penman, garnishee therein, plaintiff appeals. Affirmed.

Neyland & Neyland, for appellant. Craddock & Looney, for appellee.

BOOKHOUT, J. January 1, 1897, appellant sued G. W. Gamble in the district court of Hunt county, Tex., on an indebtedness of \$3,900, and on January 2, 1897, caused William Penman to be served as garnishee therein. On June 11, 1897, Penman filed a sworn answer to said writ, in which he denied being indebted to said Gamble then or at the time of the service, denied having any effects belonging to said Gamble then or at the time of service, and denied that he knew of any other person or persons indebted or having effects belonging to Gamble. He disclosed in his answer that on January 1, 1897, Gamble had conveyed to him, as trustee, a certain stock of goods, wares, and merchandise, situated in Greenville, for the purpose of securing certain preferred creditors,—among others, W. F. Balthrop and Ed L. Jones. He set out his authority under said instrument, and alleged that he, acting thereunder, had sold the property. He also showed that the preferred creditors had accepted under the trust deed prior to the service of the writ, except the appellant. He interpleaded the

preferred creditors who had accepted, and prayed to be allowed his commissions as trustee, fee for selling, costs of suit, and that he be protected by the judgment of the court. This answer was contested by appellant, by affidavit filed November 17, 1897, in which appellant alleged that Balthrop was preferred for more than Gamble owed him, and that the debt of Jones was fraudulent, fictitious, and unjust, and that Gamble was not indebted to Jones in any sum. On November 18, 1897, Jones, having been interpleaded, filed his answer, in which he excepted to the controverting affidavit of appellant, and alleged that his debt was just, valid, and a subsisting debt, due him by Gamble for money loaned, and on hearing he prayed that plaintiff take nothing as to him, and that he have judgment against Penman, garnishee, for the amount of his debt, principal, interest, and attorney's fees. The only pleading filed by appellant was the contesting affidavit. The case was tried November 20, 1897, and resulted in judgment for the defendants. Penman was allowed \$195.11 commissions and \$25 fee for answering the writ. Jones was given judgment against Penman for \$627.73, and Penman was directed, after discharging the debts preferred and expenses, if there remained any money, to pay the same over to appellant. From this judgment the appellant bank has appealed.

Appellant presents but two assignments of error, which are as follows: "(1) The court erred in not declaring the chattel mortgage from Gamble to appellee void, as to the claim of Ed L. Jones, because said claim was plainly excessive, and greater than the amount really due to Ed L. Jones by Gamble, in this: Jones made his first advance of \$200 to Gamble June 15, 1896, and the other sums making up the amount of the note preferred were advanced by said Jones on divers occasions in September and November of same year. Said note was not really executed until the 1st day of January, 1897, and bore 10 per cent. interest from June 15, 1896, and on its face dated June 15, 1896, that being the highest legal rate of interest. (2) The court erred in not setting aside Jones' claim, and giving judgment against appellee to the amount of Jones' note."

January 1, 1897, G. W. Gamble executed a chattel mortgage to William Penman, trustee, by which he conveyed to him a certain stock of goods, wares, and merchandise, store fixtures, and an unexpired lease for the storehouse in the town of Greenville, in trust, to secure certain creditors therein named, and to be paid in the order named in said chattel mortgage. The names of the preferred creditors, and the amount of their debt, and the order in which they were to be paid, are as follows: (1) House rent, due W. F. Balthrop, \$510.35; (2) W. A. Jones, \$28.29; (3) M. Arvin, \$61.00; (4) Scott, Force & Goodbar Hat Co., of St. Louis, \$274.85; (5) Sherrill & Hefner, \$100; (6) Ed L. Jones, of St. Louis,

Mo., with interest, \$550; (7) First National Bank of Greenville, \$3,900. Immediately upon the execution of the instrument, the trustee, Penman, accepted the trust, and all of the creditors, except the First National Bank of Greenville, accepted the terms of the chattel mortgage. The appellant bank did not accept under the chattel mortgage, but instituted suit upon its claim against G. W. Gamble, and caused a writ of garnishment to be served upon William Penman. Penman answered the writ, denying any indebtedness to Gamble, and denying that he had any property of said Gamble in his possession, excepting such as he held in trust under the chattel mortgage, setting up the terms of the same. This answer was contested by an affidavit filed by appellant, and in its contesting affidavit appellant attacked the claims of Balthrop and Jones as being fraudulent, fictitious, and unjust. All the beneficiaries in the chattel mortgage were interpleaded, and answered in the case. Ed L. Jones excepted to the controverting affidavit of appellant, and alleged that his debt was a just, valid, and subsisting debt, due to him by Gamble for money loaned, and he prayed that plaintiff take nothing as to him, and asked for judgment for the amount of his debt, principal, interest, and attorney's fees. The basis of the claim of Ed L. Jones was money loaned by him to Gamble, as follows: On June 15, 1896, \$200; in September, 1896, \$200; and in November, 1896, \$150,—making a total of \$550, for which, on January 1, 1897, Gamble executed his note to Jones for \$550, dating said note June 15, 1896, the date of the first loan, providing by the terms of said note that it should draw 10 per cent. interest from its date on the amount thereof.

The contention of appellant is that Ed L. Jones is only entitled to interest on the respective sums of money from the time that each was loaned to Gamble, and that interest on the full amount at the rate of 10 per cent. from June 15, 1896, is greater than that allowed by law, and is therefore usurious, and renders his entire claim void. The only attack made by appellant upon the debt of Ed L. Jones is that it is, and was at the time of the execution of said chattel mortgage, fraudulent, fictitious, and unjust; and, in fact, "plaintiff has reason to believe, and does believe, that said Gamble was not indebted to said Jones in any sum whatever at the time of the execution of said chattel mortgage, but that, if said Gamble was indebted to said Jones at that time, the debt was created by the collusive agreement between said Jones and said Gamble, in order that said Gamble might cheat, swindle, and defraud his bona fide creditors out of the amount of the pretended debt for which he preferred said Jones in said mortgage." If it be admitted that appellant could attack the claim of Ed L. Jones on the ground that it embraced usurious interest, then we hold that, in order to do so, it should specially plead

such fact. Our statute provides that "no evidence of usurious interest shall be received on the trial of any cause unless the same shall be specially pleaded and verified by affidavit of the party wishing to avail himself of such defense." Rev. St. 1895, art. 3107. We think, under this statute, that, if appellant wished to avail itself of the defense of usury against the claim of Ed L. Jones, it should have complied with said statute. Having failed to do so, it is in no position to complain of said claim because it contained usurious interest.

This is the only question insisted upon by appellant. Appellant expressly waives any attack upon the claim of Balthrop. Finding no error in the record, the judgment of the court below is in all things affirmed.

### MISSOURI, K. & T. RY. CO. OF TEXAS v. HUNT.

(Court of Civil Appeals of Texas. May 28, 1898.)

#### RAILROADS—KILLING STOCK—INSTRUCTIONS.

1. An animal was killed at a private crossing, where the railroad company was not required to signal the approach of trains. There were two public crossings at which the company was required to give such signals; but which were too remote from the place of the accident for failure to give signals to have been the proximate cause thereof. *Held*, that an instruction that if the animal was killed near a public crossing, and defendant's servants failed to give the required signals, such failure would be negligence, and, if the proximate cause of the killing, render defendant liable, was not applicable to the facts.

2. Where the evidence did not show that failure to give signals for a crossing was the proximate cause of the killing of an animal, an abstract instruction, permitting a recovery if the jury should find the accident to have occurred at the crossing and signals were not given, was error.

Appeal from district court, Dallas county; Edward Gray, Judge.

Suit by P. B. Hunt against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Alexander, Clark & Hall, for appellant. McCormick & Spence, for appellee.

RAINEY, J. This suit was brought by appellee to recover of appellant the value of one pony, killed by appellant's train within the switch limits of the town of Red Oak. A recovery was had, from which this appeal was taken.

In the first paragraph of the charge the court instructed the jury as follows: "Now, if you find, and believe from the evidence, that plaintiff's horse was killed at or near a public crossing over defendant's track, and you find that the above-explained requirements of the law as to the blowing of the whistle and ringing of bell were not observed by defendant's servants running said train,

then such failure to observe such requirements would be negligence; and if you find the facts so to be, and you further find that such negligence, if any, was the proximate cause of the killing of said horse, then, in these events, you will find for plaintiff," etc. This paragraph of the charge is made the basis of appellant's first assignment of error. We are of the opinion that the charge is erroneous:

1. Because the crossing near which the animal was killed was not such a public crossing as required the employes of the railroad company to ring the bell and blow the whistle for same. The crossing was used in going to and from a private lumber yard, and there is nothing to show that same was intended for or used for general travel by the public. *Railway Co. v. Warner*, 88 Tex. 642, 32 S. W. 868. It was shown that there were two public crossings, one north and the other south of the depot building; but we think the place of the killing of the animal was too remote from the crossing for the failure to blow the whistle or ring the bell for the crossing to be the proximate cause of the killing. The killing of the animal having occurred at a place where appellant was not required to fence its road, the care imposed by law upon appellant in operating its train was ordinary care. *Railway Co. v. Cocke*, 64 Tex. 151; *Railway Co. v. Dunham*, 68 Tex. 231, 4 S. W. 472; *Railway Co. v. Saunders* (Tex. Civ. App.) 26 S. W. 128; *Railway Co. v. Glenn* (Tex. Civ. App.) 30 S. W. 845; *Railway Co. v. Wallace*, 2 Tex. Civ. App. 270, 21 S. W. 973. Ordinary care being the measure of appellant's duty under the circumstances, the charge of the court, though correct as an abstract proposition of law, was not applicable to the facts of the case, and was calculated to mislead the jury.

2. As we view the evidence, there is no circumstance by which the jury were authorized to conclude that the failure to give the statutory signals, if there was a failure, was the proximate cause of the accident. The evidence shows that appellant's train was being operated through the town of Red Oak at its usual rate of speed, it being a train that passed through said town without stopping. The animal killed was permitted to run at large, and when the train was near the animal ran out from behind the lumber piles near the track, and attempted to cross the track ahead of the train, and was struck by the engine and killed. After the animal came in view of the operatives of the train there was not sufficient time for the operatives to have prevented the accident. If the circumstances had been such as required the giving of signals for a crossing, still the charge was error, being abstract, as no proximate cause was shown. *Railway Co. v. Nycum* (Tex. Civ. App.) 34 S. W. 460.

The judgment is reversed, and the cause remanded.

CRENSHAW v. HEDRICK et al.<sup>1</sup>

(Court of Civil Appeals of Texas. April 9, 1898.)

## BUILDING AND LOAN ASSOCIATIONS — USURY — LAW GOVERNING — WITHDRAWALS.

1. A foreign building and loan association, doing business in Texas under a permit from the state, by making a loan contract showing that both parties intended it should be performed in Texas, subjects the contract to the usury laws of Texas, though the note was made payable in the foreign state, where the contract was not usurious.

2. After making stock payments and usurious interest payments, a borrower gave notice to a building association for withdrawal of his stock, claiming that the loan had been paid. The by-laws provided for a withdrawal and return of the installments when the loan had been paid in full, and for sale of the stock in case of default. The borrower also tendered any balance that might be found due, and sale under the mortgage was restrained. *Held* that, though there was a small amount due, the borrower was entitled to the cancellation of the note and mortgage on payment of the same.

3. Where a mortgage to a building association provided for 10 per cent. attorney's fees in case of legal proceeding, a borrower who sued to cancel his mortgage as paid was liable for attorney's fees where a small balance was found due the association.

4. The association was not entitled to recover fines imposed after a member had availed himself of the withdrawal privilege.

5. Plaintiff was not entitled to have the sum paid for membership fees applied on his debt.

Appeal from district court, Grayson county; Don A. Bliss, Judge.

Suit by Charles Crenshaw against Julian G. Hedrick and others to restrain a sale under a deed of trust. From a judgment for defendants, plaintiff appeals. Reversed.

Head, Dillard & Muse and Brown & Crenshaw, for appellant. Dudley G. Wooten and J. W. Finley, for appellees.

FINLEY, C. J. On July 10, 1896, the appellant filed his suit in the district court of Grayson county against appellee, in which he alleged that he was the owner of 50 shares of stock in the defendant corporation; that on May 12, 1891, he borrowed of appellee \$2,500, for which he executed to it his note for the sum of \$5,000, of same date, due six months from date, with interest at \$12.50 per month, and calling for the payment of \$35 per month as monthly assessment upon stock. The note was secured by deed of trust on property described in plaintiff's petition, situated in Grayson county, Tex., and further secured by lien on stock and installments paid in, and to be paid in, when the said contract was made in Grayson county, Tex. The question of the homestead was waived upon the trial of the said cause, and the issue confined to the question of usury, which was pleaded by plaintiff, alleging facts showing its usurious character. The writ of injunction was issued,

restraining sale under the deed of trust. The defendant answered by general denial, and pleaded that the contract was not usurious under the laws of the state of Louisiana, where the appellee was incorporated, and where the obligation was payable. Defendant asked for a judgment for its debt, foreclosure of its lien, etc. The plaintiff filed a supplemental petition, in which he alleged the fact that there was a branch office in Sherman, Grayson county, Tex., and a local treasurer thereof elected, to whom all payments were made by this plaintiff, in said state and county. Judgment was rendered by the court against plaintiff for the sum of \$3,648.75, foreclosing the lien upon the land described in plaintiff's petition, and upon the stock, and ordering the same to be sold in satisfaction of said judgment; and further ordering that upon payment by plaintiff of \$3,462.50, interest and costs, he shall be entitled to withdraw said stock at its withdrawal value. Plaintiff excepted in open court, and gave notice of appeal, and has duly prosecuted his appeal to this court.

There is no statement of facts in the record, the case being brought up on conclusions of fact and law filed by the trial judge. The said conclusions are as follows:

"(1) On June 10, 1890, plaintiff subscribed for ten shares of stock of the defendant, and paid one dollar membership fee on each share. On the same date S. M. Luckett subscribed for forty shares of stock in the defendant corporation, and paid membership of one dollar per share. About July 1, 1890, before the said Luckett had paid anything to the defendant corporation, except membership fee, he sold and transferred his said stock to plaintiff for \$20.

"(2) The defendant corporation, the Southwestern Building & Loan Association, is and was on June 10, 1890, a corporation duly incorporated under the laws of the state of Louisiana, and had its domicile and principal office for business in the city of New Orleans, in said state.

"(3) The object and purpose for which the said defendant corporation was established were as follows: (a) To assist members who held stock in said corporation in building and purchasing homes; (b) to enable stockholders in said corporation to save and accumulate money, and obtain a reasonable interest thereon; and (c) to give to cities and towns where branches of said corporation should be established the advantages and benefits of local building and loan associations. The charter of said corporation provides that a fund shall be accumulated from the monthly installments paid in on account of subscriptions to the capital stock, and from rentals, discounts, and interest on loans and other sources, and that this fund, after deducting the expense fund provided for in its charter, shall be used for the purchase and sale of real estate, for the building, sale,

<sup>1</sup> Writ of error denied by supreme court.

and rental of homesteads and real estate, and for effecting loans upon mortgage securities within the United States of America; and as shares of stock in said corporation shall mature for paying off and liquidating the same, the defendant corporation's charter provides that each share of stock therein shall be of the face value of \$100. Under said charter the said shares were divided into two classes,—current shares and single-payment shares. Current shares were to be paid up in monthly installments of seventy cents per share. Single-payment shares were to be issued on the payment of such sum as, when properly invested, would produce, in the opinion of the board of directors of said corporation, the full face value of said shares at the maturity of the series to which such shares belonged. At the close of each fiscal year the profits were to be proportioned, and a dividend credited to the value of each share in force in such manner as the board of directors might determine; provided that such dividend should not exceed the earned proportion of the profits belonging to, and withdrawable by, said share. Whenever any shares, by reason of the payment of account of subscription thereto, together with the addition of the profits, accumulations, and dividends, should be worth the par value of \$100 each, the charter of said corporation provided that the shares so arrived at par or maturity should, on the surrender of the certificate of stock, be liquidated in a manner consistent with the best interest of the corporation. The charter provided that payments on current shares, installments, and interests should be due and payable at such times and dates as might be fixed by the board of directors. Any shareholder who should fail or omit to pay the installment on his shares, for the period of one month after the same shall become due, should forfeit and pay as a penalty the sum of ten cents a share on each share upon which such stockholder failed or omitted to pay the installments due, and such shareholder should pay the same penalty on each share for each subsequent similar default, said fines to be paid before any other installments or interests could be received, but any shareholder owing fines could have the same remitted by paying all arrearages, and also by paying in advance a sum equal to the amount of said arrearages. The charter provided that shareholders should be entitled to withdraw their stock under such terms and conditions as might be provided in the by-laws of said corporation. Under the charter, the receipts of said corporation were to be divided into two classes, which should be called, respectively, the 'Capital Fund' and the 'Expense Fund,' which were to be kept entirely separate and distinct one from another. The capital fund consisted of all receipts which did not go into the expense fund, and no part thereof could be

used for the operating expenses of the association or any expenses except taxes. The expense fund consisted of admission, transfer, and withdrawal fees, together with \$10 per share per annum on each and every share; and the charter provided that said expense fund should constitute no part of the capital stock of the association, but the amount belonging to the expense fund of each year was appropriated by the charter to be used by the board of directors to pay and liquidate all operating expenses of the association for said year, paying salaries of officers and agents, for paying commissions, for services of whatsoever kind, for meeting and defraying the expenses incident to printing, advertising, stationery, rent, and all other expenses of the association, except taxes, and neither the capital fund, nor any of the branches or series of the association, had any right, claim, or participation in said expense fund at any time. The charter provides that the corporate powers of the defendant corporation shall be exercised by a board consisting of ten directors, to be elected by the shareholders. Said directors have and had the power to enact by-laws for the corporation. Said charter gave and gives said corporation the right to carry on business and establish branches in any county or district of any other state of the United States. Each of such branches was to be controlled by the local board of directors, under the management, supervision, and direction of said corporation, and subject to the by-laws, rules, and regulations adopted by the board of directors of the association.

"(4) The defendant corporation had elected a board of directors under its charter, who had enacted by-laws for the government of the association, and had established branches of the corporation in various counties in other states, including one at the city of Sherman, in Grayson county, Tex. The by-laws provided that the members holding stock in said corporation in each town might organize a local board, consisting of a president, vice president, secretary, treasurer, and attorney, and a board of not less than three, nor more than nine, directors, all of whom had to be stockholders. The defendant Julian G. Hedrick was the elected secretary and treasurer, and plaintiff, Crenshaw, was elected local attorney of the board at Sherman. Other persons holding shares were elected as members of the local board at Sherman, among them defendant Carpenter, who was president of the local board.

"(5) The plaintiff, Crenshaw, subscribed for the first ten shares of stock of the defendant, held by him for the purpose of enabling him to hold the position of local attorney for the local board at Sherman, but he purchased the said forty shares from Luckett, for the purpose, and with the view, of obtaining a loan from the defendant.

"(6) Among the by-laws enacted by the general board of directors of the defendant were the following: 'At any time after one year, and before two years, the certificate (or stock) may be returned, and members will be entitled to receive for each share the money paid into the capital fund of such shares, with six per cent. interest. At any time after two years, and before three years, the certificate may be returned, and the member will be entitled to receive for each share the money paid into the capital fund on such share and seven per cent. interest, and after three years eight per cent. interest. A withdrawal fee of fifty cents per share will be charged. A member desiring to withdraw his shares shall be required to give the association sixty days' notice of such intended withdrawal. The association shall not be required, without the consent of the directors, to use more than one-half the money received from monthly payments in any one month for the payment of withdrawing stock. Members who have obtained loans cannot withdraw their shares unless the loan is paid. Payments of each share shall be 70 cents per month, and shall commence one month from date of certificate, and shall be due each subsequent month, on the day of the month on which certificate is dated: provided, however, that the board of directors may require monthly payments on all or a portion of the stock outstanding, to be paid on the same day of the month. One dollar per annum on each share shall be passed to the expense fund, as provided in the charter.' 'All money due from members of the association, or from it to the members, shall be payable at the home office in New Orleans, La.' 'If the loan is granted, interest for the first six months may be deducted from the amount of the loan.' 'Loan on real estate may be repaid at any time after one year, on thirty days' notice.' If a borrower thereon neglects to pay interest due on monthly payments for a period of six months from the time the same shall be due, then the whole principal mentioned in the mortgage and note or bonds shall at once become due and payable without notice, and proceedings may be commenced forthwith to foreclose such mortgage, or to collect said bond or note, in such manner as the board of directors may deem best. All contracts made by or with the association shall be deemed to have been made at the home office in New Orleans, La.

"(7) On the 12th day of May, 1891, the defendant corporation loaned to the plaintiff the sum of \$2,500, deducting therefrom the sum of \$75, which the defendant retained as interest on said sum for the first six months. The plaintiff executed and delivered to the defendant corporation his promissory note for the sum of \$5,000, which note was in all respects as set forth in his original petition. At the same time plaintiff executed and delivered to the defendant a mortgage or deed of trust, in substance as follows: On May

12, 1891, plaintiff executed and delivered his deed of trust to said corporation on certain lots described in his petition to secure the payment of a note for the sum of \$5,000, bearing the same date, due six months after date, payable to the order of said corporation at its office in New Orleans, La., together with interest thereon at the rate of \$12.50 per month from date, payable monthly, and, in case of legal proceedings, 10% attorney's fees, insurance, costs, and expenses, secured by pledge of the installments already paid in, and those to be paid in, on fifty shares of stock of said association, in the name of the plaintiff, and also secured by the aforesaid deed of trust. It is provided in said note that, so long as the interest and installments on said stock are punctually paid, the payment of the obligation shall not be demanded, but extended until, exclusive of interest dividend, the amount of said installment and dividend credit thereon shall be equal, exclusive of interest, to the amount of this obligation, at which time the certificate representing such stock shall be canceled, and the association released from all liabilities thereon, and the note canceled and returned to the plaintiff, each offsetting the other. It is further provided in said note the failure to pay the interest and installments on said shares for six months renders it due, and authorizes the association to sell said stock as provided in its charter; and it is further provided in the deed of trust that, on a failure to pay the interest and said installments for a period of six months, that the trustee or substitute shall sell the property at the request of the Southwestern Building & Loan Association, or to the holder or holders of said note.

"(8) At the time the plaintiff subscribed for the first ten shares of stock of the defendant corporation a certificate for said shares was issued to him, which was, in substance, as follows: No. 1,857. Series No. 4. Ten shares, for \$1,000. It shows on its face that the plaintiff has subscribed for and owns ten shares of stock, and holds the same under the following conditions: He was to pay 70 cents monthly for each share, payable on the day of the month on which this certificate is dated, until such shares mature or are withdrawn, payment due and payable at the home office at New Orleans, La., provided that any branch may elect a local treasurer, and payments made to him at the home office for transmission, he being deemed the agent of members, and not of the association. It is further provided that the monthly installments, together with fines and interest, shall go to the capital fund, and authorizes the association to deduct \$1 per share per annum for the expense fund. In default of the monthly payment, a fine of 10 cents is assessed. Stock is nonforfeitable, but, in case of default in monthly payments, the shares of stock may be sold, and proceeds applied—First, to the payment and expenses of

the sale; second, to the payment of monthly dues, arrears, and fines, and balance to the owner of stock. The association has the right to bid therefor an amount equal to that which is due for its monthly dues unpaid and fines, and, if it becomes a purchaser of the shares, stock shall be canceled, and all funds standing to the credit of such stock forfeited to the other shareholders. It is further provided that stock on which no loans are made may be transferred on the books of the association, when not in arrears for dues or fines, and shares on which loans have been made may be transferred to the purchaser of the property on which the association has its lien by the consent of the board of directors. It is further provided in the certificate at the end of each fiscal year the profit arising from interest, premiums, fines, and other sources shall be apportioned among the shares in good standing; that, whenever monthly payments on the shares and the profits apportioned to such shares amount to the sum of \$100, it matures the said shares, and monthly payments shall cease. There are other provisions in this certificate which do not affect this case.

"(9) The certificate for the Lockett shares is in all respects the same as the certificate for the ten shares, except the number, the name of the shareholder, and the amount.

"(10) Plaintiff paid to the defendant corporation all his monthly stock dues on said fifty shares of stock, amounting to the sum of \$35 per month, and the monthly interest, amounting to the sum of \$12.50 per month, up to and including January 19, 1895, beginning with June 10, 1890. After January 19, 1895, plaintiff failed and refused to make any further payments to the defendant corporation whatever.

"(11) A short time prior to July 10, 1896, the defendant corporation, through its board of directors, exercised its option, and declared the entire principal and interest on said loan to be due, and directed the trustee, Julian G. Hedrick, named in said deed of trust, to advertise the land described in said deed of trust for sale at public outcry, in accordance with the laws of Texas, which the said Hedrick was proceeding to do when he was restrained by writ of injunction issued from this court July 10, 1896.

"(12) Plaintiff in open court waives the issue of business homestead set forth in his pleading, and agrees, so far as this suit is concerned, the property described in said deed of trust shall not be considered as his homestead.

"(13) At the time plaintiff and his wife executed and delivered said deed of trust to the defendant corporation, plaintiff hypothecated and transferred to the defendant corporation all of said shares of stock for the purpose of securing the said loan, installments, and dues thereon.

"(14) At the time plaintiff subscribed for said ten shares of stock, and purchased said

forty shares of stock from said Lockett, the laws of the state of Louisiana, as set forth in Exhibit C of the defendants' first amended original answer, were in force, have continued in force, and are still in force.

"(15) The laws of the state of Louisiana, as the same have been finally and authoritatively construed by the court of last resort in that state, to wit, the supreme court of said state, provide that the said contract between the plaintiff and the defendant corporation is not such a contract as can involve or permit the defense of usury as between a stockholder and the association.

"(16) The provisions of the charter of the defendant corporation and the by-laws hereinbefore set forth were not devised by the defendant corporation for the purpose of evading usury laws of the state of Texas.

"(17) The first payment of interest on said loan made by plaintiff to the defendant corporation was on January 9, 1892, and was for the sum of \$12.50. Since that date the plaintiff paid to the defendant corporation, as interest on said loan, the sum of \$12.50 each month, up to and including January 19, 1895.

"(18) Prior to the time of the issuance of said stock by the defendant corporation to plaintiff said corporation had duly complied with the laws of Texas relative to foreign corporations doing business in this state, and had obtained a permit to do business in the state.

"(19) In October, 1895, the plaintiff gave the defendant corporation the notice in writing required by the by-laws of the defendant corporation for the withdrawal of his stock, but did not pay to said corporation the balance on said loan still due, nor offer to pay the same, claiming that he had paid said loan in full and wanting settlement."

#### Conclusions of Law.

"(1) Under the decision of the supreme court of this state, the loan contract between plaintiff and defendant corporation, as embodied in the note and deed of trust mentioned in the conclusions of fact, was and is usurious, and therefore all the payments made by the plaintiff to the defendant corporation as interest, including the sum of \$75 retained by the defendant corporation at the time it made the loan, should be applied to the satisfaction and payment of the original amount of the loan, to wit, \$2,500. The plaintiff having made forty-five payments of interest, of \$12.50 each payment, and having also paid the sum of \$75 as interest in advance, he is entitled to have the sum of \$637.50 deducted from the \$2,500 originally loaned him by the defendant corporation, which leaves a balance due from the plaintiff to the defendant corporation of \$1,862.50 on said loan.

"(2) The plaintiff, never having complied with the provisions of the by-laws with reference to the withdrawal of stock where a loan is made thereon, is not entitled to have the withdrawal value of said stock credited on said loan.

"(3) The defendant association is entitled to recover all monthly stock dues held by him that have accrued since January 19, 1895, being \$35 per month, amounting to \$1,490.

"(4) The defendant corporation is also entitled to recover of the plaintiff fines on the unpaid monthly stock dues at the rate of 10% per share for each installment of stock dues that is in arrears, amounting to the sum of \$200.

"(5) The defendant corporation is entitled to recover of plaintiff the sum of \$186.25, being 10% of the balance of said loan, as attorney's fees.

"(6) The defendant corporation is entitled to recover judgment against the plaintiff for the aggregate of said amounts, to wit, the sum of \$3,648.75, with interest from this date at the rate of 6% per annum; and is entitled to have its said mortgage on the property described therein, and its said lien on said stock, foreclosed.

"(7) The decisions of the supreme court of this state holding contracts like the one in this case usurious do not impair the obligation and validity of contracts, within the meaning of the constitution of the United States."

#### Opinion.

1. The first assignment of error complains that the court erred in not holding the contract of loan usurious, and in not rendering judgment for the plaintiff canceling the note and mortgage. The court did hold the contract to be usurious, and applied the interest payments to the satisfaction of the principal of the debt. It found, as a matter of fact, that the charter and by-laws of the defendant corporation were not devised for the purpose of evading the usury laws of the state of Texas, but it did not find that this particular character of contract was required by the charter and by-laws of the corporation, nor that the form of the contract used was not adopted for the purpose of covering up usury, nor that the contract was in good faith intended to be performed in Louisiana. The corporation was doing business in this state under a permit from the state, and the contract, by its terms, manifests that it was the intention of the parties that it should be performed in this state. The contract is of the same character as that held usurious in *Association v. Griffin*, 90 Tex. 490, 39 S. W. 656. And in that case it was held that the fact that the corporation was chartered under the laws of Dakota, and the note made payable in that state, where the contract, under its laws, was not usurious, would not prevent the application of our usury laws. As to the other proposition raised by the assignment,—that the note and mortgage should have been canceled by the judgment,—we will dispose of that question hereafter.

2. The second assignment urges that the court erred in not allowing appellant credit upon the loan debt of \$2,500 of his stock pay-

ments of \$35 per month, in addition to the \$637.50 paid as interest. The amount paid and denominated "interest" was \$637.50; the amount of monthly stock payments made prior to the loan was \$350; the amount of such stock payments made after the loan was \$1,500,—the whole aggregating \$2,487.50. This amount, it will be seen, only lacked \$12.50 of being the amount of the original loan,—\$2,500. The appellant paid regularly the interest and stock payments up to and including January 19, 1895, at which time he had paid, as before stated, \$2,487.50 in all, not including membership fees and dues. In October, 1895, appellant gave notice to the company in writing, as required by the by-laws, for the withdrawal of his stock, claiming that the full amount of the loan had been paid by him. In July, 1896, the company treated him as in default, and declared the debt, principal and interest, to be due, and directed the trustee to sell under the deed of trust. The trustee was proceeding to execute this order when the injunction in this case was issued, and he was thereby restrained from doing so. The by-laws expressly permit the withdrawal of stock, and provide that the monthly stock payments previously made shall be returned to the stockholder, with certain specified rates of interest thereon. It is required, however, in cases where members have obtained loans, that they cannot withdraw their stock and receive back the installments paid, unless the loan is paid. It is further provided that the stock is nonforfeitable, but, in case of a default, a sale of the stock is provided for. Had appellant's loan of \$2,500 been fully paid up at the time he made the demand for withdrawal and settlement, he would have been entitled, under the plain express terms of the contract, to the withdrawal privileges. The law will make the application of the usury paid by him as payment upon the principal debt. This sum, and the stock payments which he had made, lacked only \$12.50 of meeting the entire loan. The loan company was demanding a continuation of the regular installments, including the usurious interest, while appellant was contending that the debt was paid. The sale attempted under the deed of trust being restrained, the rights of the parties are to be judicially determined, as invoked by the pleadings of the parties.

There is nothing in the contract of the parties which has worked a forfeiture of appellant's right to have his stock payments applied in liquidation of the loan debt. There was no sale of the stock and purchase by the company, as provided for in the by-laws. The matter stands just as if the company were called upon to make an adjustment of the whole matter. Appellant in his pleadings tenders payment of the amount which it may be determined he is justly due and owing, and asks a cancellation of his note and deed of trust. We are of opinion that



he is not entitled to have the membership fees of \$50 applied upon the debt, as is contended for by him. *Association v. Griffin*, 90 Tex. 480, 39 S. W. 656. But we think it quite clear that he is entitled to have that disposition made of his stock payments. The company could not require that he should pay more usury before availing himself of the withdrawal privilege provided for in the by-laws of the company. As to the \$200 fines allowed by the court below, there was no such default as justified such fines, and they should not be recovered by the company. As to the attorney's fee of 10 per cent. provided for in the contract, the appellant, having brought the company into court, and contested all indebtedness, made himself liable for 10 per cent. attorney's fees upon the amount finally recovered by the company. Judgment will here be rendered, in accordance with the views expressed, reversing the judgment of the court below, and decreeing in favor of appellant the cancellation of the note, mortgage, and shares of stock, upon appellant's paying to the clerk of this court, for the use and benefit of said company, within 20 days, such sum as will cover \$12.50, with 6 per cent. interest from January 19, 1895, 10 per cent. attorney's fees thereon, and all costs of the court below; and, in case he shall fail to comply with this requirement, said loan company shall have judgment for such sum and a foreclosure of the deed of trust. Reversed and rendered.

#### GARRETT v. GARRETT.

(Court of Civil Appeals of Texas. June 25, 1898.)

**EVIDENCE—TRANSACTIONS WITH DECEDENT—SECONDARY EVIDENCE—ADMISSIBILITY—CLAIM AGAINST TESTATOR—RIGHT TO SUE EXECUTOR.**

1. By Rev. St. 1895, art. 2302, in actions by or against executors in which judgment may be rendered against them as such, neither party shall testify against the other as to any transaction with the testator unless called by the opposite party. *Held*, that a plaintiff suing an executor on an account against the testator cannot testify in his own behalf that decedent had an understanding with the witness that the balance due was to become due at a certain date, and that he told witness that he owed him.

2. Where one sued an executor on an account against his testator, the statement of a witness that testator's account books showed that he was indebted to plaintiff is not admissible where it is not shown that the books were lost, or any excuse given for failure to produce them.

3. Where a judgment admitting a will to probate, and appointing an executor, was appealed from, as under Rev. St. 1895, art. 2262, the matter was triable de novo, the judgment below was annulled by the appeal, and the executor could not act nor be sued pending such appeal.

Appeal from Rains county court; James A. Boyd, Judge.

Action by W. H. Garrett against D. L. Garrett, administrator of James Garrett, de-

ceased. Judgment for plaintiff, and defendant appeals. Reversed.

Perkins, Gilbert & Perkins and B. M. McMahon, for appellant. Alex. Mason, for appellee.

**BOOKHOUT, J.** This suit was instituted September 18, 1897, in the county court of Rains county, Tex., upon an account dated September, 1894, for the purchase from appellee by appellant's testator of certain promissory notes, and to establish said account as a claim against the estate of the testator, James Garrett, deceased. It was alleged that the notes were sold by appellee to James Garrett, now deceased, in September, 1894, at a price then agreed upon, being the face of the notes, with a discount of 15 per cent. thereon. It was alleged that the account had been presented to the executor, and that he had declined to either allow or reject it. There was a prayer for the account to be established as a claim against the estate of James Garrett, deceased, and that the same be paid according to law. The executor pleaded general denial, statute of limitations of two years, and that after being appointed executor of the estate of James Garrett, deceased, by the county court, an appeal was taken from said order, and the judgment appointing him superseded, and that said appeal was still pending in the district court of Rains county undetermined. The case was submitted to the court without the intervention of a jury, and resulted in a judgment for plaintiff in the sum of \$208 against the estate of James Garrett, deceased, to be paid according to law. From this judgment, the executor has prosecuted his appeal in due form to this court.

Appellant's first assignment of error reads as follows: "The court erred in permitting the plaintiff, W. H. Garrett, to testify that the deceased, James Garrett, had an understanding with witness that the balance due on the account sued on was to become due in July, 1896, and that the deceased, James Garrett, told witness W. H. Garrett in July, 1896, that he owed witness; because the witness was an interested party, and could not testify to a declaration of the deceased, and to contracts made with him and deceased which were not in writing,—all of which is fully shown in defendant's bill of exceptions No. 1." The record shows that W. H. Garrett, in his own behalf, testified as set forth in the foregoing assignment. The testimony was objected to, the objection overruled, and a bill of exceptions taken. This evidence was clearly incompetent, under article 2302, Rev. St. 1895. *Parks v. Caudle*, 58 Tex. 216; *Reddin v. Smith*, 65 Tex. 26; *Johnson v. Lockhart* (Tex. Civ. App.) 40 S. W. 640.

Appellant's third assignment reads: "The court erred in permitting the plaintiff to

prove by the witness T. C. Spradlin that after the death of James Garrett, deceased, the witness and plaintiff, W. H. Garrett, and defendant, D. L. Garrett, examined the books of deceased, and, from the best they could tell, deceased owed plaintiff about \$208, and witness told defendant that the witness believed James Garrett, deceased, owed plaintiff about \$208; because the books of deceased were better evidence, and because the statement by witness to defendant was hearsay,—all of which is shown by defendant's bill of exceptions No. 3." The record shows that the witness Spradlin, in behalf of appellee, testified, over objection by appellant, that he (witness) examined the books of James Garrett after his death, and, from the best he could tell, deceased owed plaintiff \$208, and further testified as set forth in said assignment of error. Objection was made to the testimony, as stated in the foregoing assignment, and the objection was overruled, and the evidence admitted, to which appellant took a bill of exceptions. The books of the deceased were not shown to have been lost, and there was no excuse given for the failure to produce the books upon the trial. The books themselves were the best evidence. The statements of the witness as to the contents of the books were purely hearsay, and the evidence was incompetent. If the appellee desired to show an indebtedness due him by the books of James Garrett, deceased, he should have introduced said books in evidence. *Baldrige v. Penland*, 68 Tex. 441. 4 S. W. 565.

By the fourth assignment appellant claims that the account sued upon was barred by the statute of limitations of two years. The evidence upon this contention is conflicting. In view of the disposition we make of this case, we do not deem it proper to comment upon the testimony. The statute prescribes that, upon the death of any person against whom there may be a cause of action, the law of limitation shall cease to run against such cause of action until 12 months after such death, unless an administrator or executor shall have sooner qualified according to law upon such deceased person's estate, in which case it shall cease to run only until such qualification. *Sayles' Rev. Civ. St.* 1897, art. 3369.

Appellant's fifth assignment reads: "The evidence shows that the defendant, D. L. Garrett, has got no legal authority to allow the claim against the estate of James Garrett, deceased, and did not have, and did not have when the claim sued to establish was presented to the defendant; because the judgment of the court admitting the last will and testament of James Garrett, deceased, to probate, and appointing D. L. Garrett executor of said will, had been appealed from, and was pending in the district court of Rains county, Tex., when said account was presented to defendant for allow-

ance, and, by virtue of said appeal, defendant's acts as executor of the estate of James Garrett, deceased, were estopped." The will of James Garrett, deceased, was admitted to probate, and letters of executorship granted appellant on April 2, 1897, and he qualified as such executor on April 25, 1897. An appeal was taken from said order to the district court by parties contesting the probate of the will, the order granting letters of executorship to appellant, and said appeal was perfected April 30, 1897. The account sued upon was sworn to May 31, 1897, and was presented to appellant for allowance, as executor, in the month of September, 1897; and this suit was instituted on said account September 18, 1897. The term of the district court of Rains county to which the appeal was prosecuted did not begin until the last of November, 1897, and said appeal was pending at the time of the presentation of the account to appellant for allowance or rejection; and, at the time of the institution and trial of this suit, said appeal had not been disposed of. Under our statute, trials in the district court on appeal from the county court in probate matters are had de novo; and, such being the case, the judgment in the county court is annulled by the appeal, and the executor during the pendency of such appeal is without authority to act. *Rev. St.* 1895, art. 2282; *Moore v. Jordan*, 65 Tex. 395; *Kelly v. Settegast*, 68 Tex. 13, 2 S. W. 870; 1 *Williams, Ex'rs*, \*490. The record clearly shows that, pending the appeal from the county to the district court, the account was presented to appellant as executor for his acceptance or rejection. He has no authority to act pending such appeal; and as no suit could be maintained for the account until rejected by a legal representative of the estate of James Garrett, deceased, it follows that this suit cannot be maintained. *Rev. St.* 1895, art. 2082. The judgment will be reversed, and the cause dismissed. Judgment reversed, and cause dismissed.

#### HOLLOWAY SEED CO. v. CITY NAT. BANK.<sup>1</sup>

(Court of Civil Appeals of Texas. March 19, 1898.)

FRAUDULENT CONVEYANCES—REMEDY OF LIENORS—KNOWLEDGE OF GRANTEE—CORPORATIONS—GARNISHMENT—AFFIDAVIT—LIEN—CONFUSION OF GOODS.

1. A merchant, being involved, organized a corporation, taking all but two shares of its stock in his own name, and transferred his stock in trade to it as a consideration therefor. He then sold all the shares but one, chiefly to members of his own family. He was manager of the corporation, and, in making the trade, acted for both parties. *Held*, that a finding that the corporation was a party to the fraud was justified.

2. *Rev. St.* 1895, art. 219, requires an application for garnishment to state that the gar-

<sup>1</sup> Writ of error granted by supreme court.

nishee is indebted to defendant, that he has effects belonging to him, or that the garnishee is a corporation or joint-stock company, and defendant a stockholder therein. Articles 220 to 222 prescribe a writ of garnishment, which requires the garnishee to answer whether he is indebted to defendant, and what effects of defendant he has, and whether others are indebted to him or have effects belonging to him, and, if the garnishee is a corporation or a joint-stock company, it is required to answer as to what number of shares, if any, defendant owns therein. Article 226 requires the garnishee to answer under oath as to the several matters inquired of in the writ. Article 245 provides that plaintiff may controvert the garnishee's answer by affidavit stating in what particular the same is incorrect, whereupon, under article 247, issue is to be formed and tried as in other cases. *Held*, that plaintiff may controvert the garnishee's answer as to any matter concerning which the writ requires a disclosure, and is not confined to the ground stated in the controverting affidavit.

3. Where goods were fraudulently transferred to a corporation for shares of its stock, which were afterwards disposed of, with the exception of one, a creditor of the seller was not compelled to foreclose his lien on such share, but might disregard it, and subject the entire property transferred to payment of his claim.

4. Where a garnishee sold part of the attached goods, and invested the proceeds in other goods of like character, and willfully mingled them with the attached goods, the value of the entire stock remaining the same, the garnishment lien extended to both the old and the new goods.

#### Appeal from district court, Dallas county.

Action by the City National Bank against the Holloway Seed Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

This suit was commenced May 7, 1896, in the district court of Dallas county, Tex., by appellee, a national banking corporation, against appellant, a private corporation organized under the laws of Texas. On said date, appellee sued G. R. Holloway, and sued out an original attachment, and based thereon, and on the same day, sued out a writ of garnishment against appellant, alleging as grounds for the writ that George R. Holloway owned shares of stock in appellant company, and that the appellant was indebted to George R. Holloway, and served the same on appellant May 7, 1896. Appellant filed its answer to said writ on July 3, 1896, in which it denied all indebtedness to George R. Holloway, and denied that it held effects belonging to him, and admitted that he owned one share of stock in said company, and denied all the other statutory questions. On February 8, 1897, appellee recovered judgment against George R. Holloway in the original suit for \$4,971.58 and costs, which judgment is still in force. On May 12, 1897, appellee filed a contest of appellant's answer, alleging that George R. Holloway had on May 2, 1896, sold to appellant a stock of merchandise consisting of farm and garden seeds and grains, situated at No. 292 Elm street, city of Dallas, which was all the property he then owned subject to execution; that said sale was fraudulent

as to appellee, and that no title passed to appellant by said sale; that said goods were of the value of \$5,000; and prayed for a judgment against appellant for said stock of seeds, and, in the event they are not forthcoming for their value, to be made as under execution. On May 14, 1897, the appellant filed its tender of issues, denying all fraud or knowledge of fraud in said sale, and alleging that it was a purchaser in good faith for full value. This paper was filed under protest, and over the appellant's objection and exception. Said cause was tried on May 14, 1897, before the court, and resulted in judgment in favor of appellee against appellant; the court, in its judgment, finding that said sale was fraudulent and void as against appellee, foreclosing appellee's garnishment lien thereon, and in the alternative, in case said identical goods sold by George R. Holloway could not be found, gave judgment against appellant for \$5,000, which it found was the value of said seeds, to be made as under execution. Appellant's motion for new trial being overruled, it has duly perfected its appeal to this court. The case was tried before the court, without the intervention of a jury; and, upon request, the trial judge filed his conclusions upon the facts and law. The facts will appear in the opinion.

Hudson & Woody and Crawford & Crawford, for appellant. McCormick & Spence and Morris & Crow, for appellee.

BOOKHOUT, J. Appellant's first assignment of error complains of the court's finding of fact that the sale made by George R. Holloway to appellant was made with the intent to delay and defraud the creditors of George R. Holloway, because it is insisted the undisputed evidence shows that Holloway disposed of the same to pay his debts, and believing the appellee's debt had been extended. The cashier of the bank denies that there had been an extension of appellee's debt; that, upon a request being made for an extension of the same, he absolutely declined to grant it. There is evidence supporting the court's conclusion that the sale was made to the appellant with the intent to delay and defraud the creditors of Holloway, and we cannot say that the conclusion of the trial court in this respect is error.

Appellant also complains of the finding of the trial court that the Holloway Seed Company, through George R. Holloway, its chief promoter and only stockholder at the time it purchased said stock of seeds, knew of the fraudulent intent, and became a party to the fraud. It is claimed that George R. Holloway did not own all the stock at the time of the transfer, and that, in making the sale, he acted for himself, and adversely to the interests of the company, and therefore the company is not bound by the knowledge of his fraud in said transaction. The Hol-

loway Seed Company was incorporated on May 2, 1896, with a capital stock of \$5,000, divided into 50 shares, of the face value of \$100 each. The incorporators were George R. Holloway, Thomas James, and William Shuttles. Holloway owned 48 shares, and James and Shuttles owned 1 each. Holloway was the president and general manager of the company. On May 2, 1896, George R. Holloway sold and conveyed to the Holloway Seed Company his entire stock of seeds, taking in payment stock in said company. On May 4, 1896, he sold the shares of stock to different parties, mainly the members of his family,—5 to his wife, 10 to one of his daughters, 15 to another, 5 to his son, 1 to his attorney, and retained 1 himself. He says: "I sold said stock of seeds to the Holloway Seed Co., May 2, 1896. I represented both sides, and made the sale for myself, and accepted it for the company; and, after the sale, I sold the shares of stock as above stated." At the time of this transfer, Holloway owed appellee about \$4,500, for which appellee held security of the value of \$1,000; and Holloway also owed one Finley a debt, which went to judgment on May 1, 1896, and which he compromised in September, 1896, by paying \$800 out of the money he received from the sale of the stock in the corporation. Of the money received from the stock in the corporation, he paid commercial debts of the said company, amounting to \$2,000. After selling the stock of seeds, he owned no property subject to execution, except the shares of stock in the corporation, which he sold on May 4, 1896, and excepting 15 acres of land upon which appellee held a deed of trust to secure its debt. The evidence was sufficient to support the finding of the court complained of in the second assignment of error.

There was evidence that the stock of seeds was worth \$5,000 at the time of the service of the writ of garnishment, and we therefore overrule appellant's third and fourth assignments of error.

Appellant's fifth assignment of error complains of the action of the court in requiring appellant to file its tender of issues, for the reason that the court had no jurisdiction to determine the title to the stock of seeds, because this issue was not raised by the affidavit for garnishment, said affidavit not charging the garnishee with the possession of any effects belonging to George R. Holloway. After the garnishee was served, he filed an answer, making full answer to all the questions contained in the writ. The plaintiff in garnishment filed an affidavit under the statute controverting the garnishee's answer, and thereafter, under the statute, tendered issues under which it sought to hold the garnishee liable. The garnishee orally objected to the tendering of issues for the reasons above stated. The court overruled the objection, and the garnishee took

a bill of exceptions. This assignment, as well as the sixth and seventh assignments of error, raises the question of the sufficiency of the affidavit for garnishment to support the judgment in this case. Without holding that a defect in the affidavit could be reached in this manner, we shall proceed to consider these assignments.

The contention of appellant is: that the affidavit having alleged that the Holloway Seed Company is indebted to George R. Holloway, and that the garnishee is a private corporation, and that the defendant George R. Holloway is the owner of shares of stock in said corporation, the plaintiff is confined to the grounds set up in said affidavit as a basis for charging the garnishee, and therefore the garnishee cannot be charged for any effects which it may have in its possession belonging to the defendant Holloway. This requires a construction of the statutes of this state in reference to garnishment proceedings. The plaintiff, desiring a writ of garnishment under the laws of Texas, must make an application therefor in writing, under oath, signed by him, stating the facts prescribed by Rev. St. 1895, art. 217, authorizing the issuance of the writ; and, further, that the plaintiff has reason to believe, and does believe, that the garnishee, stating his name and residence, is indebted to the defendant, or that he has in his hands effects belonging to the defendant, or that the garnishee is an incorporated or joint-stock company; and that the defendant is the owner of shares in such company, or has an interest therein. Id. art. 219. It will be seen that the statute specifies three grounds upon which a writ of garnishment may issue, and upon which a party may be charged as garnishee, namely: (1) When the garnishee is indebted to the defendant; (2) when he has in his hands effects belonging to the defendant; (3) when the garnishee is an incorporated or joint-stock company, and the defendant is the owner of shares in such company, or has an interest therein. The writ requires the garnishee to appear and make answer, under oath, what, if anything, he is indebted to the defendant, and was when the writ of garnishment was served, and what effects, if any, of the defendant, he has in his possession, and had when such writ was served, and what other persons, if any, within his knowledge, are indebted to the defendant, or have effects belonging to him in their possession. Id. art. 220. In addition to prescribing the requisites of the writ, the statute goes further, and directs the form of the writ. Id. art. 222. The statute further provides that, "from and after the service of such writ of garnishment, it shall not be lawful for the garnishee to pay to the defendant any debt or to deliver to him any effects; \* \* \* and any such payment or delivery shall be void and of no effect to so much of said debt or effects as may be necessary to satisfy plaintiff's demand." Id. art. 225.

The answer of the garnishee must be under oath, in writing, and signed by him, and shall make true answer to the several matters inquired of in the writ of garnishment. *Id.* art. 226. If the plaintiff should not be satisfied with the answer of any garnishee, he may controvert the same by an affidavit in writing, signed by him, stating that he has good reason to believe, and does believe, that the answer of the garnishee is incorrect, stating in what particular he believes the same incorrect. *Id.* art. 245. The defendant may also in like manner controvert the answer of the garnishee. *Id.* art. 246. If the garnishee whose answer is controverted is a resident of the county in which the proceeding is pending, an issue shall be formed under the direction of the court, and tried as other cases. *Id.* art. 247. The requisites and form of the writ are the same, whether the affidavit alleges the garnishee is indebted to the defendant or has effects belonging to the defendant in his possession. If the garnishee is an incorporated or joint-stock company, and the defendant is alleged to be the owner of shares therein, or has an interest therein, then the writ shall further require the garnishee to answer upon oath what number of shares, if any, the defendant owns in such company, or owned when such writ was served, and what interest, if any, he has in such company, or had when such writ was served. *Id.* art. 221. It makes no difference which one of the three grounds is set out in the affidavit as a basis for the issuance of the writ; the requisites of the writ prescribed by article 220 must be met in order to make the same a valid writ.

In support of appellant's contention, we are referred to two cases decided by the supreme court of Michigan,—*Mack v. Brown*, 20 Mich. 335, and *Botsford v. Simmons*, 32 Mich. 357,—in which it is held that the garnishee cannot be required to disclose as to matters not alleged in the affidavit. These decisions seem to be based upon the statutes of that state, which provide that, "upon making the necessary affidavit, the writ shall issue commanding the officer to serve and summon such person (the garnishee) to appear, \* \* \* to make disclosure in writing under his oath to be filed with the clerk of such court touching his liability as garnishee of the principal defendant, as charged in said affidavit." *How. Ann. St. § 8058*; *Wade, Attachm. p. 567*. It would seem that a copy of the affidavit is attached to and accompanies the writ. *Drake, Attachm. (5th Ed.) p. 669*. The affidavit for the writ of garnishment constitutes the plaintiff's declaration or petition, and, upon the coming in of the answer, the issues are deemed formed. *How. Ann. St. § 8068*; *Wade, Attachm. p. 569*. It will be seen that there is a wide distinction between the statutes of the state of Michigan and of this state in reference to the procedure by garnishment, and especially the requisites and form

of the writ. The decisions of Wisconsin seem to hold that the garnishee is only required to make disclosure as to matters alleged in the affidavit. *Goll v. Hubbell*, 61 Wis. 293, 20 N. W. 674, and 21 N. W. 288. This is by reason of the statutes of that state, which only require such a disclosure. *Wade, Attachm. p. 718*. Garnishment proceedings being purely statutory, we can draw but little aid from the decisions of other states. Appellant cites the case of *Bowers v. Insurance Co.*, 65 Tex. 52. In that case a writ of garnishment had issued in the suit of *Bowers v. Brande*, to be served upon J. B. Littlejohn, agent of the Continental Insurance Company and the N. O. Insurance Company. The companies appeared, and moved to quash the affidavit, bond, and writ. The motion was sustained. The court says in the opinion that the affidavit for garnishment does not allege that the insurance companies are indebted to the defendant Brande, but that Littlejohn, as their agent, was so indebted. The affidavit, therefore, was clearly insufficient. It was further stated that the court acquired no jurisdiction over the garnishees. The judgment quashing the garnishment and dismissing the proceedings was affirmed. Again, we are cited to *Insurance Co. v. Freidman*, 74 Tex. 56, 11 S. W. 1046. *Freidman Bros.* were judgment creditors of J. C. McDonald, and caused an affidavit to be made that the Insurance Company of North America and another insurance company were indebted to McDonald, with the view of obtaining a writ of garnishment. The affidavit did not state whether either of the insurance companies was a corporation, joint-stock company, or a co-partnership, but did allege that B. M. Burgher was agent of each. A writ of garnishment issued, directing the officer to summon B. M. Burgher, agent as aforesaid, etc. It was held that the writ did not direct the companies upon whom liability as garnishees was desired to be fixed should be summoned, and for this reason the writ was held fatally defective. In this case it was held the court acquired no jurisdiction over the garnishees. Under the statutes of Texas, as before stated, an affidavit stating any one of the three grounds for the issuing of the writ of garnishment is sufficient as a basis for the writ. *Curtis v. Bank*, 78 Tex. 261, 14 S. W. 614; *Scurlock v. Railway Co.*, 77 Tex. 479, 14 S. W. 148. The statute prescribes the requisites of the writ and the questions to be answered by the garnishee. It has been held that, upon the failure of the garnishee to make answer to any one of these questions, the court is authorized to enter judgment by default against him. *Freeman v. Miller*, 51 Tex. 443; *Melton v. Lewis*, 74 Tex. 411, 12 S. W. 93; *Selman v. Orr*, 75 Tex. 528, 12 S. W. 697. Again, it has been held that where an affidavit for garnishment is made against two persons as a firm, and each answers, denying liability

as a firm or individually, and the answers are controverted, the court, on sufficient evidence, can render judgment against one of the garnishees for an individual debt. *Bank v. Graham* (Tex. App.) 22 S. W. 1102.

The affidavit contesting the garnishee's answer, and attacking the sale by George R. Holloway, on May 2, 1896, to appellant, as fraudulent, and seeking to set aside the sale and hold the goods as subject to the writ of garnishment, was filed May 12, 1897. The trial court found that plaintiff was not guilty of laches in filing this contest and prosecuting the same, and this finding is not challenged. We conclude that the plaintiff in the garnishment had the right to controvert the answer of the garnishee as to any matter in reference to which the writ required a disclosure or answer, and was not limited to the particular ground set forth in the affidavit.

We do not think there is any merit in appellant's seventh assignment of error. Plaintiff could decline to take a foreclosure on the share of stock admitted by the garnishee to be held by George R. Holloway in the corporation. It might have been regarded as worthless, and of greater expense to foreclose on same than could be realized from its sale.

Appellant's ninth assignment of error complains of the judgment of the court, and the foreclosure of the lien upon the stock of goods in the possession of the garnishee at the date of the trial, as the proof showed that the garnishee had been selling and replenishing it ever since said stock had been in its possession, and that said stock was not the same stock that was in possession of the garnishee either at the time of the service of the writ or the answering of the garnishee. The writ of garnishment was served on May 7, 1896. George R. Holloway testified that the Holloway Seed Company was in possession of the stock of merchandise on May 7, 1896, and that on that date the market value of the same was \$5,000, and that the company has been in possession of the same, doing business thereon as its only stock in trade, to the date of the trial. The seed company has been selling and replenishing the stock since the service of the writ of garnishment. The garnishee having willfully mingled the goods with new goods, and the new having been bought with the proceeds of the old, and the stock being of the same value as at the time of the levy of the garnishment, we do not think the court erred in rendering judgment and foreclosing the lien on the stock of goods. *Brown v. Bacon*, 63 Tex. 595; *Evans v. Reeves* (Tex. Civ. App.) 26 S. W. 219; *Johnson v. Hocker* (Tex. Civ. App.) 39 S. W. 406.

We think the judgment sufficiently described the goods upon which a foreclosure was had; and we therefore overrule appellant's tenth assignment of error. *Bourcier v. Edmondson*, 58 Tex. 675. Judgment affirmed.

47 S.W.—6

# HUBBARD et al. v. GODFREY.

(Supreme Court of Tennessee. July 18, 1898.)

EJECTMENT—TITLE TO SUPPORT—TAXATION—SALE  
—PARTITION—ADVERSE POSSESSION  
—COLOR OF TITLE.

1. Where land was sold for taxes in a certain county, a deed delivered by the proper officer of such county was not absolutely void, but was an assurance or color of title, though at the time of delivery the land had become part of another county.

2. Where land in one county had been a part of another county, partition proceedings in the former county, in which it was assumed to sell the land as the property of a minor heir of a former owner, were void.

3. One holding under tax deeds which conveyed mere color of title on account of defects conveys to his grantee assurance of title only.

4. Ejectment was made a real action by Shannon's Code, § 4970, which provides that "any person having a valid subsisting legal interest in real property and a right to the immediate possession thereof may recover the same by an action of ejectment." Hence it cannot be maintained against a trespasser by one who is not possessed of the legal title, either by derangement from the state or by seven years' adverse possession under color of title.

Appeal from chancery court, Cumberland county; H. T. Fisher, Chancellor.

Ejectment bill by Hubbard & Abbott against C. O. Godfrey. From a decree for plaintiffs, which was affirmed by the court of chancery appeals, defendant appeals. Reversed.

Snodgrass, Robinson & Derossett, for appellant. Tracy & Cotter, for appellees.

MCALISTER, J. This is an ejectment bill to recover the possession of a tract of land comprising about 1,050 acres, situated in Cumberland county. Defendant answered, denying title of complainants, and denying also that complainants were in possession of land at time defendant entered. Complainants offered evidence to show title. Defendant showed no title in himself, but relied upon the failure of complainants to show title. The court of chancery appeals affirmed the decree of the chancellor, which was in favor of the complainants. Defendant appealed, and has assigned errors. The court of chancery appeals, by Judge Wilson, has filed a very elaborate opinion, presenting with great detail the facts of a very complicated litigation. Premitting a narrative of the details, we will content ourselves with a general statement of the case.

It appears from the findings of the court of chancery appeals that in 1837 the state issued six grants, each for 5,000 acres of land, to one John B. McCormick. The lands embraced in one of these grants, or partly in two of them, were assessed for taxes to one James E. Manning, as the reputed owner; and the land so assessed to him was condemned by the circuit court to be sold for the payment of delinquent taxes. In July, 1895, the land was sold, and purchased by F. F. Narramore, James Scott, and P. M. Hodden-

pyle. On the 3d of July, 1857, the tax collector executed to the purchasers a deed wherein the land was fully described and bounded. No conveyance of this land to Manning by John B. McCormick, the original grantee, is shown in the record. It further appears that, shortly after this purchase, the purchasers, by a parol agreement, partitioned the land among themselves, and the part allotted to each was surveyed, and the lines and corners of each share distinctly marked. The land in controversy in this litigation was that part assigned under the parol partition to P. M. Hoodenpyle. This land was afterwards assessed to said Hoodenpyle for taxes, and in 1868 was sold for the payment of delinquent taxes, and at this sale was purchased by Seth Arnold, George Linder, and O. H. Perkins. On the 17th of August, 1874, complainants purchased the one-third interest of Arnold in this land. Linder and Perkins, on December 9, 1873, and June 18, 1874, respectively, conveyed their interests to one W. W. Powell. It further appears that complainants, at a subsequent time, instituted proceedings in the county court of Cumberland county against Charles W. Powell, minor heir of W. W. Powell, for the purpose of having this land partitioned, and to subject the interest of Powell to sale to pay its part of the cost of the proceeding and the taxes complainants had paid on the land for W. W. Powell. Such proceedings were had that commissioners were appointed, who divided the land, assigning 316 $\frac{1}{2}$  acres to complainants. This report was confirmed, and the costs taxed, one-third to complainants, and two-thirds to the estate of W. W. Powell. A decree was also pronounced ordering the clerk and master, as special commissioner, to sell the interest of the minor, to pay costs and taxes; and on the 15th of December, 1883, this interest was sold to the complainants, and the sale confirmed by the court. On April 27, 1885, the clerk of the court made complainants a deed to this Powell interest; and thus they became the owners of the whole tract allotted to Hoodenpyle under the parol partition between him, Narramore, and Scott, made in 1857 or 1858.

The court of chancery appeals was of opinion that the assessment of the land in Bledsoe county to Manning for taxes, the sale thereof to Scott, Narramore, and Hoodenpyle, and the deed of the tax collector to them, purporting to convey the fee, created an assurance or color of title, under our statute (Shannon's Code, § 4456). The land being in Bledsoe county at the time it was assessed and the taxes accrued, the sale and deed made by the official who sold, or his successor in office, although the land became a part of Cumberland county on its organization, was not absolutely void. It was, says the court of chancery appeals, an assurance or color of title, and possession thereunder for the prescribed period would give a good title. Cumberland county was not organized until

1856. Acts 1855-56, c. 6. The court of chancery appeals was also of opinion that, when this land was sold for delinquent taxes due from Hoodenpyle, the deed of the tax collector of Cumberland county to the purchasers, Arnold, Perkins, and Linder, constituted color of title, but that, on account of certain infirmities in the proceedings, they did not acquire a perfect title. As already stated, Arnold sold and deeded, his undivided one-third interest to complainants. The other two parties, Perkins and Linder, sold and conveyed by deeds to W. W. Powell. These deeds were put of record, and from this time on the land was assessed for taxes, and the taxes paid by these purchasers. Powell died, and the interest of his minor heir, Charles L. Powell, was sold by the county court of Cumberland county, and acquired by complainants. On account of fatal irregularities in the latter proceedings, the sale of the interest of the minor heir was absolutely void. We also concur with the court of chancery appeals that the partition proceeding in the county court of Bledsoe county, wherein the court assumed to sell this land as the property of the minor heir of P. M. Hoodenpyle, deceased, for reinvestment for the minor in the state of Kentucky, was also void.

The court of chancery appeals very properly held that the deed of the tax collector of Cumberland county to Arnold, Perkins, and Linder was mere color of title; that the deed of Arnold of his interest to complainants was only an assurance of title; that the deeds of Linder and Perkins to W. W. Powell were but assurances of title; and that the deed of the clerk of the county court of Cumberland county, purporting to convey the interest of W. W. Powell, was likewise merely an assurance of title. The court of chancery appeals further found that the deeds of complainants to this land were a matter of record; that the land was assessed to them for taxes; that they had caused small pens to be erected on it, to evidence their claim and ownership; that these pens were erected at one point, then moved a short distance to another, then a short distance to another, and then a short distance to another, all of them being, however, on the land. The court of chancery appeals, however, find as a fact that these possessions had not been kept erected in the manner stated on this land continuously for seven years before the wrongful entry of defendant. It is, moreover, conceded by that court, that the erection of a small rail pen on land where hogs or cows are occasionally fed, is not such an open and notorious possession, or of such a character, as to meet the demands of our statute. Hicks v. Fredericks, 9 Lea, 491. "Such an occupation," says Judge Freeman, in the last case, "on such a tract of land, would not be a real bona fide possession, notifying the owner of an adverse claim and occupancy." "Actual possession," says Judge McFarland, "for

seven years, is necessary to give the younger grantee the better title, under our act of 1819; and actual possession is generally understood to mean an inclosure by buildings, fences, or other similar improvements." *Pullen v. Hopkins*, 1 Lea, 744. The court of chancery appeals, however, assert that possession under color of title and claim of ownership, even for less than seven years, is maintainable against a pure trespasser, such as this defendant appears to be from the record. "He does not even pretend," says that court, "to have any claim or right to this land, and offers no evidence at all of any right of any kind. Can he be dispossessed by these complainants, who have been claiming this land under color of title, and who have been paying taxes on it for years, and have had agents on it and about it, to protect it from trespassers and depredation? We take it to be good law," says Judge Wilson, "as well as in accord with sound reason and justice, that where a party has been in possession of land under color of registered title, and claiming thereunder for some years, during which time the land has been assessed to him for taxes which he had paid, may recover against one who shows no title to the premises, but merely possession, at the time the suit is brought, although the title of the party suing may be inferior to that of the real owner,"—citing *Harker v. Birkbeck*, 3 Burrows, 1556; *Jackson v. Harder*, 4 Johns. 202; *Cutts v. Spring*, 15 Mass. 184; *Hubbard v. Little*, 9 Cush. 475; *Pettingell v. Boynton*, 130 Mass. 244, 29 N. E. 655. The court cites *Litchfield v. Ferguson*, 141 Mass. 97, 6 N. E. 721, in which it was held that one being in possession, even if it is not such as would amount to a disseisin of the true owner, might maintain trespass against a mere intruder without right upon that possession, and, if he is ousted by such intruder, may maintain a right of entry against him; also *Dale v. Faivre*, 43 Mo. 556, in which it was said that prior possession accompanied by a claim of the fee raises a presumption of title, and is sufficient to support the right to eject him who has only the naked possession, and that the grantee of the person so holding prior possession succeeds to his rights; also *Smith v. Lorillard*, 10 Johns. 355, in which it is said that "the first possession should in such cases be the better evidence of right. The ejectment is a possessory action, and possession is always presumption of right, and it stands good until other and stronger evidence destroys that presumption." Many other cases are cited in support of this position. "Again," says Judge Wilson "we do not dispute the general rule that the plaintiff in ejectment must rely for a recovery upon the strength of his own title, and not on the weakness of his adversary's. *Huddleston v. Garrott*, 3 Humph. 629. This well-settled rule," continues the judge, "like most all general rules,

has qualifications equally well settled; and one is that where a party has been in peaceable possession under color of title, documentary in character and a matter of record, purporting to convey the fee, he may recover on this title against a defendant who is a mere trespasser,"—citing 6 Am. & Eng. Enc. Law, pp. 227-229, and cases cited.

We are unable to concur with the court of chancery appeals in the conclusions of law reached, since we regard them as wholly at variance with the law of ejectment as well settled in this state. The action of ejectment has been variously declared to be a personal action, a mixed action, and a real action. 6 Am. & Eng. Enc. Law, p. 225; *Tyler, Ej. (Ed. 1876)* p. 36. At common law the action was strictly a possessory remedy. 6 Am. & Eng. Enc. Law, p. 225; 3 Com. Dig. tit. "Ejectment"; *Tyler, Ej. (Ed. 1876)* p. 70. The right to recover titles by ejectment was given by the statute 32 Hen. VIII. c. 7. *Adams, Ej. 30*. In many of the states of the Union it is still regarded as a possessory remedy, and many of the cases cited by the court of chancery appeals are based upon the common law or on local statutes, where the action is merely to determine the right to present possession, and not to settle the title. In Tennessee, ejectment is, by Act 1851-52, c. 152, § 2, distinctively a real action. That act provides, viz.: "Any person having a valid subsisting legal interest in real property and a right to the immediate possession thereof may recover the same by an action of ejectment." *Shannon's Code*, § 4970. Ejectment has been a real action in this state since Act 1801, c. 6, § 60. *Hess v. Sims*, 1 Yerg. 142. In *Langford v. Love*, 3 Sneed, 311, this court said, viz.: "The action of ejectment is strictly a legal remedy. It looks only to legal title. It cannot be maintained unless the plaintiff has the legal estate in the premises, and an equitable title cannot be set up in this action against the legal title." *Campbell v. Campbell*, 3 Head, 325; *Lafferty v. Whitesides*, 1 Swan, 123; *Crutsinger v. Catron*, 10 Humph. 24. Complainant must show a dereliction of title to himself by connected conveyances from the grantee, or show seven years' actual adverse possession under a grant or color of title. *Stinson's Lessee v. Russell*, 2 Overt. 40 (bottom page 447); *Kimbrough v. Benton*, 3 Humph. 129. In *Evans v. Land Co.*, 92 Tenn. 355, 21 S. W. 671, this court said, viz.: "Complainant could not recover in ejectment upon a showing that she had acquired a color of title. She must show a perfect legal title, and recover upon the strength of her title, and not upon the vices in the adversary's title." Again, in *Garrett v. Land Co.*, 94 Tenn. 479, 29 S. W. 726, it was held that, under an ejectment bill alleging a legal title, complainant cannot recover upon proof of an equitable title; and this is so whether the suit is brought in a court of law or equity. In *King v. Coleman*,



98 Tenn. 570, 40 S. W. 1082, it was said the person seeking relief must show a complete legal title in himself, however wrongful the possession of the defendant may be. The court of chancery appeals, however, held that, as against a mere trespasser, complainants may recover by showing color of title and possession for a term less than seven years. The court of chancery appeals find that complainants did not acquire a perfect legal title to the land, and did not connect their chain of title with the original grant, and that complainants only show a color of title. That court further finds that complainants had failed to show an actual, continuous, adverse possession of said land under their color of title for a period of seven years. The court of chancery appeals further finds that defendant had no title, but was a mere intruder or trespasser upon the land. That court, however, held that while complainants were not possessed of the legal title to the land in controversy, either by deraignment from the state or by seven years' adverse possession under color of title, they might maintain ejectment against the defendant, who shows no title in himself, and is a mere trespasser. The fundamental error, as we conceive, in the opinion of the court of chancery appeals, is in following a line of cases from other states in which ejectment is considered a possessory action merely, and in ignoring our own statute and decisions which regard it as a real action. The fact that defendant is a trespasser is of no consequence to complainants, since they have shown no legal title, and the law presumes that defendant is holding for the true owner, and his possession is therefore lawful against all persons who do not hold the legal title. The decree of the court of chancery appeals is therefore reversed, and complainants' bill is dismissed, but without prejudice.

#### BAILEY v. GALBREATH et al.

(Supreme Court of Tennessee. March 8, 1898.)

##### BROKERS—PERSONAL LIABILITY.

Note brokers are not personally liable for loss on a forged note sold by them, where they advised the vendee at the sale that they were acting as agents, and disclosed their principal.

Appeal from chancery court, Shelby county; Sterling Pierson, Chancellor.

Bill in equity by R. E. Bailey against Galbreath Bros. From a decree for defendants, plaintiff appeals. Affirmed.

Carroll, Chalmers & McHellar, for appellant. W. B. Edington, for appellees.

MCALISTER, J. The object of this bill is to hold the defendants liable for a certain forged note sold by them to complainant. Defendants, Galbreath Bros., were stock and note brokers in the city of Memphis. On the 8d of July, 1895, complainant, Bailey,

purchased of Galbreath Bros. one note for \$2,750 drawn by A. K. Ward, as secretary and treasurer of the Memphis Barrel & Heading Company, apparently indorsed by J. L. Welford, William A. Williamson, A. K. Ward, and W. F. Taylor. The names of all the indorsers, excepting that of Ward, were forged. The theory of the bill is that the defendants, in selling this paper to complainant, impliedly warranted the genuineness of the signatures of said indorsers. The chancellor found, as a matter of fact, that when complainant purchased the paper he was advised by defendants that the latter were acting merely as the agents of the Memphis Barrel & Heading Company, and hence were not individually liable. It appears from the proof that this purchase was negotiated for complainant, Bailey, by his brother-in-law and agent, R. H. Vance. Mr. Vance testified that on July 3, 1895, he met Maury Galbreath, a member of the firm of Galbreath Bros., and inquired if he knew any party who wanted to borrow money. Galbreath replied: "Yes; I think I can get you a piece of paper of the Memphis Barrel & Heading Company." Vance remarked: "All right. I will take that paper, with good indorsers." Some three or four hours later, during the day, Galbreath returned with this note, apparently indorsed by Williamson, Welford, and Taylor. Vance states he then took the paper to the German Bank, and inquired of Mr. Cochran, the cashier, if it was good. Cochran replied in the affirmative, and offered to purchase the paper for his bank. Vance, however, declined this offer, and notified Galbreath of his acceptance of the paper, and gave him a check for it, less the discount. We are satisfied from an examination of the record that Mr. Vance, at the time he purchased this paper from Galbreath Bros., knew the latter firm was negotiating the loan for the Memphis Barrel & Heading Company; and there is no room in this case for the application of the principle invoked by complainant's counsel, that an agent or broker negotiating paper for another, without revealing his principal to the purchaser, becomes personally liable in the event the paper turns out to have been forged. A bill and note broker, who acts within the scope of his authority, and discloses, not only his agency, but the name of the principal for whom he is acting, incurs no personal liability. 1 Am. & Eng. Enc. Law (New Ed.) p. 51; Lyons v. Miller, 6 Grat. 427, 52 Am. Dec. 129. In Worthington v. Cowles, 112 Mass. 30, it was held that, "to relieve an agent from liability upon an implied warranty of the genuineness of a promissory note sold by him, which turns out to be forged, the transaction must have been such that the purchaser understood, or ought, as a reasonable man, to have understood, that he was dealing with the principal." Morrison v. Currie, 4 Duer, 79. "When the relation of principal and agent exists in re-

gard to a contract, and is known to the other party to exist, and the principal is disclosed at the time as such, the contract is that of the principal; and the agent is not bound, unless credit had been given to him expressly and exclusively, and it was clearly his intention to assume a personal responsibility." 1 Am. Lead. Cas. 454; Stanton v. Camp, 4 Barb. 278; Meeker v. Claghorn, 44 N. Y. 349; Humes v. Furnace Co., 93 Ala. 461, 13 South. 368; Ahrens v. Cobb, 9 Humph. 643; Davis v. McKinney, 6 Cold. 19; 1 Am. & Eng. Enc. Law (New Ed.) p. 1119. These principles, we think, are conclusive of this case, and result in an affirmance of the decree.

### NATIONAL EXCHANGE BANK v. CUMBERLAND LUMBER CO. et al.

(Supreme Court of Tennessee. March 5, 1898.)

NOTE—LIABILITY OF INDORSER—MARRIED WOMAN—SEPARATE ESTATE.

1. Indorsers of a note before delivery to payee are liable as makers, without demand or notice of nonpayment.

2. Indorsers before delivery to payee are liable, even though it be a renewal note, and, had an accounting been had between maker and payee, there would have been nothing due at the time of such renewal.

3. A married woman may charge her separate estate for payment of a debt for which she is liable only as surety.

4. An indorsement on the back of a promissory note by a married woman, "I hereby bind my separate estate," was sufficient to charge her separate property with the liability.

Appeal from chancery court, Davidson county; H. H. Cook, Chancellor.

Bill by the National Exchange Bank against the Cumberland Lumber Company and others. There was a decree for complainant, which was affirmed by the court of chancery appeals, and defendants appeal. Affirmed.

James S. Pilcher and Marshall Morgan, for appellants. Stokes & Stokes, for appellee.

CALDWELL, J. The bill in this cause was filed to enforce the collection of the following note: "\$500. Nashville, May 13, 1895. Sixty days after date we promise to pay to the order of Rice Bros. five hundred dollars, at any bank in Providence, Rhode Island, value received. [Signed] Cumberland Lumber Co. Geo. Benedict, Prest., by O. Ewing, Tr.,"—and indorsed on the back: "Geo. Benedict. O. Ewing. A. G. Ewing. I hereby bind my separate estate. H. C. Ewing." "Rice Bros." The suit was brought by the indorsee of the payees against the maker and indorsers. The chancellor rendered a decree for the amount of the note, with interest, against all of the defendants except Mrs. H. C. Ewing, a married woman. He adjudged her separate estate liable, and directed its sale, unless the decree should be paid in 30 days. The court of chancery appeals affirmed the action of the chancellor in

all respects. The cause is before this court on appeal and assignment of errors.

It is apparent, from an inspection of the note and indorsements, as well as from the findings of fact by the court of chancery appeals, that George Benedict, O. Ewing, A. G. Ewing, and H. C. Ewing indorsed the note before its delivery to the payees, Rice Bros., who subsequently indorsed it to the complainant. This being so, the prior indorsers are to be treated, in this litigation, as makers, jointly with the Cumberland Lumber Company, and therefore liable for the payment of the note without proof of demand and notice. Morrison Lumber Co. v. Lookout Mountain Hotel Co., 92 Tenn. 9, 20 S. W. 292; Bank v. Jefferson, 92 Tenn. 537, 22 S. W. 211; Assurance Soc. v. Edmonds, 95 Tenn. 53, 31 S. W. 168; Good v. Martin, 95 U. S. 93.

The last observation answers the first objection of appellants, which is based on a contrary view of the law applicable to this case; and it also renders immaterial the several objections urged against the sufficiency of the demand and notice alleged by the complainant to have been made and given.

It can make no difference, in legal contemplation, that the note in suit was executed in renewal of a prior one to the same payees, and that upon a settlement of accounts between them the payees would have been indebted to the Cumberland Lumber Company in an amount sufficient to satisfy the prior note. A note executed for such a purpose and under such circumstances stands on the same footing, at least so far as the irregular indorsers are concerned, as an original note in like form and tenor. In either case, the presumption is that such indorsers put their names on the paper to induce its acceptance by the payees, and hence they are deemed in law co-makers as to the payees and subsequent bona fide holders.

Finally, it is objected that the separate estate of Mrs. H. C. Ewing was adjudged liable for the payment of this note, the contention of her counsel being that her act in the matter was not sufficient to impose a charge upon that estate. It is well settled in this state that a married woman, owning a separate estate, with unlimited power of disposition, as does Mrs. Ewing, may charge it in equity with her debts and liabilities, by an express stipulation, in parol or writing, made for that purpose. Warren v. Freeman, 85 Tenn. 513, 3 S. W. 513; Eckerly v. McGhee, 85 Tenn. 661, 4 S. W. 386; Webster v. Helm, 93 Tenn. 322, 24 S. W. 488; Jordan v. Everett, 93 Tenn. 390, 24 S. W. 1128; Bank v. James, 93 Tenn. 8, 30 S. W. 1038. There is no technical or prescribed form for the stipulation. It is only required that the purpose to charge be explicitly and unmistakably expressed in some suitable language, formal or otherwise. Nor is it essential to the validity of the stipulation that it be made for her personal benefit, or for

an obligation in which she is principal. Her relation to the debt, whether that of primary or secondary obligor, is of no consequence, so far as the efficacy of the intended charge upon her separate estate is concerned. Having unlimited power of alienation, which, of necessity, includes unlimited power to charge, she may make the charge for a debt on which she is surety only as well as for one in which she is principal. *Webster v. Helm*, 93 Tenn. 326, 327, 24 S. W. 488. It would be immaterial, then, on this branch of the case, whether Mrs. Ewing be regarded as an indorser merely, as she contends she is, or as a co-maker, as we have held her to be; for she could as well have made the note a charge upon her separate estate in the one instance as in the other. The language of her stipulation is: "I hereby bind my separate estate." This is an explicit and unambiguous sentence, when found on the back of the note and signed by Mrs. Ewing. It meant but one thing, and that was that she intended thereby to bind her separate estate for the payment of the note,—to make the note a charge upon that estate. The decree of the court of chancery appeals will be affirmed, with the single modification that the sale of Mrs. Ewing's property will not be made until after those against whom a money recovery was obtained shall have had 90, instead of 30, days in which to make payment.

#### HERMAN et al. v. KATZ et al.

(Supreme Court of Tennessee. Dec. 10, 1897.)

INSURANCE — CHANGE OF OCCUPANCY — TITLE TO PROPERTY.

1. The provision of an insurance policy that "change of occupants, without increase of hazard, shall not affect the policy," applies to the personal property covered by the policy.

2. The levy of an attachment does not divest the debtor of the title to the property, within the provisions of an insurance policy.

3. Where a levy under execution is subordinate to an attachment levy, and is contingent on a surplus arising after satisfaction of the attachment, the title of the property levied on does not pass to the officer, within the provisions of an insurance policy.

4. Where the situation of a stock of goods after a levy was identical with that prior thereto, and a fire occurred after the time for closing stores, there was no increase in hazard which would vitiate a policy containing a stipulation that a change of occupants, with increase of hazard, would avoid it.

Appeal from chancery court, Dyer county; John S. Cooper, Judge.

Bill by Herman Bros., Lindaur & Co., and others against Katz Bros. and others. There was a decree for complainants, and defendant insurance companies appeal. Affirmed.

M. M. Marshall, Stokes & Stokes, Deason & Rankin, and Harwood & Tyree, for appellants. John Rhum & Son, Draper & Rice, and Nathan Cohn, for appellees.

McALISTER, J. Complainants, who are creditors of the defendants Katz Bros., filed these bills in the chancery court of Dyer county, alleging that defendants were fraudulently disposing of their property, and caused attachments to be levied upon a stock of goods in defendants' storehouse, in the town of Dyersburg, Tenn. On the same night the attachments were levied, to wit, December 3, 1895, Katz Bros. procured judgments, aggregating about \$3,800, to be rendered against their firm before a justice of the peace of Dyer county, in favor of certain relatives and friends. Instantly executions were issued upon these judgments, which, by consent of the sheriff, who had levied the attachments, were levied upon the same stock of goods subject to the prior levy. On December 9, 1895, on motion of complainants in the attachment cases, a receiver was appointed to take charge of the stock of merchandise, and sell the same. About 2 o'clock a. m. on December 10, 1895, and before the receiver had taken charge, the entire stock of goods was destroyed by fire. Katz Bros. were insured against loss by fire on this stock of merchandise in the aggregate amount of \$10,500. Complainants thereupon filed amended and supplemental bills in these causes against the defendant insurance companies, attaching the policies, and seeking to subject their proceeds to the satisfaction of their claims. Defendant insurance companies denied any liability on said policies, and, among other defenses, relied principally upon the following clause contained in each of the policies, to wit: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if any change, other than by the death of the assured, take place in the interest, title, or possession of the subject-matter of insurance (except change of occupants, without increase of hazard), whether by legal process or judgment, or by voluntary act of the assured, or otherwise." The contention made on behalf of the insurance companies is that the levy of the attachments and executions invalidated the policies, under the express provisions of this clause. The chancellor was of opinion that the levies of the attachments and executions did not render the policies void, and did not cause any increase of hazard, and that defendant insurance companies were liable on said policies to complainants to the extent of their respective debts, and so decreed. The chancellor further found that, when the fire occurred, the key to the storehouse in which said stock of merchandise was stored was still in the possession of the sheriff. The court further found that the stock of goods was worth more than \$10,500, the amount of the insurance. Defendant insurance companies appealed, and have assigned errors.

The second assignment is that the chan-

cellor erred in holding that the levy of the attachments and executions by the sheriff and constable, and the possession of said officers under their levies, and the appointment of a receiver, did not render the policies void under their terms, provisions, and stipulations. It will be observed that each of the policies provides that if any change take place in the interest, title, or possession, whether by legal process or judgment or otherwise, the entire insurance shall be void, excepting, however, a change of occupants, without increase of hazard. The argument is that the levy of the attachments and executions worked such a change in the title, interest, and possession of the subject-matter of the insurance as avoided the policies. It is argued that the limitation contained in the clause "except change of occupants without increase of hazard" refers alone to cases where real estate is the subject of insurance, as the word "occupant" clearly indicates. It is said, further, that, if the word "occupant" may properly be applied to personal property as the subject of insurance, it can only limit the words "possession and interest," and not the word "title." It is further insisted that, if the word "occupants" be construed to limit the entire phrase "interest, title, or possession," the proof shows an "increase of hazard," which, by virtue of said clause, avoids the policy. It is not true, as assumed by counsel for appellants, that the word "occupant" has reference always to real estate. As shown by counsel for appellees, the words "occupant" and "occupancy" are frequently used in connection with personal property by commentators and lexicographers. Blackstone, in chapter 28, bk. 2, p. 400 et seq., under the head of "Of title of things personal by occupancy," says: "Whatever movables are found,—upon the surface of the earth, or in the sea, and unclaimed by the owner,—they belong to the first occupant or fortunate finder." In a subsequent part of the chapter, "accession" is used where title of realty by "occupancy" is discussed. And in the same chapter, on page 399: "A property or title in goods and chattels movable may be acquired by occupancy, which was the only and primitive method of acquiring property at all." See, also, Bouv. Law Dict., title of "Occupancy" and "Occupant," and also, Broom, Leg. Max. 355. Richardson's Dictionary defines "to occupy": "To take or seize; to hold or keep possession of; to possess." Standard: " \* \* \* to have in possession and use. \* \* \* " Webster defines "occupant" thus: "One who occupies or takes possession; one who has the actual use or possession or is in possession of a thing." Worcester: "One who has the actual use or possession of a thing."

The case of *Walradt v. Insurance Co.*, 136 N. Y. 375, 32 N. E. 1063, presents a striking analogy in its facts, and the questions of law involved, to the case now in judgment. The

suit was upon an insurance policy which contained a clause identical in terms with the one at bar. The court said, viz.: "We must first determine what the parties to the contract intended when they made use of the terms 'change in interest, title, or possession' of the subject of insurance, whether by legal process," etc. \* \* \* The change of possession produced by the levy and the action of the sheriff must now be considered. The policy is not avoided, by the terms of the condition referred to, by every change of possession that may take place in the property. A 'change of occupants without increasing the hazard' is excepted from the operation of the condition, and does not invalidate the insurance. Counsel for the defendant argues that the exception in the condition does not apply when personal property is the subject of the insurance, and does not apply in this case, as there cannot be an occupant of goods in a store consistent with the ordinary and appropriate use of language. The word 'occupant' is certainly sometimes used with reference to personal property. When the subject of insurance is a ship, a building not attached to the soil, so as to become part of the realty, or other things of like character (as, for instance, a tent, or a chair, or a sofa), the term 'change of occupants' would, it will be admitted, be appropriate. When it is used in reference to goods in a store, its fitness is not at first glance so appropriately apparent; but, as the words of the policy were used to meet all cases, we have no right to say that the exception in the condition was not designed to apply when goods were the subject of insurance merely because the term 'change of occupants' does not seem to be the most natural and appropriate. A large part of the contracts of insurance now entered into relate to personal property; and to hold that such an important exception as that now under consideration to the broad terms of a condition had no application to such contracts would make the rights of the parties turn upon the literal meaning of a word, and to the meaning most in use. What the parties intended was that a change in the control and dominion over the property should not avoid the policy, unless such change rendered the risk more hazardous. A change in the possession of a store of goods must, moreover, refer to the place where the goods are situated. In this case they are described as situated in a brick store. The place where the goods were kept, though not the subject of insurance, was an important element in the risk; and it was natural and proper for the parties to provide against a more hazardous change in the occupancy of that place; and hence the parties agreed that, in case the possession of the goods changed, that fact alone would not avoid the policy, unless the occupancy of the place where they were was also changed in such a manner as to become more hazardous. In

this way the words of the exception can be given their ordinary and natural meaning, and the exception itself can have effect. It is only in a plain case that we are warranted in saying that the parties have used language not intended to have any application to the subject-matter of the contract." See, also, *Germania Fire Ins. Co. v. Home Ins. Co.*, 144 N. Y. 195, 39 N. E. 77; *Wood v. Insurance Co.*, 149 N. Y. 382, 44 N. E. 80, where the Walradt Case is approvingly cited. We think that case presents a conclusive answer to the argument submitted by counsel for insurance companies, and no further discussion is needed on this branch of the case.

It is argued, however, by counsel for appellants, that whether the proviso applies to real or personal property, or both, in no event could it refer to or limit the preceding word "title," and that a change of title, whether the risk is increased or not, would terminate the policy under this clause. The argument is that, under the decisions of this court, the levy of an execution invests the levying officer with the title to personal property,—citing *Pennebaker v. Tomlinson*, 1 Tenn. Ch. 603; *Brown v. Allen*, 3 Head, 429; *Bradley v. Keesee*, 5 Cold. 226; *Connell v. Scott*, 5 Baxt. 598; *Freem. Ex'ns*, § 268. It is well settled in this state that the levy of an attachment does not divest the debtor of the title to the property, but simply creates a lien upon it. *Green v. Shaver*, 3 Humph. 139; *McKnight v. Hughes*, 4 Lea, 525; *Puckett v. Richardson*, 6 Lea, 58; *Montgomery v. Realhafer*, 85 Tenn. 668, 5 S. W. 54; *Snell v. Allen*, 1 Swan, 208; *Connell v. Scott*, 5 Baxt. 598.

It is insisted by counsel for complainants, in an argument evincing much research and ability, that the levy of an execution on personal property vests in the officer a special or limited property, and does not divest title out of the debtor. It is argued that this is so because the debtor may sell the property subject to the right of possession in the officer; and, further, that the mere payment of the debt by the debtor operates as a discharge of the execution, and causes the possession to revert instantaneously to the debtor, without a decree or conveyance. *Overton v. Perkins*, 10 Yerg. 329; *Tyler v. Dunton*, 1 Tenn. Ch. 361; *Pennebaker v. Tomlinson*, 1 Tenn. Ch. 602. It is said in several of our cases that, by the levy of an execution, the title of personal property levied on passes to the officer, and that this is so because a seizure to the value of the debt prima facie satisfies it, and discharges the debtor. *Brown v. Allen*, 3 Head, 429; *Bradley v. Keesee*, 5 Cold. 226; *Connell v. Scott*, 5 Baxt. 598; *Evans v. Barnes*, 2 Swan, 293. Other cases speak of the possession of the levying officer as a limited or special property in the goods. *Malone v. Abbott*, 3 Humph. 533; *Evans v. Barnes*, 2 Swan, 293; *Caruth. Lawsuit* (Martin's Ed.) § 331. A

careful review of the cases will probably show that the terms were used interchangeably, and mean that the title thus acquired by the sheriff was not absolute, but only for the purpose of satisfying the execution debt. However this may be, the levy in this case was subordinate to the attachment levy, and contingent upon any surplus arising after the satisfaction of the attachments. The levy of the executions was merely constructive, and did not change the status of the property or its custody or control. Since, then, these levies were dependent, and made with the consent of the sheriff to reach a contingent surplus, there is no merit in the contention that the policies were thereby vitiated.

It is next insisted by appellants that there was in fact an increase of risk or hazard, and therefore the policies became void, notwithstanding the exception. It suffices to say the record fails to show there was any increase of the risk. The situation of the stock of goods after the levy was identical with that surrounding it prior to the levy. In the Walradt Case, *supra*, the New York court, upon a state of facts precisely like that in the case at bar, even to the removing of the insured from the store, and the locking up of the store, and the taking possession of the keys, by the sheriff, submitted to the jury the question whether, under the circumstances, the condition of the goods was more hazardous after the levy than before. The jury answered the question in the negative. And in an early case, decided by the Pennsylvania supreme court in 1841 (*Insurance Co. v. Findlay*, 6 Whart. 483), that court found that the sheriff had levied the execution in his hands upon a stock of goods, had put the execution debtor out of doors, had fastened the shutters, locked the doors, and took and kept the keys. Say the court in the latter case: "From the evidence it appears that the goods remained precisely in the same situation after the seizure that they were in before. \* \* \* It is said the sheriff fastened down the windows, closed the window shutters, and locked the doors, and, having done this, took and kept the keys. The fire happened in the night, long after the usual time of closing stores and ceasing to do business in them, indeed after all citizens had gone to bed; so that the storehouse was really in the same situation at the time of the fire that it doubtless would and ought to have been had no seizure been made. The sheriff had the keys, and was away; but that is immaterial, because it had nothing to do with the origin of the fire, and could not in the least degree prevent the goods from being destroyed or saved, for the doors could have been forced open, had it been thought that it would have availed anything, in as short a time without the keys as they could have opened by the use of the keys. \* \* \* There is no ground, so far as the evidence goes, upon which any increase

of risk can well be imagined." Other questions of fact were disposed of orally, and the decree of the chancellor affirmed.

### UNION RY. CO. v. SNEED.

(Supreme Court of Tennessee. April Term, 1897.)

#### CORPORATIONS—INCREASE OF STOCK—STATUTES.

Acts 1875, c. 142, § 5, providing that a corporation may, by by-laws, fix the amount of capital stock, is restricted by section 6, which relates to railway companies, and the manner of increasing their capital stock, and hence does not apply to a railway corporation organized and operated under the latter section, the charter of which incorporated said section as a part thereof.

On petition for rehearing. Dismissed.  
For former opinion, see 41 S. W. 364.

WILKES, J. Upon petition to rehear, it is urged upon us that on the original hearing the court did not consider section 5 of the general incorporation act of 1875, which permits an increase of capital stock by by-law. This is true, from the fact that section 5 relates to corporations generally, while section 6 relates to railway companies and the increase of capital stock by railways, and this section is made part of the charter of complainant, and is the law under which it was organized and operates. It is also called to our attention that the proof shows that the corporation is in debt to the extent of \$10,000 or \$12,000. This is also true, but it likewise appears that it owns some tracks and real estate, representing over \$95,000. The bill does not allege any indebtedness or the necessity of collecting the subscription to pay debts, and no creditor appears in the record in any way seeking to collect anything from the company or from W. M. Sneed.

Our attention is also called to the case of *Peck v. Elliott*, 24 C. C. A. 425, 79 Fed. 10, decided in the United States circuit court for the Eastern district of Tennessee, on the 2d of March, 1897, by Judges Taft, Lurton, and Sage. It is insisted that this case is in point, and persuasive in favor of the binding obligation of this subscription. We have examined the case critically. The proceeding was one affecting the property of the Southern Malleable Iron Company, a manufacturing corporation chartered under Acts 1875, c. 142, § 11, but incorrectly stated in the opinion to be chapter 97 of said Acts. The object of the bill was to preserve the entity of the property as an operative unit plant, collect its debts, complete certain valuable contracts, and then sell the property as a whole, including its good will, for the satisfaction of all its debts, according to priority of liens. The bill was brought by receivers, in whose hands it had been placed at the instance of a judgment creditor, as an insolvent concern, and the bill was essentially a bill to wind up an insolvent

corporation for the benefit of its creditors. Elliott, a director and the president of the company, was made a defendant, and it was attempted to collect from him a balance of unpaid subscription, upon the ground that the insolvency of the company and pressing of creditors rendered such action necessary. Elliott, among other grounds, defended upon his contention that his subscription was to increased stock, which the corporation had no power to authorize or collect. The provisions of section 5 of the general incorporation act of 1875 were considered as applicable, but not those of section 6, inasmuch as the corporation then before the court was not a railway, but a manufacturing corporation. The court below held that the proper construction of section 5, and of the act referred to, was that, while the corporation could fix its capital stock by by-law, yet, when once fixed, it must remain fixed, and could not be either increased or diminished by a subsequent by-law. The provision of section 5 is substantially that "the corporation may, by by-laws, make regulations concerning the subscriptions for or transfer of stock, fix upon the amount of capital to be invested in the enterprise, the division of the same into shares, the time required for payment thereof by subscribers for stock, the amount to be called for at any one time." There is no special provision as to the increase of the capital stock of a manufacturing corporation chartered under section 11 of the act, as there is of a railway corporation chartered under section 6 of the same act. The question considered in the case was whether such manufacturing corporation had power to increase its capital after it had once been fixed by by-law. The conclusion reached in the case was that, when the corporation has the power by by-law to fix its capital, it may, by the same means, increase its capital, and that Act March 27, 1883, c. 163, did not take away this power. But that case does not pass upon the manner of making the increase effective, except that it may be done by by-law, or, as elsewhere stated, by a resolution of the members of the incorporation; but it does not refer to the provisions of section 19, which provides that the directors shall copy the desired amendment, make formal application to the state, have the amendment probated and registered, and the registration certified by the secretary of state, under the great seal of state. This we hold to have been the necessary ceremony to be performed in order to make the increase of stock valid and effectual under that act, and so long as it remained in force, if we concede that it might be authorized by by-law or resolution. In other words, although the power to increase by by-law or resolution may have existed under Acts 1875, c. 142, still it must be exercised according to the provisions of Acts 1883, c. 163, and in the manner there prescribed, while said act was in force. The requirements of Acts 1883, c. 163, not having been complied with, the increase was not validly made, even if we con-

cede that it might be changed after being once fixed. The petition to rehear is therefore dismissed.

### COLLIER et ux. v. STRUBY.

(Supreme Court of Tennessee. Sept. 20, 1897.)

HUSBAND AND WIFE—LIABILITY OF WIFE FOR TORTS OF AGENTS—SEPARATE ESTATE—POSSESSION—NEGLIGENCE—PLEADING—JUDGMENT.

1. The building where an accident occurred through the negligence of a servant in operating an elevator was neither the general nor separate estate of a married woman, but a mere security for the price thereof; the building having been purchased from her, and the note, secured by deed of trust, being made payable to her sole and separate use. *Held*, that her interest in the property was not such as gave her the power to appoint an agent to manage it, and hence she was not responsible for the negligence.

2. Where one was put in possession of a building, with the consent of a married woman, for the purpose of managing the property for her benefit, but afterwards another was put in possession without her knowledge, and an accident occurred during the latter's possession, through his negligence, the married woman was not in such possession of the property as to make her liable for the negligence.

3. Where the owner of property executed a trust deed thereof to secure a married woman on a note payable to her sole and separate use, he had no authority to appoint for her an agent to manage the property on her behalf.

4. A husband, whose wife had no power to appoint an agent to manage certain property, by reason of having no separate estate therein, was not the owner of the building at the time an accident occurred there through negligence of an employé therein, and had no control thereover. *Held*, that he was not liable for the negligence.

5. A declaration alleged that a married woman was in possession of a building, and that an accident occurred through the negligence of servants employed by her in operating an elevator therein. *Held* that, where the married woman was not liable, no liability could be adjudged against her husband, under the declaration.

Appeal from circuit court, Shelby county; L. H. Estes, Judge.

Action by Henry Struby, Jr., against W. A. Collier and his wife, Alice T. Collier. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Metcalf & Walker, for appellants. Percy & Watkins, for appellee.

McALISTER, J. Henry Struby, Jr., recovered a verdict and judgment in the circuit court of Shelby county against W. A. Collier and his wife, Alice T. Collier, for the sum of \$750, damages for personal injuries. Collier and wife appealed.

The injuries were sustained by the plaintiff while alighting from an elevator in the Appeal Building, in the city of Memphis. The contention made on behalf of plaintiff is that Mrs. Collier at the time of the accident was in possession of the Appeal Building, by an agent collecting the rents, and that she is liable for the negligence of the employé in charge of the elevator. Among other de-

fenses, the plea of coverture was interposed in behalf of Mrs. Collier. The proof shows that on June 7, 1892, W. A. Collier and his wife, Alice T. Collier, sold and conveyed to the Memphis Appeal Company the property then known as the "Appeal Building," situated on the northwest corner of Main and Jefferson streets, in the city of Memphis, fronting about 75 feet on Main street, and running back 105 feet on Jefferson street. This property belonged principally to Mrs. Alice T. Collier; the more valuable portion thereof having been conveyed to her sole and separate use, and a part thereof as her general estate. Other parts of said property were owned by said Collier and wife under conveyances giving them estates by entireties. The consideration for the property conveyed by Collier and wife to the Memphis Appeal Company was \$250,000, \$50,000 of which were payable in cash, and \$200,000 were to be paid in 20 years, as evidenced by coupon bonds, with semiannual interest coupons, maturing in 20 years. The \$200,000 of bonds were accordingly issued, and secured by a deed of trust from the Memphis Appeal Company to the Memphis Trust Company, covering the real estate, and all personal property and fixtures in the building. The Memphis Appeal Company failed to make the cash payment of \$50,000, and on October 23, 1893, executed its note therefor to the sole and separate use of Alice T. Collier, payable six months after date, and for the security of said note executed a trust deed on the Appeal Building property to William M. Smith and Henry Croft, as trustees. The record further shows that W. A. Collier, husband of Mrs. Alice T. Collier, was president of the Memphis Appeal Company, and on or about October 1, 1893, becoming dissatisfied with the outlook of the business, procured his wife's brother, Mr. J. M. Trezevant, to take charge of the building, and collect the rents for her benefit. Mr. Collier states he thinks his wife knew of her brother's possession as her representative. At the time that Mr. J. M. Trezevant was in possession of the building as agent for Mrs. Collier by appointment of W. A. Collier, Mrs. Collier was the owner of the 200 bonds secured by the deed of trust from the Memphis Appeal Company to the Memphis Trust Company. Afterwards, to wit, on October 23, 1893, the second deed of trust was executed to secure the note for \$50,000; and Mr. W. A. Collier states that on that day, representing the Appeal Company, he "undertook to, and did, turn the building over to C. E. Cline, —who was considered a fine office man,—to look to the building, and collect Mrs. Collier's rents." Counsel for Mrs. Collier objected to this testimony upon the ground it was not shown that Mr. Collier had any authority to put Mr. Cline or any one else in charge of the building for Mrs. Collier. The court, however, overruled the objection, and admitted the testimony. Mr. Collier states that his

wife was not aware of this transaction at the time it occurred, but thinks she knew of it afterwards, but does not know when she acquired knowledge of it. He further states, in his original examination, that Cline paid her some money on rents. Mr. Collier was recalled, later in the progress of the trial, and asked to be permitted to correct statements made on his former examination. He then stated that Mrs. Collier never received any money from Cline on account of rents; that Cline claimed that the expenses of running the building were more than the income. He further states that he did not appoint Cline by direction of his wife, nor, at the time, with her knowledge, but she may have known of it afterwards, "but don't know"; that he left, directly after the appointment, for New York, and was not here when Cline was in there. Mr. Collier further stated that when Cline was put in charge of the building, October 23, 1893, the Appeal Company, as owner, had anticipated the rents from most of the tenants; the company collected the notes, and discounted them, or used them as collateral, leaving possibly enough that was collected monthly to meet the current expenses of the building. His recollection is that Cline paid him six dollars. It was while Cline was in charge of the building, to wit, on November 10, 1893, that the accident to the plaintiff happened.

The principal question presented for our determination is whether, upon the facts stated, Mrs. Collier, a married woman, is liable for the injuries sustained by the plaintiff in consequence of the negligence of the employé in charge of the elevator. In other words, was there such a relation of master and servant established between Mrs. Collier and the negligent employé as that the principle of respondeat superior applies?

The case of *Merrill v. City of St. Louis*, 88 Mo. 244, cited by counsel for the defendant in error, is somewhat analogous to the present case. That was an action to recover damages for injuries sustained by the plaintiff, Hannah M. Merrill, in falling through a coal hole in the sidewalk of one of the streets of St. Louis. The legal title to the property abutting on the sidewalk where the injury occurred was in James M. Duffer, trustee for the sole and separate use of his wife, Lucinda M. Duffer, both of whom were sued for the injury. It was further alleged that said premises were used by Duffer and wife, and that the hole in the sidewalk was used by them in conveying coal to the cellar under the house. "The more important question," said the court, "involved in this appeal, is the action of the circuit court in rendering judgment in personam against Mrs. Duffer, a married woman. It is placed chiefly on the ground that Mrs. Duffer was the separate owner of the real estate, for the betterment of which the nuisance was maintained; that the neglect to keep the coal hole in repairs was a tort, and a married woman, at common law, is answerable personally in dam-

ages for her torts not committed in the presence or under the influence of her husband. This general proposition was not controverted by counsel, but the contention was that the legal title to the real estate was in the husband, who was managing the property and collecting the rents for her, and that in fact she neither created the nuisance, nor controlled the property on which it was permitted." The supreme court said, viz.: "The husband was the mere depositary of the legal title. She was the real party in interest. His was a dry, naked trust, not coupled with any interest. \* \* \* He is therefore to be regarded, in this discussion, as any other stranger who might be such trustee,—with no greater or less obligations and responsibilities resting upon him." The court further said that the authorities concur in holding that a married woman is liable to an action for her torts not committed in the presence or under the supposed influence of her husband; citing 2 Bish. Mar. Wom. 256, 257; Schouler, Husb. & Wife, 134; *Dailey v. Houston*, 58 Mo. 361; *Marshall v. Oakes*, 51 Me. 308; *Wright v. Leonard*, 11 C. B. (N. S.) 259, 266. The case of *Merrill v. City of St. Louis* is to be distinguished from the case now being adjudged in several important attributes. It appeared in that case that Mrs. Duffer owned the property adjoining the sidewalk, as her separate estate, while in this case the Appeal Building was not the property of Mrs. Collier, either as a general or separate estate. The legal title was in Smith and Croft, trustees, to secure the note for \$50,000 payable to Mrs. Collier. In the former case the husband "seems to have attended to renting and collecting rents thereon at times. At other times other persons attended to these matters, but whether under direction of the wife or husband does not appear." In the present case there is no proof that W. A. Collier was the agent of his wife, or that he attended to the collection of rents for her benefit. The whole scope of the proof is that W. A. Collier, as president of the Appeal Company, put the building in the possession of J. M. Trezevant and N. E. Cline, respectively, at different times, for the collection of rents for the benefit of Mrs. Collier. The next case cited by counsel for defendant in error is *Flesh v. Lindsay*, 115 Mo. 1, 21 S. W. 907, which was an action against Jane Lindsay and her husband, Andrew J. Lindsay, for damages sustained by plaintiffs in consequence of the falling of a party wall, alleged to have been occasioned by the careless, negligent, and unworkmanlike manner in which the said Jane Lindsay made repairs in her said building. The evidence showed that Mrs. Lindsay was the owner in fee of the property, and that it was not a separate estate. The court held that a married woman can have no agent, unless she is possessed of a separate estate, and that the trial court committed error in instructing the jury that "if Farrar & Co., or Charles Farrar, were the agents of Jane Lindsay for the purpose of causing the alterations and chan-



ges in question to be made, their act was her act, and she is responsible for the alterations and changes in her said building, as if she had made the contract for such alterations and changes in person, without the intervention of an agent." For this error the cause was reversed, and remanded for a new trial. The court, in discussing the liability of a feme covert for a tort, said, viz.: "At common law the husband had almost absolute control over his wife's person; was entitled, as a result of their marriage, to her society, services, and earnings, to her goods and chattels; had a right to reduce her choses in action to possession during her life; could collect the rents and profits of her real estate, and had entire control over her property. She was bound to obey him; was incapable of making contracts, except for necessities; so that, in law, they were regarded as one person. As a necessary consequence, he alone was liable for, and could be sued for, her torts and frauds committed, during coverture, in his presence or by his procurement; otherwise they were jointly liable, and must be so sued. The only torts for which the wife could be sued at common law, and judgment rendered against her, and jointly with her husband, were torts unmixed with any element of contract, such as an assault, libel, slander, and the like. And even then she was not liable unless the tort was committed out of the presence of her husband, and without his order or consent; otherwise he alone was liable, under the presumption that she was induced to commit them under his coercion." In 14 Am. & Eng. Enc. Law, 647, under the head of "Postnuptial Torts," the compiler says, viz.: "For all torts committed by a married woman during coverture, in person, except such as are committed under the coercion of her husband, and such as are intimately connected with her invalid contracts, and such as are committed against her husband, she is liable fully, as if unmarried. Thus, she may be sued for assault and battery; for trespass; for conversation; for slander; for fraud, and false and fraudulent representations unconnected with her invalid contracts; for burning property, etc. But at common law she could not be held responsible for the act of another as her agent, because she could not contract, and therefore could not appoint an agent," etc.

It is not claimed that the tort for which Mrs. Collier is sought to be held liable in this action was committed by her in person, but that the relation of master and servant existed between her and the employé in charge of the elevator, for whose negligence she is bound. In cases where a tort is committed by the married woman in person, her liability is plain; but, when the wrongful act is done by some one claiming to represent her as agent, her liability is determined by the extent of her power to constitute the agent. "If she is liable at all," says the supreme court of Rhode Island [Ferguson v. Neilson (R. I.) 20 Atl. 229], "her liability must rest

upon the same ground as that of any master or principal for the act of a servant or agent. The foundation of the rule, respondeat superior, is contract, express or implied, by means of which the servant stands in the place of the master, so that his act is regarded as the act of the master. If, therefore, there is not, and cannot be, a contract of hiring, there can be no representation of one by the other, and no ground for the application of the rule. There is no substantial difference between holding a married woman liable directly on a contract, or indirectly for a breach of duty imposed upon her by contract. Although the plaintiff is not a party to a contract with her, yet, when he asserts a relation, based upon a contract, as the foundation of a consequent breach of duty, his position is essentially the same as one who sets up the same contract in order to recover directly for its breach. If we should say she is liable for the tort because of the relation, we should say there was a contract which made her liable, for if the driver was her husband's servant, and not hers, of course she is not responsible for him; but if he was her servant, and not the husband's, how could a court, for example, refuse him judgment, if he were to sue for wages upon the contract?" The same thing is true of married women which was held in regard to infants in Jennings v. Rundall, 8 Term R. 335,—that there is no liability for torts dependent upon a contract. Lord Kenyon said, "If it were in the power of a plaintiff to convert that which arises out of a contract into a tort, there would be an end of that protection which the law affords infants." The court observed that it had been somewhat surprised that neither the diligence of counsel nor its own research had brought to light any cases like the one before the court; and yet the absence of authority, so likely to have occurred before, is perhaps the best authority for the conclusion that a married woman has never been thought to be liable for a tort based upon a contract relation. Ferguson v. Neilson (R. I.) 20 Atl. 229. Mr. Cooley, in his work on Torts, after stating the rule in respect of the joint and several liability of husband and wife for the tortious conduct of the latter, remarks: "But the element of contract is as important here as in the law of infancy. The same reasons which would preclude the indirect redress of the infant's breach of contract, by treating it as a tort, will preclude the like redress in the case of a contract of a married woman. \* \* \* In the recent changes in the common law effected by statute in the several states, whereby married women have been given an independent power to make contracts and control property, it is not very clear how far the law of torts has been modified. We should probably be safe in saying that, so far as they give validity to a married woman's contract, they put her on the same footing with other persons; and, when

a failure to perform a duty under a contract is in itself a tort, it may doubtless be treated as such in a suit against a married woman. The same would probably be true, under the statute, of any breach of duty imposed upon a married woman as owner of property which she possesses and controls the same as if sole and unmarried."

The common law on this subject has not been changed by statute in Tennessee. In the case now being decided, the Appeal Building, where the accident happened, was neither the general nor separate estate of Mrs. Collier, but a mere security for the company's indebtedness to her; and, under the authorities, it is clear she had no power to appoint an agent, and is not responsible for the negligence of those in charge of the elevator. It is wholly immaterial that the note secured by the deed of trust was payable to the sole and separate use of Mrs. Collier, since, in our opinion, her power to appoint an agent is determined by the character of her interest in the real estate, and, unless that interest amounted to a separate estate, she had no power to appoint an agent. The theory upon which the liability of Mrs. Collier was submitted to the jury is indicated in the following instructions given in charge to the jury, to wit: "Who was in possession of that building and elevator is the first question to establish. Until this is ascertained from the evidence, you have no right to consider any other question, and this means that until the evidence establishes to your satisfaction that Mrs. Alice T. Collier was in possession, and was running and operating the elevator by her servant, you need consider no other question." The court then proceeds, viz.: "If you find from the evidence that her brother, Macon Trezevant, had been put in possession for her sole and separate use and benefit, and that she knew that fact, and did not repudiate it, then she was in possession, and could not be deprived of it except by her consent. So that whatever action might have been taken afterwards by her husband and attorney, without her consent, could not change her possession to any one else. And if you find that her possession was for her sole and separate use and benefit, to secure her in the collection of the rents and profits, to be applied to a debt held by her to her sole and separate use, then it became her duty to have such servants in her employ to run and operate the elevator carefully and safely," etc. This charge was clearly erroneous, for the reason the accident did not happen while Trezevant was in charge of the building, but during the agency of Cline, who was appointed by W. A. Collier, and, so far as this record shows, without the knowledge of Mrs. Collier, or her subsequent ratification. On this subject the court was in error in refusing the ninth request submitted by counsel for Mrs. Collier, viz.: "(9) If you shall find that Macon Trezevant was put in possession, but find that thereafter one

Cline was put into possession of the property without the knowledge or consent or acquiescence of Mrs. Collier, and that this accident occurred during Cline's possession, then Mrs. Collier cannot be considered to have been in possession of the property, so as to make her liable for the negligence of Cline or his employes." Again, the court erred in refusing to give in charge to the jury the fourth request submitted by counsel for Mrs. Collier, viz.: "The fact that the Memphis Appeal Company, the owner of the property, executed a trust deed thereon to secure Mrs. Collier in a note payable to her sole and separate use, did not create in her a separate estate in the property covered by the trust deed, and that, therefore, having no separate estate in the Appeal Building, she had no power, as a married woman, to appoint an agent to take charge of and manage the property, nor did the Appeal Company, or her husband, acting for the company, have any power to appoint for her an agent; and if you find that Cline was appointed agent for her by the Appeal Company, or by Mr. Collier, acting for the Appeal Company, then Mrs. Collier is not liable for the negligence of such agents or servants." The court was also in error in refusing the eighth request respecting the liability of W. A. Collier, the husband of Mrs. Collier, as follows, to wit: "If you find that the defendant W. A. Collier was not the owner of the Appeal Building at the time the injury occurred, and was not such owner at the time Cline was put in possession thereof by the Appeal Company, and find that Cline was put in possession by the Appeal Company, and that defendant Collier was not in possession of the property at the time the accident occurred, and had no control thereover, and further find, upon the last charge hereinbefore given, that the defendant Mrs. Collier is not liable, then plaintiff cannot recover against W. A. Collier. In such case he (defendant Collier) is not a wrongdoer, and cannot be sued as such." The declaration in this case alleged that Mrs. Collier was in possession of the property at the time of the accident, and that through the negligence of her servants and agents the injury occurred, and does not proceed upon the idea that it was through the negligence of W. A. Collier or his agents. If, therefore, no liability was fixed against Mrs. Collier, there is no ground upon which liability could be adjudged against Mr. Collier. For the reasons indicated, the judgment is reversed and the cause remanded.

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WINN v. FIDELITY MUT. LIFE ASS'N.  
(Supreme Court of Tennessee. Feb. 24, 1898.)

PLEADING—AIDER BY VERDICT.

Where to a declaration on a life insurance policy a plea of not guilty was filed, and issue joined, and verdict for defendant reached, on the false assumption that such was equivalent

to the general issue, plaintiff cannot impeach such verdict on the ground that the trial was without issue, although Shannon's Code, §§ 4602, 4604, require correct pleading, and make it the duty of the court to see "that the rules of pleading are substantially adhered to."

Error to circuit court, Davidson county; J. W. Bonner, Judge.

Action by Mary Polk Winn against the Fidelity Mutual Life Association. There was a judgment for defendant, and plaintiff brought error. Affirmed.

W. D. Covington and G. W. Pickle, for plaintiff in error. Champion, Head & Brown, for defendant in error.

BEARD, J. This action was brought by the plaintiff to recover on a policy of insurance issued by the defendant company on the life of her lately deceased husband, of which she was the beneficiary. On the trial in the court below, there was a verdict for the defendant, and one of the errors assigned here is that the trial was without an issue, inasmuch as the defendant put in the plea of "not guilty," and relied upon it as the sole defense to the plaintiff's declaration. This objection is made for the first time in this court. Although the record discloses five trials in the court below, and on this plea alone, yet at no stage of the proceedings in that court was the attention of the trial judge challenged to it as improperly filed, by demurrer or otherwise. On this last trial the whole controversy arising upon the issuance and the alleged forfeiture of the policy was submitted to the jury upon the assumption, by both parties, that this plea was that of the general issue. This being so, it is clear that, if the verdict had been in favor of the plaintiff, the defendant would not have been heard afterwards to complain that the trial had proceeded upon an immaterial issue. *Bledsoe v. Chowning*, 1 *Humph.* 85. The plaintiff having failed in the court below to avail herself of her right to treat this plea as a nullity (*Insurance Co. v. Thornton*, 97 *Tenn.* 1, 40 *S. W.* 136), and the case, after a trial on the merits, having resulted in a verdict against her, will she be permitted, raising her objection for the first time in this court, to impeach the judgment on that ground?

While the Code (Shannon's Code, §§ 4602-4604) enforces the necessity of correct pleading, and imposes on the court the duty of seeing "that the rules of pleading are substantially adhered to," yet it is well settled in this state that, if parties choose to make even radical departures from these rules, neither will be heard to complain of such departure when the case reaches this court. In *Grant v. Jennings*, 1 *Cold.* 54, after characterizing "pleas in short" as frivolous and as nullities, speaking through Judge McKinney, this court said: Yet, "if the parties shall choose to go to trial upon such issues, and the court, regardless of the positive injunction of the statute, shall tolerate them in doing so, we think

the objection to such pleading could not be taken after verdict by either party." This rule of practice as to such pleas is affirmed in *Shirley v. Keathy*, 4 *Cold.* 33; *Railroad Co. v. Conk*, 11 *Heisk.* 575; *Fry v. Tippet*, 16 *Lea*, 516. This in harmony with the common-law rule that every fair and reasonable intendment will be indulged in, from the allegations in the record, to support a verdict (*Insurance Co. v. Thornton*, 97 *Tenn.* 1, 40 *S. W.* 136), this intendment being invoked, as it is in the present case, by the party securing the verdict. While this rule was not in terms referred to, yet it was in effect recognized in *Sanders v. Young*, 1 *Head*, 219. That was an action against the keeper of a ferry for the loss of an animal while being carried across the river on his boat. To the declaration there were several pleas, among them being an informal plea of not guilty, "not inappropriate," as is said in the opinion, "to the gravamen of the action, as laid in the declaration." This was struck out by order of the trial judge, and his action in this regard was complained of as erroneous; but as the record disclosed that, "under a less formal and less appropriate plea,—a sort of plea of nonassumpsit,—he [the defendant] was permitted to bring out and avail himself fully of all matters of defense," it was held that, however subject to criticism, yet it was not error for which the judgment of plaintiff below should be reversed. Also, in recognition of this rule of intendment, in *Carter v. Graves*, 9 *Yerg.* 445, it was said: "The plea of not guilty is not a good plea to an action of assumpsit, but is maintained after verdict, as amounting to a general issue of nonassumpsit." Even in those courts where the forms of common-law pleading were most observed, this practice has been adopted. In *Marsham v. Gibbs*, 2 *Strange*, 1022, the plaintiff demurred to the defendant's plea of not guilty to his (plaintiff's) demand in assumpsit; and the court said "that, though it [the plea] would be good after verdict, yet it was ill on demurrer." In *Cavene v. McMichael*, 8 *Serg. & R.* 441, it was held that the plea of "not guilty in assumpsit is cured by verdict." To same effect is *Hunnicut v. Carsley*, 1 *Hen. & M.* 153. But it is urged that *Insurance Co. v. Thornton*, supra, is authority for this assignment of error. That case, however, is easily distinguishable from this, in that the insurance company, in answer to a declaration on four tickets of accident insurance of \$3,000 each, pleaded as the general issue the false or immaterial plea of "Not guilty," and certain special pleas, in each of which it relied on a breach of a condition, indorsed on those tickets to defeat recovery. One of the conditions on the back of the tickets was that "the insurance which may be issued to any one person, under the company's accident tickets, is limited to two tickets, aggregating \$6,000," etc.; but a breach of this condition was not covered or relied on in any special plea. In this state of the record, the plain-

tiff below had a recovery for the full amount of the insurance claimed, to wit, \$12,000 and interest. On appeal it was insisted that the last condition was a limitation on the power of the agent who sold the tickets, that could not be waived by him. In answer to this contention, this court said that the insurance company could not avail itself, under a false plea of the general issue, of a condition to defeat the plaintiff's recovery, and the case was treated as having been tried alone upon the special pleas. In disposing of the cause on this point, the court was careful to discriminate it from a case like the one at bar, by saying "that a verdict in favor of the defendant going to trial upon a false plea is not involved in this discussion. Where such is the case, anything that can be will be implied by fair and reasonable intendment from the allegations in the record to support the verdict." So, we have now a case falling directly within this reservation. Other assignments of error are disposed of in a full written memorandum filed with the record. We discover no error in the action of the court below, and its judgment is therefore affirmed.

**HOUSTON & T. C. R. CO. v. O'NEAL.**  
(Supreme Court of Texas. May 9, 1898.)

**RAILROADS—SIGNALS AT CROSSING.**

Rev. St. 1895, art. 4507, provides that the whistle of a locomotive shall be blown and the bell rung at a distance of at least 80 rods from a public highway crossing. *Held*, that under this statute it is incumbent upon the railroad company to begin blowing the whistle and ringing the bell at a distance of at least 80 rods from a crossing; and an instruction that "the law requires that persons running railroad engines shall, when within eighty rods of a public highway crossing of the railroad, blow the whistle and begin to ring the bell," is error.

Error to court of civil appeals of Fourth supreme judicial district.

Action by Ross O'Neal against the Houston & Texas Central Railroad Company. There was a judgment for plaintiff, which was affirmed by the court of civil appeals (45 S. W. 921), from which defendant brings error. Reversed.

Frost, Neblett & Blanding, for plaintiff in error. Croft & Croft, for defendant in error.

DENMAN, J. O'Neal sued the railroad company to recover damages for injuries alleged to have been negligently inflicted upon him by it in a collision between him and one of its engines at a crossing of the railroad and a public road. The petition charged that the injury was occasioned by the negligence of the company in failing "to ring the bell upon said engine and blow the whistle while coming to said crossing, as required by law to do." From the evidence the jury might have found either that the whistle was not blown, or that it was only blown after it passed a point 80

rods from the crossing, or that it was only blown before it passed such point. The company, by its evidence, sought to establish the last proposition. The court charged the jury that "the law requires that persons running railroad engines shall, when within 80 rods of a public highway crossing of the railroad, blow the whistle and begin to ring the bell on the engine, and continue to ring the bell until the crossing has been passed; and, if the persons in charge of the engine in this case failed to so blow the whistle and ring the bell of said engine, they were guilty of negligence." The court of civil appeals having affirmed the judgment against the company, it has brought the case to this court, complaining that the court of civil appeals erred in holding that said charge was not erroneous.

Rev. St. 1895, art. 4507, provides that "the whistle shall be blown and the bell rung at the distance of at least eighty rods from the place where the railroad shall cross any public road or street, and such bell shall be kept ringing until it shall have crossed such public road or stopped." In order to comply with this statute, the whistle must be blown for the crossing before passing the point 80 rods distant therefrom. The language, "at the distance of at least eighty rods," is not susceptible of any other construction. The blowing of the whistle after passing such point is not demanded by the letter of the statute, which only requires the continuous ringing of the bell thereafter. The reason for requiring the whistle to be blown before passing that point was to give at least that much warning from an instrument that could be heard a long distance. While the statute does not in terms fix the distance from the crossing at which the whistle must be blown, otherwise than to direct that it shall be done before passing such point, its spirit clearly requires it to be blown so near that under all the circumstances it would be reasonably calculated to give warning to persons about to use the crossing. It results that, in order to comply with the statute, the whistle must be blown at some point sufficiently near the crossing to be reasonably calculated to give warning to persons about to use same; such point not to be nearer to such crossing than 80 rods. The charge above quoted was erroneous, in that it construed the statute as requiring the whistle to be blown at some point nearer than 80 rods to the crossing. For this the judgments will be reversed, and the cause remanded. The other errors assigned here are without merit.

**HOLLOWAY SEED CO. v. CITY NAT. BANK OF DALLAS.<sup>1</sup>**

(Supreme Court of Texas. June 20, 1898.)

GARNISHMENT—GROUNDS—ISSUE—PLEADING—  
CONFUSION OF GOODS—MONEY JUDG-  
MENT—WHEN PROPER—ERROR.

1. An affidavit in garnishment, by alleging only that the garnishee is indebted to defend-

<sup>1</sup> For opinion on rehearing, see 47 S. W. 516.

ant, does not preclude a trial on the issue as to whether garnishee has effects of defendant in his possession; since under Rev. St. 1895, art. 220, the garnishee is required, without regard to the ground on which the writ is obtained, to fully answer both as to indebtedness, effects in his possession, and knowledge of other indebtedness owing defendant.

2. A finding in garnishment, where the stock of goods owned by defendant and in the possession of garnishee had been mixed by purchases and sales in the usual course of trade, after the service of the writ, so as to be incapable of identification, that the whole stock, as it existed at the time of the trial, should be delivered to plaintiff, is proper, though no such facts are pleaded, since the rule as to confusion of goods is merely a rule of evidence.

3. In order to warrant a judgment against garnishee for the value of the goods of defendant in his possession, if the goods themselves are not delivered to plaintiff, the facts justifying a money judgment must be pleaded; since under Rev. St. 1895, art. 240, the only judgment provided for is a delivery of the goods themselves, and article 241 provides that failure or refusal to deliver shall make the garnishee liable for contempt.

4. A judgment rendered on improper pleadings to support it is "error in law apparent on the face of the record," which the court of civil appeals should consider without an assignment of error, within Rev. St. 1895, art. 1014.

Error to court of civil appeals of Fifth supreme judicial district.

Garnishment by the City National Bank of Dallas against the Holloway Seed Company. From a decision of the court of civil appeals affirming a judgment for plaintiff (47 S. W. 77), defendant brings error. Reversed.

Crawford & Crawford and Hudson & Woody, for plaintiff in error. McCormick & Spence and Morris & Crow, for defendant in error.

GAINES, C. J. The defendant in error, an attaching creditor of G. R. Holloway, made affidavit and caused a writ of garnishment to issue and be served upon the plaintiff in error, a private corporation. The garnishee answered that it was not indebted to the judgment debtor, and had no effects of his in its possession, but that he was the owner of one share of the stock in the corporation. The plaintiff in garnishment contested the answer, alleging, in substance, that the garnishee had in its possession a stock of merchandise consisting of "farm and garden seeds and grain," which had been transferred to it by G. R. Holloway with the intent to defraud his creditors, and that the garnishee knew of the fraudulent intent at the time of the transfer. The garnishee replied, admitting the transfer to it of the merchandise, but denied all fraud on part of the seller, and knowledge on its part of any fraudulent intent of the seller, if such in fact existed. The garnishee also alleged that it gave for the merchandise stock in the corporation of the value of \$5,000, and that such was the value of the goods. The court found that the sale was fraudulent, and that the garnishee had

knowledge of the fraud, and gave judgment for the plaintiff, ordering the seed company to turn over the goods, and directing that, upon its failure to do so, execution should issue against it for the sum of \$5,000, the assessed value thereof. The garnishee having appealed, and the court of civil appeals having affirmed the judgment, the case is brought to this court upon a petition for a writ of error, which assigns four grounds of error. Two of these, in our opinion, present substantially the same question.

The affidavit which was filed for the purpose of obtaining the writ was against the Holloway Seed Company and another corporation. The affidavit is made by an agent. As grounds for the writ, it states "that it, and its agent who makes affidavit hereto, have reason to believe, and do believe, that the said garnishees are each indebted to the defendant George R. Holloway, and that the garnishee Holloway Seed Company is a private corporation, and that the defendant George R. Holloway is the owner of shares in said corporation," etc. The effect of the plaintiff in error's third and fourth assignments in this court is to claim that, since it was not alleged in the affidavit that the garnishee had effects of the attachment debtor in its hands, the court erred in trying that issue, and in rendering judgment against it for such effects. The court of civil appeals held that this objection to the proceedings was not well taken, and we think that their ruling is correct. The point is ably discussed in the opinion of that court, and it is hardly necessary to add anything to what is there said. We will, however, venture some additional remarks upon the question. The writ of garnishment is the creature of the statute, and the procedure a matter of statutory regulation. Under the statutes of some of the states, the objection here taken would be good. They contain language which shows that the intention was that the contest should be confined to the specific allegation made in the affidavit. It is not so, however, with our statutes. Under article 219 of the Revised Statutes of 1895, the plaintiff may obtain the writ (the other requisites existing) by making affidavit that he has reason to believe, and does believe, in the existence of either one of three facts: (1) That the garnishee is indebted to the defendant; (2) that he has effects of the defendant in his possession; and (3) the garnishee is a corporation, and that the defendant owns shares or an interest therein. But, whatever the ground upon which the writ is obtained, the garnishee is required, in every case, "to answer upon oath what, if anything, he is indebted to the defendant, and was when such writ was served, and what effects, if any, of the defendant he has in his possession, and had when such writ was served, and what other persons, if any, within his knowledge, are indebted to

the defendant or have effects belonging to him in their possession." Id. art. 220. The garnishee is required to "make true answers to the several matters inquired of in the writ." Id. art. 226. If the garnishee does not answer, or if he does not fully answer, the plaintiff may take judgment against him for the amount of his demand. Id. arts. 228, 237, 238; *Selman v. Orr*, 75 Tex. 528, 12 S. W. 697; *Jemison v. Scarborough*, 58 Tex. 358. The answers as to matters not alleged in the affidavit were not, in our opinion, intended as an idle ceremony, but were to bring every debt due the defendant by the garnishee, and all effects of the defendant held by him, before the court, in order that they might be subjected to the payment of the plaintiff's demands. All the provisions of our garnishment law, taken together, show that this was the policy; and we think it a wise one. A creditor may believe that a person has effects belonging to his debtor in his possession, and may have no reason to believe that he owes him a debt; and we see no good reason why, when in such a case a writ of garnishment has been obtained on the ground of the existence of effects, the garnishee should not answer as to debts also; and so, likewise, as to effects, when the ground alleged in the affidavit is that the garnishee is believed to be indebted. That the effect of the writ of garnishment was not to be limited to the matter alleged in the affidavit is further shown by the fact that the garnishee is required to answer as to his knowledge of other persons who are indebted to the defendant or have effects of his in their possession. This, we apprehend, is merely for the purpose of discovery, but it indicates that the intention was to give the writ a wide scope as a remedial process.

The evidence showed that after the seed company obtained possession of the stock of goods it carried on a business with it, buying and selling in the usual course of trade, so as to make the original articles incapable of identification. There were no allegations in the pleadings of either party with reference to this matter. The court held that since the garnishee, after the service of the writ, had so mingled other merchandise of a like character with the original articles of the stock as to make it impracticable to distinguish them, it should deliver up to the sheriff the whole stock as it existed at the time of the trial. The complaint here is that the court erred in its ruling, because the facts upon which it was based were not pleaded. We are of the opinion, however, that it was not a matter necessary to be pleaded. The rule as to the confusion of goods is merely a rule of evidence. The wrongful mingling of one's own goods with those of another, when the question of identification of the property arises, throws upon the wrongdoer the burden of pointing out his own goods, and, if this cannot be done,

he must bear the loss which results from it. It is but an application of the principle that all things are presumed against the spoliator; that is to say, against one who wrongfully destroys or suppresses evidence. 1 Smith, Am. Lead. Cas., note to *Armory v. Delamirie*, p. 689. See, also, *Bethel v. Linn*, 63 Mich. 464, 30 N. W. 84. Clearly, the evidence by which the property is to be identified need not be pleaded.

The remaining assignment is that "the court erred in awarding a judgment against said seed company for \$5,000 in the event said company failed to deliver the seeds; such a judgment was conditional, and was wholly unauthorized by any statute,"—and we are of the opinion that it should be sustained. The following articles of the Revised Statutes of 1895 apply to the case:

"Art. 240. Should it appear from the garnishee's answer, or otherwise, that the garnishee has in his possession, or had when the writ was served, any effects of the defendant liable to execution, the court shall render a decree requiring the garnishee to deliver up to the sheriff or any constable presenting an execution in favor of the plaintiff against the defendant, such effects or so much of them as may be necessary to satisfy such execution.

"Art. 241. Should the garnishee be adjudged to have effects of the defendant in his possession as provided in the preceding article, fail or refuse to deliver them to the sheriff or constable on such demand, the officer shall immediately make return of such failure or refusal, whereupon, on motion of the plaintiff, the garnishee shall be cited to show cause at the next term of the court why he should not be attached for contempt of court for such failure or refusal; and should the garnishee fail to show some good and sufficient excuse for such failure or refusal, he shall be fined for such contempt and imprisoned until he shall deliver such effects."

To our minds, it is very clear, from the latter article, that in an ordinary case, where it appears that the garnishee has effects of the debtor in his possession, the only judgment authorized by the statute is that he deliver the property to the sheriff; and it is also clear that the only statutory method of enforcing the judgment is by attachment for contempt. It does not follow, however, that the plaintiff would be without remedy, in case the garnishee should fail to obey the judgment of the court. Since the plaintiff acquires by his proceeding a lien upon the effects, the garnishee, it would seem, could be proceeded against, either in an original suit or an ancillary proceeding, for the conversion of the property upon which he has acquired such lien. If, in a case of fraudulent transfer, the garnishee has sold a part of the effects transferred before the service of the writ, then, as is held in *Willis*

v. Yates (Tex. Sup.) 12 S. W. 232, he may be held liable to the extent of the goods so sold, as for a debt. And so we think that where he has sold or converted the goods, in whole or in part, after the writ has been served upon him, the plaintiff is not without remedy in the very proceeding itself. While there is no express remedy given by the statute in such a case, and while the courts do not ordinarily go out of the statute to give additional remedies in case of garnishment, we are of the opinion that it was not intended that the garnishee could, by an unlawful disposition of the property after the service of the writ, force the plaintiff to a new suit. This we understand to be the ruling in the case of Willis v. Yates, cited above. But we also think that in neither case can the plaintiff have a judgment for money, either absolute or conditional, without pleading the facts from which the liability arises. For example, if the plaintiff had desired to show that the garnishee had disposed of a part of the goods before the service of the writ, and to hold it responsible therefor, in its contest of the answer, it should have alleged the fact of such disposition, and asked a judgment by reason of such fact. So, if it was desired to show a pecuniary liability on the part of the garnishee by reason of its having disposed of a part of the whole of the effects after the service of the writ upon it, the plaintiff should have also pleaded the facts from which such pecuniary liability arose, so that the garnishee should have the opportunity of contesting them upon the trial. That the garnishee has so dealt with the effects that were found in his hands at the time of the service of the writ as to authorize a judgment against him for money is a substantive issuable fact, necessary to be established in order to justify such a recovery, and, in the absence of an appropriate allegation in his adversary's pleading, he cannot be called upon to meet it. It does not appear from either the original opinion or that on motion for a rehearing in the case of Willis v. Yates, cited above, whether the facts upon which the garnishee was held liable for a judgment for money in that case were pleaded or not (12 S. W. 232, 482), but it is apparent the question of pleading was not there considered.

We will add that we hardly think that the error just considered was properly assigned in the brief filed in the court of civil appeals, but it was, however, made a ground of the motion for a rehearing, and is assigned in this court. After careful consideration, we have concluded that to render a judgment without proper pleadings to support it is "error in law apparent upon the face of the record," which that court should have considered without an assignment. Rev. St. 1895, art. 1014; Harris v. Petty, 66 Tex. 514, 1 S. W. 525. For the error pointed out the judgment is reversed, and the cause remanded.

## PASCHALL et ux. v. PIONEER SAVINGS & LOAN CO.<sup>1</sup>

(Court of Civil Appeals of Texas. May 7, 1898.)

**HOMESTEAD — LIENS — HOW CREATED — BUILDING CONTRACTS — PERFORMANCE — ESTOPPEL — PAYMENT — APPLICATION.**

1. Under the constitutional requirement that a lien on a homestead must be based on a written contract, one who entered into a valid contract with husband and wife to erect a residence on their homestead, and for a lien thereon, and by his own fault failed to erect the house substantially as agreed, did not acquire the right to a lien on such homestead.

2. Where one contracted with husband and wife to erect a house on their homestead for a stated sum, and afterwards agreed with the husband that some of the money should be diverted to other uses, the wife, by acquiescing in such diversion, is not estopped to require construction of the house according to the contract.

3. A wife, by occupying with her husband a house not constructed according to a contract for its erection made by them jointly with a third person, is not estopped to deny performance of the contract.

4. Where a lender took up vendor's lien notes for the borrower on his homestead, and also held his note to cover a loan, including the amount paid on the lien notes, and payments had been made on the principal note in excess of the amount of the vendor's lien, such payments will in equity be first applied to the cancellation of the lien notes, as being the more onerous on the debtor.

Appeal from district court, Dallas county: W. J. J. Smith, Judge.

Action by the Pioneer Savings & Loan Company against John D. Paschall and wife. There was a decree adjusting the various rights, and defendants appeal. Modified.

Harris, Etheridge & Knight, for appellants. Morris & Crow, for appellee.

RAINEY, J. Appellants were sued by appellee to recover the balance due on a note for \$1,500, given by John D. Paschall, and to foreclose a lien upon the land in suit herein, which was the homestead of appellants. Appellee recovered judgment against John D. Paschall for \$860.65, and a foreclosure of the lien as to \$390.42.

### Conclusions of Fact.

This cause was submitted upon an agreed statement of the facts and issues of law, as follows:

"In addition to the findings of the jury upon special issues submitted to them by the court, as is set forth at large in judgment rendered herein, and which is made a part hereof, the following are the facts: (1) Plaintiff and said union pleaded and proved that they had obtained a permit to do business in the state of Texas. (2) The premises in controversy were on and prior to December 2, 1889, the homestead of the defendants, they having no other homestead, nor any other homestead lot. (3) The defend-

<sup>1</sup> Writ of error denied by supreme court.

ants and the plaintiff's predecessor, the said union, entered into a contract with defendants, whereby it was agreed that, for and in consideration of the note declared upon by the plaintiff in this case, the plaintiff's said predecessor would erect, build, and complete for them a residence upon the lot of ground described in the judgment herein, and that in the erection and completion thereof it should expend \$1,500, and that said residence should have, when completed, a cash value of at least \$1,300. The same was to be two stories high, was to contain seven rooms and a bath room, was to be finished with native pine, was to have four mantels, and was to be 34x35 feet. (4) Plaintiff's said predecessor, the said union, did not expend \$1,500 in the erection of said residence; but, it did, subsequent to the entering into said contract, expend the sum of \$944.89, as found by the jury, and it did pay off valid vendor's lien notes against the lot, aggregating the sum of \$279.06. The house which was actually constructed contained no bath room, and contained but one mantel, and contained only three rooms downstairs; and the second story was merely floored, without being partitioned or otherwise completed, and the same, when completed, was not worth exceeding \$900; and the defendant Allie Paschall testified that she would not have consented to enter into a contract for the building of the house which in fact was built. (5) The payments made by the defendants are in excess of the amount of the vendor's lien notes paid off by the said union. (6) The said contract so entered into by and between the said union and the defendants was drawn and executed in accordance with the constitution and laws of the state of Texas relating to the fixing of a lien upon a homestead, and was such that if the said union had performed its said contract substantially that its lien as claimed would have existed for labor and material expended in its improvement and prior to the date when the said labor and material were furnished. (7) And the failure to comply with said contract arises upon a state of facts, as follows: After the lien contract was entered into as required by law by husband and wife for the improvement of the homestead, the said union, through its subcontractor, Charles Robbins, expended \$944.89 for labor and material used in erecting said residence, and the remainder of the \$1,500 was expended in the expense of procuring the lien, interest, and premiums in advances, stock dues, fees, assessments, insurance on said property, and other improvements as they appear herein in an itemized statement, all of which were paid and retained with the knowledge of defendants, and with the consent of John D. Paschall, and by the acquiescence of Allie Paschall, since she at the time made no complaint to plaintiff or to said union; and defendants received and took possession of said house,

and have since continuously used and occupied it as their home, without complaint made to plaintiff that it did not keep and perform its said contract, until after the filing of this suit.

"It is understood and agreed, however, that the stipulations herein contained as to the facts proven are in no wise to militate against or modify the findings of the jury upon the special issues submitted to them, as such findings and special issues are embodied in the judgment. There are but two questions for decision in this case, and one of them is this: (1) The said union having contracted with the defendants to erect upon their homestead lot a residence of given dimensions and of given value, and, by its own fault, failed to substantially perform its contract in that respect, did it acquire a lien for its partial performance of the contract, when the failure to so perform it was due to its own fault? In other words, can there be a lien against the homestead as against the married woman upon a quantum meruit, where the failure of substantial performance is due to the fault of the contractor? If the said union acquired no lien by reason of its failure to substantially comply with its contract, then the remaining question for decision is this: (2) The defendants having made payments to the said union in excess of the amount expended by the said union in paying off the vendor's lien notes, will such payments be, in equity, appropriated to the extinguishment of any claim that said union may have by reason of its having paid off said vendor's lien notes? If the said union, by reason of its failure to substantially comply with the contract, did not acquire a lien upon the homestead of the defendants, and if the payments made by the defendants are to be appropriated to the extinguishment of the claim of the said union for having paid off the vendor's lien notes, then and in that event the judgment shall be reversed and rendered denying any foreclosure, but in the event that said union did acquire a lien under the facts stated, and in the event that, under the facts stated, the payments of the defendants will not be appropriated to the extinguishment of the claim of the union for having paid off the vendor's lien notes, then the judgment is to be affirmed. And these are the only issues to be submitted on this appeal, other matters being waived: First. Did said union or plaintiff acquire a lien for the \$944.89 expended for labor and material used in improving defendants' homestead under the facts in this case? And, second, if plaintiff has no such lien, will the payments made be applied first to satisfy the vendor's lien? And, if plaintiff has a lien for the amount expended for labor and material as stated, the judgment is to be affirmed."

The special findings of the jury above alluded to are as follows: "(1) You are requested to find from the evidence whether



or not the union, when it entered into its contract with Chas. Robbins, actually intended to pay him \$1,500, or a less sum. Answer: We do not think that the union intended to pay Robbins \$1,500. (2) You are requested to find whether or not the union did or did not perform its contract with defendants for the erection of said residence, and, if it did not, then to whose fault was such failure due. Was it the fault of the union or of defendants? Answer: The union did not perform its contract with defendants. It was the fault of the union that the contract was not complied with."

#### Opinion.

Only two questions arise under the facts in this case as presented. The first is: Does a party who has entered into a valid contract with the husband and wife to erect a residence upon their homestead acquire a lien thereupon when there has been a partial, but not a substantial, performance thereof, and the failure to perform was due to his own fault? We are of opinion that this question should be answered in the negative. Under the constitution and statutes of this state, a valid lien can be created upon the homestead to secure the payment of money obtained for improving the same, where such money is expended in making such improvements, and the statutory prerequisites in entering into the contract are complied with. The contract in this case was valid, and would have been enforced had there been a substantial compliance therewith. *Lippen-cott v. York*, 86 Tex. 276, 24 S. W. 275; *Lignoski v. Crooker*, 86 Tex. 324, 24 S. W. 278, 788; *Loan Co. v. Everheart* (Tex. Civ. App.) 44 S. W. 885. In this case, on former appeal (34 S. W. 1001), we used the following language: "The amount of money expended in the construction of such building, and in the material procured therefor, was a valid contract lien; and to that extent the lien under the contract should have been enforced against the property." The question here raised was not presented at that time, and the same was not considered. Therefore the language quoted is not applicable to the phase of the case as now presented. By a long line of decisions in this state, it is well settled that, in order to recover on a contract, there must have been, at least, a substantial performance thereof by the party seeking a recovery thereon, or show that performance was prevented by the other party. When there has been partial performance and an acceptance of the benefits, if any, arising therefrom by the other party, then a recovery can be had for a quantum meruit; not by force of the contract, but independent thereof. *Gonzales College v. McHugh*, 21 Tex. 257; *City of Sherman v. Connor*, 88 Tex. 36, 29 S. W. 1053; *Childress v. Smith*, 90 Tex. 610, 38 S. W. 518, and 40 S. W. 389. In the case of *City of Sherman v. Connor*, supra, which is followed by *Childress v. Smith*, su-

pra, there was a failure on the part of Connor and associate to comply with a contract made with the city to construct waterworks. There was only a partial performance of the contract, the failure to substantially comply therewith being attributable to his fault, but the city took possession of the waterworks. In passing upon their right to recover, the court says: "Not having performed the contract, they could not maintain an action thereon for the contract price, or any part thereof. They having, however, constructed a system of waterworks, of which the city has taken possession, are entitled to recover the reasonable value thereof upon an implied contract of the city to pay therefor." Mr. Phillips, in his excellent work on *Mechanics' Liens* (section 134), uses the following language: "A substantial performance, according to the terms and conditions agreed upon, is a condition precedent to the builder's right to maintain an action under the mechanic's lien law. Every one has a right to build his house, cottage, or store after such model and such style as will best accord with his notions of utility, or be most agreeable to his fancy. The specifications of the contract become the law between the parties until voluntarily changed. If the owner, having regard to strength and durability, has contracted for walls of specified materials to be laid in a particular manner, or for a given number of joists and beams, the builder has no right to substitute his own judgment or that of others. Having departed from the agreement, if performance has not been waived by the other party, the law will not allow him to allege that he has made as good a building as the one he engaged to erect. He can demand payment only upon and according to the terms of his contract; and, if the conditions upon which payment be due have not been performed, then the right to demand it does not exist." It is clear that the plaintiff failed to substantially comply with the contract to build a house, and consequently it is, under the foregoing authorities, not entitled to a recovery on the contract, but entitled to a recovery upon an implied contract. Not being entitled to recover on the contract, there is no basis for a lien against the homestead. Consequently, a judgment for foreclosure was not authorized.

It is insisted by the defendant in error that the husband agreed to, and the wife acquiesced in, the diversion of the funds, and took possession of and used the house, and are therefore not in a position to claim that no lien existed for the amount actually expended on the improvements. The defendant in error entered into a contract to build plaintiffs in error a house for so much money, for which amount a note was executed. Defendant in error will not be relieved from complying with its contract because there was an agreement with the husband that it might divert some of the money for other uses, although acquiesced in by the wife. The wife

testified that she never consented to the house as constructed, and her evidence is not contradicted, and she is not estopped by acquiescing in the diversion of the funds. Nor is she estopped by having occupied the house. Phil. Mech. Liens, § 106. The house was on the homestead lot, and, when defendant in error failed to complete it as per the contract, the lien was lost, and the act of the wife in occupying it with her husband could not affect the status of the lien. Id. 137.

The other issue raised is stated by plaintiffs in error as follows: "The plaintiffs in error having made payments to the said union (the predecessor or assignor of defendant in error) in excess of the amount expended by the said union in paying off the vendor's lien notes, will such payments be in equity appropriated to the extinguishment of any claim the said union may have by reason of its having paid off said vendor's lien notes?" It is a general rule of equity that in the application of payments on an indebtedness, where the courts are called upon to make the application, the debtor will be favored, and the payment applied to the debt most onerous to him. Applying this rule, we think the court erred in not applying the payments to the cancellation of the vendor's lien notes held by defendant in error. *Wingate v. Loan Co.* (Tex. Civ. App.) 39 S. W. 999. There is no controversy about the amount of the judgment. To that extent, it is affirmed as to John D. Paschall; and, as to that part foreclosing a lien, it is reversed, and rendered for plaintiffs in error.

#### SMITH et al. v. DAVIS et al.<sup>1</sup>

(Court of Civil Appeals of Texas. March 26, 1898.)

#### TRESPASS TO TRY TITLE—COMMON SOURCE—IDENTITY OF ANCESTOR—EVIDENCE—INSTRUCTIONS—BURDEN OF PROOF.

1. Rev. St. 1895, art. 5263, providing that it shall not be necessary for plaintiff in trespass to try title to deraign title beyond a common source, applies though the title is specially pleaded beyond such source.

2. The rule of common source applies though the action is one of partition, where defendants make a case for the test of titles.

3. Where plaintiffs in trespass to try title prove common source and a superior title under it, they are entitled to recover, unless defendants show a title superior to the common source which they have acquired, or that title never vested in the common source.

4. A deed attempting to convey a one-half interest in land, and reciting the source of the title to such interest to be by virtue of a contract between grantor and the heirs of an alleged common source, and a special warranty deed from the grantee therein conveying all his title in the land, are sufficient conveyances as links in establishing a common source.

5. It was not error to refuse to peremptorily instruct for plaintiffs in trespass to try title, on the ground that defendants claimed title to the land under a common source with plaintiffs, where plaintiffs, claiming as heirs, had offered

contradictory evidence as to the identity of their ancestor with the person named in the patent as the grantee under whom defendants claimed, though such evidence was unnecessary.

6. Refusing to instruct that, the ancestor of plaintiffs being the common source of title, plaintiffs were entitled to recover, unless defendants had shown by a preponderance of the evidence that the land claimed by defendants was not granted to plaintiffs' ancestor, was not error, where plaintiffs themselves had offered evidence which tended to disprove the identity of their ancestor with the person under whom defendants deraigned title.

7. In trespass to try title, where there was a question of identity of plaintiffs' ancestor with the patentee who was the common source, and the evidence showed conclusively that, if the ancestor had ever acquired title, it was directly as such patentee, it was proper to refuse to instruct that defendants were bound to show that the land was not granted to plaintiffs' ancestor, and that the title of the party who was not the ancestor, and to whom the land was patented, did not afterwards vest in the ancestor; since proof that the ancestor was not the patentee was also proof that title did not vest in him.

8. In trespass to try title, where plaintiffs, claiming as heirs, have shown common source of title, but have unnecessarily introduced evidence tending to disprove the identity of their ancestor with the person constituting such common source, it is error to put upon plaintiffs the burden of establishing identity, and deprive them of the benefit of their proof of common source.

9. On an issue as to the identity of plaintiffs' ancestor with a person of the same name through whom defendants deraigned title, it was error to require the jury to find certain detailed and immaterial facts concerning his life and actions as the basis of such identity.

Appeal from district court, Ellis county; J. E. Dillard, Judge.

Action by T. A. Smith and another against M. J. Davis and others. From a judgment for defendants, plaintiffs appeal. Reversed.

This was a suit by T. A. Smith and Sarah J. Abbott, plaintiffs, against M. J. Davis, J. E. Davis, and a number of other defendants, for partition and division of a tract of land of some 500 acres, a part of the one-third league survey situated in Ellis county, patented to Benjamin F. Adams. Plaintiffs below (appellants) set out that they were two of the seven children and heirs of said Benjamin F. Adams, who was dead; that a part of said one-third league survey, to wit, about 500 acres cut off the north end of said survey, is now in possession of defendants (appellees) under claim of title from some of plaintiffs' co-heirs and limitations from others; that plaintiffs are entitled to a one-seventh undivided interest each in said tract of 500 acres, but that defendants had refused to divide the same or award the plaintiffs their shares. They set out with more than usual elaboration their family history, and claimed as heirs of one B. F. Adams, who died in Robertson county, Tex., in 1844, and whose estate was administered in that county, and who was alleged to be the patentee of the lands in controversy. The defendants, appellees here, defended as to different portions of the lands in contro-

<sup>1</sup> Writ of error dismissed for want of jurisdiction.

versy, each disclaiming except as to the lands defended for, and pleading general denial, not guilty, statutes of limitation of five and ten years, and improvements in good faith, except the J. B. Watkins Land Mortgage Company, which disclaimed all interest except as mortgagee of a portion of the lands in controversy. A trial resulted in a verdict and judgment for defendants, and this appeal was prosecuted.

F. N. Read, R. S. Neblett, and Leake, Henry & Greer, for appellants. Groce & Skinner, for appellees.

FINLEY, C. J. (after stating the facts). Appellants group and present together the following assignments of error: Second assignment of error: "The court erred in refusing to give in charge to the jury the special charge asked by plaintiffs, No. 3, to the effect that as the defendants had not shown any title in themselves to the land sued for, by limitation or otherwise, and as the plaintiffs had shown that the defendants M. J. Davis and J. E. Davis claimed title to one-half of the land described in their answer under a common source with plaintiffs, to wit, under plaintiffs' father, that the jury must render a verdict against the Davises, and in favor of plaintiffs, for two-fourteenths of the land claimed by the said M. J. Davis and J. E. Davis." Third assignment of error: "The court erred in refusing plaintiffs' special charge No. 4, to the effect that, the ancestor of plaintiffs being the common source of title, as to one-half of the land claimed by M. J. Davis and J. E. Davis, the plaintiffs were entitled to recover from M. J. and J. E. Davis two-fourteenths of the land claimed by them, unless said defendants have shown by a preponderance of the evidence two facts: First, that the land claimed by the said Davises was not granted to plaintiffs' ancestor; and, second, that the title of the party who was not the ancestor of plaintiffs, and to whom the land was patented, did not vest in the ancestor of plaintiffs." Seventh assignment of error: "The court erred in charging the jury as follows: 'The burden of proof rests upon the plaintiffs to show by a preponderance of the evidence that they are the heirs of the person named in the patent to the land in controversy, and, if they have failed to do so, then your verdict should be for the defendants,'—in that the evidence showed that the defendants M. J. and J. E. Davis claimed at least one-half of the land claimed by them in their answer under a common source with plaintiffs, to wit, under the plaintiffs' father; and, this being so, the burden of proof was on the defendants to show that the land was not granted to the ancestor of plaintiffs, and that the title of the true patentee had not come into the common source."

The plaintiffs' evidence showed that the land in controversy was patented to Benja-

min F. Adams October 11, 1849. The certificate upon which the patent issued was issued on January 18, 1838, to Benjamin F. Adams, by the land board of Washington county. It recites that said Adams proved that he was entitled to one-third league of land; that he had immigrated to Texas in 1835, was a resident at the declaration of independence, had remained and resided in the county, and was a single man. The certificate also showed that it was approved by the traveling board. The land was surveyed by David R. Mitchell, and the certificate located May 11, 1846, and issued, as above stated, in 1849. Their evidence showed that they were the children and heirs of Benjamin F. Adams. In addition to these facts, plaintiffs introduced evidence to establish the identity of their ancestor with the Benjamin F. Adams to whom the patent issued. This evidence, in the main, tended to establish such identity; but a part of their evidence had a contrary tendency. It developed the fact that there were three or more Benjamin F. Adamses who came to Texas in the early days, and received lands from the government; and one of the plaintiffs, Mrs. T. A. Smith, testified, as family history, that her father died in Texas, in 1844, which was an established fact, and that he came to Texas about four or five years previous to his death. If this statement be accepted as fixing the time when their ancestor came to Texas, he could not have been the Adams who was here at the declaration of independence, and received the certificate for one-third of a league of land. Mrs. Abbott, another one of the plaintiffs, and an elder sister, testified, as family history, that their father came to Texas in the fall of 1835, when Mrs. Smith was a babe in arms. Plaintiffs also introduced evidence to show common source of title. This evidence consisted of: (1) Certified copies from the records of certain defectively executed powers of attorney from them and their co-heirs, to one B. W. Brown, dated in 1859, to look up, take possession of, and sell their interest in lands in Texas, belonging to the estate of their father, one of such instruments providing that Brown should receive a half interest as compensation for his services. (2) A deed from said B. W. Brown to James Hogue, conveying all his right, title, and interest in and to a one-half interest in several tracts of land, one of which is the survey of which the land in controversy is a part, reciting that the grantor claimed said half interest by virtue of a contract between him and the heirs of B. F. Adams, dated in 1859. This deed bears date October 8, 1872, and was duly acknowledged and recorded. (3) A deed from James Hogue to M. J. and J. E. Davis, dated September 30, 1882, and duly recorded, for the consideration of \$689 paid, conveying to them all right, title, and interest that he owns or may hereafter acquire in and to the following described tract of

land, "situated in Ellis county, a part of the B. F. Adams survey." Then follows a description by field notes of the land, embracing all the land claimed by the defendants the Davises. This is a special warranty deed. The defendants introduced deeds to themselves to the land in controversy, their chain of title extending regularly back to the W. N. Howe heirs, and they were shown to have claimed under a void judgment against Benjamin F. Adams. Possession began under this claim in 1859, prior to the time of the deeds from Brown and Hogue. Defendants also introduced evidence tending to show that plaintiffs' ancestor was not the Benjamin F. Adams to whom the land in question was patented. This evidence consisted in the reintroduction of the documentary evidence previously offered by plaintiffs.

This statement is not intended as a detailed statement of the evidence, but it is given merely to point out the issues properly arising from the evidence, and the relation of the parties to such issues, and we indicate no opinion upon the weight of the evidence. In the light of this statement of the record, we will consider the contentions in relation to common source of title.

Does the doctrine of common source of title apply in this case? Appellees contend that it does not, for these reasons:

1. Plaintiffs specially alleged the title claimed by them, which was asserted to be by inheritance from their father, Benjamin F. Adams, to whom they alleged the land was patented by the state, and they must recover, if at all, upon the strength of the title deraigned by them. In other words, it is urged that the rule of common source has no application where the plaintiff specially sets out his title in his pleadings. We are cited to no authority in support of this position, and we have found no decision upon the exact point. The general rule, in trespass to try title, that, where a party specially deraigns his title, he must prove the title as alleged, does not settle the question here presented. The inquiry is whether this rule prevents the plaintiffs who have specially alleged title from taking the benefits of the rule of common source. Our statute (Rev. St. 1895, art. 5286) provides, "It shall not be necessary for the plaintiff to deraign title beyond a common source;" and this right is not limited to cases where the title is not specially pleaded. In *Sellman v. Hardin*, 58 Tex. 87, Mr. Justice Stayton says: "The evidence showed that the parties claimed title from a common source, and that of appellee, being the older, entitled him to recover. The fact that the appellee filed an abstract of title under which he claimed that reached back to the sovereignty of the soil, which he did not establish by proof, did not alter the rule." Article 5263, Rev. St. 1895, provides, when abstracts are filed, "in all cases the documentary evidence of title shall, at the trial, be confined to the matters con-

tained in the abstract of titles." If the rule of common source may be applied in cases where the title is set out by an abstract filed under the statute, we can see no reason to exclude it when the title is specially set out in the pleadings.

2. It is asserted that the suit being brought for partition, and not in trespass to try title, the rule of common source does not obtain. It is sufficient answer to this proposition to say that the answer of the defendants made a case for the test of titles, and converted the suit into an action to try title, as well as for partition.

3. It is insisted that the powers of attorney from the plaintiffs and their co-heirs to W. B. Brown were defectively acknowledged, and admitted over objection of appellees, and that the court erred in admitting them in evidence, and for this reason this court should not treat them as legal evidence to show common source. It is urged that article 2312, Rev. St. 1895, governs in the introduction of such evidence. These instruments were defective in respect to the acknowledgments, under the laws of this state; and, had the certified copies been offered to prove title, they should have been excluded under article 2312, Id. Should we concede the correctness of the position that the certified copies of the powers of attorney should not have been admitted in evidence because they were defectively acknowledged, it would not follow that the evidence of common source should be disregarded by this court. The deed from Brown to Hogue recited that he claimed under a contract with the heirs of Benjamin F. Adams, made in 1859; and it was shown by the testimony of witnesses that plaintiffs and their co-heirs executed to B. W. Brown, in 1859, these powers of attorney. No assignment of error is presented to us raising the question of the correctness of the action of the court in admitting the evidence over appellees' objection, and, under these conditions of the record, we do not feel called upon to decide the point.

4. Appellees assert that they showed by evidence that they claimed under a chain of title in which the deeds relied upon by plaintiffs to show common source were not links, and these deeds did not show a common source, unless plaintiffs' ancestor was the Benjamin F. Adams to whom the patent issued. This contention has reference to the claim under the Howe heirs, who claimed under the judgment held to be void in *Mitchell v. Adams*, 1 Posey, Unrep. Cas. 117. The proposition is that they showed that they claimed title through a different source than plaintiffs' ancestor, unless their ancestor was identified as the patentee, and that this proof destroyed the feature of common source, regardless of the fact that their title run back to and through a void judgment, which was not in evidence as proof of title. This proposition, we think, involves an erroneous view of the doctrine of common

source. When the plaintiff proves common source and a superior title under the common source, he is entitled to recover, unless the defendant shows a title superior to the common source which he has acquired, or that the title never vested in the common source. *West v. Keeton* (Tex. Civ. App.) 42 S. W. 1034; *Rice v. Railway Co.*, 87 Tex. 93, 26 S. W. 1047. In *Burns v. Goff*, 79 Tex. 239, 14 S. W. 1010, it is said by Chief Justice Stayton: "The case of *Linthicum v. March*, 37 Tex. 350, seems to hold that a defendant may defeat the rule of common source by a declaration that he does not claim under it, as was attempted in this case; but we are of the opinion that such a rule cannot be maintained under the statute now in force. Rev. St. 1879, art. 4802. If defendant has superior right to the land, whether this arises from adverse possession or other fact, this he is not precluded from showing; but, in the absence of some evidence on his part tending to show such superior right, the plaintiff would be entitled to recover on proof of claim of title by defendant emanating from and under the common source, made in the manner prescribed by the statute." The authorities lead us to the conclusion that the effect of proof of common source by the plaintiff cannot be met and overcome by the defendant merely by showing that he claims the land under another source of title, which is defective and legally insufficient as evidence of title. He can prove any title which he possesses, but he cannot escape from the rule of common source by showing a different claim of title under muniments which do not invest title in him.

5. Appellees claim that the deeds from Brown to Hogue, and Hogue to appellees, were, in legal effect, mere releases, did not convey any specific interest, and were not such conveyances of the land as is contemplated in establishing the common source; citing *Hendricks v. Huffmeyer*, 90 Tex. 579, 40 S. W. 1, and *Howard v. Masterson*, 77 Tex. 41, 13 S. W. 635. The principle announced in these cases, that the deed must convey some particular interest in order to be a sufficient basis for the application of the rule of common source, we fully recognize. But we do not think that principle can be applied to appellees' benefit in this case. The deed from Brown to Hogue attempted to convey a one-half interest in the land, and the deed recites the source of his title to such interest. The deed from Hogue conveys his title to the particular land described, and is a special warranty deed to the land. These deeds attempt to convey the land, and are not mere quitclaims, and, in our opinion, are sufficient to show common source. None of the reasons presented by appellees why the rule of common source should not obtain in this case are, in our judgment, sound; and we hold that the plaintiffs were entitled to its benefits upon

the trial, unless the fact that their evidence extended beyond the point of common source to the question of identity of their ancestor with the person named in the patent as the grantee should be held to defeat that right. As has been previously stated, some items of this evidence tended at least to create doubt upon the point of identity; and we entertain no doubt that it was proper for the jury to consider it upon that issue, the defendants having also offered evidence of the same tendency. The plaintiffs had put the evidence in the case, unnecessarily it is true (*Yarbrough v. Johnson* [Tex. Civ. App.] 34 S. W. 310); and we think the rule of common source should not be held to destroy any force or effect which might properly attach to it. To have given the peremptory charge asked, the refusal of which is made the basis of the second assignment of error, would have had this effect, and the court properly refused to give the charge.

We further hold that the special charge refused, complained of in the third assignment of error, should not have been given, because it unqualifiedly put the burden of proof upon the defendants, and required that they should show that the land "was not granted to plaintiffs' ancestor, and that the title of the party who was not the ancestor of plaintiffs, and to whom the land was patented, did not vest in the ancestor of the plaintiffs. This charge was subject to two objections: The jury might well have inferred from it that they were not at liberty to consider upon the issue of identity, the evidence offered by the plaintiffs relating to that issue, and which tended to disprove the identity of their ancestor with the patentee. It was objectionable also because it required, not only disproof of such identity, but proof that plaintiffs' ancestor did not acquire the title of the true grantee. The evidence showing conclusively that, if their ancestor had title, he derived it directly from the state through the patent in question, proof of the first proposition, namely, that he was not the patentee, was also proof that title did not vest in him, and this proof would have defeated plaintiffs' recovery. The condition of the evidence, however, did not justify the court in putting the burden as to the whole case upon the plaintiffs. The charge of the court had the effect to put the burden of establishing the identity upon the plaintiffs, and cut them off entirely from all benefits from their proof of common source of title. The jury should have been told that the plaintiffs had shown a common source of title as to one-half the land claimed by M. J. Davis and J. E. Davis, and were entitled to recover, unless they believed from the evidence that the Benjamin F. Adams to whom the patent issued was a different person from the Benjamin F. Adams who was shown to be plaintiffs' ancestor. Ordinarily, it would be proper to expressly place the unqualified burden of

such proof upon the defendants, but we do not think this should have been done under the condition of the evidence in this case, heretofore explained.

Appellants further complain of the charge, as follows: "The court erred in his charge to the jury wherein they are instructed as follows: 'The jury is further charged that if they believe from the preponderance of the evidence that the plaintiffs are the children and heirs of B. F. Adams, deceased, and that said Benjamin F. Adams, deceased, is the same identical person who immigrated to Texas as a member of Capt. Wiatt's company of volunteers in December, 1835, and also the same person who was discharged from service by Capt. Wiatt, and was also the same person who applied for and received the certificate from the board of land commissioners of Washington county in February, 1838, and is the identical person named in the patent, then it would be the duty of the jury to find for plaintiffs for two-sevenths of the land,'—because this charge required plaintiffs to prove immaterial facts before they were entitled to recover." This assignment is also well taken. It has the effect to place the burden on the said issue of identity upon the plaintiffs as to the entire case, and requires the jury to find detailed facts involved in that issue, some of which need not necessarily be true, as the basis of such identity.

The other assignments of error we deem it unnecessary to consider. For the errors indicated, the judgment is reversed, and the cause remanded.

RAINEY, J., disqualified, and not sitting.

#### CITY OF ST. LOUIS v. WENNEKER, Collector.

(Supreme Court of Missouri. June 25, 1898.)

TAXATION—EXEMPTIONS—MUNICIPAL CORPORATIONS—REAL ESTATE—ASSESSMENT—  
NAME OF OWNER.

1. Under Const. 1875, art. 10, § 6, providing that the property of municipal corporations shall be exempt from taxation, property devised to a city in trust to constitute a relief fund for the benefit of poor emigrants coming to the city on their way to settle in the West is not exempt from taxation.

2. Under a provision of the revenue laws directing the assessment and taxation of all real estate not exempt therefrom, property held by a city as trustee may be assessed and taxed in the same manner as other property.

3. Under Rev. St. 1889, § 7653, requiring an assessment to be made in the name of the owner, if known, where property was assessed and tax bills were made out against it under the name of the "Mullanphy Emigrant Relief Fund," and at the time the revenue officers knew that the title stood in the name of a certain city, as trustee, the tax bills are void.

In banc. Appeal from St. Louis circuit court.

Suit by the city of St. Louis, trustee under the will of Bryan Mullanphy, deceased, against

Charles F. Wenneker, collector of said city. From a judgment in favor of plaintiff, defendant appealed. Affirmed.

B. Schnurmacher and Chas. C. Allen, for appellant. Geo. E. Smith and G. A. Finkelnburg, for respondent.

WILLIAMS, J. The city of St. Louis, as trustee under the will of Bryan Mullanphy, deceased, instituted this proceeding in equity to prevent the enforcement of, and to procure a decree canceling, certain tax bills against real estate constituting part of the trust property. Mullanphy died in said city on the 15th of June, 1851. He gave to the city of St. Louis, by his will, one-third of all his property, real, personal, and mixed, "in trust to be and constitute a fund to furnish relief to all poor emigrants and travelers coming to St. Louis on their way, bona fide, to settle in the West." The city accepted the trust by an ordinance approved November 16, 1857. The real estate was partitioned, and plaintiff's share under the will set off by metes and bounds. The petition alleges "that since the year 1865 all the property thus owned by the plaintiff was expressly exempted by the constitution and laws of the state of Missouri from taxation. Yet, notwithstanding such exemption, the assessor of the city of St. Louis did pretend to assess said property for taxation from time to time for the years and in the manner hereinafter more fully shown, and did deliver the pretended tax bills evidencing such pretended assessments to the defendant and his predecessors in office, so that the same are now all held by the defendant as such collector, and the defendant threatens to enforce the same as liens against the property hereinafter described." The petition then states that said tax bills are void for the following reasons: "That they are assessed against property which by the constitution and laws of the state at the date of the assessment was wholly exempt from taxation," and "that they are assessed either against the 'Mullanphy Emigrant Relief Fund,' or against the 'Mullanphy E. R. Fund,' whereas there is not, and was not at the date of such assessment, any person, natural or artificial, known by that name, but that the name of such pretended owner as contained in such tax bills is a mere abstraction." A full description of the tax bills is given, and the prayer is that defendant be enjoined from enforcing them, and that they be canceled. The defendant demurred on the ground that the petition failed to state facts sufficient to constitute a cause of action. This was overruled, and a decree entered as prayed, and defendant has brought the case here.

1. The first question for decision arises out of the claim that this property is exempt from taxation. This involves a construction of the constitutional provisions on that subject. Sections 6, 7, art. 10, of the constitution of this state adopted in 1875, are as follows:

"Sec. 6. Property Exempt from Taxation. The property, real and personal, of the state, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real and personal, as may be used exclusively for agricultural or horticultural societies: provided, that such exemptions shall be only by general law.

"Sec. 7. Other Exemptions Void. All laws exempting property from taxation, other than the property above enumerated, shall be void."

It is plain that the framers of the constitution did not intend to permit property, regardless of its amount, to be relieved from taxation simply because of use for charitable purposes. A restriction is placed upon the exemptions that may be made upon that ground. Lots in incorporated cities and towns, or within one mile of the limits thereof, to the extent of one acre, and lots one mile or more from such limits, to the extent of five acres, "where the same are used \* \* \* for purposes purely charitable," may be exempted by general law. There is an express prohibition against the exemption of any other property than that specifically enumerated. The real estate in question here greatly exceeds the limits above mentioned. It is not claimed—nor, indeed, can it be—that it can escape taxation, under the constitutional provision set out above, because of the use to which it is devoted under the Mullanphy will. Section 6, *supra*, in terms directs that property of the state and of counties and other municipal corporations shall be nontaxable. Immunity is claimed for this real estate solely under that provision. It is said that it is the property of the city of St. Louis, and hence is exempt. The legal title is unquestionably in said city, but it remains to be determined whether it is the property of the city, within the meaning of the above section of the constitution. It is certainly not held by it in the same manner or in the same right as its general corporate property. The devise is to it as trustee. The gift is not to the city of St. Louis. A trust is created for the benefit of a particular class, and the testator selected the city to execute it. Any other trustee might with equal propriety have been chosen, and, in carrying out the provisions of the will, such trustee would not have been assuming any municipal function, or interfering with the property of said city. A court of chancery might, even yet, in a proper case, and upon a proper showing, remove the trustee. "A court of chancery is vested with the same jurisdiction over corporate trusts which it ordinarily possesses and exercises over other trust estates." "The

choice of trustees is a matter of judgment, and the deviser of the trust has, in the exercise of that judgment, preferred an artificial to a natural person. Both, as trustees, are equally liable to animadversion and control of the courts." *Chambers v. City of St. Louis*, 29 Mo. 543. The city, however, could not thus be deprived of its property, viz. that of which it was the rightful and real owner. Again, this court has recognized the fact that said real estate is not the "property of the city of St. Louis," in the usual and ordinary meaning of those words. It was said in *Chambers v. City of St. Louis*, *supra*, in discussing the power of said city to take under Mullanphy's will: "The question whether the city can take the land in trust is a compound one, and involves—First, the inquiry whether, under her charter, she can take the land; and, secondly, although she may have the capacity to take it purely as a gratuity, or for her own use, yet whether she can take and hold it for the object mentioned in the testator's will, thereby making herself a trustee in respect to it." "It is not denied but that the city, under her charter, could take all the lands devised to her within her limits, if the devise had been to her own use, uncoupled with the trust to which, by the terms of the devise, it was subjected." "The next question in order is whether the city, even admitting that she can hold the lands outside of her limits for her own use and in her own right, can become a trustee of them for the benefit of others." The trust, too, was not created solely for the benefit of those who might at the time be charges upon the city; nor is the relief to be accorded confined to such amounts as otherwise might properly be appropriated therefor from public funds. The reason for exempting from taxation property of the state and its municipalities is plain. Judge Cooley, in his work on *Taxation* (2d Ed., p. 172), expresses it thus: "All such property is taxable if the state shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself." This reason does not exist for excluding from the tax books the Mullanphy real estate. The city, as trustee, can only use the property for the class and in the manner designated in the will. It cannot be applied by said city to its own benefit, or for municipal purposes. The argument of respondent concedes that, if the property was held in trust by an individual or a private corporation, it would be subject to taxation. We cannot think that a different rule should prevail on the sole ground that a municipal corporation is the trustee. The constitution should not be construed to exempt real estate held in trust by a city, and to require the taxation of that held by the same title and upon the same trusts by an individual trustee. The legislature (Sess. Acts 1897, p. 59) has conferred power upon each county of the state to receive property in trust

for charitable uses, and to act as trustee in such cases. Respondent's contention would exempt such property in the hands of the county, but subject it to taxation if held for the same purpose by any other trustee. Only lots to the extent of one acre in incorporated cities and towns, and to the extent of five acres in country districts, can be relieved from taxation, under the constitution, on the ground of the use thereof for charitable purposes. Const. 1875, art. 10, § 6. An easy way of escaping this prohibition exists, if respondent's theory should be adopted. It will then be only necessary to make the county the trustee, and the exemption will follow, regardless of the number of acres so held by it. We think that the property of a county or city exempted from taxation by the constitutional provisions hereinbefore quoted is that of which such county or city is the beneficial owner, which is held by it "for its own use," and not merely in trust. It does not include that in which the only interest of the municipality is as trustee. We therefore hold that this real estate is not exempt from taxation.

2. The point is made that the tax bills are void because the property therein described has never been subjected to taxation by the general assembly; in other words, that there is no statute providing for its assessment, and directing the manner thereof. Neither, it is said, is there any procedure marked out for the enforcement of the tax lien. If the premises are correct, the conclusion necessarily follows that the tax bills are invalid. The legislature must provide for the taxation of property. The "ways and means" for the assessment thereof must be prescribed by law. Omissions in that behalf cannot be supplied by the courts. *City of Kansas City v. Mercantile Bldg. & Loan Ass'n* (Mo. Sup.) 46 S. W. 624; *Valle v. Ziegler*, 84 Mo. 214; *State v. St. Louis, K. C. & N. Ry. Co.*, 77 Mo. 202. The revenue laws direct the assessment and taxation of all real estate not exempt therefrom. These provisions are broad enough to include this property, if an individual was the trustee. When we hold that it stands upon no different footing, so far as taxation is concerned, simply because the city occupies that position, we necessarily affirm that the revenue laws apply to this real estate. It does not stand upon the same plane as a class or species of property which might be taxed, but for the assessment of which no provision has been made. The general laws direct the assessment of real estate. There is no reason for requiring a special act applicable to this property. It can be assessed just as it would be if there was a different trustee. *State v. Barr* (Mo. Sup.) 44 S. W. 1045.

3. Lastly, respondent objects that the assessments were not legally or properly made. The property in some instances was assessed to, and the tax bills made out against, the "Mullanphy Emigrant Relief Fund"; and in others, the "Mullanphy E. R. Fund." The statutes require the assessment to be made in

the name of the owner, if known; and, if not known, the name of the original patentee, grantee, or purchaser from the federal government must be given upon the assessor's books. This forms the foundation of the proceedings against the owner to enforce the tax, and foreclose the lien therefor. Rev. St. 1889, §§ 7553, 7555, 7562, etc.; *Hubbard v. Gilphin*, 57 Mo. 441; *Abbott v. Lindenbower*, 42 Mo. 162. It cannot be pretended that the trustee was unknown. A legal assessment is a prerequisite to a valid tax. "There is a general concurrence of authority that, when the statute provides for the assessment of occupied lands to the owners or occupants, the requirement that it shall be so assessed is imperative." *Cooley, Tax'n* (2d Ed.) p. 396. It is true that it has been held that a slight change in the corporate name will not vitiate the assessment. *Factory v. McConihe*, 7 N. H. 309. An individual also may be proceeded against by the name under which he does business, and by which he is known. *Patchin v. Ritter*, 27 Barb. 34. These cases cited by appellant do not meet the question for determination here. There was no attempt in the case at bar to make the assessment in the name of any individual or corporation. Neither the real name, nor any appellation by which the corporation is known, is given in the assessments or tax bills. It is evident that it was not intended to give any such name. We must therefore hold that the tax bills are void. Hence the demurrer was properly overruled, and the judgment must be affirmed. It is so ordered.

GANTT, C. J., and SHERWOOD, BURGESS, ROBINSON, and BRACE, JJ., concur. MARSHALL, J., having been of counsel, took no part in the decision.

#### SHIELDS, Treasurer, v. JOHNSON COUNTY.

(Supreme Court of Missouri, Division No. 2.  
April 20, 1898.)

#### INSANE PERSONS—CONVICTS—LIABILITY OF COUNTY FOR SUPPORT—STATUTES—RETROSPECTIVENESS.

1. 1 Rev. St. 1889, § 4247, which empowers the governor to order a convict, who has become insane before execution or the expiration of his sentence, conveyed to the asylum, and there kept until restored to reason, and provides that the expenses shall be paid as provided in cases of the insane poor, does not require, as a condition to the liability of a county for the keeping of an indigent insane convict, that the county court of the county in which he was convicted shall first find as to his residence, lunacy, and insolvency, and enter an order making him a county patient.

2. 1 Rev. St. 1889, § 4247, making counties liable for the keeping of indigent insane convicts in the asylum, does not apply to convicts sentenced before its passage.

Appeal from circuit court, Johnson county; W. W. Wood, Judge.

Action by R. S. Shields, as treasurer of State Lunatic Asylum No. 1, at Fulton,



against Johnson county. From a judgment for defendant, plaintiff appealed. The judgment was reversed.<sup>1</sup> Afterwards a motion for rehearing was made. Affirmed.

N. D. Thurmond and O. L. Houts, for appellant. J. W. Suddath and N. M. Bradley, for respondent.

#### On Motion for Rehearing.

BURGESS, J. At the April term, 1897, we reversed the judgment of the court below in this case, and remanded the cause for further trial. Since then the defendant has presented a motion for rehearing, and, upon further consideration, we are of the opinion that, upon one question raised in the motion to be hereafter passed upon, we committed error.

It is insisted in the motion that it was a condition precedent to the right of plaintiff's recovery that the county court of Johnson county must first find that Canute Farland was a citizen of that county, and that he was insane and insolvent, and then make an order of record making him a county patient. That he was a citizen of the county at the time of his being sentenced to the penitentiary, has since become insane, and is insolvent, are conditions precedent to the liability of the county for his board and clothing at the asylum, may be conceded, but all of these facts are alleged in the petition, and, being material averments, stand admitted by the demurrer. But that the county court of the county must first find these facts to be true, and then make an order making Farland a county patient, before her liability for his keeping attaches, if liable at all, we are unable to give our assent to. By section 4247, 1 Rev. St. 1889, it is provided "that if any person, after having been convicted of any crime or misdemeanor, become insane before the execution or expiration of the sentence of the court, it shall be the duty of the governor of the state to inquire into the facts, \* \* \* and may by his warrant to the sheriff of the proper county, or the warden of the penitentiary, order such lunatic to be conveyed to the insane asylum, and there kept until restored to reason." By this statute express power and authority are conferred upon the executive of the state to inquire into the facts, in such manner as he may think best, with respect to the insanity of convicts who become insane after their conviction, and before the expiration of their sentences, and, by his warrant directed to the warden of the penitentiary, to order such lunatic to be conveyed to the insane asylum, and there kept until restored to reason. There is no appeal from the conclusion which may be reached by the executive in such cases, and his warrant to the warden is conclusive with respect to such action. This power was conferred upon

the executive for the manifest purpose of avoiding the necessity, inconvenience, and expense necessarily attending the removal of convicts, who become insane after their incarceration in the penitentiary, to the county or place where convicted, for the purpose of having them declared insane by a jury of the county where convicted. This same section further provides that "the expenses of the insane convict at the asylum for his board and clothing shall be paid as now provided by law in cases of the insane poor: provided, if such person shall have property, the costs shall be paid out of his property, by his guardian." The expenses for keeping the insane poor at the asylum are paid by the counties of their respective residence. Section 484, 1 Rev. St. 1889. While in this case the burden would rest upon the plaintiff of showing that Farland was a resident of Johnson county at the time of his conviction, and that he had no property, those issues are properly presented by the allegations in the petition, and it was not essential, under the facts disclosed by the record in this case, that they should have been first found to have been as alleged before the institution of this suit by the county court or of any other tribunal of that county. Such proceedings were dispensed with, impliedly at least, by section 4247, supra. The circuit court, being of general jurisdiction, could inquire into such matters in an action of this character. The mode of payment simply means how and by whom paid, and has no reference whatever to the tribunal in or by which, or the conditions upon which, counties may be held liable for the keeping at the insane asylum of indigent insane convicts.

It is also insisted that section 4247, supra, is not retroactive in its operation, and does not, therefore, include convicts who were sentenced to the penitentiary and became insane before it became a law, on the 26th day of June, 1881. Farland was convicted at the October term, 1871, of the circuit court of Johnson county. In *Leete v. Bank*, 115 Mo. 184, 21 S. W. 788, it was ruled, *Sherwood, J.*, delivering the opinion of the court, that a statute is to be construed prospectively, unless the intent that it is to be construed retrospectively is clearly expressed on its face. A similar ruling was announced in *State v. Thompson*, 41 Mo. 25; *State v. Ferguson*, 62 Mo. 77; *Thompson v. Smith*, 8 Mo. 723; *State v. Hays*, 52 Mo. 578; *Reed v. Swan*, 133 Mo. 100, 34 S. W. 483; *Bartlett v. Ball* (Mo. Sup.) 43 S. W. 783. There is nothing in this statute which would seem to indicate, with any degree of clearness, that it was intended by the legislature to apply retrospectively, and, under the rule announced by this court in the foregoing adjudications, we must hold that it does not do so. It therefore logically follows that the defendant county cannot be held responsible for the keeping at the insane asy-

<sup>1</sup> Opinion on reversal suppressed by order of court.

lum of the insane convict Farland, and that the demurrer to the petition was properly sustained. We therefore affirm the judgment.

GANTT, P. J., and SHERWOOD, J., concur.

### MEEHAN et al. v. WATSON.

(Supreme Court of Arkansas. April 9, 1898.)

#### ACTIONS—CONSOLIDATION.

An action by M. for rent, and one by M. and his partner against the same defendant for merchandise, cannot be consolidated, under Sand. & H. Dig. § 5707, authorizing a consolidation where the same plaintiff brings separate actions against the same defendant for causes of action which may be joined.

Appeal from circuit court, Woodruff county, in chancery; Grant Green, Jr., Special Judge.

Actions by Meehan & McGowan against W. V. Watson, and by Charles Meehan against W. V. Watson. There was an order that the two cases be consolidated, and plaintiffs appeal. Reversed.

The following is the answer of the clerk of the court to the writ of certiorari:

"In the Woodruff Circuit Court, September 5, 1895. Meehan & McGowan vs. W. V. Watson. Came the parties by attorneys, and the motion to consolidate this cause with the case of Chas. Meehan vs. W. V. Watson, No. 729, and to transfer this cause to the equity docket, came on to be heard; and after hearing the argument of counsel, and being fully advised in the premises, it is ordered by the court that this cause be consolidated with No. 729, and that the consolidated case be transferred to the equity docket, there to be determined upon the principles of equity as No. 729 and 736 consolidated, to which order of the court in consolidating the said causes and transferring the consolidated case to the equity docket the plaintiff excepted at the time.

"State of Arkansas, County of Woodruff. I, Ed. S. Corl Lee, clerk of the Woodruff Co. circuit court, hereby certify that the above is a true, complete, and perfect copy of the order of consolidation and transfer made in law cases No. 736 and 729, and contained on Law Rec., vol. B, page 675, in my office. Witness my hand and seal, this 11th day of Mar., 1898. Ed. S. Corl Lee, Clerk, by Elmo Corl Lee, D. C."

Appellants, Meehan & McGowan, sued appellee in the circuit court upon a mutual running account for an alleged balance due of \$714.49, embracing transactions between the parties of about three years' duration, amounting in the aggregate to over \$4,500; and, about the same time, Charley Meehan brought suit before a justice of the peace for an alleged balance due for rents of \$199.53, which cause was brought into the circuit court by appeal by the appellant Charles Mee-

han. At the August term of the Woodruff circuit court, 1895, at which term said suits stood for trial, appellee filed an answer to appellants' complaint, denying the indebtedness alleged, and stating that, upon a fair accounting, the balance would be in his favor. Appellee, by way of counterclaim and cross complaint, stated that Charles Meehan and John W. McGowan were partners under the firm name of Meehan & McGowan, and, as such, carried on a general mercantile business, and each of them was engaged in farming and renting land in his individual capacity; that for three years appellee rented land from Charles Meehan, obtaining supplies from the firm of Meehan & McGowan, and delivering to them all the products of his farming operations, to be applied in the payment of rents for each year, the balance to be applied to the payment of his supply account; that, during the time of doing business with said parties, appellee did a large amount of improvement and performed labors for Charles Meehan, at his request, amounting to over \$500; that the account between appellee and appellants, in their individual character and as a firm, were kept by the firm of Meehan & McGowan, and that the firm account and the individual account were so intermingled as to render them intricate, and so confused as to make it impossible for appellee to obtain adequate relief in a court of law; that there had never been a settlement of the matters of account between the parties; that said Charles Meehan had struck an arbitrary balance in his favor of \$199.53, to prevent appellee from pleading a set-off of proceeds of crops against the rents, which crops and produce had been received by the firm, and misappropriated to the account of Meehan & McGowan. Appellee further alleged that the produce delivered to Meehan & McGowan for the payment of rents was more than sufficient to pay all the rents due; that many of the items charged to appellee in the account of Meehan & McGowan should have been charged to Charles Meehan, being furnished for the improvements made on his farm; and the items of loaned money were usurious and fraudulent, being far more than 10 per cent. per annum interest. Appellee prayed in his cross complaint that the case of Meehan & McGowan and the case of Charles Meehan be consolidated and transferred to the equity docket, and that an account be taken and stated between the parties, and that the account of Meehan & McGowan be purged of all the usurious items, and that appellee have judgment for all items which may be due him from Charles Meehan and from Meehan & McGowan, and for general relief. After hearing the motion to transfer to equity, the court ordered that the two cases be consolidated and transferred to the equity docket. See answer of clerk to writ of certiorari. The appellants failing to deny the cross complaint, the court directed a reference to the

master to state the account between the two parties.

Norton & Prewett, for appellants. J. N. Cypert, for appellee.

HUGHES, J. (after stating the facts). Section 5707 of Sandels & Hill's Digest provides that whenever several suits shall be pending in the same court by the same plaintiff against the same defendant, for causes of action which may be joined, or where several suits are pending in the same court by the same plaintiff against several defendants, which may be joined, the court in which the same may be prosecuted may, in its discretion, order such suits to be consolidated into one action. We do not think this case comes within the above statute, because the plaintiffs are not the same in the two cases, and the issues are not the same. We think the court erred in ordering the two cases consolidated. Reversed and remanded, with directions to try these cases separately.

#### NEWTON v. BATEMAN.

(Supreme Court of Arkansas. July 9, 1898.)

##### ADVERSE POSSESSION—DURATION—EFFECT.

An action of ejectment is barred by adverse possession under a donation deed from the state for two years next preceding its commencement, under Sand. & H. Dig. § 4819, which provides that no action for the recovery of land shall be maintained against one holding under a donation deed from the state, unless it appears that plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the land within two years next before commencement of the action.

Appeal from circuit court, Jackson county; Richard H. Powell, Judge.

Action of ejectment by S. D. Bateman against John W. Newton. From a decree for plaintiff, defendant appeals. Reversed.

Appellee instituted this action of ejectment against appellant on October 27, 1892, alleging that he was the owner of, and entitled to the possession of, the lands described in his complaint, and exhibiting the deeds under which he claimed. Appellant answered, denying appellee's ownership, and claiming title under a donation deed from the state executed in 1887. He alleged that he had gone into possession of the lands in 1896 under his certificate from the commissioner of state lands, had been in possession ever since, and had made valuable improvements. He pleaded the statute of limitations as a bar to plaintiff's action. On motion of plaintiff, the cause was transferred to the equity docket. Evidence was introduced sustaining the allegations of the answer. The decree was for plaintiff, and defendant appealed.

S. M. Bains, for appellant.

WOOD, J. The appellee had been for two years next before the commencement of the action in adverse possession under a donation

deed from the state. This bars plaintiff's action. Sand. & H. Dig. § 4819; Finley v. Hogan, 60 Ark. 499, 30 S. W. 1045. The chancellor erred in not so holding. Hence the decree is reversed, and the cause remanded, with directions to the chancellor to dismiss the bill, and tax costs against plaintiff.

#### PIKE v. THOMAS.

(Supreme Court of Arkansas. July 9, 1898.)

##### EXECUTORS AND ADMINISTRATORS—CONTRACTS FOR LEGAL SERVICES—VALIDITY—ENFORCEMENT.

1. An administrator of an estate which has no assets except a certain claim against the United States is entitled to be reimbursed for 50 per cent. paid by him to an attorney for its collection, where the question was whether the estate should lose the entire claim, or pay such percentage for its collection. Sand. & H. Dig. § 217, providing the compensation to be paid attorneys by administrators for the prosecution of suits, applies only to those claims which can be collected by the method provided for the collection of ordinary debts in the courts.

2. An administrator has, as a rule, no power to bind the estate by his contracts, and he is liable on them individually.

3. Where services of value to an estate have been rendered by an attorney in performance of his contract with the administrator, and the administrator is insolvent, a suit will lie in equity to enforce payment for such service out of the estate.

4. Where it is not alleged or proved that an administrator is insolvent, plaintiff is not entitled to relief against the estate for valuable services rendered to it in pursuance of a contract with the administrator.

Appeal from circuit court, Clark county; Rufus D. Hearn, Judge.

Suit by Yvon Pike, as administrator, against C. L. Thomas, individually and as administrator, to recover on a contract. From judgment against defendant individually, plaintiff appealed. Affirmed.

Dodge & Johnson and J. H. Crawford, for appellant. John E. Bradley, for appellee.

BATTLE, J. Yvon Pike, as administrator of the estate of L. H. Pike, deceased, brought an action against C. L. Thomas, in his individual capacity, and as administrator of the estate of Louis Thomas, deceased. He alleged in his complaint that his intestate, Luther H. Pike, in his lifetime, entered into the following contract with C. L. Thomas, as administrator of Louis Thomas, deceased:

"Whereas, I, Charles L. Thomas, as administrator of the estates, respectively, of Louis Thomas, deceased, and H. H. Carter, deceased, of Arkadelphia, in the county of Clark, in the state of Arkansas, have employed Luther H. Pike, attorney and counselor, of Washington, D. C., to take charge of and prosecute to its final determination, in such lawful manner as he may deem best for my interests, the certain claims against the United States, for \$2,625 and \$866.50 respectively, that were presented to the commissioners of claims, under the act of congress of March 3, 1871,—the one on behalf of

the estate of said Louis Thomas, the other by said H. H. Carter,—and were disallowed by it; said attorney to defray the further prosecution of said claims out of his own proper means, without reclamation therefor:

"Now, therefore, I do hereby agree, in consideration thereof, to pay to them a sum of money equal to 50 per centum of the amounts that may be recovered on said claims, the payment of which is hereby made a lien upon the said claims, and upon any drafts, money, or evidence of indebtedness which may be paid or issued thereon.

"In witness whereof, I have hereunto set my hand and seal, this 28th day of July, A. D. 1886.

"[Seal.]

Charles L. Thomas

"Witnesses:

"J. P. Hart.

"A. M. Crow."

He further alleged that his intestate had performed his part of the contract, and recovered on the claim of C. L. Thomas, as administrator of Louis Thomas, deceased, the sum of \$1,338; that this sum was paid to the defendant on the 2d day of December, 1892, by the United States, without passing through the hands of Luther H. Pike, deceased, or his administrator; and that the same still remained in the hands of the defendant, as administrator; and that he had a lien on the same for the services rendered by his intestate; and asked for the enforcement of the same.

The defendant, C. L. Thomas, as administrator of Louis Thomas, deceased, answered, and admitted the execution of the contract, the performance by Luther H. Pike, in his lifetime, of his part, the recovery of the \$1,338, the receipt of the same by himself, and that the same was still in his possession, none of it having been paid out. He admitted that the estate of Thomas was still unadministered, and alleged as a defense that the contract was illegal, and was not binding upon him as administrator.

The deaths of Louis Thomas and Luther H. Pike are admitted; and the fiduciary capacity of Yvon Pike and C. L. Thomas is not disputed. It was admitted that, at the time the contract sued on was entered into, or since, no assets of any kind whatever, except the funds in controversy, belonged to the estate of Thomas; "that congress appropriated the money to pay the \$1,338, and ordered it to be paid directly to the defendant, as administrator, and it was so paid and received by defendant, without its passing through the hands of the attorney, L. H. Pike"; and that no valid order was ever made by any court of record directing the administrator of Thomas to pay L. H. Pike any sum for his services.

Luther H. Pike, in his lifetime, testified that he was a practicing attorney in the city of Washington, in the District of Columbia, and for many years had been prosecuting claims before congress, the court of claims,

the executive departments, and United States commissioners. He explained the course necessary for him to take in order to collect the defendant's claim, as follows: "Congress, by act of March 3, 1871, created a commission of three members, generally known and designated as the 'Southern Claim Commission,' whose jurisdiction was to investigate the claims of persons in those states that had been declared in insurrection, who claimed they had been loyal to the government of the United States during the war of 1861-65, and had furnished or had taken from them stores and supplies for the use of the army of the United States; and to report to congress for its action the result of the investigation."

Under the act of congress of March 3, 1883 (known as the "Bowman Act"), "the claimant had to go to congress, and get his claim referred to the court of claims. This was accomplished by a bill and petition prepared and presented by the attorney of the claimant being referred to the proper committee of either the senate or house of representatives, and by the attorney obtaining the order of the committee sending the claim to the court of claims. The first step in the court of claims was the preparation and presentation of a printed petition and copies for the claimant. The next was the taking of new and additional testimony. That done, the attorney prepared a brief for the trial of the question of loyalty, that fact being made jurisdictional. This brief consisted of all the evidence on loyalty, and the attorney's comments or arguments upon the same. Upon the attorney for the defense filing his brief on loyalty, that question was argued and submitted to the court, though, by agreement, this question was generally submitted without argument. If the finding of the court was in favor of loyalty, then the attorney prepared a brief upon the merits. This consisted of a request for findings of facts, and all the evidence upon the property furnished or taken, when, where, by whom, and its value. \* \* \* When the government's attorney filed his brief on the merits, the case was argued and submitted; and, upon the court filing its findings of fact favorably, the attorney secured from the clerk's office a certified copy of it, filed the same with the committee that sent the case to the court of claims, thereby again bringing the claim before congress for appropriation of the money to pay the amount allowed by the court of claims. But as the court's finding was not a judgment, but merely advisory to congress, and as congress had reserved the right to further investigate, the attorney had to attend to the reference of the claim to a subcommittee and the securing of a favorable report, and then work to secure the desired appropriation by congress."

As to the compensation received by attorneys for such services, he says:

"The rate of amount of compensation depends, in the first place, upon the amount and time of its payment. It is not worth

while to speak of a retainer in cash, with balance during or at the conclusion of the prosecution of the claim. I am not aware of any such cases, and, if there were any such, the number is so small as not to create a rule.

"Under section 823 of the United States Revised Statutes authorizing contracts for fees contingent upon success, the contracts have been almost universally of that character,—either for 33⅓ per cent. if the claimant paid current expenses of the prosecution, or 50 per cent. if the attorney paid them. The two principal considerations upon which such rates were established and stand are:

"(a) Uncertainty as to the length of time the attorney may have to be engaged in the prosecution of the claim, and the amount of labor, and the time he may have to invest in it. \* \* \*

"(b) Uncertainty as to the amount that may be recovered, there being the possibility of the amounts claimed being cut down to such a small figure as to make the attorney's percentage not fairly remunerative for his investment of time, labor, and expenses paid in money."

He further testified that he undertook the collection of defendant's claim for \$2,625, upon the terms stated in the contract sued on, it having been previously investigated and disallowed by the Southern Claims Commission, and the defendant having no money to defray the expenses of the prosecution; that he prosecuted it under the Bowman act; and that he performed all the acts which he testified were necessary to be done in order to collect such claims, and was engaged three years in so doing, and expended over \$175 in payment of the expenses of the prosecution. The facts to which he testified are undisputed.

Upon this evidence and the pleadings, the circuit court refused to grant any relief against the administrator of Thomas, or the fund in question, but rendered a judgment against C. L. Thomas, in his individual capacity, for the sum of \$882.87, it being one-half of the \$1,338 collected and 6 per cent. per annum interest thereon from the 2d day of December, 1892, the day on which the \$1,338 were paid, to the date of the judgment; and the plaintiff appealed.

When Luther H. Pike undertook to collect the claim of the administrator of Thomas against the United States, there were no assets belonging to the estate except that claim. The question was: Should the estate lose the entire claim, or pay one-half of the amount collected thereon for the collection of the amount that should be recovered? The administrator wisely decided to pay the one-half. Thirteen hundred and thirty-eight dollars were collected. Pike's administrator demands one-half of this amount. He is entitled to it. His intestate earned it by valuable services. His demand is eminently just, and should have been promptly paid by the administrator of Thomas; and the latter,

had he done so, should have been allowed a credit for it, by the probate court, in his account with the estate of his intestate.

It is true that section 217 of Sandels & Hill's Digest provides: "When it shall become necessary, in the opinion of the court, for any executor or administrator to employ an attorney to prosecute any suit brought by or against such executor or administrator, the attorney so employed shall receive, as a compensation for his services, eight per centum on all sums less than three hundred dollars and on all sums over three hundred and less than eight hundred dollars, four per centum, and on all sums over eight hundred, two and a half per centum." But this section has application to those claims which can be collected, if collectible, by the method provided for the collection of ordinary debts in the courts, and not to the claims against the United States, which can be collected only through congress and the court of claims, as was the claim of the administrator of Thomas. *Turner v. Tapscott*, 30 Ark. 320. The compensation fixed by the statute shows that the general assembly which enacted it did not have in mind any claim except ordinary debts, which, as a general rule, could be collected without any great expenditure of labor, time, or money.

But we have repeatedly held that an administrator has no power to bind an estate by his contracts. In *Tucker v. Grace*, 61 Ark. 410, 33 S. W. 530, Judge Riddick, speaking for the court, said: "An administrator has no power to enlarge, by his contract, the liability of the estate he represents. Whether he contracts as an administrator or not, it is his own undertaking, and not that of the decedent; and he incurs a personal liability. An attorney employed by the administrator of an estate has no claim against the estate, although his services may have inured to the benefit of the estate. He must look for compensation to the administrator who employed him." The same rule was laid down in *Pike v. Thomas*, 62 Ark. 223, 35 S. W. 212, which was a suit by Luther H. Pike against C. L. Thomas, as administrator of Louis Thomas, deceased, upon the same contract upon which this action is based.

While an administrator, as a general rule, cannot enlarge the liability of the estate he represents, by his contracts, there are exceptions to this rule. Where services have been rendered by an attorney in performance of his contract with an administrator, which are of value to the estate, and the administrator is insolvent, an action will lie in equity to enforce the payment for such services out of the assets of the estate. Equity grants relief in such cases, upon the ground that the administrator has a charge against the estate for the disbursements made by him which are reasonable in amount, and for services which he had the right to contract for in the proper discharge of the duties imposed upon him, although a reimbursement of the same would

not leave a surplus sufficient to pay the creditors of the deceased. Inasmuch as the remedy against the administrator is of no value on account of his insolvency, equity transfers to the attorney the right to collect out of the assets of the estate the amount due him for his services, which the administrator would have had, had he paid it with his own money. *New v. Nicoll*, 73 N. Y. 127; *Clapp v. Clapp*, 44 Hun, 451; 2 *Woerner, Adm'n*, § 356.

In this case it is not alleged in the pleadings nor shown by the evidence that the administrator is insolvent. Unless this be shown, it does not appear that appellant is entitled to any relief in equity against the estate; for, if the administrator can be forced to pay the amount due him, he has an adequate remedy at law, and no right to subrogation to the rights of the administrator against the estate.

The decree of the circuit court is therefore affirmed, without prejudice to the right of appellant to institute an action in equity to be subrogated to the right of the administrator against the estate in the manner indicated, as to one-half of the \$1,338, the amount due on the contract sued on; the estate not being liable for interest on account of the default of its administrator in the payment of the same.

**BUNN, C. J.** This is a suit in equity, based on the following contract:

"Whereas, I, Charles L. Thomas, as administrator of the estates, respectively, of Louis Thomas, deceased, and H. H. Carter, deceased, of Arkadelphia, in the county of Clark, in the state of Arkansas, have employed Luther H. Pike, attorney and counselor, of Washington, D. C., to take charge of and prosecute to its final determination, in such lawful manner as he may deem best for my interests, the certain claims against the United States, for \$2,625 and \$866.50 respectively, that were presented to the commissioner of claims, under the act of congress of March 3, 1871,—the one on behalf of the estate of said Louis Thomas, the other by said H. H. Carter,—and were disallowed by it; said attorney to defray the further prosecution of said claim of his own proper means, without reclamation therefor:

"Now, therefore, I do hereby agree, in consideration thereof, to pay to him a sum of money equal to 50 per centum of the amounts that may be recovered on said claims, the payment of which is hereby made a lien upon the said claims, and upon any drafts, money, or evidence of indebtedness which may be paid or issued thereon.

"In witness whereof, I have hereunto set my hand and seal, this 28th day of July, A. D. 1886.

"[Signed] Charles L. Thomas. [Seal.]

"Witnesses:

"J. P. Hart.

"A. M. Crow."

47 S.W.—8

Under this contract, Pike prosecuted said claims in congress, and through the court of claims, and finally had them allowed, to the extent of \$1,338, for the estate of Louis Thomas, deceased, of which he claimed, as his fee, one-half, to wit, the sum of \$669. By some rule of law, the whole amount recovered was required to be, and was, paid, not to Pike, the attorney of record of Charles L. Thomas, as administrator, but to the said Charles L. Thomas himself, as administrator of Louis Thomas, deceased; and said administrator still holds the same. There is no sort of question as to the justness of the claim, and, more than this, the fund would evidently have been lost to the estate had it not been for the services of Pike, or of some other person performing similar services as he did. It also appears that, under the contract, Pike has spent a considerable sum of his own money, some of which he was able to recall, but some he made no memorandum of, not thinking that it would be important to preserve evidence of the same. Thomas, the administrator, having become possessed of the sum aforesaid, and, as aforesaid, refused to pay Pike his share of it as his fee under the contract, refused also to petition the probate court of the proper county to order its payment out of said fund or the assets of the estate. Pike then filed his petition in the probate court, setting up the facts, and asked an order upon the administrator to pay over to him the said sum of \$669. Upon the hearing, the probate court adjudged that the petitioner, Pike, was entitled to the sum of \$57.45, doubtless an amount he had expended out of his own funds in his efforts to realize on the claim of the estate against the government. Pike appealed to the circuit court, when the judgment of the probate court was sustained, and the additional sum of \$69.96 was allowed; and from the judgment of the circuit court he appealed to this court, where the cause was reversed and remanded, without prejudice, on the ground that the probate court had no jurisdiction to hear and determine an adversary suit between a claimant and the administrator, on a contract between them. The reversal without prejudice was suggestive of a proper remedy for the petitioner in another jurisdiction; and so, when the cause was remanded, he brought his suit in equity against the administrator, as such, to enforce his attorney's lien on the ground, and also against the administrator individually; and the decree was against the administrator individually, but for the estate on the question of the lien, and Pike appealed again to this court.

The decision of *Pike v. Thomas*, 62 Ark. 223, 35 S. W. 212, supra, was based on the decision of *Tucker v. Grace*, 61 Ark. 410, 33 S. W. 530, that particular part of it which says: "It is proper practice, where an administrator refuses to pay for such services, for the attorney to bring suit against him individually, and not in his representative ca-

pacity," meaning to bring suit before a court having jurisdiction over controversies between individuals; and this doctrine grew out of the rule announced in the books, to the effect, as therein stated, that "an attorney employed by the administrator of an estate has no claim against the estate, although his services may have inured to the benefit of the estate. He must look for compensation to the administrator who employed him." Granting, for the sake of the argument at least, that the authorities are correct in sustaining that theory, yet cases in which it is at all applicable are common-law cases, or cases, at least, wherein, by suits against the administrators as such, the estates are sought to be made liable generally; for in such suits the claims are necessarily against assets of the estates generally. Such were the cases of *Pike v. Thomas* and *Tucker v. Grace*, above referred to, and relied upon by the court in its decision herein. It is unnecessary to refer further to *Pike v. Thomas*, since that is but this case, as it appeared here on a former appeal, and because the point decided therein is not, and cannot be, controverted here. Nor need there be any controversy over the real meaning of *Tucker v. Grace*, for it only meant, after all, that suits against administrators for services rendered in behalf of estates at their instance should be against them individually in courts having common-law jurisdiction. Take the cases upon which that decision is based, and which are cited in support of it, and the distinction I am seeking to point out is clearly made. Thus *Underwood v. Milligan*, 10 Ark. 254, was a case where Underwood, for attention to and care of cattle belonging to the estate, sought to have his claim allowed and charged against the estate, over the objection of the administrator. Of course, he suffered defeat in the end. And so it will be found that not a single one of the cases therein cited and relied on have any element of equitable jurisdiction, but all involve simple claims at law.

The plaintiff, Pike, in the case at bar, claimed a lien on the fund he recovered for the estate, not only by the express terms of his contract with the defendant, but by law, which presumably they endeavored to embody in their contract. Pike does not seek to bind the estate generally, on the contract of the administrator. On the contrary, he seeks to recover, not the estate's property, not a debt against the estate, to be settled out of its assets, but he seeks to recover from the administrator that which is his own, and which the latter wrongfully withholds from him, at the instance of general creditors, who seek to enjoy the benefits resulting from plaintiff's labors honestly expended, and at the same time to deprive him of any remuneration for the same, by a supposed rule, which leaves him remediless. But it is said in the decision of the court that, had the plaintiff alleged and proven

the insolvency of the administrator, the decree would have been in his favor. That idea is involved in some of the decisions cited, and, for the purposes of the cited cases, is doubtless correct; but it will strike the most casual observer that to say in one breath that an administrator cannot bind the estate in his charge by his contracts with third persons, and then in the next breath to say that the estate will be bound if it so happens that the administrator is or becomes insolvent, is a little peculiar. Why an estate, not otherwise bound, should be made to pay because the administrator of it cannot or ought not finally to be made to pay, is to my mind making the estate bound at all events; for it is also said that where an administrator performs his contracts with third parties, and they are for the benefit of the estate, and pays what is due on them, the probate court will make an allowance out of the assets of the estate to indemnify him, and that, too, when he is not insolvent. What authority has the probate court to make such an allowance in the one case, and an equity court to subject the funds of the estate to answer the default of the administrator in the other, if by his contract the administrator cannot bind the estate? The truth is, we come back to the point from which we started. The administrator cannot bind the estate in law, but he may do so in equity. If that be true, insolvency of the administrator is not the basis of recovery,—at least not the only ground upon which a recovery may be had,—but a fixing of a lien is also a matter of equitable jurisdiction: and that is just what is asserted here. The idea that one who produces a thing has a lien upon it for the value of his labor expended thereon in bringing it into existence now pervades the law everywhere, and in most instances has been made the subject of statutory enactment; and so it is that the law provides that, where an attorney saves a property to his client, he has a lien upon it for his services. Whether his services have or have not been rendered by authority of law, in any case, is a subject of inquiry, and ought to be determined on principles of equity when the law falls short in its provisions.

The result of the decision of the court in this case is that, on the cause being remanded, the controversy will be renewed, by a complaint in which the insolvency of the administrator will be alleged and shown, if such be the fact, in which case the claimant will succeed in his suit. If, however, the administrator is not insolvent, he will be made to pay the judgment already against him; and he will immediately seek indemnity out of the assets in his hands, and, according to the rule, the probate court will afford him the relief out of the general assets. In other words, the estate will pay the amount at last, unless plaintiff is estopped by some act of his own before the matter has been car-

ried that far. The question then is: Why this circumlocution? Why this useless and expensive procedure, when the same end might be answered by a simple decree, to the effect that, as the complainant has saved so much to the estate, and his demand for services in that behalf is reasonable, that much of the fund will be paid over to him without further trouble and delay? I think such should be the decree in this case.

**ST. LOUIS, I. M. & S. RY. CO. v. JORDAN.**  
(Supreme Court of Arkansas. July 9, 1898.)

**TRESPASSER ON RAILROAD—DRUNKENNESS—NEGLIGENCE—INSTRUCTION.**

1. In the case of a drunken trespasser on a railroad, who was killed by a train towards which he was walking, it is error to charge that the railroad company is liable if the trainmen failed to observe the rule of law as to keeping a constant lookout, and could have discovered his condition in time to prevent injuring him, had they kept such lookout, as this gives a drunken man immunity from the charge of contributory negligence.

2. Where the uncontradicted testimony of defendant's trainmen is that they kept a constant lookout, and that the first intimation that they had of the intoxication of the person on the track, coming towards them, was his staggering, and that they then immediately did everything they could to avoid the accident, an instruction as to the company's liability if the trainmen failed to keep a constant lookout, and could have discovered the man's condition in time to prevent injuring him, had they kept such lookout, is erroneous, as allowing a finding of negligence without evidence.

Appeal from circuit court, Cross county; Felix G. Taylor, Judge.

Action by J. S. Jordan, administrator of G. L. Walters, deceased, against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

Dodge & Johnson, for appellant. Rose, Hemingway & Rose and J. S. Jordan, for appellee.

BUNN, C. J. This is an action for damages for negligently killing plaintiff's intestate—First, for the benefit of the estate; and, second, for the benefit of the widow and next of kin of the deceased. The verdict of the jury was for the defendant company on the first count, but for the plaintiff on the second count, in the sum of \$1,500. On the first count the damages were laid in the complaint at \$5,000, and on the second count at \$10,000.

The testimony shows that on the 1st of March, 1894, one of defendant company's trains was being run northward on the Bald Knob Branch of the Iron Mountain Railroad, and, on approaching the town and station of Wynne, struck, ran over, and instantly killed plaintiff's intestate, Walters, while he was approaching the train, on the track. O. C. Cradock, at the time of the accident fireman on the engine, as a witness for plaintiff testified, in substance, that the lower end of

the railway yards at Wynne there was a signpost marked, "Switch Limits. Slow." This was reached by the engine about 300 feet before the engine struck the deceased, which occurred about  $\frac{1}{4}$  mile before reaching the station of Wynne. When the engine passed that post, it was running at the rate of about 20 miles per hour, and when it struck deceased it was running at the rate of 15 or 18 miles per hour, and was evidently slowing up at the time of the accident. Witness saw Walters walking on the track directly towards the engine, and the engineer saw him about the same time. He was about 200 or 300 yards away when they first saw him, but was 50 or 60 yards from them when, by his staggering, they saw that he was drunk. Previously the engineer had sounded the whistle at the limit post, giving it a long sound, and, we infer, began to slow up. When they saw the man was apparently drunk, the engineer at once sounded the whistle four or five times, and put on the brakes. Witness, continuing, states: "He [the engineer] commenced that whistling when he was, I guess, 50 or 60 yards from the man. I guess the man could have gotten off in the 50 or 60 yards. He could have gotten off the track on either side. About two steps would have taken him off. With the brake lever the engineer threw the brake on. This as soon as we saw he was intoxicated,—just instantly. I do not think the engineer could have done anything else to avoid the accident. I could not tell which way the man was looking, but think he was looking down. Our train made a kind of rumbling noise. I did not know this man was drunk until I saw him stagger, as I have said." This witness was substantially supported by the others.

The evidence in support of the charge of negligence of the railroad employees in charge of the train is, to say the most of it, of the most unsatisfactory character, and to some of us, at least, it is not exactly clear; but, with proper instructions, the jury might not have reached a different verdict. The first instruction given at the instance of the plaintiff applies solely to the first count, which, by the verdict and the judgment of the court, is eliminated from this controversy. The second has reference to the measure of damages under the second count only, and it is not necessary to consider it here. The third is a copy of section 6207 of Sandels & Hill's Digest, on the subject of keeping a constant lookout, which, from the uncontroverted testimony in this case, was perhaps needless, if not abstract and misleading; and, seemingly to cure any errors in giving it, the court, on its own motion, gave the following, also over the objection of the defendant: "The law makes it the duty of all persons running trains in this state upon any railroad to keep a constant lookout for persons and property upon the track of any and all railroads; and, if any



person or property shall be killed or injured by the neglect of any employes of any railroad to keep such lookout, the company owning and operating any such railroad shall be liable and responsible to the person injured for all damages resulting from neglect to keep such lookout. This law does not apply where adult persons go upon a railroad track, where they have no right to be, and carelessly allow a train to strike them; but if you find from the evidence that the deceased, G. L. Walters, was so badly intoxicated as to be insensible of danger, and that the employes of the defendant in charge of the train that struck and killed said Walters failed to observe the above rule of law, by keeping a constant lookout, and that, if they had kept such lookout, they could have discovered said Walters' insensible condition in time to prevent injuring him, you will find for plaintiff." In saying that the lookout statute "does not apply when adult persons go upon a railroad, where they have no right to be, and carelessly allow a train to strike them," the trial court did so, apparently, in recognition of the fact that this court has said in *Railway Co. v. Leathers*, 62 Ark. 235, 35 S. W. 216, and other cases, that the recent lookout statute does not do away with the defense of contributory negligence. But, in what follows, the court destroys or confuses all that it said in this statement. In the first place, the latter part of the instruction gives to a trespasser who is drunk an immunity from the charge of contributory negligence, which a sober person would not enjoy; and in the same connection the court tells the jury that they might find from the evidence that if the trainmen had kept a constant lookout, as required by statute, they could have discovered Walters' intoxicated condition in time to prevent injuring him. That the trainmen kept the constant lookout in this case goes without controversy, unless all testimony is to be arbitrarily disbelieved. That it necessarily follows from the keeping of such lookout that the trainmen could have discovered the intoxicated condition of the deceased is not the law, nor do the facts in this case warrant such a conclusion. Before this part of the instruction should have been given, there should have been something in the evidence going to show some conduct or movement on the part of the deceased not usual in a person of sound mind and in a normal condition, or some circumstance showing that the condition of the deceased should have been known in time for the trainmen to avoid the injury, before the act of staggering, of which the trainmen speak as the first indication they saw of the drunkenness of the deceased; for the undisputed evidence is that as soon as they saw this "staggering" they immediately applied the brakes, blew the whistle (which had just ceased to blow for the station), and did everything they could to avoid the accident. The trainmen testify that they saw the de-

ceased walking on the track, approaching them, some 200 or 300 yards ahead. Considering the time of day (about dusk), when the engine headlight had already been lighted for the night's run, this distance was sufficiently great to indicate that the proper lookout was being kept, and constantly showing that deceased could and would have gotten off in time, had he been in proper condition; and this they had a right reasonably to expect him to do at any time before they saw his condition, especially as the whistle for the station was sounded, as we take it, between the time they first saw him and when they observed that he was drunk, or appeared to be drunk. The trainmen say that, from the time they first saw the deceased, they saw nothing unusual in his conduct or movements, until, at a certain point and at a certain time, they saw him apparently turn to get off the track, and then suddenly going back on the track, staggering; and this indicated to them that he was intoxicated, or something unusual was the matter with him, and, being so impressed, they undertook to stop the train, as stated.

In *Railway Co. v. Leathers*, 62 Ark. 238, 35 S. W. 216, in approval of the doctrine of *Johnson v. Stewart*, 62 Ark. 164, 34 S. W. 889, this court said: "We adhere to the ruling in that case respecting the effect of the statute upon the doctrine of contributory negligence. In our opinion, it makes the failure to keep a constant lookout, by the employes of a railroad company, negligence, and puts the burden upon the railroad company to establish the fact that it kept such lookout. This is the extent of the change made in the law by statute, which, in our opinion, does not, in such case as this, abrogate the doctrine of contributory negligence." One of the doctrines not abrogated by the lookout statute is thus enumerated in *Railway Co. v. Wilkerson*, 46 Ark. 513: "If the employes of a railroad company in charge of its train see a man walking upon the track at a distance ahead sufficient to enable him to get out of the way before the train reaches him, and are not aware that he is deaf or insane, or from some other cause insensible of danger, or unable to get out of the way, they have a right to rely on human experience, and to presume that he will act upon the principles of common sense and motive of self-preservation common to mankind in general, and will get out of the way, and to go on, without checking the speed of the train, until they see he is not likely to get out of the way, when it would become their duty to give extra alarm, by bell or whistle, and if that is not heeded, and it becomes apparent that he will not get out of the way, then, as a last resort, to check its speed, or stop the train, if possible, in time to avoid disaster. If, however, the man seen upon the track is known to be, or, from his appearance, gives them good reason to believe that he is, insane or badly intoxicated, or otherwise insensible of danger, or unable

to avoid it, they have no right to presume that he will get out of the way, but should act upon the hypothesis that he might not or would not, and they should use a proper degree of care to avoid injuring or killing him. Failing in this, the railroad company would be responsible for damages if, by the use of such care after becoming aware of his negligence, they could have avoided injuring him." In other words, this is the old doctrine, applied to the particular state of facts, that, while a railroad company owes no duty to a trespasser on its track, yet, after becoming aware of the trespasser's negligence and danger, it is the duty of the trainmen to do everything reasonably in their power to prevent injury. And in treating of the phase of case where the insensibility to danger is produced by intoxication, in the same case, this court said: "Lee had no legal right to be on that part of the railroad track of appellant where he was walking at the time he was killed. It was not a public crossing, and was no part of a public highway. It was made solely for the running of the cars and train of appellant, and the fact that persons did walk upon it, however frequently, did not change its character, and convert it into a highway for footmen. Being on the private property of appellant, he was where he should not have been, and was bound to use every precaution, every diligence, every care, against any danger which might have happened to him there." "This was his duty. The fact that he was drunk did not excuse one [him] for a failure to exercise the measure of care and prudence which is due from a sober man under the same circumstances. Men must be content, especially when they are trespassers, to enjoy the pleasures of intoxication cum periculis. When they make themselves drunk, and in that condition wander upon a railroad track and sustain an injury, they will not be heard to plead their intoxication as an answer to the charge of negligence, or as a reason why the railroad company should be held responsible to them for damages." Had this man been sober, and not have been discovered to be drunk, the defense of contributory negligence would have been without controversy, under the circumstances; and so it is that the testimony of the trainmen, at last, to the effect that they believed the deceased was intoxicated, is all that justifies a discussion of the case. That being so, the only question of controverted fact was whether or not the trainmen saw his drunkenness in time to save the deceased by the use of proper effort and exertion. The proposition that they might have seen his condition before they did is not an established fact in the case, because there is no proof of prior indication of drunkenness, and no circumstances showing that the condition of deceased might have been discovered sooner; and it is not a question of law, for it was stated thus by this court in *Johnson v. Stewart*, 62 Ark. 164, 34 S. W. 889: "But he seems to

have overlooked the fact that the use of the words, 'or by reasonable diligence might have been discovered,' in the instruction asked by plaintiff in that case (and which is similar to the modification added by the court to the third request of appellant in this case), added a qualification so important and far-reaching as to even overturn the very doctrine of contributory negligence which he was announcing; for it must be seen that, if this principle be sound, it sweeps away every duty and obligation of the plaintiff to exercise ordinary care for the protection of himself and property. He may be reckless of danger, and heedless of consequences, either deliberately or carelessly putting himself or property in front of moving trains; and yet if it can be shown, in case of injury, that it might not have happened if the defendant had exercised ordinary care to discover the situation, the plaintiff may still recover. In other words, it matters not how careless or reckless the plaintiff may be in contributing to his own hurt, the defendant nevertheless is liable, if he has also been negligent. This would be erroneous and unjust. The true rule, which no amount of amplification can simplify, is that, whenever the negligence of the plaintiff contributes proximately to cause the injury of which he complains, the defendant is not liable." In this case, and under the peculiar facts of it, there is no necessity of going to the extent of either of the decisions we have just quoted. All that is necessary to say is, that while the law puts the burden upon the railroad company of showing in any case that a constant lookout was kept, yet when that is shown to have been done, and when it is also shown that the plaintiff has been guilty of contributory negligence, it does not follow that the burden is any further upon the defendant. In other words, applying the rule to this case, where it is shown that the plaintiff was intoxicated, there is no burden on defendant to show when its servants discovered his condition, or under what state of facts they might have discovered it. In this case there is no proof of circumstances from which the trainmen should have seen deceased's drunken condition before they claim to have done so, and the jury had no right to assume the existence of any such circumstances; and still less was it right in the court to instruct them, in effect, that they could arbitrarily say that the trainmen might have seen the drunkenness of deceased sooner, by the exercise of due care, for no amount of care could discover indications of drunkenness where none are shown to have appeared, or may not have appeared. The judgment is reversed for the errors in the instruction named, and the cause remanded for a new hearing not inconsistently herewith.

BATTLE, J. I think the judgment of the circuit court should be reversed on account of the instructions held to be erroneous in the opinion of the court, and for no other reason.

**DE LOACH MILL & MANUFACTURING  
CO. v. LITTLE ROCK MILL &  
ELEVATOR CO.**

(Supreme Court of Arkansas. July 9, 1898.)

**INTERPLEA—RES JUDICATA.**

One who after sale of attached goods, but before payment of the proceeds, files an interplea, claiming title to the property, is not estopped to make his claim by the judgment in the original suit, discharging the attachment, and giving defendant therein damages.

Appeal from circuit court, Miller county; Rufus D. Hearn, Judge.

Suit by the Little Rock Mill & Elevator Company against the Texarkana Grain, Lumber & Machinery Company. The De Loach Mill & Manufacturing Company filed an interplea. Judgment for plaintiff against interpleader, and interpleader appeals. Reversed.

The Little Rock Mill & Elevator Company brought an action upon an account for \$1,540.60 against the Texarkana Grain, Lumber & Machinery Company, on April 29, 1893, and sued out a writ of attachment, which was levied upon the sawmill and one cornmill belonging to the appellants, and upon other property of the defendants in the attachment. All the property was sold by the sheriff under an order of sale made by the judge in vacation of court, and at said sale the said mills were purchased by the plaintiff below (who is the appellee) at \$475, but were not paid for. Before other steps were taken in the case, the De Loach Mill & Manufacturing Company (the appellant here) filed an interplea, claiming title to the property, at the June term of court following, which was sworn to, and prayed for the proceeds of said sale of said mills. This interplea was not answered then. The defendants in the original suit, the Texarkana Grain, Lumber & Machinery Company, answered the complaint in the original suit, admitted the debt, but denied the grounds for the attachment, and claimed damages for the wrongful attachment. The court gave judgment for the debt, but discharged the attachment, and gave the defendants to the original suit damages for \$200, difference between the value of property attached and what it sold for, and ordered that the damages be credited on the judgment, and directed the sheriff to pay the proceeds of the sale of the attached property to the defendants or their attorney. The attorney who represented the defendants also represented the interpleader. The plaintiff gave bond, and appealed to the supreme court; and matters stood in statu quo with reference to proceeds of sale until after the judgment of the circuit court was affirmed, in April, 1895. No answer had been filed to the interplea, which, at the November term, 1895, by consent of parties, was continued until the January term, 1896. At the June term, 1896, the plaintiff filed answer to the interplea, not denying the ownership of the interpleader, but setting up as a defense

only the facts that there had been a trial between the plaintiff and defendant in the original suit, and judgment for the plaintiff, and that the interpleader was estopped to claim the proceeds of the sale of the mills, because judgment had been rendered for the value of the property interpleaded for, and damages for the detention thereof against the plaintiff in the attachment suit, and said judgment had been satisfied by said plaintiff. They said that said interpleaders were, during all the stages of the proceedings prior to and under said judgment, parties to said suit, and made no objection to the judgment and orders of the court therein, although they were cognizant of such proceedings. They submit, in the answer, that the interpleaders are estopped, and that the matters and issues involved are res adjudicata.

Williams & Arnold, for appellant. L. A. Byrne, for appellee.

HUGHES, J. (after stating the facts). The question of estoppel was the only question considered and decided by the circuit court between the interpleader and the original plaintiff. The interpleader's title seems to have been admitted. It was not disputed. There was no answer denying it. Was the interpleader estopped? The interpleader was not a party to the original suit. Speaking of an interplea, in *Berlin v. Cantrell*, 33 Ark. 611, Chief Justice English said, in substance, that it was in the nature of a cross action for the property claimed, and was the interpleader's suit, in which, in legal effect, the interpleader was the plaintiff. Chief Justice Cockrill said, in *Sannoner v. Jacobson*, 47 Ark. 41, 14 S. W. 459, "that the intervening suit is a separate one." As such is its nature, we think the pleadings in it must be governed by rules applicable to similar pleadings in other actions. *Boone*, Code Pl. 159. Our conclusion, therefore, on this point, is that the court erred in refusing to require a written answer to the interplea of the appellants. *Rice v. Dorrian*, 57 Ark. 545, 22 S. W. 213. "In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits." *Hughes v. U. S.*, 4 Wall. 236. It must appear, either on the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. When the record leaves the matter in doubt, extrinsic proof is admissible to show that the same point was adjudicated in the former suit. *Russell v. Place*, 94 U. S. 606; 1 Freeman Judgm. § 256. Chief Justice Watkins said, in *Hershy v. Institute*, 15 Ark. 128: "According to what seems to be the proper construction of the statute concerning attachments, the claimant, other than the defendant, of the personal property seized un-

der the writ, and who has been summoned as a garnishee, may present his claim to the property, as an independent proceeding, and without reference to any controversy between the parties, the determination of it not affecting the right of property between the defendant in the attachment and the claimant or third persons." *Mitchell v. Woods*, 11 Ark. 180. The interpleader in the case at bar fully put the plaintiff on notice by filing his interplea. The statute provides (Sand. & H. Dig. § 372): "Any person may before the sale of any attached property, or before the payment to the plaintiff of the proceeds thereof, or of any attached debt present his complaint, verified by oath, to the court disputing the validity of the attachment, or stating a claim to the property or any interest in or lien on it under any other attachment or otherwise, and setting forth the facts upon which such claim is founded and his claim shall be investigated." The interpleader filed his claim to the proceeds of the sale of his mills, in accordance with this statute. His title to the property was never denied or controverted. The interpleader was not estopped to claim the proceeds, which amounted to \$474; and it is entitled to this amount, with interest thereon. The satisfaction of the plaintiff's judgment pro tanto may be set aside as to the proceeds of the interpleader's property, to which the defendant in the attachment had no title, it having been procured without gain to the plaintiff or loss to the defendant. The satisfaction pro tanto was apparent, but not real. *Jones, McDowell & Co. v. Arkansas Agricultural Co.*, 35 Ark. 28; *Freem. Ex'ns*, §§ 54, 352. The judgment is reversed, and cause is remanded for further proceedings consistent with the opinion.

#### REDD et al. v. STATE.

(Supreme Court of Arkansas. July 9, 1898.)

WITNESS—COMPETENCY—SECOND TRIAL—PARDON—EVIDENCE—REMARKS OF COUNSEL—WAIVING OBJECTIONS—OPINIONS.

1. Though parties agree, on a second trial, that testimony recited in a bill of exceptions prepared for the first appeal was the testimony of a witness since deceased, the facts set forth in a parenthetical recital therein, that defendant having objected to testimony of a witness on the ground that he had been convicted of a felony, and had not been shown to have been pardoned, the pardon was produced, restoring him to citizenship, so he was permitted to testify, cannot be proved by reading the same, and, if they could, would only show that he was held competent to testify at the former trial.

2. A ruling on the first trial as to the competency of a witness is not res judicata on the second trial.

3. An accused, against whom testimony of a deceased witness in a former trial is offered, can make any objection that he could were the witness present and offered for the first time.

4. A pardon cannot be proved by oral testimony, if not being shown that the original was

lost, or, if it was, that a certified copy could not be produced; a certified copy of official acts of the governor, which the secretary of state is required to give, being, equally with the original, the best evidence. *Sand. & H. Dig. §§ 2880, 3166, 3168.*

5. A pardon reciting conviction of a person in certain courts of the state of certain offenses, including burglary and larceny, and granting unto him full and free pardon from the offenses of burglary and larceny, or burglary or larceny, either grand or petit, is a good pardon for petit larceny.

6. The fact of one testifying under a pardon applied for by an attorney for him, and sent to the attorney, shows delivery and acceptance thereof.

7. A witness, on being recalled, need not be sworn, having been previously sworn in the case.

8. Complaint that a witness testified without being sworn will not be heard, objection not having been made thereto.

9. Remark of prosecuting counsel that "every voice in the court house would bear out the conclusion that the testimony was sufficient" to support a verdict of guilty, while improper, is not ground for reversal; the jury having been charged to acquit unless they felt compelled by the law and the evidence in the case to convict.

10. Reference by prosecuting counsel to matters outside the evidence is not ground for reversal; the court having admonished him to confine himself to the evidence, and he and the court having asked the jury not to consider such matter.

11. Objection that the wording of a charge required each defendant to prove an alibi for the other as well as himself cannot be urged, defendants not having requested a charge in the language they desired.

12. One who has seen and read a letter which another admitted he wrote may testify that he thinks the writing on another he saw was also his.

Appeal from circuit court, Drew county; *Marcus S. Hawkins*, Judge.

*James Redd* and *Alex. Johnson* were convicted of murder, and appeal. Reversed.

*H. King White* and *J. W. House*, for appellants. *E. B. Kinsworthy*, Atty. Gen., for the State.

*WOOD, J.* This appeal is from a conviction of murder in the first degree.

1. One of the grounds of the motion for new trial is as follows: "Because the court erred in permitting the prosecution to read to the jury, as evidence in the case, the testimony of *John Henry*, given at a former trial of this case; the same being irrelevant, incompetent, and no proper foundation having been laid for the introduction of same." Witness *H. W. Wells* read from the bill of exceptions prepared for the first appeal what counsel on both sides agree was the testimony of *John Henry*. In the midst of this testimony, as set forth in said bill of exceptions, occurs this recital, in parenthesis: "At this point attorneys for defense objected to the witness testifying, whereupon the pardon was produced, restoring him to citizenship; so the witness was permitted to testify, and proceeded as follows," etc. "The defendant at the time objected to the testimony of the said *John Henry* being read to the jury, on

the ground that no proper foundation had been laid therefor, and because the said Henry had been convicted of a felony, and it was not shown that he had ever been pardoned."

(1) Without setting it out in detail, it suffices to state that the testimony of Henry tended to connect the defendants with the crime charged, and was therefore relevant.

(2) The state showed that since the first trial John Henry had moved to Mississippi; also, that he had been killed; and therefore the proper foundation was laid for the introduction of his testimony taken at a former trial.

(3) Was it competent? The defendants proved that on the 1st of October, 1892, John Henry was sentenced to the penitentiary for the crime of grand larceny. The rule is well settled that the testimony of a witness taken at a former trial, since deceased, "is open to all the objections which might be taken if the witness were personally present." *Railway Co. v. Harper*, 50 Ark. 159, 6 S. W. 720; 1 Greenl. Ev. § 163. If witness Henry had been present at the trial, and the defendants had objected to his testimony, showing that he had been rendered incompetent to testify by reason of conviction of an infamous crime, it would then have devolved upon the state to show that his competency had been restored by the pardon of such offense, before said witness could testify. Under the rule *supra*, the testimony of the witness at the former trial stands in lieu of the witness himself, and precisely the same proof should be made as to the competency of this evidence as should be made if the witness were present in person to testify. What is the effect of the recital in the bill of exceptions in the former trial, which was read in evidence on this trial as a part of the testimony of John Henry, to wit: "(At this point the attorney for the defendants objected to the witness testifying, whereupon the pardon was produced, restoring him to citizenship.)" It is argued in the able brief of the attorney general that this recital shows that John Henry was a competent witness at the time he testified at the first trial, and therefore his evidence was competent on the second trial, unless it had been shown by the defendants that he had been rendered incompetent since his evidence was taken at the first trial. We do not consider this position tenable, for several reasons:

(a) This was a mere parenthetical recital in the bill of exceptions, in the midst of what purported to be, and what counsel agreed was, the testimony of John Henry; but the facts set forth in this recital were no part of John Henry's testimony, and the facts which this recital disclose were not agreed to by counsel, and could not be proved by reading from the bill of exceptions in the former trial. *Stern v. People*, 102 Ill. 533; *Roth v. Smith*, 54 Ill. 432.

(b) If these facts could be established that way, the effect would only be to show that

John Henry was held competent to testify at the former trial, which is proved as well without the recital, by the fact in evidence that he did testify.

(c) What was ruled as to the competency of the witness John Henry at the first trial is not *res adjudicata* on the second trial. The reversal and remand of the first case for new trial sent the whole case back to be tried *de novo*. The defendants on the second trial could raise anew any objection to the competency of John Henry as a witness that they raised on the first trial, and every objection which could have been raised. For instance, if they had overlooked any fact at the first trial, which, if known, would have rendered his testimony incompetent, they had the right to bring forward such fact on the second trial, in order to have his testimony taken on the first trial declared incompetent.

(d) This brings us back to the rule announced in the beginning, that "the party against whom the testimony of a deceased witness in a former trial is offered is allowed to make every objection which could be made if the witness were in life, and personally offered for the first time." *House v. Camp*, 32 Ala. 541. The record in regard to the proof of pardon is as follows: "H. W. Wells, prosecuting attorney, testified: Question. State whether you know John Henry was pardoned before he testified, and by whom? Answer. Yes, sir; he was pardoned. (The defendants objected to this question and answer, and asked that it be excluded from the consideration of the jury. The court overruled their objection, and the defendants excepted.) Question. What became of that pardon? Answer. I obtained the pardon, and made proof of it in the case when John Henry was being examined before the court; and after the court was over I gave the pardon to John Henry, and I have never seen it since." The best evidence of a pardon, under our law, is either the original or a certified copy. Section 2880, *Sand. & H. Dig.*, provides: "Copies of official acts of the governor and \* \* \* of all records deposited in the office of the secretary of state and required by law there to be kept, certified under his hand and seal of office, shall be received in the same manner and with like effect as the original." Section 3168, *Sand. & H. Dig.*, is as follows: "The secretary of state shall keep a full and accurate record of all the official acts and proceedings of the governor." Section 3168 provides: "He shall keep a seal of office, surrounded with the words 'Seal of the Secretary of State, Arkansas,' and shall make out and deliver to any parties requiring same, copies of any \* \* \* commissions or other official acts of the governor, and of all rolls, records, etc., deposited in his office and required there to be kept, and certify said copies under his hand, and affix the seal of his office thereto." It is an old, familiar, and wise rule of law that oral evi-

dence cannot be substituted for any instrument which the law requires to be in writing, so long as the writing exists, and is in the power of the party. 1 Greenl. Ev. § 86; Whart. Ev. § 68. Here the nature of the fact to be proved, to wit, a pardon, disclosed the existence of some evidence of that fact in writing, of an official character, more satisfactory than oral proof; and therefore the production of such evidence, or a showing why it could not be produced, was demanded, before any oral evidence of the fact could be admitted. 1 Greenl. Ev. § 85, and authorities cited in note d. The rule, so far as we know, is without exception, and the authorities uniformly so declare it. *Brown v. State* (Tex. Cr. App.) 28 S. W. 536; *Hunnicut v. State*, 18 Tex. App. 499-520; *Underh. Cr. Ev.* § 208. The wisdom of such a rule is clearly demonstrated in this case by the general and indefinite manner in which it was attempted to prove the pardon by oral evidence; the witness simply stating that he obtained a pardon for John Henry, and that John Henry was pardoned, leaving to inference that the pardon was for the specific offense of which said Henry had been convicted. Mr. Wharton says: "When it is sought to rehabilitate a convict by means of a pardon, the pardon must accurately cite the conviction." Whart. Cr. Pl. § 535. If it be conceded that the original was lost, still it was not shown to have been beyond the power of the state to produce a certified copy of the pardon. As appellants showed that John Henry, if present, was incompetent to testify, and the state has offered no evidence, such as the law requires, to controvert that fact, it follows that the court erred in permitting the testimony of such witness taken at a former trial to be read to the jury; and, as such evidence was prejudicial, the error in admitting it entitled appellants to a new trial.

2. Was it error to admit the testimony of witness James Robinson? He claimed to have been an eyewitness to the alleged murder of W. F. Skipper. This witness was shown to have been convicted of the crime of burglary and grand and petit larceny. No less than three pardons were produced for him when he was first offered, and two others when he was re-examined. After Robinson had first testified, appellants moved to exclude his testimony, for incompetency growing out of the conviction of petit larceny, of which they alleged he had never been pardoned. The state then produced the third or last pardon, which is as follows: "Whereas, James Robinson, of Drew county, Arkansas, has been duly convicted in a certain court or courts of this state of certain offenses, including those of burglary and larceny: Now, therefore, I, Dan'l W. Jones, governor of Arkansas, by virtue of the power and authority in me vested by the constitution of this state, do hereby grant unto the said James Robinson full and free par-

don of and from the offenses of burglary and larceny, or burglary or larceny, either grand or petit, and of all felonies of which he may have heretofore been convicted in any court or courts of this state; hereby fully absolving him of and from all such judgments of such courts, and all the effects and consequences thereof; this pardon being for the purpose of restoring said Robinson to citizenship." Proper exceptions were saved to the reading of this pardon. Since a conviction of petit larceny disqualifies as a witness (*Hall v. Doyle*, 35 Ark. 445), unless the above pardon was good for that offense the testimony of Robinson was incompetent. But, if it was a good pardon for petit larceny, it was also good for the other offenses, of burglary and grand larceny, of which Robinson is shown to have been convicted; for all these offenses are described with the same certainty. Was it a good pardon?

(1) "A pardon must be construed most strictly against the king or the state, and most beneficially for the subject." 4 Bl. Comm. Like any other grant, if its meaning be in doubt it is taken more strongly against the grantor. 1 Blsh. New Cr. Law, § 908; *Ex parte Hunt*, 10 Ark. 284; Whart. Cr. Pl. § 523, and authorities cited. It can be clearly understood from this pardon that the governor intended to pardon James Robinson of the offenses of burglary and grand and petit larceny, no matter in what county conviction for these offenses may have been had. These particular offenses are designated in the pardon, and these were the particular offenses of which it was shown James Robinson had been convicted. If it is possible to show that the pardon was intended to cover and does cover the offense of which the witness was convicted, the pardon, if in other respects valid, is sufficient. *Com. v. Railroad Co.*, 1 Grant, Cas. 329; 1 Blsh. Cr. Law, § 906; *Martin v. State*, 21 Tex. App. 1, 17 S. W. 430; *Hunnicut v. State*, 18 Tex. App. 500. If appellants had shown that Robinson had been convicted of some other offenses than those named in the pardon, it may be that the terms, "and of all felonies of which he may have been heretofore convicted," used in the pardon, would not have covered such offenses. In such a case the pardon may not have been allowed upon the theory that the governor "was not acquainted with the heinousness of the crime, but deceived in his grant." 2 Hawk. Pl. Cr. c. 37, § 8533; *State v. Foley*, 15 Nev. 64; *State v. McIntire*, 46 N. C. 1; *State v. Leak*, 5 Ind. 359. But no imposition or fraud upon the governor could reasonably be inferred from the language of this pardon. He knew the nature of the crimes named which he was pardoning, and what a conviction thereof meant.

(2) The pardon was full and free for the offenses named, and as such, in the eyes of the law, removed every vestige of infamy from the witness which had attached by

reason of the convictions mentioned. It placed him in statu quo in his relations to the state. The words, "for the purpose of restoring said Robinson to citizenship," were superfluous. *State v. Foley*, supra; *Ex parte Hunt*, supra.

(3) Delivery and acceptance are essential to a valid pardon. 1 Bish. Cr. Law, § 907; *U. S. v. Wilson*, 7 Pet. 150. On this point H. W. Wells testified as follows: "I received this pardon on yesterday's mail. It has been in my possession ever since. It was procured by telegraphing." The pardon was absolute. It is manifest that the governor intended to grant it. He had parted with all control over it, and, as it was highly beneficial to the grantee, an acceptance of it, we think, in the absence of any proof to the contrary, must be presumed. *Whart. Pl.* § 533; *Elsberry v. Boykin*, 65 Ala. 336; 2 Greenl. Ev. § 297. Robinson testified under this pardon. Without it, he could not have testified at all. The circumstances show delivery and acceptance. *Hunnicut v. State*, 18 Tex. App. 520. H. W. Wells was an attorney. He made application for the pardon for James Robinson, and it was delivered to him for Robinson. It may reasonably be inferred from this that he was representing Robinson. "The principles," says the supreme court of Alabama, "applicable to the delivery of a pardon and of an ordinary deed of gift, must be considered as analogous. In the case of a deed, its delivery is generally said to be complete when the grantor has parted with his entire control or dominion over the instrument, with the intention that it shall pass to the grantee or obligee, and the latter assents to it, either by himself or his agent. The delivery may as well be made also to a stranger for the benefit of the grantee." *Ex parte Powell*, 73 Ala. 517. Therefore James Robinson was a competent witness. There is nothing in the fact that he was not sworn when recalled. He had been sworn in the case before, and, even if he had not been sworn, no objection was raised to his testifying without being sworn. See authorities cited in brief of attorney general. What we have said upon the subject of the delivery of the pardon of James Robinson applies equally to the pardon of John Henry.

3. We find no error in the court's ruling upon the questions presented in the third, fifth, sixth, seventh, and tenth subdivisions of appellants' brief. Most of these are not likely to arise upon another trial, and have already been often passed upon by this court,—such, for instance, as the proper foundation for the introduction of the testimony of a witness taken at a former trial, the legitimate scope of cross-examination, the remarks of counsel in argument, and the improper conduct of jurors. We would not be understood, however, as licensing a repetition of some of the remarks made by counsel, by failing to condemn same. Those

made by counsel to the effect that "every voice in the court house would bear out the conclusion that the testimony was sufficient" to support a verdict of guilty were highly improper, as were also those which referred to the insurance company. Remarks which may be construed as appealing to the prejudices or passion of juries, to have their verdicts influenced by the sentiment and opinion of the idle or interested spectator, or, indeed, by any other considerations than such as are grounded upon the facts and law of the case being tried, deserve the severest exhortation from the presiding judge, and will result in a reversal of the judgment here, where it seems reasonable or probable that such remarks had any effect in producing the verdict. But, when objection was made to the remarks of counsel in regard to the insurance company, the court admonished the counsel to confine himself to the evidence, and the counsel who had made the remarks asked the jury not to consider that part of his argument. As to what was said about the voice of every one in the court room approving the sufficiency of the evidence to sustain a verdict of guilty, that was but the mere expression of the opinion of the counsel. It was in bad form, to be sure; but jurors must be presumed to be men of intelligence, and scrupulous of the oaths which they take to try cases according to the law and the evidence. The court, in a very full and fair charge for appellants, called the attention of the jurors to their duty in this respect. He told the jury that it was their duty to give the defendants the full benefit of the presumption of innocence, which was an essential and substantial part of the law of the land, and to acquit the defendants unless they felt "compelled to find them guilty as charged, by the law of the land and the evidence in the case, convincing them of their guilt as charged, beyond all reasonable doubt." The court also took away from the jury, by an instruction, any consideration whatever of any insurance company in connection with the case, and in many other instructions fully protected every right of the appellants to have the case tried according to the law and the evidence. So we are of the opinion that the remarks of the counsel, under the circumstances, did not in any manner influence the verdict.

4. We find no error in the charge of the court. It was as liberal to appellants as they could have asked. The only instruction of which they complain here, when fairly construed, does no more than tell the jury that the defendants could not avail themselves of an alibi unless it was shown that they were at some other place than the place of the commission of the crime charged, at the time of the killing. This instruction, when taken in connection with the one on the subject of alibi asked and given on behalf of appellants, we do not think could

possibly have misled the jury. The defendants were both on trial at the same time, and the instruction was designed to apply to both, or to each one independently, according as one or both should claim alibi. It did not mean, as contended by counsel, that, in order for one to avail himself of an alibi, he would have to show, also, an alibi for the other. Moreover, the objection urged is nothing more than a mere criticism of the verbiage. If counsel desired to have the idea they contend for here more specifically presented, they should have prepared a request in the language they desired, and asked the court to give it.

5. The court did not err in permitting witness Lephlew to testify that he saw the plat introduced on the former trial, and that the handwriting on said plat was similar to the handwriting of Redd, and that he thought it was Redd's handwriting. Lephlew had seen and read a letter which Redd admitted he wrote. That was sufficient to establish at least a prima facie acquaintance of Lephlew with the handwriting of Redd, and was sufficient to admit his testimony. The weight to be attached to such testimony depends, of course, upon the credibility of the witness, and his familiarity, or lack of it, with the handwriting about which he testifies. 1 Greenl. Ev. 577; Whart. Cr. Ev. 551, 553; 3 Rice, Ev. p. 109; Woodford v. McClenahan, 9 Ill. 80.

6. The twenty-seventh and twenty-eighth grounds of the motion for new trial are as follows: "That the verdict was contrary to the evidence, and was the result of passion and prejudice pervading the minds of the inhabitants of Drew county." The prosecution has proceeded upon the theory that Skipper was murdered by appellants; the defense, upon the theory that Skipper committed suicide, but, if murdered, that they were not the guilty agents. These are purely questions of fact, and, inasmuch as there must be a new trial for the error of law mentioned supra, the majority refrain from expressing any opinion concerning them. Speaking for myself, only, upon this point, after a careful examination of this large record, which I necessarily had to make in preparing this opinion, my conclusion is that under the rule announced by this court in *Richardson v. State*, 47 Ark. 567, 2 S. W. 187, there is evidence to support the verdict here, both as to the corpus delicti, and as to the connection of the defendants with the crime charged. For the error in admitting the testimony of John Henry, the cause is reversed and remanded for new trial.

#### EATON v. LANGLEY.

(Supreme Court of Arkansas. July 9, 1898.)

REFLEVIN—TRESPASS—DAMAGES.

1. The nature of an action, as one for recovery of possession of specific personal prop-

erty, is not affected by the fact that plaintiff does not, as authorized by Sand. & H. Dig. § 6398, "at the commencement of the action, or at any time before judgment, claim the immediate delivery of the property," but directs the sheriff to return the order for delivery without service.

2. The owner of standing timber is entitled to a judgment for delivery against a trespasser who has cut the same and made it into ties, though he was an innocent trespasser, and the ties are worth six times what the timber was while standing; but, in case delivery cannot be had, his judgment is for the value of the ties, less the labor expended on the timber, not to exceed the increase in value.

Bunn, C. J., dissenting.

Appeal from circuit court, Green county; Felix G. Taylor, Judge.

Action by P. A. Eaton against H. G. Langley. From a judgment for less than asked, plaintiff appeals. Reversed.

Block & Sullivan for appellant. Luna & Johnson, for appellee.

BATTLE, J. P. A. Eaton alleged in his complaint that he was the owner of 5,000 cross-ties, of the value of \$750, that they were in the possession of H. G. Langley, and that he was entitled to the immediate possession of the same, and asked for the possession thereof, or, if that could not be obtained, their value.

After filing with the clerk of the circuit court the affidavit required in such cases, he sued out an order for the delivery of the cross-ties to himself; also, a summons for Langley. He caused the summons to be served upon the defendant, but directed the sheriff to return the order of delivery without service, which was done.

The defendant answered the complaint by denying the allegations therein, and alleging that he was the owner of the ties.

The issues in the action were tried by the judge and jury. Upon the evidence adduced, the jury found a special verdict, and the judge filed his conclusions of fact, both of which are stated by the judge as follows:

"From the evidence in this case the court finds as follows:

"First. That the ties in controversy were cut by the defendant from the E.  $\frac{1}{2}$  of section 35, township 17 N., range 3 E.

"Second. That the plaintiff was the owner of said land, and the timber thereon, at the times the ties in controversy were cut.

"Third. That said ties were cut without authority from the plaintiff or any one representing him, and that in so cutting the said timber the defendant was a trespasser.

"Fourth. That the defendant in cutting said timber was acting under a bona fide belief that he was the owner of the said timber and had a right to cut it, and that he was an innocent, and not a willful trespasser therein.

"And from the answers of the jury to the special interrogatories the court finds:

"Fifth. That at the time this action was begun the defendant had 3,500 cross-ties, which



he had made from said land while the plaintiff was the owner thereof, under the foregoing circumstances.

"Sixth. That said ties at the beginning of this action were of the value of 12½ cents each.

"Seventh. That the timber from which the same were made, while standing, was of the value of 2 cents per tie."

Upon these findings of facts the court rendered a judgment as follows:

"It is therefore ordered, considered, and adjudged by the court that the plaintiff have and recover of and from the defendant the sum of seventy dollars, and all costs of this cause, and that, further, in case the sums of money above mentioned, together with the said costs, are not paid within ten days from this date, the plaintiff shall have and recover of the defendant the possession of the 3,500 cross-ties situated on the east half of section thirty-five in township seventeen north, range three east, and for which writ of delivery in this case may issue."

After filing a motion for a new trial, which was overruled, and a bill of exceptions, the plaintiff appealed.

In an attempt to sustain the judgment of the circuit court, appellee insists that this is not an action of replevin or detinue, "but is in the nature of an action of trover or trespass under the common law." But the name of it is immaterial. The Code abolished all forms of action. Let its name be what it may, it is unquestionably an action to recover the possession of specific personal property. In such actions the statute provides that the "judgment for the plaintiff may be for the delivery of the property, or for the value thereof, in case a delivery cannot be had, and damages for the detention." Sand. & H. Dig. § 6398. The right to this judgment is in no wise affected by the issue or failure to issue an order of delivery, which is only necessary to enable the plaintiff, upon the execution of the proper bond, to obtain the immediate possession of the property at the beginning or during the progress of the suit, or force the defendant to give bond for its retention, and for no other purpose. Id. § 6393 et seq.

The cross-ties in controversy are the product of the timber of appellant, and of the labor of the appellee. The latter, honestly believing that he was the owner of the timber, converted it into the cross-ties. The material used in making each tie, as it was in the tree, was worth 2 cents, and, as it is, is worth 12½ cents. Under these circumstances, is appellant the owner of the ties, and entitled to their possession?

As a general rule, an owner cannot be deprived of his property without his consent, or operation of law. If unauthorized persons have bestowed expense or labor upon it, that fact cannot constitute a bar to his reclaiming it, so long as identification is not impracticable. But there must be a limit to this right.

Mr. Justice Blackstone lays down the rule, very broadly, that if a thing is changed 'into a different species, as by making wine out of another's grapes, oil from his olives, or bread from his wheat, the product belongs to the new operator, who is only to make satisfaction to the former proprietor for the materials converted. 2 Bl. Comm. 404. Many authorities have followed this rule, while others have held that, in the case of a willful appropriation, no extent of conversion can give to the willful trespasser a title to the property, so long as the original materials can be traced in the improved article. *Wetherbee v. Green*, 22 Mich. 311.

In *McKinnis v. Railway*, 44 Ark. 210, and *Stotts v. Brookfield*, 55 Ark. 307, 18 S. W. 179. It was held that the owner of timber which had been taken and converted by a willful trespasser into cross-ties may recover the ties, or their value, in an action of replevin against the trespasser. In the latter case the court said: "While it is difficult to draw from the authorities a rule by which we may determine with certainty what change in the original property converted will destroy its identity so that replevin will not lie for its recovery, it is settled that the conversion of timber into cross-ties is not such a change, whether the change has been wrought by a willful or an innocent wrongdoer." But there was no occasion for saying what was said as to innocent wrongdoers. In that case the defendant entered upon the land of plaintiff, and, without his authority or consent, knowing at the time his claim of ownership of the same, cut timber therefrom, and converted it into the cross-ties in controversy. Upon that fact the judgment of the court was based. In neither of these cases was any rule laid down by which the identity of the property can be ascertained.

The authorities generally agree in holding that when a party has taken the property of another in good faith, and, in reliance upon a supposed right, without intention to commit wrong, converted it into another form, and increased its value by the expenditure of money and labor, the owner is precluded from following and reclaiming the property in its new form if the transformation it has undergone has converted it into an article substantially different. But they have not agreed upon any rule by which it can in all cases be ascertained whether this transformation has or has not taken place. "If grain be taken and made into malt, or money taken and made into a cup, or timber taken and made into a house, it is held in the old English law that the property is so altered as to change the title. \* \* \* But cloth made into garments, leather into shoes, trees hewed or sawed into timber, and iron made into bars, it is said, may be reclaimed by their owner in this new and original shape. \* \* \* Some of the cases place the right of the former owner to take the thing in its altered condition upon the question whether its iden-

uity could be made out by the senses." *Wetherbee v. Green*, 22 Mich. 318, 319.

But the supreme court of Michigan (Mr. Justice Cooley delivering the opinion of the court) said that the test of the senses is unsatisfactory, and that "no test which satisfies the reason of the law can be applied in the adjustment of questions of title to chattels by accession, unless it keeps in view the circumstances of relative values." It said: "It may often happen that no difficulty will be experienced in determining the identity of a piece of timber which has been taken and built into a house, but no one disputes that the right of the original owner is gone in such a case. A particular piece of wood might perhaps be traced, without trouble, into a church organ, or other equally valuable article; but no one would defend a rule of law which, because the identity could be determined by the senses, would permit the owner of the wood to appropriate a musical instrument, a hundred or a thousand times the value of his original materials, when the party who, under like circumstances, has doubled the value of another man's corn by converting it into malt is permitted to retain it, and held liable for the original value only. Such distinctions in the law would be without reason, and could not be tolerated. When the right to the improved article is the point in issue, the question how much the property or labor of each has contributed to make it what it is, must always be one of first importance. The owner of a beam built into the house of another loses his property in it, because the beam is insignificant in value or importance as compared to that to which it has become attached; and the musical instrument belongs to the maker, rather than to the men whose timber was used in making it, not because the timber cannot be identified, but because in bringing it to its present condition the value of the labor has swallowed up, and rendered insignificant, the value of the original materials. The labor in the case of the musical instrument is just as much the principal thing as the house is in the other case instanced. The timber appropriated is in each case comparatively unimportant." *Wetherbee v. Green*, 22 Mich. 319, 320.

*Wetherbee v. Green*, 22 Mich. 311, was an action of replevin by the appellee against the appellant to recover a quantity of hoops made out of the timber of the former by the latter, in good faith, under what he supposed to be good authority. The timber in the tree was worth only \$25, and the hoops made out of it were worth \$700. The court held that the owner could not recover the hoops, but was entitled to the damages sustained by reason of the unintentional trespass. This decision was based upon the reason that the hoops were made in good faith, and upon the fact that the value of the timber, as compared with the value of the labor expended in making them, was insignificant.

In *Mining Co. v. Hertin*, 87 Mich. 332, the parties were owners of adjoining tracts of timbered land. In the winter of 1873-74 the Hertins, in consequence of a mistake respecting the boundaries, went upon the lands of the mining company, and cut a quantity of cord wood, which they hauled and piled on the bank of Portage Lake. The next spring the mining company took possession of the wood, and converted it to their own purposes. The wood on the bank of the lake was worth \$2.87½ per cord, and the value of the labor expended by the Hertins in cutting and putting it there was \$1.87½ per cord,—nearly doubling the value of the timber. After the mining company had taken possession of the wood, the Hertins brought an action against the mining company for the value of their labor expended in converting the timber into cord wood, and placing it upon the bank of the lake. The court held that they were not entitled to recover. Chief Justice Cooley (the same judge who delivered the opinion in *Wetherbee v. Green*, supra), in delivering the opinion of the court, said: "It is on all hands conceded that where the appropriation of the property of another was accidental, or through mistake of fact, and labor has in good faith been expended upon it, which destroys its identity, or converts it into something substantially different, and the value of the original article is insignificant, as compared with the new product, the title to the property in its converted form must be held to pass to the person by whose labor, in good faith, the change has been wrought; the original owner being permitted, as his remedy, to recover the value of the article as it was before the conversion. This is a thoroughly equitable doctrine, and its aim is to so adjust the rights of the parties as to save both, if possible, or as nearly as possible, from loss. But, where the identity of the original article is susceptible of being traced, the idea of a change in the property is never admitted, unless the value of that which has been expended upon it is sufficiently great, as compared with the original value, to render the injustice of permitting its appropriation by the original owners so gross and palpable as to be apparent at the first blush. Perhaps no case has gone further than *Wetherbee v. Green*, 22 Mich. 311, in which it was held that one who, by unintentional trespass, had taken from the land of another young trees of the value of \$25, and converted them into hoops worth \$700, had thereby made them his own, though the identity of trees and hoops was perfectly capable of being traced and established.

"But there is no such disparity in value between the standing trees and the cord wood in this case as was found to exist between the trees and the hoops in *Wetherbee v. Green*. The trees were not only susceptible of being traced and identified in the wood, but the difference in value between the two is not so great but that it is conceivable the owner

may have preferred the trees standing to the wood cut. The cord wood has a higher market value, but the owner may have chosen not to cut it, expecting to make some other use of the trees than for fuel, or anticipating a considerable rise in value if they were allowed to grow. It cannot be assumed, as a rule, that a man prefers his trees cut into cord wood, rather than left standing; and if his right to leave them uncut is interfered with, even by mistake, it is manifestly just that the consequences should fall upon the person committing the mistake, and not upon him. Nothing could more encourage carelessness than the acceptance of the principle that one who by mistake performs labor upon the property of another should lose nothing by his error, but should have a claim upon the owner for remuneration. Why should one be vigilant and careful of the rights of others, if such were the law? Whether mistake or not is all the same to him, for in either case he has employment, and receives his remuneration, while the inconveniences, if any, are left to rest with the innocent owner. Such a doctrine offers a premium to heedlessness and blunders, and a temptation by false evidence to give an intentional trespass the appearance of an innocent mistake." See *Grant v. Smith*, 26 Mich. 201; *Gates v. Boom Co.*, 70 Mich. 309, 38 N. W. 245.

Judge Cooley, in his work on Torts, lays down the rule upon this subject in the same words it is stated in *Mining Co. v. Hertin*, supra. Cooley, Torts (2d Ed.) pp. 59, 60.

Prof. Schouler, in his work on Personal Property, sums up the modern doctrine upon this subject as follows: "Where the trespass was not willful, but accidental, as through some mistake of fact, and the materials taken can still be identified, and the labor and materials of the trespasser are not shown to have gone further than the appropriated materials towards producing the present valuable chattel, the owner of the materials is still entitled to the chattel. But where no element of willfulness or intentional wrong whatever appears on the part of him who applied another's materials, and the identity of those materials has finally disappeared in the new product, or where it can be shown that his own labor and materials contributed essentially much more to the value of the present chattel than those materials which he took without intending a wrong, he shall keep the chattel as his own; making, however, due compensation to the owner of the materials for what he took." 2 Schouler, Pers. Prop. (2d Ed.) § 37.

On account of the conflict of opinion upon this subject, and the fact that this court is free from the restraints of precedents in respect thereto, we are at liberty to select the rule which is sustained by authority, and is in our opinion the wisest and most just. The rule as stated by Judge Cooley comes nearer approaching this standard. The increased value of the original materials furnishes no

guide by which the merit of the laborer who has given them their new form can be determined. The increased value is the joint result of the original material, and the work and materials expended by the laborer in creating the new form. They may be equal, or the former may exceed the latter in value; and the increased value may exceed the aggregate value of the original materials and that expended upon them. Independent causes may contribute to the increased value. For instance, transportation to a market where the original material is scarce and in great demand may greatly increase its market value, or may diminish such value by the transfer to the place where the supply is greater and the demand is less than it is in the market from which it was shipped. So it cannot be said that the transportation added the increased value. Other causes—supply and demand—affected the value. So may labor change the original material into a new form, and increase the demand for it in that shape, and thereby enhance its value. Why, then, should the person who has made the expenditure be entitled to the difference between the aggregate value of his expenditure and the original material and the value of the article in its new form? He can lose no more than the value of his labor or other expenditure. His right to the property in its new form should not, therefore, in any case, be dependent upon its increased value, but upon the relative values of the original materials and his expenditures upon the same: and this should be considered only when the identity of the original article is susceptible of being traced, and then only when he has acted in good faith, and converted it into something substantially different, and the value of the original article, as compared with the value of that expended upon it, is so insignificant as "to render the injustice of permitting its appropriation by the original owner so gross and palpable as to be apparent at the first blush." In addition to the relative values, the injury inflicted upon the owner by the trespasser, and the injustice of taking from the former his property, against his will, at its market value, should be considered, and compared with the hardship the latter may suffer by the loss of his labor and other expenditures, in determining whether this appropriation would be such gross and palpable injustice as to give the innocent trespasser the right to the property in its converted form, as in *Mining Co. v. Hertin*, 37 Mich. 332. In this manner the rights of parties would be more nearly protected, and justice at the same time administered.

The value of the cross-ties in controversy was 12½ cents a tie. The value of each in the tree was two cents. The value of the labor expended upon them is not shown, but, assuming it to be the increased value of 10½ cents a tie, the difference between it and the value of the original material is not so great as to make the value of the latter, as com-

pared with that of the former, insignificant, and to make the appropriation of the cross-ties by the original owner to his own use, without compensation, appear, under the circumstances, gross injustice, at the first blush. The disparity is not so great as it was in *Wetherbee v. Green*, supra, in which trees of the value of \$25 were cut and taken by one from the land of another, and converted into hoops of the value of \$700, which was 28 times the value of the trees, while the cross-ties in this case were about six times; and yet the supreme court of Michigan, in *Mining Co. v. Hertin*, supra, said that "perhaps no case has gone further than *Wetherbee v. Green*."

In considering the justice of permitting the appellant to appropriate the cross-ties to his own use, the invasion of his rights and the injury done to him by appellee should not be overlooked. The trees belonged to him. They were standing upon his land, and he had the right to hold them as they were. No one had the right to take them from him, convert them into ties, and force him to accept their value at the time of the conversion. He may have preferred to have them stand, and, if left standing for a few years, they might yield him a great profit; and the enhancement of their value by the labor of appellee might be a poor compensation for the wrong done. But, whether he wished to sell or not, it would be gross injustice to permit appellee to force him to sell. He is entitled to the protection of the laws. Deny to him the right to the cross-ties, and force him to accept the value of his timber when appropriated by a trespasser, as it was at the time of the conversion, and he has no adequate protection. The injury inflicted by the trespasser would be borne in part by the innocent owner, and the guilty would escape. "Such a doctrine," as said by Chief Justice Cooley, "offers a premium to heedlessness and blunders, and a temptation by false evidence to give an intentional trespasser the appearance of an innocent mistake."

Assuming the trees to be the property of appellant, and taking into consideration the great wrong committed by appellee in cutting them; the deprivation of the appellant of the right to use the same as it might please him; the probable loss occasioned thereby; the fact that the identification of the original material was unaffected by the labor expended; the encouragement that would be afforded to trespassers by allowing them to enjoy the fruits of their labor upon a mere showing of mistake; the protection a contrary policy would afford to the owner of standing trees against heedlessness, carelessness, pretended mistakes, and trespasses; and the importance of pursuing such course to secure such protection,—and comparing the injury inflicted upon the appellant by the appellee, and the injustice of taking from the former his property against his will, with the hardship the latter may suffer by the loss of his labor, we think it

would be lawful and right to allow appellant to recover the cross-ties, and to impose upon the appellee the consequences of his own carelessness.

But appellant has not obtained possession of the cross-ties. In the event he cannot do so, he is entitled to the value of the property he has lost. How is this value to be estimated? This question is not beset with the difficulties which attend the right of recaption. When the appellant sued for the possession of the cross-ties, he was entitled to their possession, unless he had lost his property by the wrongful act of another. If entitled to retake it in its new form, it must be taken as he found it, though enhanced in value by the labor of appellee. The ties cannot be restored to their original form. The appellee cannot force the appellant to become a debtor to him for the value of his labor, or demand compensation for his voluntary additions to the value of the trees converted into ties, without the assent of the appellant. He cannot impose any conditions upon the right to retake them. The question therefore being whether the appellee shall lose his labor, or the appellant lose the right to take his property, the law decides in favor of the latter. But in determining the compensation the appellant shall receive as the value of his property which has been wrongfully converted this difficulty does not arise. The value of the property of the owner, which has been converted, can be ascertained and fixed without including therein the labor expended upon it. Hence the law protects the unintentional trespasser in such cases by limiting the right of the owner to recover. *Lumber Co. v. Lesh*, 119 Ind. 98, 20 N. E. 291; *Heard v. James*, 49 Miss. 236; *Herdle v. Young*, 55 Pa. St. 176; *Single v. Schneider*, 30 Wis. 570; 2 Sedg. Meas. Dam. (8th Ed.) § 534; *Mining Co. v. Hertin*, 26 Am. Rep. 525, 530. As to the extent of this limitation the authorities are not agreed. But we think that inasmuch as this is an exception to the general rule, made for the purpose of protecting the unintentional trespasser, it should be allowed to prevail only to the extent it is necessary to give protection, and that the owner, in actions for the possession of personal property in the new form into which it has been converted inadvertently, under a bona fide but mistaken belief of right, "in case a delivery cannot be had," is entitled to recover the value of the property in its new form, less the labor and material expended in transforming it, provided the expenditures do not exceed the increase in value which was added to the transformation, in which event he should recover the value of the property in its new form, less the increase. *Weymouth v. Railway Co.*, 17 Wis. 550. Some courts hold that the owner, in such cases, should recover the value of his property in its new form, less the expense incurred in converting it into such form and increasing its value.

*Goller v. Fett*, 30 Cal. 482; *Naye v. Yappen*, 23 Cal. 306; *Herdie v. Young*, 55 Pa. St. 176. But we do not think this is a correct rule in all cases, for the expense may in some cases exceed the increase in value, and in that event the rule would require the owner to pay for something that he never received.

According to this opinion, two errors appear in the record in this action. One is in the form of the judgment. If the appellant was the owner of the property in controversy, he was entitled to a judgment for its possession, and for its value, according to the rule before stated, "in case a delivery cannot be had." *Sand. & H. Dig. § 6398*. On the contrary, the judgment rendered is for the value of the property determined by the court, and then for its possession in the event the value is not paid. The other error is the failure to fix the value according to the rule we have stated.

For these errors the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

BUNN, C. J. (dissenting). This is either an action of replevin, as contended by appellant, or an action of trespass or trover, as contended by appellee, brought by appellant against appellee for the recovery of a lot of cross-ties, or the value thereof in the one case, and damages for the conversion thereof, in the other case. As the names of actions amount to nothing, under the Civil Code, we have necessarily to resort to the language and prayer contained in the pleadings, and the intention of the plaintiff as therein shown, in order to determine what is the real object of his suit. In this case there is the form and prayer of a replevin suit, but the service of the writ, restricted to the office of a summons, merely, at the instance of the plaintiff, indicates that it was not intended by him as a possessory action, but one for money damages only. Where a complaint is for replevin, and the property is not taken by the officer because it cannot be found, there is no reason to presume that the plaintiff intends to prosecute his action otherwise than by replevin; but, when the record shows that he prosecutes his action voluntarily otherwise than in replevin, the case is, or may be, quite different. What object could the plaintiff have in directing the sheriff to make no seizures of the property mentioned in the writ in his hands unless he intends merely to recover the damages he has suffered, or unless it be that he is afraid of his case, and declines to become responsible for the seizure and detention of the specific property named in the writ? He certainly has the right to avoid this liability, but he cannot wait until judgment is pronounced, and then demand a seizure, and thus make sure of his case, because the law does not tolerate such a lying in wait. The statute on the subject (section 6383 of the Digest) reads thus: "The plaintiff, in an action

to recover the possession of specific personal property, may, at the commencement of the action, or at any time before judgment, claim the immediate delivery of the property, as herein provided." And section 6396 of the Digest reads: "An order, may at any time before judgment, be directed to any other county for the delivery of the property claimed." When the court comes to render judgment, it does not go about it to inform the successful party beforehand of the nature and scope of that judgment, but renders it on the record and the evidence before it, regardless of the effect it may have upon the one or the other of the parties. The court, in a case like this, will dispose of the property shown to be in the hands of the sheriff, or such as has been delivered by him to the one or the other of the parties; and this showing is made by his return, and that only. In this case the return showed that there was no property in the hands of the sheriff, and that there had been none by virtue of the writ. No judgment of seizure or caption could therefore be rendered, for the writ in the case had served its purpose, and the judgment cut off all aliases. "If the owner of standing timber cut into logs by an innocent trespasser sees fit to bring trespass or trover for its value, instead of reclaiming his property, he thereby elects to receive a just compensation from his trustee." *Gates v. Boom Co.*, 70 Mich. 309, 38 N. W. 245.

Aside from the effect of the pleadings, proceedings, and judgment in the case, the right of recovery in any form of action is involved; and to discuss this question, it is necessary to recall the facts in evidence. One James M. Smith, of Dayton, Ohio, became the purchaser and owner of the 40-acre tract of land from which the cross-ties in controversy were cut, by purchase from one Hathway, who lived at the time of the purchase from him in Pegua, in the same state. The purchase was by deed dated November 4, 1894, and filed for record in the recorder's office of Green county, this state, December 19, 1894. Appellant, Eaton, purchased this land from Smith by deed dated December 8, 1894, and recorded in said office December 26, 1894. This deed from Smith to Eaton was defectively acknowledged, in this: that the certificate of acknowledgment did not contain the word "consideration," required by statute. The omission of this word made it necessary to establish the deed by extraneous proof before it could be used as such; and not only so, but it was, in that shape, incapable of being put on record for the purposes of record preservation and notice to the world. *Little v. Dodge*, 32 Ark. 453; *Shryock v. Cannon*, 39 Ark. 434; *Jacoway v. Gault*, 20 Ark. 190; *Johnson v. Godden*, 33 Ark. 600; *Griesler v. McKennon*, 44 Ark. 517; *Wright v. Graham*, 42 Ark. 140. It is, moreover, in proof that the defendant never had any actual notice of Eaton's claim or ownership of the land from which the ties were cut until some time after

he had cut the same and hauled them away. In the progress of the trial, when the defendant exhibited the timber contract from Smith to Rogers, under which he claimed by purchase from Rogers, its execution was put in issue by the plaintiff; and the subscribing witnesses not being present, and not having proved the same, the court held, in effect, that the contract was not proven, notwithstanding the testimony to that effect by other witnesses present, and that, therefore, the same was not admissible in evidence. Thus, the defendant failed to prove his title to the timber, but this exclusion of his contract did not exclude it for other purposes than that named in the objections to it,—evidence of title. It still could be used to show the animus of defendant's possession, and the extent of it, just as could be shown by a void deed. The controversy then narrows down to right of possession. Each one claimed under a defective paper title,—defective as against the other,—and the burden was on the plaintiff to show the superior right to the possession of the timber. The defendant's purchase was first in point of time, and his possession was exclusive and uninterrupted for the time he had occasion to hold it; and he had during the time neither actual nor constructive notice of plaintiff's claim or title. Should not the plaintiff have taken some notice of his occupancy? Had he done so, and made proper inquiry, he would have received actual notice of defendant's claim, which antedated his own. Failing in this, did the plaintiff establish his right to the cross-ties, and show his right in replevin?

Much difficulty arises in cases where an innocent trespasser, as in this case, has cut timber from another's land, and manufactured it into another and more valuable form. When the owner attempts to replevy his property in the new form, he is confronted with several difficulties: First, the difficulty of identification; and, that being obviated or overcome, then arises the question of value, to fix the amount of the alternative judgment. *Prima facie*, when one claiming to be the real owner and entitled to the possession is entitled, not only to the specific property replevied, but also to its value in case the property cannot be delivered to him, and in the case of an appropriation by a willful trespasser, the alternative judgment should be for the value of the property in the form most advantageous to the owners. But in the case of timber taken by an innocent trespasser the equitable doctrine now very generally prevails, to the effect that while the owner is entitled to his timber, and the true value of it in the alternative, yet the innocent trespasser is entitled to a reduction on the alternative judgment to the extent of the value of his labor bestowed upon the property to put it in the new shape, and thereby increase its value. This rule naturally leaves an option to the defendant to restore the property to the plaintiff, or pay the equitable damages to him. There is no doubt as to the

general application of this equitable rule, the only question in any case being whether or not the facts justify its application; and, if the facts in the case call for the application of the rule, the judgment should be affirmed; otherwise not.

In *Wetherbee v. Green*, 22 Mich. 320, Judge Cooley, in delivering the opinion of the court, said: "No test which satisfies the reason of the law can be applied in the adjustment of questions of title to chattels by accession unless it keeps in view the circumstances of relative values. When we bear in mind the fact that what the law aims at is the accomplishment of substantial equity, we shall readily perceive that the fact of the value of the materials having been increased a hundredfold is of more importance in the adjustment than any chemical change or mechanical transformation which, however radical, neither is expensive to the party making it, nor adds materially to the value. There may be complete changes, with so little improvement in value that there could be no hardship in giving the owner of the original materials the improved article; but in the present case, where the defendant's labor, if he shall succeed in sustaining his offer of testimony, will appear to have given the timber in its present condition nearly all its value, all the grounds of equity exist which influence the courts in recognizing a change of title under any circumstances." That was a case where timber of the value of \$25 had been converted into hoops, by an innocent trespasser, and the hoops were of the value of \$700, denoting an increase of 28 fold; and upon the facts the court said: "We are of opinion that the court erred in rejecting the testimony offered. The defendant, we think, had a right to show that he had manufactured the hoops in good faith, and in the belief that he had the proper authority to do so; and, if he should succeed in making that showing, he was entitled to have the jury instructed that the title to the timber was changed by a substantial change of identity, and that the remedy of the plaintiff was an action to recover damages for the unintentional trespass." In that decision Judge Cooley emphasizes two essential things to be established by the defendant claiming the benefits of the equity rule: First, the defendant must show that he is in fact an innocent trespasser, if trespasser at all; second, he must show that the timber was changed by a substantial change of identity, and, therefore, that the remedy of the plaintiff is an action for damages for the unintentional trespass. The court in that case also plainly says that much depends upon the degree of increase of value by the defendant's labor, as to whether he will be entitled to the equity under the rule or not; in other words, that a great ratio of increase might entitle him to the relief, while a less ratio of increase in the value

of the property might fail to insure him the relief sought. In the one case the increase would require the plaintiff to rely upon trespass or trover as his remedy, while the other would leave him to pursue his remedy for the possession of the property specifically, as in replevin. This certainly does not leave the matter at the option of the plaintiff. While the court in that case was in the main correct, yet there does not appear to be any very sound reason in making the defendant's equitable right dependent upon the degree of increase in value he has given to the property; for if the increase is material his right attaches, and the mere degree of the increase is a circumstance more or less important in view of the financial condition of the defendant, as well as in respect to the benefit conferred upon the plaintiff by the defendant's labor, and in changing the condition of the property. Sedgwick on Damages defines the rule thus: "If the property has been altered and increased in value, the rule would again depend on the character of the conversion. If that were willful, then the value of the article so increased would be the rule. But that should never be where the act was bona fide, and in such case the true rule would be to allow the defendant for whatever value his labor had actually conferred upon the property." The increase in value being material, it seems to be the right of the innocent trespasser to have the benefit of it in the adjustment of the equities of the case, without other conditions. The supreme court of Michigan seems to be in conflict with itself on the subject, for in the more recent case of *Gates v. Boom Co.*, 70 Mich. 309, 38 N. W. 245, we find this language: "The owner of standing timber is not only entitled to the timber, but he has a right to it as it is, and to keep it uncut if he so desires. No man, however innocently he may do it, can go upon his land and convert the standing trees into logs, and charge him for the labor thus expended against his will, and perhaps his real benefit. He may prefer to have the timber stand, and, if left standing a few years, it may bring him an increased profit. There is no injustice in holding that the trespasser must lose the labor he has expended in converting another's trees into logs. Such trespasses, though casual and not willful, are ordinarily, as was the trespass in this case, the result of negligence upon the part of the trespasser; and there is no good reason why he should be recompensed for labor and expenses incurred in the trespass, when it might be avoided by proper diligence. The owner has a right to reclaim his logs, but if he sees fit to bring an action of trespass or trover instead of recognizing the property, he voluntarily puts himself within the rule of damages prevailing in such actions, and thereby elects to receive only a just compensation for his property as it was before the trespasser intermeddled with it. This

leaves the matter at the option of the plaintiff whether he will adopt one action or the other." The conflicting character of that decision is somewhat destroyed, it is true, by the statement that the trespasser, though not a willful trespasser, was yet a negligent one, and in so far not an innocent one, such as entitled him under the rule we are now considering. But, assuming that the court was discussing the case as coming under the equitable rule, the decision makes the right of the defendant altogether subject to the option of the plaintiff, whether he chooses to bring trespass or trover, in which the defendant's equities may be enforced, or replevin, strictly, in which his equities will be ignored. I think the rule laid down by Sedgwick is the correct rule, and that which expressed the reason of it from the beginning; and in trying to give other reasons for it, and assigning outside conditions upon which it will be enforced, courts have only succeeded in confusing the subject. For reasons good as to each of the grounds of contention, I think the judgment should be affirmed.

#### STEWART v. MURRELL.

(Supreme Court of Arkansas. July 9, 1898.)

TENANCY—MONTH TO MONTH—NOTICE TO TERMINATE.

A tenant from month to month must, in the absence of statute or custom to the contrary, give 30 days' notice of intention to vacate.

Appeal from circuit court, Pulaski county: Joseph W. Martin, Judge.

Action by Mary B. Murrell against J. M. Stewart. Judgment for plaintiff. Defendant appeals. Affirmed.

This is a suit by Mrs. M. B. Murrell, appellee, against J. M. Stewart, appellant, for the rent, for the month of February, of a dwelling house in this city. There was evidence tending to show that the renting was by the month; that the rent was payable in advance; that appellant, the tenant, before the end of January, notified the appellee, the landlord, of his intention to vacate the premises at the end of that month; that he did so vacate and had moved out before the last day of January. The court instructed the jury as follows: "You are instructed, as a matter of law, that fifteen days' notice of an intention to quit must be given by a tenant by the month to his landlord to relieve him of liability for the rent of the next succeeding month; and, unless you find that such notice was given, you will find for the plaintiff for one month's rent." The appellant duly excepted to the giving of this instruction. The court refused the declarations of law asked by appellant, as they proceeded upon theory opposite to that announced in the court's instruction. The appellant duly excepted. The jury found for the plaintiff

(appellee here). Appellant filed his motion for a new trial, alleging as error the instruction given, and the refusal of the court to give the several declarations of law asked by appellant. The motion for a new trial was overruled and appellant appealed. The bill of exceptions does not profess to contain all the evidence. The facts upon which the case was tried are substantially as follows: Mrs. M. B. Murrell, through her agents, Parker & Cates, rented to J. M. Stewart a dwelling house, No. 1600 Louisiana street, in the city of Little Rock, by the month, at \$40 per month. Stewart took possession on or about the 16th September, 1891, and paid his rent for September, October, November, and December, 1891, and January, 1892. On January 28, 1892, Stewart notified Mrs. Murrell, through her agents, of his intention to vacate the premises. He commenced to move on the 29th January, and got entirely out on the 30th.

Ashley Cockrill, for appellant. W. E. Atkinson, for appellee.

HUGHES, J. (after stating the facts). The only question in this case is: Did the court commit reversible error in its instruction to the jury "that fifteen days' notice of an intention to quit must be given by a tenant by the month to his landlord to relieve him of liability for the rent of the next succeeding month, and, unless you find such notice was given, you will find for the plaintiff for one month's rent"? The appellant contends that reasonable notice only is required, and that what is reasonable notice is a question of fact for the jury under the circumstances of the case, and, to support this contention, cites Wood, Landl. & Ten. p. 126, § 46, which is as follows: "Where no definite term is agreed upon, and the rent is fixed at so much a week, month, quarter, or half year, the tenancy is weekly, monthly, quarterly, or half yearly, according to the circumstances and the custom, if any, in the locality where the premises are located; and, in the absence of any stipulation to the contrary, they may, at least, be terminated by a reasonable notice to quit. As to what is reasonable notice is to be ascertained from the custom of the place, if there is any, or, if not, then by the circumstances of the case." And again, at page 110, Wood says: "There is some uncertainty as to the length of notice required to determine a quarterly or monthly or weekly tenancy. It does not appear to have been ever decided that, in the case of an ordinary weekly or monthly tenancy, a month's or week's notice to quit must be given. A tenant who enters upon a fresh week may be bound to continue until the expiration of that week, or to pay the week's rent, but that is a very different thing from giving a week's notice to quit." In Gear on Landlord and Tenant, at page 85 (section 32),

it is said: "A notice to quit is necessary to determine any periodical tenancy, unless terminated by agreement, or the landlord elects to eject a tenant who has disclaimed the tenancy. \* \* \* The right to notice to quit is mutual between landlord and tenant. \* \* \* A tenant from month to month is entitled to thirty day's notice to quit, unless the statute allows a shorter period of notice. The notice must be for a full month before the day on which a new holding would begin, and terminate at the expiration of a monthly period." See cases cited to section 32, No. 15, p. 89.

We have no statute regulating the length of notice required in such case, and we are therefore governed by the common-law rule. In the case of *Steffens v. Earl*, 11 N. J. 133, it is said that, "in cases of tenancies for periods running less than a year, the rule enunciated by the text writers is that the notice must be regulated by the letting, and must be equivalent to a period. *Tayl. Landl. & Ten.* § 478; *Archb. Landl. & Ten.* 87. How the rule arose is uncertain. It certainly did not have its origin in any resolution of the courts. \* \* \* It seems, however, to have very early shaped itself into a custom. The habit of giving and requiring reasonable notice in cases of tenancies, not for a single term, but for recurring periods, which reasonable notice, when the periods were from year to year, was, according to Lord Ellenborough, very early held to be six months, was, probably, by a custom equally as old in tenancies for less periods, established as now stated by the books. By strict relativeness, the rule of a half year's notice in tenancies from year to year would only require a half month's or a half week's notice in cases of monthly or weekly tenancies. The briefness of the latter, and the length of the former, kind of tenancies, was the probable reason why the rule was not uniform. Whatever the reason of the rule, it seems to have been well grounded in the general understanding of the English people. The cases cited by the books of authority in support of the rule already stated are merely recognition of what was obviously a custom, and, as such, the cases would seem to have as much weight as authority as if they had expressly ruled the point." While there is some conflict in the cases, the decided weight of authority seems to be as stated in *Steffens v. Earl*, supra. There was no evidence of a local custom in this case. There was no error prejudicial to appellant in the instruction given by the court as above quoted, though in fact erroneous, in that it fixed the notice required to be given in a tenancy from month to month, by the tenant to the landlord, of the tenant's intention to quit, at 15 days, whereas the law fixes it at 30 days. The judgment of the circuit court is affirmed.



NEW ENGLAND MORTG. SEC. CO. v.  
REDING et al.

(Supreme Court of Arkansas. July 9, 1898.)

LIMITATIONS—MORTGAGE FORECLOSURE.

Action to foreclose mortgage is governed by the limitation applying to sealed instruments, where founded on the covenant therein to pay the debt, notwithstanding note without seal was given therefor at same time as the mortgage; and Sand. & H. Dig. § 5094, provides suit to foreclose mortgage shall be brought within the period of limitations prescribed for suit on liability for the security of which it was given.

Appeal from circuit court, Johnson county; Jephtha H. Evans, Judge.

Action by the New England Mortgage Security Company against John A. Reding and others. Judgment for defendants. Plaintiff appeals. Reversed.

Action to foreclose a deed of trust or mortgage executed by defendants. The deed contained, among others, the following stipulations: "But this conveyance is made in trust for the following purposes only, that is to say: That whereas the party of the first part is justly and lawfully indebted to the party of the third part in the sum of three hundred dollars, for that amount loaned by the party of the third part to said party of the first part, which is evidenced by the promissory note of said party of the first part for said sum bearing even date with these presents; \* \* \* and whereas, said parties of the first part desire and intend by this deed more effectually to secure and make certain the payment thereof; \* \* \* said first parties agree to pay to said third party, or order, at the office of the Corbin Banking Company, in New York, three hundred dollars, on the 5th day of March, 1889, with interest thereon from date until paid at the rate of eight per cent. per annum, payable annually, according to the one promissory note and coupons there-to attached of the said John A. and Isabel Reding: \* \* \* Now, if the said first parties shall pay off and discharge said indebtedness in manner provided, and comply and conform with all the agreements and stipulations herein set forth, then this conveyance is to be entirely void. \* \* \* But should said first parties fail to pay any of said money hereby secured, either principal or interest, when the same becomes due," then the trustee may sell, etc. The other facts sufficiently appear in the opinion.

Watson & Fitzhugh, for appellant. A. S. McKennon, for appellees.

RIDDICK, J. (after stating the facts). This action was brought by the appellant, the New England Mortgage Security Company, to foreclose a mortgage executed by John A. and Isabel Reding. The defendants, for answer, pleaded the five-years statute of limitations; and, a demurrer being filed thereto, the same was overruled by the circuit court,

the answer was sustained, and afterwards a final decree was entered against plaintiff, dismissing its action. The only question to determine is whether the statute of limitations of five or ten years applies to plaintiff's action. The mortgage was executed on the 5th day of March, 1884, to secure the sum of \$300 and interest, which plaintiff loaned defendants, and which defendants agreed to repay on the 5th day of March, 1889. Defendants made two separate written agreements to pay the debt, one contained in a promissory note, and one in a mortgage, both of which were executed on the same day. The note was not under seal, but the mortgage was under seal. The plaintiff founded this action upon the covenant contained in the mortgage, and contends that, as the mortgage was under seal, the statutory period of limitation applicable to it is ten, and not five, years, as determined by the circuit court. Our statute provides that "in suits to foreclose or enforce mortgages or deeds of trust it shall be sufficient defense that they have not been brought within the period of limitation prescribed by law for a suit on the debt, or liability for the security of which they were given." Sand. & H. Dig. § 5094. The object of this statute was to prevent foreclosures after the right to sue upon the debt secured by the mortgage had been barred. It makes no attempt to change the statute of limitations in reference to the debt itself, but affects only the right to foreclose. In order, then, to determine whether the right to foreclose is barred, it is only necessary to consider whether, apart from the statute above quoted, the plaintiff's right to recover a personal judgment is barred. Now, this mortgage was executed prior to the act of 1889, reducing the period for bringing actions on writings under seal from ten to five years, and that act does not apply. Sand. & H. Dig. § 4828. The mortgage contains an express covenant on the part of defendants that they will pay to the plaintiff the sum of \$300 with interest thereon from date until paid at the rate of 8 per cent. per annum; and, as this promise was under seal, the right of plaintiff to sue upon it was not barred until after 10 years from the time his cause of action accrued. *Holliman v. Hance*, 61 Ark. 119, 32 S. W. 488; *Vaughan v. Norwood*, 44 Ark. 101; *Harris v. Mills*, 28 Ill. 44, 81 Am. Dec. 259; *Brown v. Cascaden*, 43 Iowa, 103; 2 Jones, Mortg. §§ 1207, 1225. So long as either of the obligations executed by defendants promising to pay the debt secured by the mortgage was not barred, the mortgage itself was not barred. The decision in case of *Mortgage Co. v. Milan* (Ark.) 42 S. W. 417, is not in conflict with our conclusion here. In that case the plaintiff alleged that the mortgage was executed to secure a promissory note. The defendant pleaded that the note was barred, and upon this issue the case was determined in the circuit court. When the case came here, the court held that the plaintiff must stand by the issues as pre-

sented in the circuit court; and, taking the allegations of the complaint as true against the plaintiff, the court held that, the note being barred, the right of action upon the mortgage was barred. In this case, the plaintiff, as before stated, founded his action, not upon the note, but upon the covenant in the mortgage. As the promise to pay was under seal, and as the action here was commenced in less than 10 years after the same accrued, we are of the opinion that the circuit court erred in holding that it was barred by statute of limitations. The judgment of circuit court is reversed, and the case remanded, with an order that the demurrer to the answer of defendants be sustained, but with leave to amend if they so desire.

**LOCK v. FRANKLIN & H. TURNPIKE CO.**  
(Supreme Court of Tennessee. Dec. 11, 1897.)  
**RECEIVERS OF TURNPIKE COMPANY—NEGLIGENCE—PLEADING.**

1. Recovery for injury from negligence of receiver of part of a turnpike to keep it in repair cannot be had of the turnpike company on the theory of joint operation of the road by the company and receiver, the portions of the road in question being in the exclusive charge of the receiver.

2. The duty of keeping in repair is imposed on a receiver by decree placing part of a turnpike in his hands and directing him to collect the tolls.

3. Recovery from a turnpike company, to extent of net income turned over to it by the receiver on his discharge, cannot be had for his negligence, negligence of the company alone being alleged.

Appeal from circuit court, Williamson county; W. L. Grigsby, Judge.

Action by C. G. Lock against the Franklin & Hillsboro Turnpike Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Berry & Crockett, for appellant. J. H. Henderson, for appellee.

**McALISTER, J.** The plaintiff in error commenced this suit in the circuit court of Williamson county against the defendant company to recover damages for personal injuries. There was a verdict and judgment in favor of the company. The plaintiff appealed, and has assigned errors. The facts necessary to be noticed are that in August, 1886, the plaintiff, then about 12 years of age, was riding along the turnpike of defendant company, and, in attempting to cross what is known in the record as the "Benton Culvert," one of its timbers gave way beneath his mule, throwing the plaintiff violently to the ground, and causing permanent injuries to his foot and ankle. The present action to recover damages was commenced on the 30th of December, 1895, shortly after the plaintiff attained his majority. The principal defense interposed by the company is that at the time the injuries were sustained by the plaintiff the turnpike was in charge

of a receiver appointed by the chancery court, and that defendant company was in no default, and that no negligence is charged against the receiver.

It is unnecessary to set out or review the pleadings in which these defenses are presented. Suffice it to say that on the trial before the court and jury the defendant company offered in evidence the record of certain proceedings in the chancery court at Franklin. It appears from this record that, in 1883, the Nashville & Duck River Ridge Turnpike Company filed a bill against the defendant, the Franklin & Hillsboro Turnpike Company, claiming the possession, control, and ownership of that portion of defendant's road from a point four miles west from Southall's, near Hillsboro, to Cunningham's bridge, it being the west half of said turnpike, including its only toll gate. It appears that the Benton Culvert, the locus in quo of the accident to plaintiff, is within the section of the turnpike which was in controversy in the litigation in the chancery court. The chancellor on the 26th of June, 1885, upon the application of complainant, appointed a receiver to take charge of that portion of defendant's turnpike which was in dispute. The receiver was directed to take possession at once of the toll-gate erected and operated by defendant on said turnpike and collect the tolls. It was further decreed he should have authority to employ a gate keeper at reasonable compensation, and he was directed to pay over to the clerk and master the tolls collected at the end of each month. It was during the incumbency of this receiver that the accident happened to the plaintiff. The original receiver afterwards resigned, and other receivers were successively appointed, who collected and paid over to the clerk and master tolls amounting to \$1,200. The litigation was ultimately decided by this court in favor of this defendant, and the tolls collected were directed to be paid over to it, which was accordingly done, after paying costs of repairs and other expenses. It is clearly shown in proof that the defective culvert which occasioned the injury to plaintiff was on that part of the road which was under the exclusive management of the receiver.

The first count in the declaration charged defendant company alone with the duty of keeping the turnpike in repair. The second count charged that defendant company was operating and controlling the road jointly with the receiver, and was liable for its failure to repair. The third count charged that defendant company, since the termination of said receivership, has received the net income from tolls collected by the receiver; that the injuries to plaintiff were caused by the negligence of defendant company in permitting the road to get out of repair previous to the appointment of said receiver, and said joint operation and control of defendant's road, as aforesaid. There was no evidence to support this count. The second and fourth counts

each charged that defendant company was liable for the injury to plaintiff, for the reason that the net income realized from the collection of tolls by the receiver was turned over to it after the termination of the receivership. The defendant company in its fourth plea sets out the appointment of the receiver by the chancery court, averring that it thus took from the company its only toll gate and only source of income. It also avers that after the receiver was appointed, until the final decree in the case, the company was not operating or controlling the road jointly with the receiver; that it had no power or authority to collect toll, and no funds with which to make repairs; and that, if any defect existed in the road, defendant company was not responsible therefore.

The second assignment made by plaintiff is that the court erred in the following instruction to the jury, to wit: "The court in construing the decree of the chancery court under which a receiver was appointed, and which has been read as evidence by agreement of parties, charges, first, that the receiver, under the order of appointment, took absolute control and management of all that portion of the pike known as the 'West End'; and that the defendant company had no power or control over the management, supervision, or operation of said pike that went into the hands of the receiver, and would not be liable for the wrongful and negligent acts of the receiver in not keeping the pike in good repair; and if the pike became defective or out of repair while in the hands of the receiver, and the injury resulted by reason of said defect while in the hands of the receiver, defendant company would not be liable," etc.

Says Mr. Beach, in his work on Receivers (section 721): "It is well established that a railway corporation which is in the hands of a receiver, who is operating the road as a common carrier, under statutory provisions or by virtue of an order of court, is not accountable for injuries occasioned by the negligence of the employes of the receiver. If a corporation be sued for such injuries, it has a perfect defense in the plea that at the time the injuries complained of were inflicted it was in the hands of a receiver duly appointed and operating the road. This rule is well founded upon principle, since the corporation after the appointment has no control over the employes of the receiver; and also for the further reason that, as we have just stated, the receiver is responsible for such injuries in his official capacity, and judgment may be had against the estate in his hands." *Hicks v. Railroad Co.*, 62 Tex. 38; *Rogers v. Railroad Co.*, 12 Am. & Eng. R. Cas. 432; *Bell v. Railroad Co.*, 53 Ind. 57; *Metz v. Railroad Co.*, 58 N. Y. 61; *Turner v. Railroad*, 74 Mo. 602; High, Rec. § 396, and cases cited; *Naglee v. Railway Co. (Va.)* 5 Am. St. Rep. 313, and note (s. c. 3 S. E. 369). Says Mr. Wood, viz.: "Upon the appointment of a receiver, the functions, powers, and liabilities of a corpora-

tion are suspended, and from that time it ceases to be liable for any contract made or acts done in the operation of the road by the receiver, unless the statute otherwise provides, or the possession of the receiver and the corporation or its lessees is joint." 3 Wood, Ry. Law, § 478.

It is insisted, however, on behalf of plaintiff, that the charge given by the circuit judge was erroneous, for the reason that the proof shows that defendant company and the receiver were jointly operating this road, and that each was responsible for the negligence of the other. Counsel cite *Railroad Co. v. Brown*, 17 Wall. 445, in which it appeared that a railroad corporation was run on joint account of a receiver of a part of it and the remaining part by lessees. It was held that an action would properly lie against the corporation itself for injuries sustained by a passenger at the hands of servants employed by the parties jointly operating the road, because the rule that the corporation is not liable in damages when the receiver is so liable is never to be applied unless the possession of the receiver is exclusive, and the employes of the road are wholly controlled by him, etc. In the case just cited it appeared that the railroad extended from Washington City to Alexandria, Va. That portion of the road located in Virginia had been leased for 10 years. Subsequently that part of the road located in the District of Columbia was placed in charge of a receiver by decree of court. Passenger tickets were sold for the whole line in the name of the Washington & Alexandria Railroad Company, and the two sections of the road were operated on the joint account of the lessees and the receiver, who jointly employed and controlled the employes. In the case now being adjudged it distinctly appears that the portion of the road in litigation was in the exclusive charge of the receiver appointed by the chancery court at Franklin, and there was no joint operation of the road in conjunction with the defendant company. It appears that the several receivers in charge of the road involved in that controversy contracted for repairs and work on the road, and that in making settlements in accordance with the orders of the court the receivers charged themselves with receipts and credited themselves with salaries paid gate keepers, and with amounts expended for work and repairs on the road.

Again, it is insisted that, by the terms of the decree appointing the receiver, he was not directed or required to take charge of any part of the road except the toll gate, and that he was not authorized to employ any one to work upon the turnpike. In this view, it is insisted that the receiver did not take absolute control of the pike, to the complete exclusion of the defendant company, and the duty imposed by its charter to keep its road in good condition remained a charge upon the company at all times during the litigation. We cannot concur in

this view of the case. It is true the decree of the chancery court does not in express terms order the receiver to keep the road in repair. But as is well said by counsel for appellee in his brief, viz.: "The decree expressly places the portion of the road in dispute in the hands of a receiver, and directs him to collect the tolls. This order, *ex vi termini*, carries with it the authority to make repairs, for the receiver could not collect tolls with his road out of repair, and the chancellor so construed his decree when he afterwards allowed the receiver credit for the repairs." Since the defendant company had no right to manage or improve or repair the section of the road upon which the accident happened, and as there was no joint operation of the road, the charge of the circuit judge under review was entirely correct.

The fourth assignment is that the circuit judge erred in refusing the following instruction submitted by counsel for plaintiff in error, to wit: "If you find from the proof that the injury complained of by the plaintiff was sustained by him while the defendant's road was in the hands of a receiver, by reason of defects in the bridge or culvert negligently permitted or allowed by the receiver, and the receiver was afterwards discharged, and the road returned to the possession and control of the defendant, the net income of the road having been used and applied by the receiver in permanent improvement of defendant's road, or some part thereof so used, and the remainder of such net income was paid over to or received by defendant in money, then, in such case, the complainant would be entitled to recover in this action for whatever damages he has sustained to the extent of the net income so applied by the receiver or received by the defendant." The court refused this request. It will be observed that this instruction proceeds upon the idea that, even if the injury was caused by the negligent acts of the receiver, the defendant company would still be liable to the extent of the funds received by it from the receiver after the termination of the receivership. As already stated, when the litigation between the turnpike companies was settled by this court in favor of the defendant company, the tolls collected by the receiver, amounting to about \$1,200, were turned over to defendant, and it is now insisted that defendant company is liable for the negligent acts of the receiver causing injury to plaintiff to the extent of the fund so received. Counsel cite on this proposition *Railway Co. v. Johnson*, 76 Tex. 421, 13 S. W. 463, in which the court says, viz.: "That a claim for damages caused by injuries inflicted through the negligence of a receiver while he is operating a railway is entitled to payment out of current receipts is well settled,"—citing *Ryan v. Hays*, 62 Tex. 42; *Barton v. Barbour*, 104 U. S. 130; *Kain v. Smith*, 80 N. Y. 470; *Hale v.*

*Frost*, 99 U. S. 389. The court continues, viz.: "If such earnings be invested in betterments, which, without sale, are returned to the company with its other property at the close of the receivership, then the company must be held to have received the property charged with the satisfaction of any claim which the receiver ought to have paid out of the earnings." *Ryan v. Hays*, 62 Tex. 42; *Fosdick v. Schall*, 99 U. S. 253; *Barton v. Barbour*, 104 U. S. 130; *Hale v. Frost*, 99 U. S. 389; *Miltnerberger v. Railway Co.*, 106 U. S. 287, 1 Sup. Ct. 140; *Addison v. Lewis*, 75 Va. 701; *Railroad Co. v. Davis*, 62 Miss. 271. The facts of that case (*Railway Co. v. Johnson*, 76 Tex. 421, 13 S. W. 463) are as follows: The plaintiff, *Johnson*, while in the employ of *Brown*, a receiver of the *Texas & Pacific Railway*, appointed by the circuit court of the United States sitting at New Orleans, was injured by the negligence of such receiver, and instituted suit against the receiver alone in a district court in Texas to recover damages. Before the cause reached an issue the receiver was discharged by order of the court that appointed him in Louisiana, the decree of discharge requiring all persons having claims against the receivership to intervene in that court and establish same before a fixed day. The plaintiff in that case did not so intervene, but amended his petition making the *Texas & Pacific Railway* a party defendant, alleging that it had received, in moneys and betterments from the receiver in settlement, all the net income from the road. The company set up as defense, by demurrer and plea, that the road was in the hands of the receiver, and that settlement with the receiver had been had in the court at New Orleans, and that all parties having such claims were required to intervene there, and that the plaintiff had failed to do so, and the time for such intervention had expired, and that plaintiff's action was barred. The cause was tried and dismissed as to the receiver, but a personal judgment was rendered against the company and execution awarded. On appeal the United States supreme court by Chief Justice Fuller said, viz.: "The company was held liable upon the distinct ground that the earnings of the road were subject to the payment of claims for damages, and that as, in this instance, such earnings, to an extent far greater than sufficient to pay the plaintiff, had been diverted into betterments, it must respond directly for the claim. This was so by reason of the statute (*Laws Tex.* 1887, p. 120, c. 131), and, irrespective of statute, on equitable principles applicable under the facts." *Railway Co. v. Johnson*, 151 U. S. 92, 14 Sup. Ct. 250; *Railway Co. v. Bailey*, 83 Tex. 19, 18 S. W. 481; *Railway Co. v. Comstock*, 83 Tex. 537, 18 S. W. 946; *Railroad Co. v. Davis*, 62 Miss. 271. "Damages for injuries to persons or property during the receivership, caused by the torts of the

receiver's agents and employes, are classed as operating expenses, and are accorded the same priority of payment as belongs to other necessary expenses of the receivership. Such claims will be paid out of the net income, if that is sufficient; but, in the event of a deficiency, they will be paid out of the corpus." 20 Am. & Eng. Enc. Law, p. 385. "So, also, if during the receivership net income is applied to the permanent improvement of the railroad property, and the receivership is afterwards discharged, and the road again turned over to the company, then the company is liable for torts during the receivership, to the extent of such net income so applied." *Id.* pp. 389, 390; *Railway Co. v. Bailey* (Tex. Sup.) 18 S. W. 481; *Beach, Rec.* §§ 718, 722.

It being conceded that the correct rule on this subject is laid down in the authorities cited, we next inquire as to their application. It is an undisputable condition of the right to recover against the company, even upon the theory that it has received a net income from the receiver, that the declaration should allege that the injuries were sustained by the plaintiff in consequence of the negligence of the receiver, his servants or agents. The gravamen of the action, as outlined in the four counts of the plaintiff's declaration, is that defendant company committed the wrong, but there is no allegation in either count that the receiver was guilty of any negligence. We have already seen that the company was not chargeable with any breach of its duty in failing to keep the turnpike in repair, for the reason that it was in charge of the receiver appointed by the chancery court. If liable at all, it must be so upon the ground that the receiver was guilty of negligence whereby the injuries were occasioned to the plaintiff, and that, instead of discharging said liability out of the receipts that came into his hands, he paid them over to defendant company upon the termination of his receivership. But the fatal and irremediable infirmity in the pleadings is that no negligence is charged against the receiver, his servants or agents, and there is therefore no theory presented upon which liability could be predicated or a recovery rested against the company. *Coal Co. v. Daniel* (Tenn. Sup.) 42 S. W. 1062. The judgment of the circuit court, for these reasons, is therefore affirmed.

#### INTERNATIONAL TRADING-STAMP CO. et al. v. CITY OF MEMPHIS et al.

(Supreme Court of Tennessee. April 2, 1898.)  
MUNICIPAL CORPORATIONS—POWER TO CREATE AND  
TAX PRIVILEGES—INJUNCTION AGAINST MUNI-  
CIPAL ACTION—MULTIPLICITY OF SUITS.

1. A city council has no power to create a privilege, and tax the same, unless authorized by the legislature.

2. Acts 1893, c. 84, § 4, empowering the city of Memphis to levy privilege taxes, confers

only the power to tax such privileges as have been previously taxed by the legislature, or such as may afterwards be ordered to be taxed by that body.

3. Injunction will lie in a proper case to restrain a city council from passing an ordinance which if enacted would be ultra vires.

4. An ordinance which would be void if passed proposed to impose a tax on a trading-stamp company, and also on each merchant using the stamps, and made its violation a misdemeanor. There were 145 or more merchants using the stamps under a contract for one year, which would be broken if the ordinance were observed. The merchant would be liable in a criminal action if he did not break the contract. Each breach of the ordinance would probably be a separate offense, and the penalty could be demanded until the question was settled on appeal. To restrain the enforcement of the ordinance, a suit would have to be brought by each person liable. *Held* to authorize an injunction to restrain the passage of the ordinance.

Appeal from chancery court, Shelby county; Sterling Pierson, Judge.

Application of the International Trading-Stamp Company and others against the city of Memphis and the city council for an injunction. The writ was granted; a demurrer to the bill was overruled; and a motion to dissolve the injunction was refused. On failure of complainants to furnish increased bond, the injunction was dissolved. From the decree overruling the demurrer, defendants appeal. Affirmed.

Carroll, Chalmers & McKellar and Metcalf & Walker, for appellants. John H. Watkins, for appellees.

WILKES, J. The complainant stamp company and certain merchants doing business in Memphis filed this bill against the city council and city of Memphis seeking to enjoin the passage of an ordinance pending before the council imposing a privilege tax upon the company of \$500, and upon each merchant of \$250, for engaging in what is styled the "trading-stamp business," and declaring the doing of such business without license a misdemeanor upon the part of the company and the merchants. An injunction was granted, and served upon the members of the council. The defendants moved to dissolve the injunction, and also demurred to the bill on various grounds. The chancellor overruled the demurrer, and refused to dissolve the injunction. On motion, the penalty of the bond was increased to \$10,000, and complainants declined to give it, and the injunction was dissolved. From the decree overruling the demurrer, the chancellor granted an appeal to the defendants, and they have assigned errors.

While the errors assigned are eight in number, only one question is presented, and that is whether a court of chancery should enjoin a city council from passing such an ordinance under its legislative power. It is conceded that a court of chancery may restrain the enforcement of an illegal or ultra vires ordinance after it is passed. Bradley

v. Commissioners, 2 Humph. 428; Lynn v. Polk, 8 Lea, 127; Public Ledger Co. v. City of Memphis, 93 Tenn. 81, 23 S. W. 51; Deems v. Mayor, etc., of Baltimore (Md.) 30 Atl. 648.

It is insisted that this ordinance, if passed, would be ultra vires and void, because it attempts to create a privilege, and tax it, and make its pursuit without payment of tax a misdemeanor, when the legislature has not so provided. The contention is that the legislature alone can create a privilege, and authorize its taxation, and that a municipal corporation cannot make any occupation a privilege, nor impose a tax upon it, unless it has first been so declared by the legislature. This, we think, is correct. Mayor, etc., v. Althrop, 5 Cold. 554, 558, 559; Fulgum v. Mayor, etc., 8 Lea, 640.

It is insisted that the legislature has not made the trading-stamp business a privilege, nor imposed a tax upon it, and an attempt to do so by the city council of Memphis would be an act ultra vires and beyond its power, and that such action may be enjoined to prevent irreparable mischief and damage. It appears that the legislature, at its special session in 1898, did pass a bill declaring that trading-stamp agencies and merchants doing business by or through such agencies should pay a tax for such privilege; and the bill is published as an act of the extra session of 1898. But it appears from the journals of the house that the bill was vetoed by the governor as unconstitutional, and was not passed over his veto; so that it has no force or vitality, and is improperly published as an existing law.

It is next contended that under section 4, c. 84, Acts 1893, the city of Memphis was empowered to levy privilege taxes, and hence the legislative council was acting within the scope of its authority. This section is as follows: "Sec. 4. Be it further enacted, that from and including the year 1893, power is hereby conferred upon the legislative council of the city of Memphis to levy and impose all necessary taxes for the support of the government of said city. In the exercise of said power the legislative council shall always levy and impose a sufficient tax to pay the interest of the outstanding bonds of said city, and to provide a sinking fund for the retirement of the bonds themselves, as required by the law under which said bonds were issued. \* \* \* The power conferred thus to impose taxes shall apply to every object and subject of taxation within the corporate limits of the city of Memphis. Said power shall extend to every species of property and to privileges and wharfage dues, and all other things upon which the legislature or the city has heretofore laid taxes, rates or assessments for the support and maintenance of said government, the object being to provide for the exercise of the power herein conferred under the restrictions named as fully as the same could be

exercised if the legislature and not the city were exercising the power." It is evident that the power conferred by this act was to tax such property, privileges, and other things as had been theretofore taxed, or thereafter ordered to be taxed, by the legislature, or the city under authority of the legislature; but it did not confer the power to create new privileges, and assess taxes for their exercise, and, as we have already seen, no such power exists independent of legislative authority. It clearly appears, therefore, that the contemplated action of the council was illegal and ultra vires; and the question recurs, should complainants be allowed to enjoin the enactment of the ordinance, or take their remedy to prevent its enforcement after it is passed? In the case of Public Ledger Co. v. City of Memphis, 93 Tenn. 81, 23 S. W. 51, this court said: "The remedy by injunction to prevent municipal corporate action is one not lightly to be applied. If the matter complained of is one merely of simple contract, of no serious moment, and which may be defeated by resistance to its enforcement, even by the body making it, there is no sufficient ground for the use of the writ at the instance of the taxpayer." But there is a broad distinction between the exercise of legislative authority when the power or jurisdiction to exercise it has been conferred by law and an attempt to legislate upon matters clearly ultra vires. Where there is power and authority conferred by law to do any legislative act, the discretion of the council cannot be controlled; but, when there is no legislative authority or power, injunction will lie. A municipal corporation has no discretion to do any act which is clearly illegal and beyond its power. Des Moines Gas Co. v. City of Des Moines, 44 Iowa, 506; Roberts v. City of Louisville (Ky.) 17 S. W. 216; High, Inj. § 1241, and cases cited; People v. Dwyer, 90 N. Y. 402; Murphy v. East Portland, 42 Fed. 308.

It is said, however, conceding that injunction will lie, it should not be resorted to so long as the complainant has other sufficient remedies, such as an action for damages, or an action to enjoin the enforcement of the ordinance when passed; and this is undoubtedly so. The legislation proposed is to impose a tax of \$500 upon the stamp company, and \$250 on each merchant using the stamps, and to make the violation of the ordinance a misdemeanor. It is alleged there are a number of these merchants,—145 or more. With these merchants the company has a contract for a year, which must be breached if the law is observed, and thus ground will be laid for a large number of suits. Moreover, the use of the stamps being made a misdemeanor, the merchants would each be liable in a criminal action if he did not break the contract. Each breach would perhaps be a separate distinct offense for which the penalty could be demanded, at least until the question was settled on appeal. To

restrain the enforcement, an action would have to be brought by each person liable; so that we think a proper case is made out to enjoin the passage of the act, and the decree of the court below is affirmed, with costs.

**JONES et al. v. CITY OF MEMPHIS et al.**  
(Supreme Court of Tennessee. June 6, 1898.)  
**TAXATION — UNIFORMITY — MUNICIPAL CORPORATIONS — LEGISLATIVE CONTROL — STATUTES — PARTIAL INVALIDITY.**

1. Acts 1898, c. 6, § 3, which provides that certain territory annexed to the city of Memphis shall be exempt from taxation for police, fire, and light purposes for a period of 10 years, is in violation of Const. art. 2, § 28, providing that taxation must be uniform and equal throughout the state, and section 29, empowering the legislature to authorize the several counties and incorporated towns to impose taxes for county and corporation purposes respectively, on principles established in regard to state taxation.

2. Acts 1898, c. 6, § 4, which provides that certain territory annexed to the city of Memphis shall not receive the benefit of police, fire, and light protection for 10 years, is invalid, for the reason that all parts of a city are entitled to the same advantages.

3. Acts 1898, c. 6, provides for the annexation of certain territory to the city of Memphis; and sections 3 and 4 exclude such territory from the benefits of, and exempt it from taxation for, police, fire, and light purposes for a period of 10 years. Chapters 13 and 14 provide for the sewerage, waterworks, and taxation of the annexed territory. *Held*, that the chapters are so interwoven that all fall on account of the unconstitutionality of sections 3 and 4.

Appeal from chancery court, Shelby county; Sterling Pierson, Chancellor.

Bill by Mrs. Charles Jones and others against the city of Memphis and others. A decree was rendered, from which both parties appeal. Reversed in part.

Carroll & McKellar and W. W. McDowell, for complainants. John H. Watkins and Metcalf & Walker, for defendants.

**WILKES, J.** This bill is brought to test the validity and constitutionality of certain acts of the general assembly of Tennessee passed at its extra session 1898. It is filed by a number of persons, some of whom are nonresidents of the state, but interested in the questions presented. Others reside in the territory annexed by the acts to the city of Memphis; others own property therein; and still others do business within the limits; while the principal plaintiff, Mrs. Charles Jones, owns what is styled in the record a "Flippin Bond," and presents a question specially affecting her interests as well as those of others holding similar bonds. The defendants are the city of Memphis, its mayor, vice mayor, fire and police commissioners, board of public works, and trustee of Shelby county, and collector of city taxes, and the city register; and the bill points out in detail the objections to the validity of the acts. There is a demurrer to the bill, set-

ting out, under separate heads and subheads, grounds in support of the acts, and objections to the bill. This demurrer was acted upon in the court below. The learned chancellor was of opinion that sections 3 and 4 of chapter 6 of the Acts of the Extra Session of 1898 were unconstitutional and invalid, but that they could be eliminated from the act, leaving the remaining portions valid and in force. He was also of opinion that the proposed action of the city council in the issuance of bonds of the city imposing a general liability upon the city for waterworks and sewerage purposes was illegal, and so much of the acts as authorized the issuance of such bonds was unconstitutional, as impairing the security of the Flippin bond, but that such bonds could be issued with a limited liability, and with a lien upon the improvements added according to the provisions of the act. Complainants and defendants have appealed, and the questions raised by the pleadings are before this court for adjudication, and, owing to the magnitude of the interests involved and the importance of the questions raised to a large portion of the public, the cause has been advanced upon the docket for a speedy hearing and determination.

The first objection to the acts is that they seek to impose a different rate of taxation upon the old and new territory within the same municipality, and the objection is based upon sections 28 and 29 of article 2 of the constitution of Tennessee. By section 28 it is provided: "All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the state. No one species of property upon which a tax may be collected shall be taxed higher than any other species of property of the same value." By section 29 it is provided: "The general assembly shall have power to authorize the several counties, and incorporated towns in this state, to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to state taxation." The argument for complainants is that a state tax must be equal and uniform throughout the state; that a county tax must be equal and uniform throughout the county; and that a city tax must be equal and uniform throughout the city. The chancellor thought this proposition was well founded, basing his conclusion upon the language of the cases of *Taylor, McBean & Co. v. Chandler*, 9 Helsk. 366, 367, and *Levee Dist. v. Dawson*, 97 Tenn. 151, 36 S. W. 1041. He was therefore of opinion that the third and fourth sections of chapter 6 of the Acts of the Extra Session were invalid, because they exempt the annexed territory from taxation for police, fire, and light purposes for a period of 10 years, while during

the same period and for like purposes the original territory is to be taxed, taxation for current purposes being thus made unequal in different parts of the same municipality. In this connection, also, attention is called to the fact that during this period the annexed portion is not to receive the benefit of police, fire, and light protection. The learned chancellor was of opinion there was a broad difference between providing for the debt of the old city which could remain a tax upon that portion of the city alone which created it, and a new debt to be created upon the enlarged city, the argument being that, as to the latter, taxes must be equally laid upon every portion of the city, while, as to the former, taxes might remain alone on the old city, and in this view he was clearly correct. The chancellor was, however, of opinion that the complainants could not successfully assail the entire act, inasmuch as the objectionable sections relating to taxation and exemptions might be eliminated from the act, and the remaining sections might remain, which provide for the addition to the city, and relate to the liability for the original debt of the city; in other words, that by these sections the new territory might be brought into the city limits, but the unconstitutional method of taxation for current and future purposes might be declared invalid, without affecting the right to annex the territory. This court is of opinion that sections 3 and 4 of chapter 6 are clearly unconstitutional and void, inasmuch as they exempt the annexed territory from taxes for fire, light, and police protection for 10 years, and for the same time expressly prohibit the district from having the advantages of this protection. The court is of opinion that taxation must always be uniform and equal throughout the extent of the same jurisdiction; that state taxes must be equal and uniform throughout the state; that county taxes must be equal and uniform throughout the county; and that a city tax must be equal and uniform throughout the city, so far as revenues for current expenses or future wants are concerned; and that this principle is fully sustained and illustrated in the cases of *Taylor, McBean & Co. v. Chandler*, 9 Heisk. 366; *Levee Dist. v. Dawson*, 97 Tenn. 151, 36 S. W. 1041; *Keesee v. Board*, 6 Cold. 127; and a number of other cases. So, also, if a portion of territory is annexed to and becomes a part of a city, it is entitled to all the benefits extended by the city to any portion; and, while it may not in all instances be necessary to furnish at once the same advantages and conveniences to each and every locality in the city, still an act which prescribes that it shall not have such advantages at all or for a given time is not valid, and cannot be sustained. The logical result of the contrary holding as to taxation would be that, in every city, taxes might be different in different wards, and on different streets; in every county, taxes might be different in every civil district; in the state, taxes might be different in every

county, and in each division,—all clearly in violation of the constitution and our whole theory of equal and uniform taxation. So, also, it cannot be maintained that a section of territory may be brought within the city limits, and made part of the city, and yet be excluded by express enactment from the benefits extended to other portions of the city. Fire, light, and police protection are necessary to a greater or less extent throughout the entire city, and cannot be excluded by positive legislation when the needs of the locality may demand and the funds of the city may warrant their supply. This being so, the question arises whether these sections may be eliminated and stricken out of the act, so as to leave the remainder of it valid and constitutional.

It is evident that the different portions of this act, as well as the several acts passed in pursuance of the same general purpose, are parts and parcels of one general system and plan, and that the whole legislation is so framed, and each part is dependent upon the other, and essential to it, and was an important element in its passage as a law. The rule is that when the provisions of an act are so interdependent as to raise the presumption that the legislature intended the act to operate as a whole, and would not have enacted the valid provisions alone, the entire statute must be adjudged invalid. *State v. Scott*, 98 Tenn. 256, 39 S. W. 1; *Levee Dist. v. Dawson*, 97 Tenn. 179, 36 S. W. 1041; *Tillman v. Cooke*, 9 Baxt. 429; *Pollock v. Trust Co.*, 158 U. S. 601, 15 Sup. Ct. 912. It is impossible to look at these several acts and their provisions separately and as a whole, without concluding that the legislature considered the matter as a whole, and thus acted upon it, and so intended the acts to operate, and that it would not have passed the acts if these invalid features had been omitted. The territory would not have been admitted but for the provisions of sections 3 and 4, and the other acts providing for sewers and waterworks would not have been passed if the territory had not been annexed. We cannot view these third and fourth sections but as important links in one chain, and, if they had not been inserted, the whole scheme and plan must have failed. This being so, the entire acts, chapter 6, must be held invalid, and along with it must go the other acts, chapters 13 and 14, providing for sewerage, waterworks, and the taxation of the annexed territory, as they are interwoven with and dependent on each other. Chapter 15, repealing the charter of Idlewild, is not involved in the pleadings in this case, and as to it we express no opinion. The result is that the entire act, chapter 6, and the other acts, chapters 13 and 14, dependent upon it, are declared unconstitutional and invalid and of no effect; and, this being a final disposition of this question upon its merits, the city council is enjoined from putting the same into operation and effect, or issuing any bonds, or



collecting any tax, or making any additions or improvements thereunder. The cause will be remanded to the court below, for such action as may be proper in regard to the refunding of taxes already paid, inasmuch as we do not consider that question properly before us in disposing of the case on demurrer. The city will pay the costs of the cause. It is useless to pass upon the other questions raised, though they have been considered.

**CUNNINGHAM et al. v. DAVIS et al.**  
(Court of Chancery Appeals of Tennessee.  
Jan. 15, 1898.)

**LANDLORD AND TENANT—FARM LEASES—ADJUSTMENT OF ACCOUNTS—PAYMENT—INTEREST—INCREASE OF STOCK—EVIDENCE.**

1. C. and M., joint owners of a farm, agreed with their lessees to furnish necessary machinery. The lessees purchased a harrow, and entered it on their books as paid for by the owners, but testified that in fact they paid for it, as C. refused to do so. M. alleged that she owed nothing on the harrow, and gave as her reason for that statement the entry in the lessees' books showing payment by herself and C. C. testified that he did not pay for the harrow, but understood that the charge for it was taken out of the settlement. *Held*, that M. should not be charged with one-half of the harrow.

2. C. and M., joint owners of a farm, agreed with their lessees to furnish necessary machinery. The lessees purchased a fanning mill for C. and one for the farm, but both were charged to the owners, and, according to the books of account, were paid for by them. *Held*, that M. was chargeable with only one-half of a mill, and, having paid for one-half of two mills, should be credited with the value of half of a mill in her account with the lessees.

3. Where the owner of a farm agrees with her lessee to stock it, and receive a portion of the increase, she is entitled to the agreed share of the increase, regardless of whether the stock furnished is her individual property or that of another for whom she acts as agent or guardian.

4. The owner of a farm was to have a certain portion of the increase of stock. The accounts kept by the lessee during 1888, although contradictory, in that an item of \$50 is both charged and credited to the owner on account of one mule, show that the item was a part of the account for that year, and the statements of both owner and lessee show that there was a balance due the lessee for that year. *Held*, that the owner cannot again be credited on account of the mule.

5. Where the owner and lessee of a farm settle their accounts every year, at which time proper credits are given the lessee for supplies furnished and expense in hauling same, no credit will be allowed the lessee at a final settlement for charges of that kind which were probably included in the yearly settlement so far as they were just, or which are brought in to the final settlement by the lessee as an afterthought.

6. C. and M., joint owners of a farm, were to stock the farm and take two-thirds of the increase. They furnished, among other stock, one cow worth \$10, which was subsequently sold for \$20, and replaced by a partnership cow. *Held*, that M. was entitled to one-third of the price received for the cow.

7. Where the owner and lessee of a farm have yearly settlements, and at one of these the lessee gives the owner a duebill in settlement, which was not thereafter included in a

settlement, nor paid, credit for it should be given the owner at a final settlement.

8. A lessee sold property belonging to the owner of the farm, but alleged that he paid the owner, an allegation supported by the testimony of his brother, who was not, however, present when the money was paid, according to the testimony of the lessee. The owner denied payment. *Held*, that payment was not proved.

9. Where the lessee of a farm sells property at or prior to a certain date, belonging to the owner of the farm, it is not error to allow the owner interest on the charge from that date.

Appeal from chancery court, Williamson county; Claude Waller, Special Chancellor.

Suit by W. W. Cunningham and another against J. O. Davis and another. From a decree giving complainant Mrs. McLemore partial relief, defendants and Mrs. McLemore appeal. Modified.

S. S. House and C. R. Berry, for complainants. H. P. Fowlkes and Cook & Marshall, for defendants.

**BARTON, J.** This case, which includes a bill and cross bill, includes a settlement of a partnership in farming. We adopt the preliminary statement of the case found in the brief of complainants' counsel, which is full, but brief and succinct, and which is as follows: "W. W. Cunningham and Mrs. Etta C. McLemore (brother and sister) were the owners and tenants in common of a farm of about 700 acres, lying in the Third district of Williamson county, Tennessee. In 1882 they entered into a written contract with J. O. and H. H. Davis, wherein they rented and leased to said Davis Bros. their farm, for the space of three years, beginning with 1882, the contract being as follows: 'We, the undersigned, hold ourselves firmly bound in the following contract,—W. W. Cunningham and Mrs. E. C. McLemore of the first part, H. H. and Jas. O. Davis of the second part: Said Cunningham & McLemore, of the first part, agree to furnish lands, wagons, plows, and reapers, all of which are on the place, and agree such necessary blacksmithing as will keep them in repair; also will have rails made at our expense; also shingles or boards to cover the tobacco barn and shop. We will furnish a carpenter to assist in covering. If the cabins are rented, we will give them one-third of the rent. We will reserve the parlor for our own use. We further agree to furnish stock to cultivate the land. H. & J. Davis of the second part agrees to take charge of the place and cultivate in a workmanlike manner in whatever we W. W. C. & E. C. McL. of the first part, H. & J. Davis think best, said Davis & Bro. agree to repair the fences, build a new fence around the land next to J. D. Brown, such other work as will be required to keep a first-class place in order. Said Davises will take charge of the hogs, cattle, sheep, and such other young stock as we think advisable to put on the place. Said Davises shall take one-third of the growth of the

stock, or one-third after cost deducted; also one-third of all the crops that grow on the place after they have taken hold. At the expiration of three years, if we dissolve partnership, said Davis must turn over to said Cunningham & McLemore same amount and size of stock as can be well agreed upon. If either Davis Bros. or Cunningham & McLemore buy young stock of any kind, cost of the stock shall be returned to the party purchasing it, and the income divided.' At the expiration of three years, the parties continued to act under this contract from year to year, and until the fall of 1891, when Cunningham and McLemore took possession of the farm. The parties were unable to agree upon a settlement, and on November 29, 1892, Cunningham and McLemore jointly, and Mrs. McLemore individually, filed their bill, seeking to have all matters settled, and to Mrs. McLemore individually a large sum. On February 4, 1893, Davis Bros. filed an answer and cross bill denying any indebtedness on their part due to Cunningham and McLemore jointly or to Mrs. McLemore individually. They charged, on the other hand, that these parties were indebted to them in a large sum. On December 15, 1893, Cunningham and McLemore filed their answer to the cross bill. Thereafter on June 28, 1895, an order of reference was entered, referring the whole matter to the master to take proof and report upon the matters in controversy. During the taking of the proof, and before the master's report, complainant Cunningham and defendants, Davis Bros., settled and compromised their matters, by Davis Bros. paying to Cunningham a certain sum of money, the amount not known. From year to year settlements and partial settlements were made, and entered upon the books kept by Davis Bros. Copies of these settlements were sometimes left in possession of Mrs. McLemore, and they are filed as exhibits to her depositions. On May 27, 1896, the master filed his report. Complainant Mrs. McLemore filed certain exceptions to the report, which the master passed upon, allowing some and disallowing others. In March, 1897, defendants, Davis Bros., filed certain exceptions, and the master allowed some and disallowed others. At the June term, 1897, the cause was heard before Special Chancellor Hon. Claude Waller. The chancellor gave judgment for Mrs. McLemore as of June 1, 1896, the sum of \$409.62. Complainant Mrs. McLemore appealed from so much of the ruling of the chancellor as disallowed her exceptions Nos. 6, 13, and 14 to the master's report." The defendants also prayed an appeal from so much of the decree as adjudicated matters against them, and both parties have assigned errors in this court.

A mass of proof was taken, but we will only refer to so much of it as may be necessary to properly pass upon the points raised

in the assignments of error by the parties. Taking up these assignments of error in the numerical order named in the brief of counsel on behalf of complainants, the exceptions and assignments of errors are as follows:

First. It is said that the chancellor erred in allowing Davis Bros. credit for, and charging Mrs. McLemore with one-half the value of, the disk harrow, \$17.50, and interest thereon, \$8.01. The contention of complainants on this point is that the book of accounts kept by Davis Bros. and the proof show that in the settlement for that year Davis Bros. received credit for and Mrs. McLemore paid this item. According to the contract between the parties, the complainants were to furnish such machinery; and the chancellor was of opinion that, having been furnished by Davis Bros., Mrs. McLemore was liable for her one-half, and that the proof did not show that she had paid for the same. The master at first reported this item against the complainants, but, on an exception, he ruled out and disallowed this item, stating that there was no proof to sustain it. J. O. Davis in his testimony states that their books of account show that McLemore and Cunningham paid for this harrow; that it was so put down on their books, but that afterwards Mr. Cunningham changed the matter, and would not pay for it, and the Davis Bros. paid for it, and used it all the time they were there, and that it is shown that Davis Bros. were not allowed to take this harrow away. Cunningham also in his testimony says that he refused to pay for the harrow, and that his understanding was that the charge for the harrow was taken out of the settlement. The insistence of complainants' counsel is, however, that, while Cunningham may not have paid for his part, Mrs. McLemore did. Mrs. McLemore in her deposition said that 'she did not owe Davis Bros. anything on the disk harrow, and gives as her reasons for the statement that book 2, p. 84, shows that Mr. Cunningham and herself paid \$35 for the disk harrow, marked, "Settled, February 8, 1888." The effect to be given to this and the evidence of the books will be stated in connection with that bearing on the second item covered in this assignment of error, which is that the chancellor erred in allowing Davis Bros. credit for one-half of one fan mill, \$15, and interest to June 1, 1896, \$7.55. It is insisted for the complainant that this item was also paid and settled for by Mrs. McLemore. The chancellor held that this fan mill appeared to have been paid for by Cunningham, and that Mrs. McLemore did not pay any part of it, although it appeared on the books. The proof shows that there were two fan mills paid for by Davis Bros. One was for the farm, and one was for Cunningham himself. It appears on the book of settlement that both of these mills were charged to Cunningham and McLemore. Mrs. McLemore says that she bought only a half interest in one fan mill, but is charged with,

and that she paid for, one-half of two mills. J. O. Davis says that he bought one mill for the firm, and the other for Cunningham individually, and that both were charged on the books. Cunningham says he paid in full for the one mill bought for him. Still, it does appear by the books that one-half of both of these mills, as well as one-half of the harrow, were included in the account as against Mrs. McLemore. The settlement made for 1887 includes, as part of the expenses, items aggregating \$836.20. This aggregate includes the harrow and fan mills; and on inspection of this account, and accounts appearing on page 91, and on pages 83, 84, 85, and 86, it will be seen that in the settlement with Mrs. McLemore these amounts were included, and were charged to and paid by her. So we find that Mrs. McLemore paid and accounted for the one-half of the disk harrow and one-half of two fan mills, when she was only liable for one. The chancellor was therefore in error as to these items, and his decree in that respect will be modified and corrected.

Second. That the chancellor erred in not allowing Mrs. McLemore credit for, and charging Davis Bros. for the sale of, a mule valued at \$100. The master's report was excepted to also upon this ground by the complainant Mrs. McLemore, but the exception was overruled, and report sustained; the chancellor holding that the mule was the property of Miss Bettie, a daughter, and that Mrs. McLemore had no right to have Davis Bros. account to her for this amount. After a careful investigation of the record, and reading every particle of proof that appears in the transcript on the subject of this mule, it is obvious to us that the ruling of the chancellor cannot be sustained on the ground stated by him; because it appears that, when the defendants took possession of the farm, the complainants turned over to them a lot of stock, and, among others, a mare belonging to Mrs. McLemore's daughter Bettie. This mare was left on the place, and surrendered when the defendants gave it up. From year to year this mare was bred, Davis Bros. paying one-third of the seasons, and Mrs. McLemore two-thirds; and Davis Bros. received one-third of the proceeds of the colts, and the complainants were to receive two-thirds. It affirmatively appears that in the settlements at least one of the mules from this mare was taken into consideration, and the defendants were allowed one-third of its value. It is obvious that, although the mare and her proceeds may have been the property of Miss Bettie, the daughter, still, by agreement of all these parties, she was treated as the property of Mrs. McLemore; and we assume, as we think we are bound to do, that Mrs. McLemore was acting as the agent or guardian for Miss Bettie, and has accounted or will account to her for her property. It is in proof that she paid Miss Bettie for one mule,—whether the mule in question is not clear from the proof. So, we think that, having treated this mare and

her proceeds as rightfully in charge of Mrs. McLemore, the defendants cannot now rely, nor could we properly place the decision of this question, on that ground; for we must assume, from the conduct of the parties, that Mrs. McLemore had a right to act as she did. Nor can we understand how the action of Mrs. McLemore can be treated as lawful in one instance and not in the other. But, notwithstanding this, after a most careful study and analysis of all the proof, we find no adequate explanation of this matter by either party. Neither side makes any statements sufficiently clear to satisfy us how this matter was. There are some statements in regard to certain mules, but nothing to identify this particular item, and two mules are accounted for by the master in his report. Upon the book kept by the Davis Bros. we find for the year 1888 the item both charged and credited as "Mule, Miss Bettie, \$50." It is obvious, from a glance at the book, that the item was first put down as a credit, and that subsequently it was entered in the same account as a charge. The charge appears to have been made at a different time, or at least with a different ink,—apparently at the time, and with the same ink, in which the last item of the account, "Expense on farm, \$94.83," was entered, and at the time the column was footed up, showing an aggregate of charges \$628.68. From this the credit of \$50 does not appear to have been deducted. On the opposite page (page 6, Book 3) this item of aggregate charges, \$628.68, which includes the charge for Miss Bettie's mule, is stated, and from that is deducted an amount of \$564.11, stated to be due Mrs. McLemore, leaving balance due Davis Bros. by E. C. McLemore, \$64.67. Looking solely at this account on the book, of course, we would be unable to understand the matter at all, except the inference would be that the \$50 item had been erroneously credited when it should have been charged in the first place, and that impression is carried out and sustained by the aggregate charges, including this item, being carried into the settlement on page 6; and this statement of the account is marked, "Settled by check and due-bill."

When Mrs. McLemore filed her bill, she alleged that the defendants were indebted to her for a number of items, which she set out. Among the items she makes no claim on account of this mule. She further alleged that the defendants were entitled to credits as follows:

Balance due on settlement, 1888.....	\$41 92
" " " " 1889.....	75 85
" " " " 1890.....	90 94
" " " " 1891.....	15 17

It is true she says there may be other claims due her that she cannot now remember. But the point is she states the defendants were entitled to credits for balance due them on settlement of 1888, and the proof and the books show that there was a settlement in 1888. The accounts show that this mule

went into the settlement of 1888. The master in stating his account adopted the statements in the bill, and properly so, we think, as to the credits to be allowed the defendants, because they were the admissions of the complainants. Now, this mule having gone into the account, and the complainants admitting that there was this balance, and the proof failing to show in any clear and satisfactory manner which we can understand, we see no ground upon which this exception can be properly sustained, and therefore affirm the conclusions of the chancellor, and the clerk and master, though on a different ground. This disposes of the exceptions on behalf of the complainants.

The defendants' first exception is that the chancellor erred in sustaining their exception No. 4, and overruling the clerk and master as to the item of \$361, being for hay, corn, etc., and use of teams in hauling same from farm to Franklin, 10 miles. This assignment, in our opinion, is not well taken. Without going into a full discussion of the evidence upon this subject, it is sufficient to say we are satisfied that this item, brought forward by the defendants, is purely an afterthought. We are further satisfied from the proof that the items of hauling, etc., included in this aggregate, so far as they were to be charged for, were settled at the end of each year. We are further satisfied that some of the items thus sought to be included in this account were not just charges, and were not understood by the parties that they should be charged for, but, so far as any of these items were just charges, they were settled and paid for. All the testimony as to these settlements goes to show this, and the course of dealing between the parties also shows it. The decree of the chancellor on this point was correct, and will be affirmed.

The next assignment of error on behalf of defendants is the action of the chancellor in overruling their exception No. 10, relative to the cow Bessie. This exception is also, we think, not well taken. The proof shows that this cow belonged to Cunningham and McLemore, and was turned over to Davis Bros. when they first took charge of the farm, for \$10, and subsequently this cow was sold for \$20, making a profit of \$10 in the business. Mrs. McLemore was charged for this cow \$20. This cow was subsequently replaced at the expense of the partnership by a partnership cow. The result is that Mrs. McLemore was entitled to one-third of the price of this cow Bessie, \$6.67; leaving after the credits allowed, computing interest, a credit of \$6.73, as shown by the calculation of the master on page 154 of the transcript. And the action of the chancellor and of the master are therefore affirmed as to this item.

The third assignment on behalf of defendants is that the chancellor erred in allowing Mrs. McLemore credit for \$123.91, duebill of Davis Bros., as of April 9, 1886. The evidence shows that this duebill was given in

settlement then made, and the weight of the evidence, in our opinion, is, and we find, that this duebill was not settled nor paid, and that Mrs. McLemore was entitled to credit therefor on the final settlement made in the court.

It is assigned as error, however, that the court could not properly allow this, aside from the question of merit, because the master first charged them with this amount and interest; that the defendants excepted thereto, and the master allowed the exception; and that the complainants did not appeal from the master's ruling, but that, during the final argument of counsel, the counsel for complainants moved that an appeal be allowed from the master's rulings. Upon this subject the decree of the chancellor recites: "It appears that no appeal was taken by complainants from the ruling of the master, and during the final argument of the case complainants' counsel moved the court to be allowed to enter an appeal from the master's ruling to said exception, which motion is now granted, and the court now considers said appeal as if it had been made at the time the master passed on said exception, and in consideration of this exception the court is of opinion that the master, in allowing said exception, is erroneous;" and it is said by defendants that the appeal must be prayed for and granted by the master, and not the chancellor, and that the chancellor had no power to grant an appeal, and the exception was not legally before the court. This discloses a practice which seems to prevail in the chancery court of Williamson county, with which no member of this court has any acquaintance, and which we have not found provided for or sanctioned by any work on equity pleading or practice. So far as we are aware, the practice in regard to accounts and reports of this character made by the master is for the master to make out his statement and report, and thereupon the parties file such exceptions as they desire to the report, and the matter is then brought before the chancellor, who hears the case upon the report and the exceptions thus presented. We are not aware of any practice which allows or requires the clerk and master to act upon or try these exceptions, or that allows or requires any appeals from him. The report is supposed to be the result of his conclusions, the exceptions are the acts of the parties, and the whole matter is to be acted upon by the chancellor. We see no objection, however, if the attention of the clerk and master is called by an exception to an error made by him, to his acting thereon so far as to correct the report, if not filed, or, if desired, to file an amended report; and we take it the report thus corrected and remodeled would be his report, which goes to the chancellor. We suppose, therefore, that the real point sought to be made is that the report came before the chancellor unexcepted to by the complainants as to this item, which had by the last action of the master been dis-

allowed. But if this be so, and on account of the peculiar manner in which it was done, or for any other good cause, the chancellor in his discretion allowed the exceptions to the report of the master to be then taken, we think this is a matter wholly within his discretion, and a discretion not to be interfered with unless abused. So, we think we will treat the whole matter as properly before the chancellor, and, inasmuch as we find with him that the duebill had not been paid, it was a proper credit, and the action of the chancellor thereon is affirmed.

The fourth assignment of error on behalf of the defendants is to the effect that the chancellor erred in sustaining exception No. 12, filed by the defendants, as to the horse Lightfoot. It is a fact, which was admitted, that this horse was the individual property of Mrs. McLemore, and that the Davis Bros. sold the horse. The claim on their behalf, however, is that they paid the money, \$95, to Mrs. McLemore. This she denies. It is said by defendants' counsel that, inasmuch as both the Davis Bros. swore that they had paid her, the weight of the evidence is in their favor, and the claim should be allowed. Having admitted that the horse was hers, and that they had sold it, the burden of proving payment is, of course, upon them. While it is true both of the Davis Bros. swore the amount was paid, and Mrs. McLemore swears it was not, yet it is evident that one of the Davis Bros. was swearing upon information, because J. O. Davis, who claims to have made the payment, says that only he and Mrs. McLemore were present. She denies positively that the payment was made, and they have failed, by the weight of the evidence, to prove the payment. We therefore find as a fact that the payment was not made, and Mrs. McLemore is entitled to this credit, and the action of the chancellor in this respect is affirmed.

The fifth and last assignment of error on behalf of Davis Bros. is that the chancellor erred in allowing interest on this item from 1884. The proof shows the horse was sold at that time, or prior thereto, and we think the chancellor's action was right.

The result of the whole case is that the chancellor's decree will be modified so as to allow the complainants the additional credits of \$17.50 for this harrow, and \$15, one-half of fan mill, with interest thereon. In all other respects the decree of the chancellor is affirmed. The cost below will be paid as adjudged by the chancellor, and the defendants will pay the cost of the appeal.

NEIL, J., concurs.

On Petition for Rehearing.

(Jan. 25, 1898.)

This is again before us on a petition to rehear as to one item. We have carefully considered the reasons urged by counsel, and

have re-read the parts of the record referred to. When we look alone to the proof, without regard to the supplementary statements of counsel, we find, as we did before, that we are unable to see that complainant Mrs. McLemore is entitled to the credit claimed. The burden is on her to prove her right to this credit. She does not do it. The petition will for these reasons be overruled and dismissed, at the cost of petitioner. The other judges concur.

Affirmed orally by supreme court, February 26, 1898.

EDWARDS v. TURNER et ux.

TURNER et ux. v. EDWARDS.

(Court of Chancery Appeals of Tennessee.  
Dec. 4, 1897.)

REVIEW—SETTING ASIDE ORDER PRO CONFESSO—  
FRAUD—ENTRY OF DECREE—RES JUDICATA.

1. A chancellor's discretionary action in setting aside an order pro confesso, and permitting an answer to be filed, will not be reversed unless palpable injustice was done.

2. A suit was begun by complainant against defendant to establish his and the public's rights in a highway across complainant's land. The matter was pending for about nine years. The rule docket entries made while defendant's attorney was living showed that some agreement had been made for a decree, in which complainant was to pay costs, but that the decree was not entered until after defendant's attorney was dead two or three years. Complainant, who was counsel in the case, swore that the decree entered was orally agreed to by defendant's attorney and himself, and that it was not entered sooner was an oversight, defendant's attorney, who had charge of the matter, being ill at least two terms before his death; that two years after his death the court insisted on disposing of the case; and that, after complainant stated the agreement made, it directed that the decree go down. The defendant claimed he was informed by his attorney that complainant had abandoned the suit, and would assume all costs, and that he never authorized the decree entered. Defendant was 79 years of age, and about 10 years had expired since. By the decree, the complainant abandoned his claim that the public had an interest in the highway, and the decree established his right to a private way only, and adjudged no right in the public, and the costs against complainant. Both pending the litigation, and until shortly before suit to annul the decree, complainant used the way without objection. *Held*, that no fraud was shown in entering the decree.

3. Where the terms of a decree to be entered have been agreed upon between the parties, its entry becomes a mere ministerial act; and the fact that the attorney of one of the parties, through whom the agreement was negotiated, died before the entry of the decree, does not entitle such party to question its validity when entered according to the agreement, and after ample time was given him to employ other counsel.

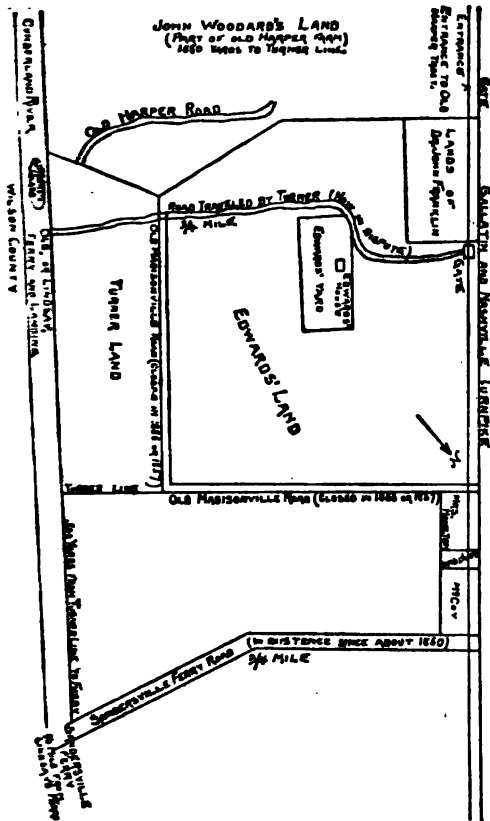
4. Where complainant sues for obstructing his right of way over defendant's land, he is estopped to invoke the right of the public in his behalf, when he, in a previous suit against the same party in relation to the same right of way, consented to a decree declaring against a public right therein.

Appeal from chancery court, Sumner county; J. S. Gribble, Chancellor.

Bill by J. J. Turner and wife against Joseph Edwards to recover a highway, and by Joseph Edwards against J. J. Turner and wife to vacate a decree entered in a suit between the same parties concerning the same highway. From a decree for complainants in the former suit, and a dismissal of his bill in the latter, Edwards appeals. Affirmed.

Dismukes & Seay, for Edwards. J. J. Turner, for Turner and wife.

NEIL, J. This is a controversy concerning the right of Turner and wife to use a road across the land of Edwards. The matters involved cannot be well understood without the use of a map. Accordingly, out of the several maps appearing in the record we have constructed one which fairly represents the various geographical points necessary to be considered. This map is as follows:



The Turner land is surrounded on two sides by the Edwards land, and on the other two sides by the Harper land and the Cumberland river; the latter being on the south and west, and the former on the north and east. The controversy is over the road that leads by Edwards' house northward, and is marked on the map as "Road traveled by Turner (now in dispute)." This road is the only out-

let that Turner has in times of high water. At other times he can go out of the road marked on the map as the "Old Harper road" on horseback, but it is exceedingly difficult to travel that road in a wagon. In times of high water the old Harper road is covered with back water from the Cumberland river 10 or 15 feet deep, and there is an expanse of water on that part of the old Harper tract and the Edwards tract sometimes 100 yards wide. At such times the only outlet that Turner has is over the road in dispute. Formerly it was possible to go out the old Madisonville road which appears on the map, but this was closed by Edwards in 1856 or 1857,—not later than 1860. This old Madisonville road was in the later 50's, and long anterior to that, a public road, that led down to the old Lindsay ferry, appearing on the map; but between 1856 and 1860 Edwards bought the land on both sides of that road, and closed it up. Edwards bought the land over which the disputed road runs, in the year 1855. At that time that road was in existence, and was used by the public to go to the Lindsay ferry and landing, but the old Madisonville road was chiefly used. After the closing of the old Madisonville road, the only way left for the public was the road now in dispute; and the public did travel that road going to the ferry as far back as 1855, and the public have so continued to use that road up to the present time. However, since 1881, when the Saundersville ferry, also appearing on the map, was established, very few people have had occasion to use the road. The old Lindsay ferry has not been used since 1881, and was not much used then; but shortly before the war, and during the years 1855 on to 1860, it was frequently used by the public in hauling to and from the ferry. At the beginning of the present litigation, in 1894, it was used principally by Col. Turner's tenants. Occasionally, fishing parties would go over it, down to the river, and any one that desired used the road for that purpose. An effort is made in the proof to show that this was merely a private road, and that it was used only with the permission of Mr. Edwards. No proof, however, is adduced showing that any one ever asked permission to go over that road except Robert Harper, who owned the Turner land prior to the time that Turner acquired it. It is said by Mr. Edwards, and also by a negro man who lives on his place, that in times of high water Mr. Harper would ask permission of Mr. Edwards to use this road. Mr. Harper is long since dead, and we, of course, have not his evidence upon the subject; but it seems incredible that he alone would have asked permission to travel that road, when all others that desired to travel it did so. The fact is that he had occasion to use that road only in times of high water, because he owned the tract of land now owned by Turner, and also the tract now owned by Woodward, appearing on the map, both being parts of one tract in the lifetime of Harper, and that tract ran

out to the pike; and he had no occasion to use the road now in dispute, except when he desired to get to his bottom land in high water. However, the proof is clear that, when Edwards bought his land, there was a landing, and for a long time prior thereto there had been a ferry at the old Lindsay landing, and this road led to that ferry, and was used by any of the public that desired to use it for that purpose. Mr. Edwards himself hauled lumber from that ferry over Turner's land, and on that road, and others did so. It does not appear that the ferry was much used, or that it was kept up continuously; but from time to time there was a ferry, and from time to time, as occasion required, it was used by the public. It was not much used by Robert Harper, for the reasons already stated. Robert Harper died in 1866, and in the early part of 1867 his land was divided among his children. The land marked on the map as the "Turner land" fell to Mrs. Turner in the division, she being a child of Robert Harper. From that time forward, Col. Turner and his tenants used the road now in dispute to reach the pike from the Turner land. No request was made of Mr. Edwards to allow this use, but they used it under a claim of right from 1867 down to 1879, at which time Mr. Edwards closed the road. Thereupon, on the 2d day of June, 1880, Turner and wife filed their bill against Edwards, in the chancery court of Sumner county, charging that the road in question was a public road, and had been such for more than 50 years; that it led to the ferry above referred to, and had been used by the public for a great length of time, and had been recognized by Edwards himself as a public road for more than 20 years; that Edwards had locked the gates and closed up the road a little over a year prior to the filing of the bill; that Turner and wife had no other road to go from their land in time of high water; that the injury, if continued, would leave both Turner and wife and the public without remedy; that Edwards had obstructed the road without any legal right or authority. The prayer of the bill was that the obstructions should be declared a nuisance, and abated, and the road declared a public road, and the rights of Turner and wife and the public should be declared and set up. Mr. Edwards answered this bill, denying the road was a public road, or that Turner and wife had any right therein.

Pending this cause, one Henry Martin, a tenant of Turner and wife, went upon the Turner land in January, 1881, and continued to reside there until the fall of 1893 continuously. During this time, Henry Martin, as such tenant, used the road in controversy, going to and from the Turner land, during the whole 12 or 13 years. Mr. Edwards says that he gave permission to Henry Martin to use the road out of special consideration for him. Henry Martin, however, says that he has no recollection of ever asking permission. Mr. Edwards, in a deposition which

he gave in that case on the 30th of May, 1884, was asked: "Have the owners of the Harper lands, or any one else, passed over your lands to reach said lands [the Turner lands] or the river, without your permission, since you owned your present place?" And he answered: "I don't think they ever asked permission. If so, I don't remember it." In his deposition in 1894 (10 years later, in the present litigation), he says that he let Mr. Martin go over that road as a special favor. We think that his testimony given in 1884, nearer the transaction when Martin began to go through the land, is entitled to more weight; and, putting this with Martin's testimony, we find as a fact that Martin, as tenant of Turner and wife, used the road under a claim of right from January, 1881, up to the fall of 1893, when he left there, and one Crutcher moved in. When Crutcher moved, in the fall of 1893, then Mr. Edwards again closed the gates. Upon this being done, Turner and wife filed their bill in the chancery court of Sumner county, seeking to have the road reopened. This bill was filed on December 27, 1893. Before stating the substance of this bill, it is necessary to go back to the litigation begun in 1880. In that litigation a decree was entered on June 15, 1889, as follows: "J. J. Turner and Wife vs. Joseph Edwards. This cause was heard upon the pleadings and proof and the agreement, when the court holds, and so decrees, that the complainants were entitled to a road or right of way from the Gallatin and Nashville turnpike, through the lands of said defendant, to their farm, on Cumberland river, as used for a long number of years by complainants and their ancestors. But this decree does not confer upon other parties any right to a road to the river through either of the lands of complainants or defendant. The costs of this cause will be paid by the complainants and their security."

In the bill of December 27, 1893, which began the present litigation, complainants charged that the road in controversy had been a public road for some 70 years; that during this period the road had been used "without let or hindrance" by the public and the complainants and their ancestors; that they, Turner and wife, and their tenants, had used the road themselves about 25 years as a matter of right, and not in submission to the rights of Edwards. The bill continues: "Some years since, some difficulty occurred between said Edwards and a tenant of theirs [the Turners] about not keeping the gates closed; and said Edwards closed the gate, and locked it, leading into the premises of the complainants; and thereupon the complainants filed a bill in this court against said Edwards, seeking to enjoin him from closing up said road, and to settle their rights in and to said road. He answered said bill, and a number of depositions were taken in said cause. The cause was finally

tried by your honor at the June term, 1889, and their rights in and to said road were fully set up, declared, and decreed by your honor." That one Crutcher, a tenant of complainants, Turner and wife, had a short time before the filing of the bill commenced to move his stock to the Turner place, using the road now in controversy; and that Edwards thereupon locked the gates upon the road to prevent Crutcher from going over the road, and to prevent Crutcher from carrying the remainder of his provisions and stock there. That, learning of this, complainants sent Mr. Edwards a copy of the decree, so that he might act intelligently; but Edwards declined to open the gates, or allow any passage to and from the Turner farm. That Crutcher could not get to and from the Turner farm, as there was no other road except the road now in controversy. The prayer of the bill is that complainants' rights be set up and declared, and an injunction issue to restrain Edwards from preventing Turner and wife and their tenants from using the road. The injunction was granted and issued. Mr. Edwards answered the bill, denying the right of the public and of Turner and wife to use the road, averring that such use of it as had previously been had, had been by permission of himself (Edwards). As to the decree mentioned in the bill, the answer avers that this was procured without Edwards' consent or knowledge, and by fraud; that such decree purports upon its face to be a decree upon an agreement; and that no agreement was ever entered into by him or by any one authorized by him thereto. It is further averred in the answer that the Turner tract was part of the old Harper tract, and that Turner's best way would be out through the old Harper tract, in the same manner that Robert Harper was accustomed to pass back and forth to the Turner land when it was Harper's bottom land.

On the 3d of January, 1894, Edwards filed his bill against Turner and wife. In this bill he recites the substance of Turner's bill of the 2d of June, 1880, and the substance of his answer thereto, and of the decree of June 15, 1889. This bill then continues: "Complainant would further show your honor that he employed, as his attorneys to represent him in this litigation, W. S. Munday and M. S. Elkin, who were at that time partners; and through them he filed his answer to said bill, and took proof in the cause. He would further show your honor that said Elkin died in 1885, in December, and said Munday died August, 1887; and your honor can see that the death of said Munday occurred two years before the taking of the final decree in said cause. Before the death of said Munday, complainant would respectfully show unto your honor he had several conversations with him with reference to the settlement or disposition of this suit, and he was informed by said Munday that

the lawsuit had been abandoned by the complainants, and was out of court, and nothing further could or would be done in the case. With this assurance from his attorney, your complainant rested content, and was never any wiser until, a week or ten days ago, he was served with a copy of the decree in the cause, which appears to have been entered in June, 1887. Complainant would further show your honor that he was greatly surprised upon being informed of such a decree, and until that time was totally unaware of the existence of such a decree. Complainant would further show your honor that said decree, entered in the cause at the June term, 1889, and purporting on its face to be done by agreement, was not entered by his agreement or consent or any knowledge, nor by the agreement, consent, or knowledge of any one authorized to represent him, and was done in fraud of the rights of complainant. Complainant charges that such decree was obtained by fraud and advantage taken of the death of the counsel for complainant, the defendant in the above-mentioned cause, and in violation of previous agreements made theretofore by counsel for complainant and defendant in the said cause. The complainant insists that the decree above mentioned was a fraud upon the rights of himself, and a fraud upon the court, for the reason that it appeared to have been entered by agreement, when in fact no such agreement was made by complainant or any one authorized to represent him. Complainant further insists that the decree above mentioned, being obtained by fraud, is a nullity, and should be vacated and set aside and for naught held." An appropriate prayer for the relief indicated closes the bill.

Process was served on Turner and wife on the 10th day of January, 1894. At the July rules, 1894, an order pro confesso was taken before the master against them. On the 13th of June, 1896, an application was made by Turner and wife to the master to set aside the order pro confesso; but he refused to do this, and thereupon an appeal was prayed to the chancellor. On December 22, 1896, Turner and wife presented their answer, accompanied by an affidavit, which stated in substance the following: That, soon after the bill was filed, Col. Turner prepared an answer, and supposed it had been filed, but that he could not find it, and supposed it had been lost or mislaid; that, while the rule docket does not show that it was filed, he knows it was prepared, and supposed it had been filed until he learned an order pro confesso had been taken in the cause; that propositions of compromise were made to him by Joseph Edwards and his son William Edwards, and were also made to his son R. H. Turner, who had charge of his land, and he and his son went over to the premises a time or two to see if the matter could be compromised, and for these reasons



he did not sooner ask for the order pro confesso to be set aside, after he learned that the bill had been taken for confessed at rules; that the answer accompanying the affidavit was true. The chancellor, upon consideration of the affidavit and the answer, set aside the order pro confesso, and allowed the answer to be filed. The answer denies all fraud in the entry of the decree.

The first error assigned is upon the action of the chancellor in setting aside the order pro confesso, and allowing the filing of the answer in the above-mentioned cause. The excuse given by Col. Turner in his affidavit for failure to file the answer, and for failure to make prompt application for the setting aside of the order pro confesso, is certainly meager. It is probable that, if this matter were before the court as a court of first instance, we would not hold that the delay was sufficiently accounted for; but the action of the chancellor in the various steps preparatory to the hearing of a cause is largely within his discretion, and the court will not reverse for such matters unless it can see that palpable injustice has been done. *Buchanan v. McManus*, 3 Humph. 449. Col. Turner accompanied his application with an answer denying all fraud. We cannot say that the chancellor was in error in allowing the answer to be filed; and we assume this position with the more confidence in view of the fact that it does not appear that any decree was entered upon the pro confesso order. This assignment of error will, for the reasons given, be overruled.

The chancellor dismissed the bill of Joseph Edwards, and error is assigned upon this action. The proof shows that at the time the decree of June 15, 1889, was entered, both of the attorneys of Joseph Edwards, Messrs. Munday and Elkin, were dead. Elkin died in 1885, and Munday died in 1887. It does not appear that any one represented Edwards in court after the death of these lawyers. The following entries, however, appear upon the rule docket, as shown by the transcript:

Solicitors.	Causes.	Dec. Term.
Duffy & Dismukes. 7	J. J. Turner & Wife vs. Joseph Edwards.	1885.
Munday & Elkin.		

Last Steps.	Remarks.
Continued because proof of deft. not taken until two days before present Dec., 1884, term.	Final decree. Turner.

Solicitors.	Causes.	Dec. Term.
Duffy & Dismukes. 7	J. J. Turner & Wife vs. Joseph Edwards.	1886.
Munday & Elkin.		

Last Steps.	Remarks.
	Final decree. (No decree entered. C. & M.)
	Agreed decree, and com. to pay the costs. (No decree entered. C. & M.)

Solicitors.	Causes.	June Term.
Duffy & Dismukes. 7	J. J. Turner & Wife vs. Joseph Edwards.	1887.
Munday & Elkin.		

Last Steps.	Remarks.
Agreed decree, and comit. to pay the costs. (No decree entered. C. & M.)	Cont'd.

Solicitors.	Causes.	Dec. Term.
Duffy & Dismukes. 7	J. J. Turner & Wife vs. Joseph Edwards.	1887.
Munday & Elkin.		

Last Steps.	Remarks.
Cont'd.	Final decree. Turner & Dismukes.

Solicitors.	Causes.	June Term.
Duffy & Dismukes. 6	J. J. Turner & Wife vs. Joseph Edwards.	1888.
Munday & Elkin.		

Last Steps.	Remarks.
Final decree. Turner & Dismukes. (No decree entered. C. & M.)	Final decree. Turner.

Solicitors.	Causes.	Dec. Term.
Duffy & Dismukes. 5	J. J. Turner & Wife vs. Joseph Edwards.	1888.
Munday & Elkin.		

Last Steps.
Final decree. Turner. (No decree entered. C. & M.)

Col. Turner testifies as follows, and there is no proof to the contrary: "After the depositions of Mr. Edwards were taken, in May, 1884, the propositions of compromise were discussed between Major Munday and myself; and previous to his death the terms of a settlement were agreed upon, just as they were entered at the June term, 1889; but, for some cause or other, the matter was not entered until the June term, 1889. When that decree was entered, the case had been continued from time to time; and Chancellor Seay said the matter must go off, as the case had been here so long, and it had been some five years since any depositions had been taken. I stated to him what the arrangement had been between Major Munday and myself, and thereupon he directed that that decree go down. Major Munday died either the 1st of August or the 1st of September, 1887; and I don't know who represented Mr. Edwards after that time, if any one did. I did not take any additional proof after Edwards filed his proof of May 30, 1884, for the reason that I thought that the case had been settled, and there was no necessity for taking any additional proof. Not entering the decree earlier or during Major Munday's lifetime was the result of oversight, or the fact that Major Munday, for at least two terms previous to his death, was not able to attend court. I never heard any question made about this matter of a compromise made or a settlement not being authorized until the bill was filed, January 3, 1894, when the question was raised by said bill. The decree of June, 1889, had stood unquestioned, so far as I

know or heard of, until Edwards filed his bill, January 3, 1894. \* \* \* The decree was drawn in strict accord with what I understood the agreement between us was. I am not certain as to whether our agreement was ever reduced to writing; but I am under the impression I submitted the proposition in writing to him, and he afterwards assented to it [that is, Munday]; but I don't think he gave it back to me. When I drew the decree, I embodied the matter as I understood it had been agreed upon. \* \* \* Well, my understanding is this: that we agreed upon the terms of the compromise or of the decree to be entered, and there was no written agreement signed by Munday and myself, and the intention was just to show what the settlement was."

We find as a fact that the above statements of Col. Turner are true. But Mr. Edwards says that he did not authorize Maj. Munday to make any such settlement; that he did not know that such a settlement had in fact been made until in December, 1893, when Turner's bill was served on him; that he did not know until then that any such decree had been entered; that, in fact, Maj. Munday told him that Col. Turner had abandoned the suit, and would assume all costs, and that Maj. Munday further said that the matter had better be recorded, so that Edwards would be saved from future trouble; that he told Munday to attend to this, and he said he would do so. Mr. Edwards is quite an old man, as the proof shows (79 years old), and he must have forgotten the real facts. It is not probable, in the face of the entries on the chancellor's docket, that Maj. Munday could have ever stated the matter in the manner in which Mr. Edwards now puts it. Those entries (three of them), made in the lifetime of Maj. Munday, show that there was an agreement for a decree. If that agreement contained nothing more than that the complainant dismissed his bill at his own costs, there would have been no occasion for the formal drawing up of a decree expressing the terms of an agreement. Such a matter would at once have been disposed of by an entry of a line or two, made by the clerk, dismissing the bill at complainant's costs. The fact that a formal entry was made upon the chancellor's docket, indicating that a "final decree" was to be entered, and, again, "Agreed decree," and complainant to pay the costs, and the clerk's formal notation on the chancellor's docket for his information at the next term, "No decree entered. C. & M.," show that some special form of decree was contemplated. It is most improbable that all of these entries would have been made merely to cover the case of a bill dismissed at complainant's costs on his own motion. Again, we find that Maj. Munday undertook to state the terms of the agreement to Mr. Edwards, and that Mr. Edwards correctly remembers a part of it; that is, that Turner assumed the costs. No doubt, Maj. Munday

stated to Mr. Edwards that Turner had abandoned some of his claim, and, further, that there were certain special features in the agreement that made it useful to Edwards to have a record made of the whole agreement; and we have no doubt that Munday was stating the matter to Edwards to receive his approval or disapproval. Now, when we turn to the agreed decree as actually entered, we find that Turner did abandon some of the claims asserted by him in his bill,—that is, that it was a public road,—and placed his right or confined his right to a private easement therein. It is further observed that that decree contains, for the protection of Mr. Edwards, the following significant sentence: "But this decree does not confer upon other parties any right to a road to the river through either the land of complainants or defendant." This was, no doubt, the feature in the decree that Maj. Munday referred to when he told Mr. Edwards that it ought to be recorded to save him future trouble. Whether the parties could, by an agreement of this kind, destroy the rights of the public in the road in fact, is immaterial. They thought it important, or they would not have inserted it in an entry so brief. But there was in fact good reason in making the agreement, because at this time, besides Col. Turner and his tenants, only a few members of the public, and they only occasionally, were using the road as a public road. If these constant users of the road should, by agreement, cut down their claim from the assertion of a public right to the enjoyment of a mere private right, the ultimate extinction of the public right by abandonment would be much hastened. So, we think, these reasonable inferences from the proof establish the proposition of fact that Maj. Munday informed Mr. Edwards of the substance of the agreement, and that Mr. Edwards directed him to have it entered. Mr. Edwards, from his subsequent conduct, in 1893, when he stopped Crutcher from going over the road to reach Turner's land, seems to have forgotten the agreement; but this makes it no less certain that such an agreement was made, and communicated to him, and agreed to by him. The facts, all taken together, can be harmonized upon this view, and upon no other.

As a corollary of the facts above recited, or a natural deduction therefrom, we find that Mr. Edwards knew of this agreement prior to September, 1887, when Maj. Elkin died. It is probably true that he did not know of the actual entry of the decree of June 15, 1889, pursuant to the agreement, until he learned that fact by the copy of the bill served upon him in December, 1893. But he, no doubt, knew of the death of Maj. Elkin within a year after that event occurred. Under such circumstances, it was incumbent upon him, if his interests needed further representation, to employ other counsel to represent him.

The question is whether, under these circumstances, the decree could be set aside. It is urged in behalf of complainant Edwards that it should be set aside, on the ground that an attorney has no right to compromise his client's case without his client's authority (*Jones v. Williamson*, 5 Cold. 371, 383); also, on the ground that the decree purports on its face to have been entered by consent or upon an agreement, and that, at the time the agreement was so acted upon, the agent or attorney who made it was dead, and that, necessarily, his authority died with him; that the agreement, being made by him as agent, even if with authority, cannot be protected beyond his own life, if left unexecuted at his death. As to the first point, we have already found, as a necessary inference from inherent facts, that Mr. Edwards was informed of the agreement by his attorney, and assented to it, and directed it to be entered, or, as he says, "recorded." This being true, the second point becomes immaterial. Mr. Edwards having assented to the agreement, even though it was initiated by his attorney or agent, it thenceforward became an agreement between him and Col. Turner; and its subsequent entry was a mere ministerial act, not dependent upon the presence or even the life of the agent through whom the agreement was originally negotiated. Of course, under such circumstances the court should feel certain that the actual agreement reached by the parties was the one in fact entered. Upon this subject we have the testimony of Col. Turner, giving an account of the matter with circumstantial detail, the inherent probability of such an agreement from the situation of the parties and the nature of the litigation, the defendant Edwards' long acquiescence and course of conduct in accordance with the agreement, and the fact that the matter, as shown by the entries on the chancellor's docket, was frequently brought to the attention of the chancellor, and that he directed that the matter should be closed up by the entry of the agreement upon the minutes. Here was no secrecy and no haste. The facts negative all surreptitious or underhand dealing. If advantage had been taken of the death of Mr. Edwards' attorneys, and the decree clandestinely entered, or any sort of deception practiced upon the court, without doubt it would be the duty of this court to set aside the decree for fraud. But in this case no advantage was taken of the death of Mr. Edwards' attorneys. The decree was not entered until nearly two years after that event. He had ample time to employ other counsel. The matter was called to the court's attention at each term, and the decree was not finally entered until the chancellor stated to counsel from the bench that the case must be closed. Under these circumstances, in view of all the facts above recited, we do not think we would be warranted in setting aside this decree for fraud.

In addition to the facts above recited, it must be observed that the decree of June 15, 1889, purports to have been based upon the pleadings and proof, as well as upon the agreement. There were not only pleadings in that case, but both sides filed the depositions of several witnesses. That record is not before us in such a way as that we can review the action of the chancellor upon the pleadings and proof; the bill of Edwards in the present case being merely an attack upon the former decree for fraud in the procuring thereof. For this reason, likewise, we cannot set aside that decree.

It necessarily follows from the foregoing that the second assignment of error must be overruled.

The third assignment of error is based upon the same subject, and is also overruled.

The fourth assignment of error is, in substance, that the proof shows that the road in dispute was a private road of Edwards, and that Turner and wife had acquired no rights therein, and that the chancellor should have so decreed. The facts recited show that, from a period anterior to 1855 down to the fall of 1879, this road was used by the public; that the consent of Mr. Edwards was not asked; that it was used by all who desired to do so, as a matter of right. It is true that the county never worked the road as a public road; but this, while a very high evidence, is not an essential element of the proof as to whether a road is a public road or not. *Nashville & D. R. Co. v. State*, 1 Baxt. 55-58; *Sharp v. Mynatt*, 1 Lea, 375. The fact that the ferry went down, and fewer and fewer people found it necessary to use the road, and the fact that, besides Turner and his tenants, only an occasional citizen went over the road in later years for the purpose of going down to the river to fish, or the like, would not, probably, destroy its character as a public road, if that character had been already acquired. The continuous use of the road, above referred to, was with the knowledge of Mr. Edwards. Probably, the length of time is sufficient to presume either a dedication to the public, or to vest in the public a prescriptive right (*Le Roy v. Leonard* [Tenn. Ch. App.] 35 S. W. 884, 886; *Stump v. McNairy*, 5 Humph. 363; *Elkins v. State*, 2 Humph. 543, 544); but it is unnecessary to authoritatively decide the question as to whether the facts make this a public road or not. At all events, complainants Turner and wife, by their decree of June 15, 1889, are estopped to invoke the public right in their behalf in the present litigation, and are confined to the terms of that decree. The chancellor so decreed, and his decree is in all things affirmed, with costs of this court and of the court below.

WILSON and BARTON, JJ., concur.

Affirmed orally by supreme court, December 15, 1897.

**WILLIAMS v. ODELL.**

(Court of Civil Appeals of Texas. Feb. 19, 1898.)

Under Rev. St. 1895, art. 1465 (Rev. St. 1879, art. 1461), the district judge has authority to appoint a receiver in vacation.

Appeal from district court, Hardeman county; G. A. Brown, Judge.

Petition by J. W. Odell against R. A. Williams for the appointment of a receiver. From an interlocutory order granting the petition, defendant appeals. Affirmed.

M. M. Hankins and B. E. Green, for appellant.

**STEPHENS, J.** This is an appeal from an interlocutory order appointing a receiver in vacation, and the controlling question is whether a district judge has the power to make such an appointment. Counsel for appellant, in denying the power, admit in their brief that, if "this precise question has been determined by the supreme court of this state," they are not aware of it, evidently overlooking the case of Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co., 88 Tex. 463, 27 S. W. 100, in which it was held that under article 1461 of the Revised Statutes of 1879, which is identical with article 1465 of the present Revised Statutes, the district judge had authority to appoint a receiver in vacation. Page 486, 88 Tex., and page 100, 27 S. W. Upon the authority of that case, therefore, the first and main assignment of error is overruled. We find nothing in any of the other assignments of error that would justify us in vacating the receivership. The order appointing the receiver must therefore stand approved.

**MOBILE & O. R. CO. v. THOMPSON.**

(Supreme Court of Tennessee. Aug. 26, 1898.)

**RAILROADS—INJURIES TO STOCK—NEGLIGENCE—DUTY TO FENCE TRACKS.**

1. Under Mill. & V. Code, § 1298, subsec. 4, requiring every railroad company to keep a person on the locomotive always on the lookout ahead, and providing that the alarm whistle shall be sounded and the brakes put down, and every possible means employed to stop the train and prevent accident, when an animal appears on the road, such a company is not liable for injury to a mare which, being suddenly frightened, rushed into a moving train, striking the engine near the cab, before those in charge of the engine could, with the greatest possible diligence, observe the statutory precautions.

2. Shannon's Code, §§ 1587, 1588, making a railroad company liable for damages to stock caused by a train except where the track is inclosed by a fence, does not apply to private crossings, since section 6869, subsec. 4, and Acts 1879, c. 183, § 1, forbid the obstruction of private ways.

Error to circuit court, Gibson county; John R. Bond, Judge.

Action by W. W. Thompson against the Mobile & Ohio Railroad Company. There

was a judgment for plaintiff, and defendant brings error. Reversed.

C. G. Bond and R. P. Raines, for plaintiff in error. W. S. Coulter, for defendant in error.

**CALDWELL, J.** W. W. Thompson brought this action against the Mobile & Ohio Railroad Company, to recover damages for injuries received by a mare in collision with one of the company's moving trains. The circuit judge, who heard the case without the intervention of a jury, rendered judgment in favor of Thompson for \$30, and the railroad company appealed in error. Though admitting the injury to the mare, the company denies that it is legally responsible for the damage done.

The collision occurred on a private crossing, at the intersection of the company's track and a private road, about one mile north of the town of Dyer. W. A. Hearn owned the private road, and had used it for 25 or 30 years as a private way from his residence across the railroad track into a large uninclosed woods, and thence to a public road, leading to town, school, mill, church, and graveyard. He owned the land on both sides of the railroad, and had no other open way of ingress and egress to and from his residence, which stands but a short distance west of the crossing. The land on each side of the track and on each side of the crossing for a greater or less distance was inclosed by the owner, cattle guards were erected by the railroad company across its track on each side of the crossing, and these were attached to the owner's fences by suitable wings, so that live stock on the crossing could go neither up nor down the track from that point. The crossing itself was not inclosed on either side of the railroad. Hearn's fences on each side of the track diverged, respectively, to the right and to the left from the outer ends of the wings of the cattle guards, those on the east passing along one side of the large uninclosed woods, and those on the west connecting one with the north and the other with the south end of his front-yard fence, so as to inclose the space between his front yard and the railroad at all points, except at the crossing, which was not inclosed. Thompson had ridden the mare into this space, and dismounted at Hearn's front gate, near which he tied her to the fence, some 50 or 75 yards from the crossing. The noise of an approaching freight train frightened the animal, which was blind in one eye, and caused her to break loose, and run rapidly to the crossing where the collision took place. Thompson thinks the pilot struck her first, and then the tender. Hearn thinks "the engine struck her or she struck the engine" near the engineer's seat, and was then knocked down by the tender or one of the cars; and the engineer says "she struck the engine at the cab

where" he sat, and in that way was injured.

There could be but one of two grounds of liability on the part of the railroad company—First, a failure to comply with statutory precautions for the prevention of accidents; or, second, a failure to fence the crossing. It is conceded in the testimony of the railroad company that there was in fact a failure in both particulars, and yet it denies that it is liable, under the attending circumstances, on either ground. In any and every view of the evidence, the animal's appearance upon the track, or in dangerous proximity to it, was, undoubtedly, so sudden that those in charge of the engine could not thereafter, by the greatest possible diligence, have observed the precautions prescribed by the statute (Code, § 1166, subsec. 4; Mill. & V. Code, § 1298, subsec. 4; Shannon's Code, § 1574, subsec. 4) for the prevention of accidents. This being so, the admitted nonobservance of those precautions affords no ground of liability on the part of the railroad company for the damages done. The law does not require impossibilities, nor impose penalties for not doing what could not have been done. The impossibility of observance in a case like that before the court excuses from liability for nonobservance. *Railway Co. v. Foster*, 88 Tenn. 680, 13 S. W. 694, and 14 S. W. 428; *Railroad Co. v. House*, 96 Tenn. 555, 35 S. W. 561. It follows that there is no ground of liability on the part of the railroad company in this case, unless a failure to fence its track at the crossing, where the injury was inflicted, renders it liable.

The statute as to fencing declares "that any person, company or corporation, lessee or agent thereof, owning or operating any railroad within the state of Tennessee, shall be liable for the value of any horse, cow or other stock killed, and reasonable damages for any injury to any such live stock upon or near the track of any railroad in this state, whenever such killing or injury is caused by any moving train or engine or cars upon such track: provided, that contributing negligence on the part of the plaintiff in any action or suit to recover damages for such killing or injury may be set up as a defence," etc. Acts 1891, c. 101, § 2; Shannon's Code, § 1587. It also declares "that no person, company or corporation, owning or operating any railroad in this state, shall be liable under the foregoing section of this act, for any damage for the killing or injury of any such live stock when the track of said railroad is enclosed by a good and lawful fence and good and sufficient cattle guards." Acts 1891, c. 101, § 3; Shannon's Code, § 1588. This is known as the "Railroad Fencing Act." Thereby "the duty of fencing, and the resulting liability for failure to perform such duty, is imposed, not so much in the interest of the owners of the animals which may go upon an unfenced road, as in the interest of the general public, who are concerned that accidents shall be avoided,

and public travel be made as safe as the exigencies of that manner of transportation will permit." *Railroad Co. v. Crider*, 91 Tenn. 466, 19 S. W. 620. "The object of the act was to induce railroad companies to fence their tracks, primarily in the interest of the traveling public, and secondarily for the protection of live stock along the line of travel. The second section makes railroad companies absolutely liable in damages for all live stock killed or injured by moving trains upon unfenced tracks; and section 3 gives them complete exoneration from liability where their tracks are fenced." *Railroad Co. v. Russell*, 92 Tenn. 110, 111, 20 S. W. 784.

Although the language is very general and comprehensive, and does not, in terms, except any part of any railroad track from the operation of the statute, it is manifest that the complete inclosure of every track from one end to the other by a continuous fence would be wholly impracticable, and could not have been contemplated by the legislature. Hence it has been held that the statute does not apply to depots or stations, or to grounds immediately surrounding them, or to the crossings of public highways, or to portions of tracks that lie within towns or cities, and are intersected by public streets. *Railroad Co. v. Hughes*, 94 Tenn. 450, 29 S. W. 723; *Railroad Co. v. House*, 96 Tenn. 552, 35 S. W. 561. A paramount public interest always intervenes at those places; and for that reason fencing statutes, though in general terms, are uniformly construed as impliedly excepting them from their operation. *Elliott, R. R. §§ 1183-1195*; 7 Am. & Eng. Enc. Law, pp. 910-912; *Thornt. R. R. Fences, §§ 86, 91*. Besides the insuperable intervention of public interest, which exists in all the states alike, there are statutes in this state which imperatively forbid the obstruction of certain ways by any one (Code, § 4913, subsec. 4; Mill. & V. Code, § 5746, subsec. 4; Shannon's Code, § 6869, subsec. 4; Acts 1879, c. 188, § 1), and for this additional reason our courts would hold such ways to be excluded by implication from the operation of the fencing statute.

Private crossings are not affected with a public interest, and therefore they are generally held, in other states, not to be excepted from the requirements of fencing statutes. *Indianapolis v. Thomas*, 11 Am. & Eng. R. Cas. 491; *Pittsburg v. Cunningham*, 13 Am. & Eng. R. Cas. 529; *Railroad Co. v. Shaft* (Kan. Sup.) 6 Pac. 908; *Railroad Co. v. Severin* (Neb.) 46 N. W. 842. In the states so holding, railroad companies are required to inclose private crossings by gates or bars, so as not to prevent owners from using them. 3 *Elliott, R. R. § 1200*. This rule, in respect of private crossings, which seems to prevail almost universally in other states, would be equally applicable in this state and controlling in the present case, if the fencing statute stood alone and unaffected by other statutes; for here, as elsewhere, private crossings are maintained for private use, and not for the good

of the public. But this statute must be considered and construed in connection with the prohibitory statutes previously mentioned. To include private crossings in the fencing statute is to run counter to those other statutes, and impose a liability for a failure to do on the one hand what is prohibited on the other. By section 1, c. 183, Acts 1879, it is made a misdemeanor for any person to obstruct public highways, private ways, streets, alleys, sidewalks, public grounds, commons, and ways leading to burying places, churches, school houses, etc. Another statute declares it to be an indictable nuisance to obstruct public highways, private ways, etc., to burying grounds. Code, § 4913, subsec. 4; Mill. & V. Code, § 5746, subsec. 4; Shannon's Code, § 6869, subsec. 4.

It cannot reasonably be assumed that the legislature in passing the fencing enactment intended to impose on railroad companies any liability for failure to inclose, by gates or bars or otherwise, any crossing or place or part of their lines, which by those other statutes, then existing, they were expressly prohibited from obstructing in any manner whatsoever, upon the penalty of punishment in the criminal courts of the state; nor can it be justly said that the necessary conflict is so great that the fencing statute impliedly repealed the others. Indeed, there is no actual conflict, when the fencing statute is given its proper meaning,—when made to apply only to those parts of the road against whose obstruction there was no previous prohibitory legislation. All of the enactments may stand together, in full force and virtue, and operate harmoniously, when the fencing act is given this construction, and rightly held to be entirely inapplicable to those places embraced in the terms of the other acts. The crossing involved in this case is undoubtedly embraced in those terms, and, being so, is excluded from the operation of the fencing act. The railroad company was not only under no legal obligation to fence this crossing, but was positively inhibited from doing so. Had it obstructed the owner's use by fence, gates, or bars, it would thereby have subjected itself to criminal prosecution under the prohibitory statutes mentioned, and the existence of the fencing statute would have been no defense; conviction would have been inevitable. From all of which it follows that the railroad company is not liable for the injury done to the plaintiff's mare. The crossing on which she was injured, though a private one, is not within the provisions of the fencing act, and for that reason a failure to fence is no ground of liability. Not having been brought within the provisions of the fencing act, this crossing was left under the operation of the statute prescribing precautions for the prevention of accidents; but, as has been seen, the mare's appearance was so sudden as to render compliance with those precautions impossible, and for that reason the failure to comply with them affords no ground of liability.

The judgment below is reversed, and this court, rendering the judgment that the trial judge, sitting without a jury, should have rendered, adjudges the nonliability of the railroad company, and dismisses the plaintiff's suit, at his cost.

# TENNESSEE COAL, IRON & R. CO. v. McDOWELL et al.

(Supreme Court of Tennessee. July 19, 1898.)

## ESTOPPEL TO ASSERT TITLE—CONSTITUTIONAL LAW—AMENDMENTS—VESTED RIGHTS—LIMITATION OF ACTIONS.

1. Where defendant stood by and permitted representatives of complainant's grantor to survey land for the purpose of selling it to complainant, and permitted the sale, without asserting any claim or title, he is estopped to assert title.

2. Const. Amend. Sched. § 4, adopted February 22, 1865, suspending the statutes of limitation from May 6, 1861, until January 1, 1867, does not apply as against one whose title had become vested by adverse possession prior to the adoption of said provision, since the people of a state cannot, by amendment of their constitution, do any matter which the state is prohibited from doing by the constitution of the United States.

Appeal from chancery court, Grundy county; Thomas M. McConnell, Chancellor.

Bill by the Tennessee Coal, Iron & Railroad Company against M. H. McDowell and others. A decree dismissing the bill was reversed by the court of chancery appeals, and certain defendants appeal. Affirmed.

J. B. Ferguson, T. C. Lind, A. B. Woodard, and Granbery & Marks, for appellants. A. T. Bell, W. D. Spears, and Steger, Washington & Jackson, for appellee railroad company.

MALISTER, J. This is an ejectment bill filed in the chancery court of Grundy county to establish complainant's title to a tract of land comprising about 160 acres, and to remove a cloud from said title. The chancellor dismissed the bill. On appeal the court of chancery appeals reversed the decree of the chancellor, and pronounced a decree in favor of complainant for the lands in controversy. Defendants McDowell and Ferguson appealed, and have assigned errors. Complainant, the Tennessee Coal, Iron & Railroad Company, derives its title from grant No. 5,087, issued by the state of Tennessee to S. B. Barrell, April 25, 1837, for 5,000 acres. This grant was based upon an entry duly made by S. B. Barrell on November 24, 1836. Defendants McDowell and Ferguson derive their title from a grant issued by the state of Tennessee to Stephen Kilgore, Jr., March 1, 1856, for 160 acres. It is conceded by counsel that this 160-acre tract granted to Kilgore was comprised within the boundaries of the 5,000-acre grant issued to S. B. Barrell. The claim of defendants is that, notwithstanding the senior entry and grant of this land to Barrell, that they and their

predecessors in title had been in possession of the 160-acre tract by actual inclosures for more than seven years prior to the institution of this suit, and that, therefore, their title is superior, under the first section of the act of 1819. The court of chancery appeals find that defendants are estopped to assert title to the land on account of certain acts in pais on the part of Stephen Kilgore, Jr., their predecessor in title, and the original grantee of this 160-acre tract. The first assignment of error on behalf of defendants is that the facts found by the court of chancery appeals would not, as a matter of law, have estopped Kilgore to claim title to the land in controversy, and hence his privies and successors in title are not estopped. The specific objection made to the decree of the court of chancery appeals is that it does not find that complainant company was misled, or that its title was acquired upon the faith of any conduct or representations made by the said Stephen Kilgore, Jr. On this point the court of chancery appeals, through Judge Wilson, finds, viz.: "It is, moreover, clear, when the representatives of the Barrell interests came to survey out the Barrell lands, and convey them to the complainant, \* \* \* they did survey and include in its transfer to the complainant company all of the Kilgore grant aforesaid, except the fifty-odd acres embraced in what is known as the 'Kilgore improvements.' We think, also, the weight of the evidence shows that Kilgore recognized the right of the representatives of Barrell to convey all of said grant outside of his improvements to the complainant. We think, also, that after the conveyance was made to complainant, Kilgore stood by and recognized its rights. He (Kilgore) permitted it to take a transfer from the representatives of the Barrell interests. He permitted it to cut off timber, and all the valuable timber, up to his improvements. He permitted it to sell lots and parcels of land up to and adjoining his improvements, and it appears that he gave in his lands for taxes as embracing only his improvements. We think, under the authorities, as well as sound reason, that when he, without asserting his title, permitted the representatives of the Barrells to sell this land to complainant, permitted it to go into possession, as far as it could take possession of such land, and sell it off, without taking any steps to assert his rights, he thereby estopped himself from asserting any title. It may be very true," says that court, "that, assuming his (Kilgore's) title to be perfect, he would not be estopped as against Barrell, to assert his title because of a parol agreement to surrender all of his grant except that embraced in his improvements. But we apprehend that a different question is presented, if the facts show that he stood by and permitted the representatives of Barrell to sell and convey the land outside of his improvements to the complainant, without asserting

his claim and title to the same. It is also true" (still quoting from Judge Wilson's opinion) "as argued by counsel, that Kilgore said to quite a number of people that all of grant 11,602 belonged to him, and was his land; but we do not understand that the mere assertion of ownership of land will preclude the operation of the doctrine of estoppel, or that it will establish title to land. Proper legal steps must be taken." The court concludes its opinion as follows: "We find as a fact that in 1867 Kilgore, knowing that the representatives of Barrell had surveyed out his (Kilgore's) improvements on grant 11,602, and for the purpose of selling and transferring the remainder to the complainant, Tennessee Coal, Iron & Railroad Company, estopped himself, by his acquiescence and by subsequent permission or acquiescence in the sale of lots up to his improvements, and the cutting and removal of timber, from asserting title to the land in dispute." We have thus quoted at length from the opinion for the reason it is earnestly insisted that upon the facts found no estoppel can be predicated. It is insisted by counsel that the court of chancery appeals does not find that the recognition by Kilgore of the right of the representatives of Barrell to convey all of his grant outside of his improvements was at a time anterior to the execution of the deed by the Barrells to the complainant company, or that such recognition in any way induced the acceptance of that deed or the consummation of that trade. We are constrained to disagree with counsel in his construction of the findings of the court of chancery appeals. That court distinctly finds—and the finding is repeated more than once—that Kilgore stood by and permitted the representatives of Barrell to sell and convey the land outside of his improvements to complainant company without asserting his claim and title to the same. Again, they find as a fact that in 1867, Kilgore, knowing that the representatives of Barrell had surveyed out his improvements in grant No. 11,602 for the purpose of selling and transferring the remainder to the complainant, estopped himself by his acquiescence and by his subsequent permission or acquiescence in the sale of lots up to his improvements. Here is a finding that the representatives of Barrell, prior to the conveyance to complainant, surveyed out, with the knowledge of Kilgore, his improvements, comprising 53 acres, as an interfering claim; that this survey was made for the purpose of selling and transferring the remainder of the 160-acre grant to complainant company; and that Kilgore acquiesced in all this, and stood by and permitted it to be done, without asserting any claim or title. It was held in *Patton v. McClure, Mart. & Y. 339*, "that if one knowingly, though he does it passively, by looking on, suffer another to purchase and expend money upon land under an erroneous opinion of title, without making his

claim known, he shall not afterwards be permitted to exercise his legal rights against such person. To do so would be an act of fraud and injustice, and his conscience would be bound by this equitable estoppel." Again, in *Storrs v. Barker*, 6 Johns. Ch. 167, it was held, viz.: "Where one having title acquiesces knowingly and freely in the disposition of his property for a valuable consideration by a person pretending to title and having color of title, he shall be bound by that disposition of the property, and especially if he encouraged the parties to deal with each other in such sale and purchase. It is deemed an act of fraud for a party cognizant all the time of his own right to suffer another party ignorant of that right to go on under that ignorance, and purchase the property, or expend money in making improvements upon it." This case is cited in *Morris v. Moore*, 11 Humph. 434, and the principle therein laid down is approved. These principles, applied to the facts found by the court of chancery appeals, are conclusive of this case, and result in its affirmation.

There is one view of the case presented by the court of chancery appeals from which we are constrained to dissent, and that is in respect of the statute of limitations. The question presented was whether the title of Kilgore had been perfected by seven years' adverse possession under his grant. The court of chancery appeals found that Kilgore's grant was issued to him March 1, 1856, and, although he went into possession, and remained continuously in possession from that date until 1867, his title was not perfected by the statute of limitations of seven years, for the reason the operation of the statute was suspended from May, 1861, until January, 1867. In this position that court was in error. If Kilgore went into possession in 1856, and continued in adverse possession, his title was perfected in 1863 by seven years' adverse possession. The statute of limitations was not suspended until after the rights of Kilgore had become vested by adverse possession under his grant. By section 4 of the schedule to the amendment to the constitution, adopted February 22, 1865, it was provided that no statute of limitations shall be held to operate from and after May 6, 1861, until such time hereafter as the legislature may prescribe. By the act of the legislature passed May 30, 1865, the statute was suspended from May 6, 1861, until January 1, 1867. The new constitution of 1870, in section 4 of the schedule, contained a similar provision. But it will be perceived that when these statutes and constitutional provisions were passed the possession of Kilgore had been perfected, and his rights vested, which could not be divested by a constitutional provision any more than by legislative enactment. It was so decided in *Union Bank of Tennessee v. State*, 9 Yerg. 490, and *Girdner v.*

*Stephens*, 1 Heisk. 280. This question, however, is immaterial, since the estoppel found by the court of chancery appeals is conclusive of the case against the defendants.

# SAUNDERS et al. v. MEMPHIS & R. S. R. CO.

(Supreme Court of Tennessee. Aug. 26, 1898.)

EMINENT DOMAIN—COMPENSATION—REMEDIES OF OWNER—EJECTMENT—EQUITY JURISDICTION.

1. A railroad company in good faith purchased a right of way from one claiming to have acquired title thereto through another regularly chartered railroad company, which had taken the right of way and operated a railroad thereon, but had failed to acquire the title by condemnation or otherwise. *Held*, that ejectment would not lie to recover possession of land so taken, plaintiff having a right to compensation only.

2. Const. art. 1, § 21, which forbids the taking of private property for public use without just compensation, does not require that the compensation shall precede the taking. It is sufficient that the law authorizing the taking provides for compensation, and designates an impartial tribunal for its settlement.

3. Code, § 1342 (Mill. & V. Code, § 1566; Shannon's Code, § 1861), provides that a landowner whose property is desired for railroad purposes may appeal in the condemnation proceedings. Section 1347 (Mill. & V. Code, § 1571; Shannon's Code, § 1866) provides that, if a railroad company is occupying another's land without previous condemnation, the owner may, on petition, have a jury of inquest assess his damages, or may sue for damages. In addition to these, a landowner has the original remedy provided by the company's charter. *Held* to exclude ejectment against a railroad company occupying a right of way without previous condemnation.

4. Where legal remedies open to one whose lands have been taken for railroad purposes without previous condemnation cannot be made available, he may have redress in equity.

Appeal from circuit court, Shelby county; L. H. Estes, Judge.

Ejectment by D. D. Saunders and others against the Memphis & Raleigh Springs Railroad Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

Morgan & McFarland, for appellants. Turley & Wright, for appellee.

CALDWELL, J. This is an action of ejectment. The plaintiffs are the owners of a tract of land lying between the city of Memphis and the town of Raleigh, in Shelby county. The defendant, a regularly chartered railroad company, claims as owner, and operates, a steam commercial railroad between Memphis and Raleigh; its line of track passing over and through the tract of land owned by the plaintiffs. The right of way through this land was taken, and the road constructed and put in operation, by the Raleigh Springs Railroad Company in 1891; such appropriation, so far as disclosed by this record, having been made without purchase, gift, or condemnation. That company became insolvent, and its property, including the right of way, was sold under decree of



the chancery court in June, 1894. J. T. Fargason became the purchaser, and in August of the same year sold it to the defendant, the Memphis & Raleigh Springs Railroad Company. The latter company went into immediate possession, and has operated the road continuously from that time to the present. This action was commenced in June, 1896, to recover from the defendant the strip of ground on which the road is located through the land of the plaintiffs. The defendant pleaded not guilty, and the judge, trying the case without the intervention of a jury, rendered a judgment dismissing the suit. The plaintiffs have appealed in error.

The judgment of the court below is right. An action of ejectment does not lie in such a case. By its charter the defendant was authorized to acquire a right of way by condemnation, gift, or purchase, and to construct and operate a railroad thereon. It purchased the right of way here in question, with the rest of the road, from one claiming to have acquired title through another regularly chartered railroad company, which had taken this particular right of way, and others in the line, and constructed a road upon them. In this manner the defendant has come into the possession of the right of way through the land of the plaintiffs in good faith, and is occupying and using it for the purpose contemplated by its charter. Such being true, that possession cannot be disturbed by an action of ejectment, though the defendant's title be bad on account of the fact that the former company failed to acquire title to this right of way by condemnation or otherwise. At the most, the plaintiffs are entitled to compensation and damages only, and not to a recovery of the land. Conceding that what previously transpired was ineffectual to divest the plaintiffs of their title to this strip of ground, and, consequently, that the defendant acquired no title thereto by its purchase, the result of this litigation must be the same; for in that event the defendant, under its charter and the general law, undoubtedly had plenary power to condemn the right of way for railroad purposes, and, being now in possession and actually operating the road, it cannot be ejected, though it has not in fact condemned the land and paid for it.

It is true that the bill of rights (Const. art. 1, § 21) forbids the taking of private property for public use without just compensation, but this does not mean that compensation shall precede the taking. It suffices that the law authorizing the taking provides for the compensation, and designates an impartial tribunal for its assessment. *Shims v. Railroad Co.*, 12 Helsk. 621. Prior to the adoption of the Code of 1858, the remedy of the owner of land taken by a railroad company was confined to the provision of the charter. The remedy there given by the legislature was exclusive. *Colcough v. Railroad Co.*, 2 Head, 172; *Railroad Co. v. Ad-*

*ams*, 3 Head, 597. But since that time, by a provision originating with the Code, the landowner has more extended remedies. He not only has his former remedy of appeal in the condemnation proceedings instituted by the railroad company (Code, § 1342; Mill. & V. Code, § 1566; Shannon's Code, § 1861); but, in addition, if the company has actually taken possession of his land, and is occupying it for railroad purposes, without previous condemnation, the landowner may, upon his own petition, have "a jury of inquest" to assess his damages, "or may sue for damages in the ordinary way." Code, § 1347; Mill. & V. Code, § 1571; Shannon's Code, § 1866; *Railroad Co. v. Cochrane*, 3 Lea, 479. Thus, the landowner's remedy was enlarged, but that enlargement does not extend to or include an action in ejectment. Originally his remedy was limited to that prescribed in the charter. Now it is limited to that plus those added by the Code. As the original remedy was exclusive, so that and those added to it are now exclusive. They do not include an action in ejectment; hence such an action is excluded. The landowner now has a right of appeal in the railroad company's condemnation proceedings, if it institute them; and, if it occupy his land without condemnation, he may have a jury of view, or an ordinary action of damages, at his election. He has no other remedies in a court of law. These are exclusive in that court. If, for any sufficient reason, these legal remedies are embarrassed, and cannot be made available in a court of law, the landowner may, in a proper case, have appropriate redress through a bill in equity. *Parker v. Railroad Co.*, 13 Lea, 670. We are aware that the courts of last resort in many of the states hold that ejectment will lie, but, in view of our statutes, it is not so in this state. Affirmed, with costs.

#### TOLLEY v. WILSON et al.

(Court of Chancery Appeals of Tennessee.  
Dec. 18, 1897.)

GIFTS—REVOCATION—HUSBAND AND WIFE—SEPARATE ESTATE—REDUCTION OF PERSONALTY TO POSSESSION.

1. A father turned over to his daughter a note for \$4,000 given by her husband for the purchase of a farm. Other purchase-money notes he retained. In his books, under the head of advancements to the daughter, he made the entry: "July 4, 1887. To amount given to the payment of land purchased by [the daughter's husband], and in compliance with her wishes, \$4,000." The note, when received, was turned over to the husband, and kept in his safe. In an action to collect the remaining purchase-money notes, instituted by the executor of the father's will, and in proceedings to foreclose a mortgage executed after this advancement was made, no effort was made by the daughter to assert a lien under the note given her. *Held*, that the transaction was a payment, to the extent of the note, on the price of the land, and a satisfaction of the note; a purpose to exclude the husband's marital rights

not having been expressed by the father when he made the gift.

2. A donor has no power, in a will, to place restrictions on a gift made before the execution of the will.

3. The payee of a purchase-money note gave the note to the wife of the maker, who turned it over to her husband; and he retained it, and treated it as no longer a lien on the premises. *Held*, that the circumstances raised a presumption that the husband had reduced the note to possession.

Appeal from chancery court, Lincoln county; Walter S. Bearden, Chancellor.

Suit by Jennie P. Tolley, by her next friend, J. H. Holman, against John G. Wilson and another. From a decree for plaintiff, defendants appeal. Reversed.

Turney & Turney, A. B. Woodard, and W. D. L. Record, for appellant Wilson. Holman & Carter and W. B. Bates, for appellee.

WILSON, J. This bill was filed September 9, 1895, by complainant, by next friend, to enforce a vendor's lien on a tract of land in civil district No. 5 of Lincoln county, which her father had sold to her husband, taking his notes therefor, one of which, it is alleged, her father had given to her as an advancement. The litigation is between her and the defendant John G. Wilson, to whom her husband had mortgaged the land to secure a loan of \$8,000; she insisting that her vendor's lien is superior to his mortgage lien, and he insisting that her claim, if it be still subsisting, is not a valid lien on the land, as against him. Her bill avers that July 20, 1886, her father sold and conveyed to her husband, who is made a defendant to her bill, the tract of land in question, for \$20,000, taking his five promissory notes therefor, each for \$4,000, and due and payable, respectively, July 1, 1887, July 1, 1888, July 1, 1889, July 1, 1890, and July 1, 1891, all bearing interest from date, and each stating specifically on its face that it was given for land. It also alleges that her father, July 4, 1887, gave and delivered to her the note of her husband, given for the land, maturing July 1, 1889, as an advancement out of his estate, and that it was so charged to her in his book of advancements to his children, and that, since this note was delivered to her by her father, she has held it as her property, and that it, with its accumulated interest, is unpaid, and due her. The bill then avers that September 2, 1891, her husband executed to defendant Wilson a mortgage to secure an alleged indebtedness of \$8,000, bearing interest from date, payable annually, the principal of the debt to mature in three years, and that this mortgage was registered; that October 26, 1894, defendant Wilson filed his bill in the court against her husband to foreclose his mortgage to secure his debt and accrued interest, and that this case was still pending in court; that she was not made a party to this bill of Wilson

against her husband, nor any one else, although it is alleged in his bill that there is an incumbrance on the land superior to his mortgage, and he prays therein that her husband "answer whether there is any purchase money due and owing on said land, and to whom," and that "the land be sold free from the equity of redemption, and the proceeds be applied first to the payment of any unpaid purchase money for the land, and second to the satisfaction of his debt, interest, and cost"; that she is advised that her note for purchase money, with its interest, is a superior lien on the land to the mortgage lien of defendant Wilson; that, by reason of the fact stated, she has an interest in this land, the subject-matter of the suit of Wilson against her husband, and has the right to intervene by her bill in that case, to the end that her rights may be protected, and complete relief obtained. Her bill prays that the defendants answer; that she be permitted, by her bill, to intervene in the case of Wilson against her husband, and her bill and case be consolidated with it, or that it be filed and treated as an independent bill, whichever is in accordance with the practice of the court; that upon the hearing she be given a decree for her note, with interest; that it be declared a lien on the land superior to the mortgage lien of Wilson, and be enforced by proper decree; and for general relief. On September 19, 1895, at the first term of the chancery court after her bill was filed, it was taken for confessed as to her husband; and thereupon a decree was rendered against him for the note and interest, amounting to \$5,972.64, for which execution was directed to issue. This decree recites the sale of the land by the father of complainant to her husband, the purchase price, and the notes given therefor; that among them was the note maturing July 1, 1889, bearing interest from date, and specifying on its face that it was given for land, with an indorsement on its back, signed by her father, that it was not to bear interest until July 1, 1887; that her father gave her this note as an advancement out of his estate; that the same was charged up against her by her father in his book of advancements to his children; that, since the gift of the note to her, she has held it as her property, and that it, with the interest, is due her and unpaid. This decree also recites that all rights and equities of Wilson relating to the lien and recovery of complainant against her husband on the note, as against the land, are expressly reserved, and that they are not to be prejudiced by the decree. So, all the equities of the complainant, as against the land, or her right to subject it to the satisfaction of her recovery on the note, are reserved in the decree. Wilson, by his solicitor, excepted to this decree.

The answer of Wilson admits the purchase of the land by the husband of complainant from her father, the consideration to be given

therefor, the execution of the notes by the purchaser, and their amounts and maturity, as stated in the bill. It admits that it is probably true that the note brought forward by her bill is one of the notes given by her husband for the land, but it does not admit that this note is a valid claim against the land, and, on the contrary, denies it. It is alleged in the answer that the brother of complainant, who prepared her bill and filed it, as her next friend, was the draftsman of the mortgage of her husband to defendant, of date September 2, 1891, mortgaging this land to him in consideration of \$8,000, and that in this mortgage, prepared by her next friend and her brother, and the brother-in-law of her husband, the express covenant is made that the said land "is unincumbered, except by two notes for purchase money, for four thousand dollars each, one due July 1, 1890, and the other due July 1, 1891, with some interest thereon; but I agree to pay off the first of said notes with the money obtained hereunder." It is alleged that the brother of complainant (her present next friend) and her husband knew at the time the mortgage was given that defendant parted with the \$8,000 on the faith of the covenant in the mortgage that only the two last purchase-money notes were outstanding, and that one of these was to be paid out of the sum procured from him under the mortgage, and that, if this covenant was untrue, the money was obtained from him under false pretenses on the part of the husband of complainant. The defendant Wilson says, however, in his answer, that he believes the husband of complainant did pay off the note maturing July 1, 1890, out of the money obtained from him, and this left outstanding, on the debt against the land, only the last note, which passed into the hands of the present next friend of complainant, as the executor of her father. It is then alleged in the answer that said executor, acting as such, March 5, 1895, filed his bill in this court against the husband of complainant and defendant Wilson to recover on said last note, alleging that it was a lien on the land superior to the mortgage lien of defendant, and seeking to restrain him from selling the land under a bill he had filed to foreclose his mortgage, and asking that the lien of his note be enforced by a sale of the land to pay it. It is also alleged that, in this bill by the executor, no hint was given that any other purchase-money note on the land was in existence and outstanding; and it is said that this is singular, in view of the present bill and its claim, inasmuch as the executor filing that bill is the brother of complainant, and, being a son of the testator, as well as his executor, had his book of advancements, showing that his sister held an outstanding lien note on the land, if in fact he understood she had such a note. It is also averred in this answer that, if the note now presented by complainant had any actual existence as a claim on the land, the executor

and her husband would have revealed it to defendant before he parted with his \$8,000 under his mortgage. The answer denies that the father of complainant gave and delivered to her the note for \$4,000 as an advancement out of his estate, and that it was his intention, in delivering it to her and her husband, that it should remain a lien or charge on the land, in favor of complainant, against her husband. This averment is based on the alleged fact that there is no transfer on the note showing such an intention on the part of her father, and that there is no other writing or instrument of the father of complainant to show that the note was to remain a lien, or that he considered it a lien, on the land, as against her husband, and that it was to be her sole and separate estate, free from the marital rights of her husband. In brief, the position taken in the answer is that, when the note was delivered to complainant or to her husband,—one or both,—it was so delivered by her father, and so understood by all the parties, as a payment on the land, and that when it was delivered, either to the complainant or to her husband, it was under such conditions as amounted to its reduction to possession by the husband, and this by the consent of the complainant, and that, this being so, it became absolutely the property of the husband. It is moreover alleged that the claim advanced in the bill is an afterthought of the complainant or her next friend, and that she knows that the turning over of the note by her father has been treated, from the time the gift of the note was made, as a payment on the land, even by herself and her husband, and that this was the way the transaction was regarded by her father in his lifetime. The defendant then pleads and relies upon the statute of limitations as a defense against the note, and it is insisted that the rights of defendant should not in any wise be affected by any collusion between complainant and her husband, as is indicated by the pro confesso taken against the husband, or otherwise. The defendant denies that the complainant has held the note as her property, or that she has any lien resting upon the land, by virtue of the note, superior to the mortgage lien of defendant. The answer then states that the executor of the father of complainant, under his bill aforesaid, did obtain a decree in this court to sell the land to pay the last note given by her husband for the land; that the land was sold under his decree July 17, 1895, when it was bid in by defendant at the price of \$6,141, which sum he paid into the office of the master of the court, and the master had made his report of sale to the court. It is also alleged that defendant, within 20 days after his bid, advanced his mortgage debt on the land according to law, and that he now held said land for the amount of his bid and advance, making together the sum of \$16,191. The insistence, under this state of facts, is that the sale made under the decree obtained by the

executor aforesaid should be confirmed, and that his rights thereunder should be decreed to be superior to any rights or liens claimed by complainant. The answer of defendant, in this connection, avers that complainant knew all about the filing of the bill aforesaid by her brother, as the executor of her father, to sell this land, and of defendant's purchase of it at the sale made under his bill, and his payment of money in compliance with his purchase, and that she was fully aware that he contemplated advancing his mortgage on the land for some days before he did make his advance; and it is alleged that she in no way communicated to defendant the fact that she had any claim on the land by reason of the gift of the note to her by her father, now presented in her bill, and it is insisted that she is estopped to now claim any right to a lien on the land superior to his mortgage lien. It is further said or alleged in the answer that it is singular that the present next friend of complainant in no way mentions in the bill the fact that he, as executor of her father, had filed a bill against her husband and the defendant, and obtained a decree to sell the land to pay the last purchase-money note, and that defendant had bid in the land under his decree obtained as executor, and had paid his bid and advance on the land of his mortgage debt. And this state of facts is relied on as a defense to her claim. This answer was sworn to, an answer on oath not having been waived in the bill.

The deposition of Col. Holman, the next friend of complainant, was taken; and an agreement appears in the record to the effect that either party might rely upon and read any part or all the records as evidence in the cases of John G. Wilson against John D. Tolley, filed in the chancery court October 26, 1894, and of J. H. Holman, Ex'r, against John D. Tolley et al., filed March 5, 1895, without procuring copies of the same; all exceptions to the same being waived, except for incompetency. We find in the record the bill and amended bill of Wilson against John D. Tolley, the answer of the latter, the exceptions to it, and his further statement to be taken and treated as evidence in the case, and also the decree of the court in the case. We also find in the record the bill filed by Col. Holman, as executor, against Tolley and Wilson, the answer of Wilson thereto (the bill having been taken for confessed against Tolley), the decree in the case, the report of sale, and its confirmation. The present bill of complainant, asking to be permitted to intervene, was filed before the sale to Wilson was confirmed. We also find in the record a copy of the will, and codicils thereto, of James W. Holman, the father of complainant.

The chancellor heard this cause November 21, 1896. He held that complainant was entitled to enforce the payment of the note claimed by her as a lien on the land superior to the claim of the defendant Wilson, and di-

rected that unless her husband, within 60 days, pay into court the amount of her decree against him, the master should advertise and sell the land for cash to the highest bidder, and report his action in the premises to the next term of this court. And in the decree it is recited that until the coming in of said report all matters not heretofore adjudged are expressly reserved. It is also stated in the decree that at the hearing defendant Wilson excepted to the competency of so much of the testimony of witness J. H. Holman as detailed conversations with his testator and with complainant and her husband, which exceptions, the decree recites, were overruled, to the extent of holding that the statements proven to have been made by the testator to witness were competent, and also that the statements of complainant were competent to show that she directed witness where the note was to be found, and committed it to his charge, as her attorney, to collect it, and also that the statements of John D. Tolley to witness were competent, so far as they reflected upon his liability on the note sued on. To these rulings on the evidence, the decree states, the defendant excepted. The decree also recites that after the hearing of the case was begun, and the deposition of J. H. Holman had been read, complainant proposed to read the filed copy of the will of J. W. Holman, deceased, when defendant objected to the same as inadmissible and incompetent, which objection was overruled, and to which action an exception was taken. From this decree of the chancellor, defendant prayed an appeal to the supreme court, which was granted; and the decree recites that on the hearing, after his prayer for an appeal was granted, the records and files in the two cases pending in the court, and all the decrees, papers, etc., therein, were read by defendant as evidence, and the master was directed to copy them into the transcript of the record sent up to the supreme court in this case. The errors assigned are in substance and legal effect: First, that the decree of the chancellor is not warranted by the facts; second, that under the facts disclosed by the record, and the law applicable thereto, the note sued on was not a subsisting demand due her, because it had become the property of her husband by a reduction of it by him to his possession, and that this is so, especially as to defendant, because the note was taken, held, and used by the husband as a payment pro tanto of the purchase money on the land, with the assent and knowledge of complainant.

We have thus gone at length into the recitation of the pleadings in this case because of the novel features presented by it, and the unsatisfactory meagerness of the evidence, in view of the peculiar form in which the pleadings present the issues. The undisputed facts are: (1) That July 20, 1886, J. W. Holman sold a tract of land to his son-in-law, John D. Tolley, the husband of complainant, for \$20,000; taking his five notes, each for \$4,000,

due, respectively, July 1, 1887, 1888, 1889, 1890, and 1891. July 4, 1887, the father of complainant, in his book showing advancements made by him to his children, made this entry under the head of "Advancements to Jennie P. Tolley": "July 4, 1887. To amount given to the payment of land purchased by J. D. Tolley, and in compliance with her wishes, \$4,000." The complainant and her husband have lived on or controlled the land ever since the purchase by the husband. (2) September 2, 1891, John D. Tolley, the husband of complainant, borrowed \$8,000 from defendant Wilson, giving his note therefor, due in three years, but bearing interest from date, payable annually, and, to secure the same, executed a mortgage on the land he bought as aforesaid from Holman, the father of complainant. This mortgage was drafted by Col. J. H. Holman, the brother of complainant; and her present next friend; and it contains a covenant that the land is unincumbered, except by two purchase-money notes for \$4,000 each, maturing, respectively, July 1, 1890 and 1891, and that one of these notes was to be paid out of the money received under the mortgage. (3) November 18, 1896, Wilson filed his bill in the chancery court of Lincoln county to collect the \$8,000 due him, with interest, by a foreclosure of his mortgage. John D. Tolley was alone made a defendant to this bill. This bill of Wilson, however, states the fact that his mortgage recites that two of the purchase-money notes, due at the dates above indicated, were outstanding, and the covenant in the mortgage with respect to the payment of one of them with the money received from him, and says that it is presumed that the note due July 1, 1890, had been paid, and that it may be, also, that the one maturing July 1, 1891, had been paid. And in the prayer of this bill Tolley is called upon to answer whether there is any purchase money due on the land, and to whom due, and a decree is asked to sell the land to pay the mortgage debt. In the original bill of Wilson it is stated that, through oversight, Tolley had not executed his note for the \$8,000, but that the mortgage showed the loan and the contract. As a matter of fact, Tolley had executed a note. It was found, and thereafter the bill was amended, by consent, exhibiting it as a part of the bill. Tolley answered the bill in person, and therein admits, in effect, the execution of the note and mortgage, but claims to have made payments on it, and says he cannot admit that it was correctly described in the bill. He admits that Wilson, after proper credits are allowed, will be entitled to a decree for whatever balance is due, and that there will be no trouble, from the papers, etc., to arrive at what is due Wilson, who, he says, had been indulgent to him. This answer was excepted to on various grounds. And Tolley on August 5, 1895, filed a statement admitting the correctness of the mortgage, and the debt of Wilson. Neither in his answer, nor in his statement filed as evidence, did he allude to

any note possessed by his wife. In his statement, however, he says that he understands that the debt of Wilson had been bid on the land, and that probably in this way the debt had been paid off. Wilson obtained a decree in this case September 17, 1895, for his mortgage debt, with interest, and it was adjudged therein that he had the right to subject the land to sale for its payment. (4) Previous to the filing of the bill by Wilson, to wit, March 5, 1895, J. H. Holman, executor of James W. Holman, his father, filed his bill in the chancery court of Lincoln county against J. D. Tolley and Wilson to collect the last note, maturing July 1, 1891, given by Tolley for the land, and to establish it as a lien on the land superior to the lien under the mortgage to Wilson. In this bill the fact of the filing of the bill by Wilson was alleged, and its purport. This bill was taken for confessed as to Tolley, and Holman, as executor, recovered a decree on his note March 21, 1896, inasmuch as Wilson, in his answer thereto, admitted, in effect, that the note sued on was a lien on the land superior to his mortgage. Wilson bought at the sale made under the decree obtained in this case of Holman, executor. There is no allusion in this bill of Holman to any note held by the complainant. As before stated, she filed her bill before the sale of the bill under Holman, executor, was confirmed. (5) Neither John D. Tolley nor his wife, the complainant, testified in this case. (6) Col. Holman, the next friend of the complainant, gave his deposition. He testified, in effect, that he heard his father say that he had given Mrs. Tolley, the complainant, one of the notes that John D. Tolley had executed to him for the land, and that he had charged it to her as an advancement. (7) It is shown in the record that James W. Holman died testate February 21, 1892, and that J. H. Holman, his son, and the next friend of his sister, the complainant in this case, qualified as his executor. The next friend, in his evidence, says that the books and papers of his father came into his hands as his executor, and among them his book showing the advancements made to his children, and that this book, under the heading of "Advancements to Jennie P. Tolley," contained the entry hereinbefore copied. Being asked when he first saw the note of complainant after the death of his father, he answered that, after Wilson filed his bill to foreclose his mortgage on the land, he saw his sister at her home, and informed her of the filing of the bill by Wilson, when she spoke of the note her father had given her, and asked him what she should do or ought to do, or something to that effect; that he replied that she ought to act promptly, if she intended to collect the note; that he then asked her where the note was, and she said it was in the safe at her husband's office; that said office was a short distance from the house, near the corner of the yard; that he stepped down there, and asked J. D. Tolley for the note, when he opened his iron safe

and handed the note to him; that he mentioned to Mr. Tolley about Mrs. Tolley bringing forward the note against the land, and collecting it, when he expressed himself as being very much opposed to it, saying that he preferred to provide for its payment in some other way; that he carried the note to his office, and put it in his safe, where it remained until her bill in this case was filed. Being asked why her note was not brought forward in the case of Wilson to enforce or foreclose his mortgage, and in his case, as executor, to enforce the collection of the last purchase-money note, he answered that he told his sister that he would take no steps to collect it unless she directed him to do so; that he saw her several times, and she seemed to be very much troubled as to what course to pursue, and said her husband was very much opposed to her taking any steps to collect the note by going on the land, and asked his advice in the matter; that he declined to advise her, further than to say that she should make up her mind and act promptly, if she ever intended to bring the note against the land; that she would postpone, from time to time, saying what she was going to do, until a short while before the bill in this case was filed, when she told him that she had concluded to insist on collecting the note out of the land, and asked him to take the necessary steps, and he then filed the bill. He says that he drew the mortgage of Tolley to Wilson, but did so as he was directed by them, but denies in strong terms that he had his brother-in-law, Tolley, to state anything in the mortgage that he (Holman) knew to be untrue, or that he was guilty of any bad practice in the matter. He states further that after Wilson filed his bill he made known on all proper occasions that Mrs. Tolley held the note in controversy, and that he told S. M. Wilson, the brother and agent of defendant Wilson, and also the solicitors of defendant, of the note, the first time he saw them after the bill was filed to foreclose the mortgage. He also denies that he concealed the fact that complainant held the note. In his cross-examination he states that he cannot now say, as a matter of memory, what year it was that he first heard his father speak of having given Mrs. Tolley one of the notes executed by her husband in payment for the land, but, as a matter of memory, believes it probable that it was before the execution of the mortgage to Wilson, and thinks, from some data on the book of advancements of his father, that it was about July 7, 1887. He states that complainant and husband were living on the land when his deposition was being given; that Tolley bought the land while he and wife were living at Lynchburg; that it was some years after he bought it before he moved on it, but that he understood that they had tenants on it from the year he bought it until they moved there. His testimony is that the husband got the note out of his safe, and handed it to him. He says he cannot re-

member the date he got the note from Mr. Tolley, but that it was after Wilson filed his bill to foreclose his mortgage, and he thinks it was before he filed his bill, as the executor of his father, to enforce the payment of the last purchase-money note.

The will of James W. Holman, deceased, appears in the record; and, so far as it is necessary to state its contents to present the questions connected with it, it need only be remarked that in its fifth clause it states, as to advancements, among others, that he had advanced to the complainant \$1,000, and that it was his intention to make other advancements to his children, and that he had made entries of his advancements in a blank book in his possession. In clause 10 of the will he directs that the share of his estate given to the complainant be vested in, and owned absolutely by, her, and to be for her sole and separate use, free from the debts, contracts, and liabilities of her present, or any future, husband. This will is dated March 24, 1878, and appears to have been attested by two witnesses the day it bears date. In a second codicil to his will, dated February 17, 1891, he directs that the share of his estate given to the complainant be invested by his executor in real estate, for her sole and separate use, free from the contracts or liabilities of her present or future husband, during her natural life, and at her death the fee-simple title to be vested in her children, and the issue of such as may be dead, share and share alike; such issue taking the part that the parents would take if living. He had, in his first codicil to his will, made his son, the next friend of complainant in this case, his sole executor. It will be remembered that defendant excepted to the reading of this will as evidence, and to the conversations that witness Holman had detailed as having taken place between him and complainant, and between him and her husband, and between him and his father; and the action of the court on said exceptions appears in a previous part of this opinion, as recited in the decree of the court.

We have thus stated in full detail the pleadings and evidence appearing in this record. We have given the exact language of the gift of the note in issue, by James Holman to the complainant, as recorded by him in his book of advancements, and when and where the note was delivered to the next friend. We think certain inferences of fact are clearly deducible from what appears in the record as we have stated it. In the first place, it is clear, we think, that the gift of the note to complainant by her father, as an advancement, under the terms of the gift, as recorded by the father in his book of advancements, was not a gift of it to her sole and separate use, free from the control, etc., of her husband. The language of the gift, as recorded by him, is: "July 4, 1887. To amount given in the payment of land purchased by J. D. Tolley, and in com-

pliance with her wishes, \$4,000." The fair and natural import of this is that the father, at the request of his daughter, intended that his gift or advancement should operate, to the extent of it, as a payment on the purchase price of the land bought by her husband from him; and, if we are to take, as we must, under the evidence in the record, the gift as embracing the note in controversy, it, in legal effect, amounted to a satisfaction of the note, for the simple reason that the gift, by its terms, was to be a payment on the land. If it was a payment on the land, it extinguished the note covered by the gift, and the lien legally inherent in it, unless there is something in the record to show that the father intended by his gift to keep the note and lien alive for the benefit of the daughter, to be enforced by her against her husband. There is not, in our opinion, a syllable of evidence in the record that tends to establish this idea. The subsequent conduct of the daughter, as well as that of her husband, disclosed by the record, demonstrates that both regarded this gift as a surrender of so much of the purchase price due from the husband on the land. The father of complainant, it is obvious from the record, was a man of intelligence, and knew what he wanted to do, and how to put in plain language his intention; and, if he had desired to give the note in controversy to his daughter, to her sole and separate use, and so that it might be held as a claim against her husband, and a lien on the land, he would have used language appropriate to express his purpose, and certainly language radically different from that recorded in his book of advancements, showing his gift. It is reasonably certain, from the evidence in the record, that the complainant knew that her husband was dealing with this land as if the note now claimed by her, and sought to be enforced, as a lien on the land, was not an existing claim against it. To say that she did not is, in our opinion, to ignore the fair and legitimate inferences to be deduced from the evidence, and to refuse to see the significance of her silence, and that of her husband, respecting her relations to the note, and the conduct of the husband in connection with the land. In saying that the gift of the father to the daughter, as evidenced by its terms, as recorded by him in his book of advancements, was not a gift to her sole and separate use, free from the control, etc., of her husband, we are not to be understood as holding that any set form of expression or technical words is necessary to create a separate estate in a married woman. It is only necessary that the terms of the gift or settlement should show that the donor or settlor intended that the husband should have no marital rights in the property. A gift of personal property may be made to a married woman, by parol, to her sole and separate use; but the purpose to exclude the husband's marital rights must be so express-

ed at the time, or his rights will attach. "This right of the husband," said our supreme court over 40 years ago, "founded in wisdom and policy, exercises a most happy influence upon the social relations, and is a fixed and stable right of the common law; and, unless the intention to displace it be perfectly manifest, it should be allowed to have its full effect." *Eaves v. Gillespie*, 1 Swan, 128. See, also, *Meredith v. Owen*, 4 Sneed, 223; *Gardenhire v. Hinds*, 1 Head, 406; *Pond v. Skeen*, 2 Lea, 126, 131; *Murdock v. Railroad Co.*, 7 Baxt. 557, 573. It is said in the case last cited that it requires express terms to impose upon property the character of a separate estate. 7 Baxt. 573. A number of instances of phrases held sufficient in themselves to create a separate estate will be found in 22 Am. & Eng. Enc. Law, p. 5, with a reference to the cases, and also phrases held to be in themselves insufficient for the purpose, with a citation to the cases, and among them our own case of *Wood v. Polk*, 12 Heisk. 220. In this case the clause in the will was in these words: "It being my purpose and will that my daughters [who were married] enjoy the respective portions herein devised to them as they see fit;" and it was held not to be sufficient to cut off the marital rights of the husband. The doctrine repeatedly announced by our supreme court is that the expressions accompanying the gift or devise, in order to defeat the marital rights of the husband, must be such as to leave no doubt of the intention to do so, and to forbid the court to speculate on what the intention of the donor may have been. Authorities *supra*, and, in addition, *Erwin v. Chrisman*, 2 Cold. 501; *Beaufort v. Collier*, 6 Humph. 487; *Thompson v. McKisick*, 3 Humph. 631. There is nothing in the gift in this case by the father to the daughter, so far as the terms thereof recorded by the father in his book of advancements go, evincing any intention on his part to cut off the marital rights of the husband. It is argued, however, that the terms of the will of James W. Holman clearly show that he intended the share given the complainant to be her separate estate. This will undoubtedly, by its terms, excludes the marital rights of her husband in his property therein given to her. But, if we can look to the will, we cannot see how its terms can place restrictions upon a gift made before the will; the terms of the gift referring in no way to any provisions of a will then in existence, but to become operative upon the death of the donor. If the donor had intended this gift to come under the restrictions of his will, which, it seems, was executed before the gift, he could easily have so expressed himself. There is not a particle of evidence in the record as to the intention of the donor in this case with respect to the rights of the husband, aside from the terms of the gift recorded by the donor himself in his book of

advancements. This, as we have seen, under the authorities, does not exclude the marital rights of the husband. If the gift, at the time it was made, did not exclude the marital rights of the husband, we are unable to see the soundness of a rule that says that the will of the donor, speaking afterwards at his death, detaches or destroys the rights of the husband. In *Wood v. Polk*, 12 Heisk., supra, a part of the property of the testator was devised in terms that excluded the marital rights of the husband; but this was not allowed to help out or extend the import of the clause relating to other property, which was held insufficient for the purpose. The case here was simply a gift by the father to the daughter, unaccompanied by any intention, expressed at the time, to exclude the marital rights of the husband. And as said in *Pond v. Skeen*, 2 Lea. 131, "It is clear that the money or chattel given became in law the money and property of the husband, upon coming to his possession, as any other property owned by him."

It is argued next that this was a gift of a note, and that the husband never reduced it to possession. It is clear that he did have the possession of it; and it is clear, also, we think, that he assumed to act in relation to it as if it had no valid existence as a debt against him, or at least that it created no lien upon his land, for which it had been given to the father of complainant. A husband, of course, may hold the note of his wife, simply assigned to her, given by him to her assignor, without reducing it to possession in such sense as to defeat the property rights of the wife thereto. But by his possession of such a note on himself it is presumptively reduced to possession, in the sense of the law, so as to destroy her right to enforce it; and this presumption will stand until removed by evidence. If he held it merely as a depository, or as the agent of the wife, that fact should be shown, and then her separate right would be held to exist; and, if this were the fact here, it could have been shown. It certainly was not necessary for this husband to sue himself in order to reduce the note to his possession, and thus extinguish the separate right of his wife by asserting his marital rights. We do not dispute the proposition that reduction to possession, in the sense of the law, means that the husband must not only have the property, but the title to it, and in exclusion of the wife. *Prewett v. Bunch*, MS. (this court, at the present term), and authorities there cited. But all these, we think, exist in this case. The plain fact is that the father, at the request of the daughter, abated \$4,000 of the purchase price of the land owing him by her husband, and charged it to her as an advancement, and, as an evidence of the fact, surrendered to her or to her husband, or to them together, the note evidencing the sum.

Whether he surrendered the note to her or to her husband, or to them both, is a matter of pure conjecture or speculation, under this record. It need not have been left to conjecture, for the wife and the husband (one or the other) could have made the matter plain if they had so desired. But, if we are left to presumption in the matter, we must presume that it was surrendered to the husband, and for the plain reason that it was found in his possession. If, however, it was delivered to the wife, the result is the same, under the facts appearing in the record, and the inferences fairly deducible therefrom. If delivered to her, she turned it over to her husband, and assented for him to act as if it were no longer a live paper, and especially a live paper preserving a lien on the land to secure its payment. This was a reduction on his part, and put an end to her right to insist upon its enforcement in conflict with intervening rights. 14 Am. & Eng. Enc. Law, pp. 644, 645, notes, and cases cited.

In our view, the will was not competent evidence, nor were the conversations held by witness Holman with complainant and her husband. But, taking all that is fairly inferable from his evidence, in all its parts, it does not change the result. There is error in the decree of the chancellor, and it must be reversed, and the bill of complainant by her next friend dismissed, with costs, and it is so ordered.

NEIL and BARTON, JJ., concur.

Affirmed orally by supreme court, February 7, 1898.

#### COOMBS v. STATE.

(Court of Criminal Appeals of Texas. May 26, 1898.)

For prior report, see 44 S. W. 854.

HENDERSON, J. Appellant was tried in the county court of Dallas county, and convicted of keeping a disorderly house. On the trial she interposed a plea to the jurisdiction of the county court, based on the ground that the charter of the city of Dallas vested in the city court exclusive jurisdiction of said offense. An inspection of the charter of the city of Dallas existing at that time and now shows that her contention to the effect that the city court was given exclusive jurisdiction of said offense was correct; accordingly the constitutional question as to whether the legislature had the power to confer jurisdiction of state cases upon the municipal court of Dallas is here presented. Under ordinary circumstances I should not feel called upon to express my views, inasmuch as I concur in the result reached in the opinion of my Brother DAVIDSON. The question, however, is of such importance that I believe it my duty to supplement that opinion with at least some of the reasons which induce me to hold said charter unconstitutional so far as it seeks to



give jurisdiction of state cases to the municipal court of Dallas. I am not unmindful of the gravity of the situation when a court is required to pass upon the constitutionality of an act of the legislature, but the question is fraught with still greater embarrassment in this instance, because I feel constrained to differ not only with the presiding judge of this court, but with the able and exhaustive opinion of the supreme court of this state on this question. But, entertaining, as I do, the belief that "it is the duty of the courts to uphold the constitution as it is written, and to yield no part of their right or authority, and that judges are chosen for the purpose of maintaining the limitations of the constitution, without which free government cannot exist," I should be recreant to the trust reposed in me by the people of the state if I did not, within the functions of my office, resist to the utmost any interference, even on the part of the legislature, with the principles of the constitution. Not even so high a tribunal should be permitted to violate its provisions with impunity. At the same time, "nothing but a clear violation of the constitution, a clear usurpation of power prohibited, will justify the judicial department in pronouncing an act of the legislative department null and void." Actuated by such a sentiment, I have given the question that examination which so grave a subject demands, and I believe I shall be able, before I conclude, "to put my finger" upon the provision of the constitution which the legislature in passing the act in question violated, or from which the prohibition necessarily arises.

1. I submit that corporation courts are mere incidents of municipal government, for the enforcement of municipal laws. This was their character at common law. See 1 Dill Mun. Corp. §§ 424-426. In America our states have generally followed the above in construing the status and functions of municipal courts. It is conceded that in some of the states this is not the rule, but, as a general proposition, I think it may be safely stated that municipal courts are merely incidents of municipal corporations. They cannot exist unless there is first in existence a town or city, which must be incorporated. Their jurisdiction and functions are co-extensive with the town or city, and pertain to offenses against the municipal government which are made such by ordinances which may be passed for that purpose. As stated by Mr. Dillon (volume 1, § 428): "It is clear that it is competent for the legislature of a state to create municipal courts with powers of local government, and to authorize them to adopt ordinances or by-laws, with appropriate penalties for their violation. The power to do this includes, by fair implication, the power to authorize violations of ordinances (where the acts are not criminal in their nature) to be tried and determined in a summary manner by a local or corporation tribunal." It may be conceded, however, that the legislature may authorize municipal courts to

exercise jurisdiction in state cases, unless some provision of the constitution should be infringed. As stated above, in some of the states municipal courts are regarded as a part of the state judiciary, but these are the exceptions which serve only to prove the rule; and it is believed an examination of the cases will show that the constitutions of such states are different from ours, and give warrant to the legislature to treat these courts as a part of the judicial system of the state; or the history of such courts, in connection with the constitution, is such as to authorize the conferring of such jurisdiction upon them. The cases which bear out this contention are cited in *Harris Co. v. Stewart* (Tex. Sup.) 41 S. W. 650. A number of states hold a different view. See *La Fon v. Dufrocq*, 9 La. Ann. 350; *State v. Maynard*, 14 Ill. 419; *Shafer v. Mummā*, 17 Md. 331; *Holmberg v. Hauck*, 16 Neb. 337, 20 N. W. 279; *Brown v. State*, 79 Ga. 324, 4 S. E. 861. In our own state it has been held that it was entirely competent for the legislature to create courts for the purpose of enforcing municipal ordinances. See *Blessing v. State*, 42 Tex. 641. And it has also been held that jurisdiction pertaining to state courts could not be conferred on municipal courts. These are decisions under a former constitution, and hold that recorders and mayors could not be justices of the peace. See *Bighy v. City of Tyler*, 44 Tex. 351; *Holmes v. State*, Id. 631. It is true, our courts have recognized the exercise of jurisdiction by municipal courts of state cases, and a number of cases are cited to that effect in *Ex parte Fagg* (Tex. Cr. App.) 44 S. W. 294. The constitutional question, however, was not made in those cases, and they cannot be considered as authority upon this question. Jurisdiction in our state was originally ingrafted upon municipal courts of petty offenses against state laws under constitutions which made corporation courts a part of the judicial system of the state. See Const. 1845, art. 4, § 1; Const. 1861, art. 4, § 1; Const. 1866, art. 4, § 1. Under said constitutions, in 1856, at the time of the adoption of our first Penal Code and Code of Criminal Procedure, the legislature passed certain articles, to wit, articles 98, 929, 930, Code Cr. Proc., which gave to mayors and recorders the same jurisdiction to try state cases as justices of the peace. More recently, however, larger jurisdiction than of mere petty offenses has been from time to time vested in municipal courts by special charters to cities. The constitutionality of these acts has for some time passed unchallenged. Nor was public attention called to the fact that the constitutions under which these courts were authorized to exercise jurisdiction as state courts was no longer in existence. No doubt, much of the confusion which has arisen on this subject was occasioned by the fact that said articles of the Code of Criminal Procedure passed in 1856, when the legislature had the right to enact them, were brought forward from time to time by the codifiers, and so con-

timed in force. It is submitted, however, if these articles of the Code were unconstitutional when brought forward, they did not get to be constitutional by simply being re-enacted and adopted as general laws, and jurisdiction exercised thereunder. If the clause of the constitution which authorizes the conferring of jurisdiction upon mayors' and recorders' courts of state cases was repealed by being omitted from the new organic law, which was passed in 1869, then said courts ceased to be a part of our state judicial system, and no authority remained with the legislature to clothe them with jurisdiction appertaining to state courts.

2. In order to present this question clearly, I submit that corporation courts are not now named as a part of the judicial system of the state, and, if they are to be regarded as such, this claim must rest on one of two propositions: (1) They either constitute a part of the judicial system of the state, despite the fact that they are not named in the constitution, or (2) they become such by virtue of the creative power of the legislature under the constitution. Discussing these propositions in their order, I insist that corporation courts constitute no part of our judicial system. The fact that our constitution once named these corporation courts as a part of our system, and afterwards, in the formation of new constitutions, the other courts formerly named were retained in the judiciary article, but corporation courts were dropped therefrom, to my mind is strong, if not conclusive, evidence of an intention to eliminate such courts from our judicial system. I do not deny that in one sense municipal courts are a part of the judicial system of the state, inasmuch as they enforce certain local state laws, but I do deny that they are state courts in the sense that they are a part of the state judiciary, as contemplated by the constitution; and I emphatically deny that the inherent right exists in the legislature under the constitution to confer jurisdiction of state cases upon municipal courts. While such courts, in a qualified sense, are a part of the judicial power of the state, they are merely incidents of municipal corporations, and they can only exercise such power as properly belongs to municipal government; that is, to enforce such ordinances as a city or town has a right to pass. And I maintain that a city or town has no right to pass an ordinance making that an offense against the city which has been declared a crime against the state. The state, by its laws, having already occupied the territory, the legislature cannot delegate authority to municipal governments to encroach upon, much less indirectly annul, state laws. It is conceded that all judicial power is derived from the state, and unless the power of the legislature is limited by the constitution, either express or implied, then the legislature is omnipotent in itself, either to create courts or confer jurisdiction upon existing courts. Now, our constitution vests

the judicial power of the state in the supreme court, court of criminal appeals, courts of civil appeals, district, county, and commissioners' courts, and justices of the peace courts. It is not necessary to go into the details of our judiciary article, but a reference thereto will show that the object of the constitution builders was to mark out a complete judicial system. The entire state, including every county, is required to be divided into judicial districts. Each county is required to have a county court, and the counties are required to be divided into commissioners' precincts, and thus commissioners' courts constituted. So, with justices' courts, each county is required to have not less than four and not more than eight justices of the peace, unless a county shall contain a city of 8,000 or more inhabitants, in which case such city is authorized to have two justices of the peace. The organization of these courts is set out in the judiciary article. The officers authorized to hold them are named, and their functions and duties prescribed. Not only so, but control is given to the district court over all the subordinate courts, and they are authorized to remove the officers of such courts on sufficient cause. The article goes still further, and provides how vacancies in such courts are to be filled. It is not a case where the constitution is silent on the subject, for that instrument speaks; and the maxim, "*Expressio unius est exclusio alterius*," becomes the rule. As was said in a New Jersey case (see *Harris v. Vanderveer*, 21 N. J. Eq. 424): "In an examination of these sections, the first thing that attracts attention is this: that the instrument itself establishes certain courts. It does not leave that all-important work to other hands. An omission in this respect in the constitution would have left the judicial system without any fixity whatever. In such a state of things, the powers, jurisdiction, and even the very existence, of the civil courts would have been placed under the control of the legislature. They could have been altered or abolished by that body at will." If the constitution stopped here, I apprehend that no one would be bold enough to declare that any state jurisdiction could be vested in municipal courts. The constitution of 1861, however, goes a step further, and authorizes the legislature to create "other courts." This same power was contained in the constitution of 1876, and was construed by Judge Roberts in *Ex parte Towles*, 48 Tex. 413. See, also, *Gibson v. Templeton*, 62 Tex. 555; *Ex parte Whitlow*, 59 Tex. 273; *Williamson v. Lane*, 52 Tex. 335; *Whitener v. Belknap*, 89 Tex. 273, 34 S. W. 594. I quote from Judge Roberts in the *Towles* Case as follows: "It was certainly the object of the framers of our constitution to mark out a complete judicial system by defining generally the province of each of the courts by reference to the objects confided to the action of each, and the relation of each to the others. To that extent it must be held to be permanent,

and not subject to change by the action of the legislature, except as a change may have been provided for. This is plainly, though incidentally, indicated by a special provision for a change in the jurisdiction of the county court." Now, if the creative power of the legislature under the constitutions of 1876 and 1891 is the same in this respect, then I maintain that the construction must be the same. That the creative power is the same I think no one will deny. If Judge Roberts' opinion was sound when written, it is equally sound now, when applied to the constitution of 1891. And I insist, in this connection, if corporation courts existed throughout the state at the time of the adoption of our constitution (and this no one will deny), and they were regarded as a part of the judicial system of the state, why were they not named in that instrument? Evidently these courts were not regarded as a part of the judicial system. Other courts were named in the constitution. These were not; and if they are to be regarded as a part of our judicial system, they are so by a higher law than the constitution itself. Nor must it be forgotten that our judiciary article is flexible, fully adequate to meet all the demands of the present and the immediate future. The amendment of 1891 makes the district court more elastic, and enlarges its jurisdiction, and as many district courts can be created as the necessities of litigation may require. True, there can be but one county court, but the jurisdiction of this court is cast in such shape as that there can never be any danger of overcrowding it. And when we come to the justices' courts, which have jurisdiction of petty offenses, such as it is claimed mayors and recorders ought to have jurisdiction to try, we find that the constitution authorizes an increase of the justices of the peace where such cities have over 8,000 inhabitants; thus negating the idea that it was intended that municipal courts should constitute a part of the judicial power of the state for the trial of even petty offenses. It will not be contended that the legislature, in the face of the constitution limiting the number of justices of the peace in a county, could directly create a greater number of justices than is provided by the constitution. If the legislature could not create a greater number of such justices in any county directly, it is a self-evident proposition that they could not do so indirectly. Therefore they could not indirectly constitute mayors and recorders of cities justices of the peace, for this would be doing by indirection what the constitution prohibits directly. See *Holmes v. State*, 44 Tex. 631, where this question was directly decided; and also *Bigby v. City of Tyler*, 44 Tex. 351: "When the constitution, as the source of judicial power, vests that power in designated tribunals, the legislature can neither vest it elsewhere, nor create new judicial offices, nor divide the duties of the judicial office designated by the constitution. The constitution cannot be

evaded by a change in the name of an office, nor can an office be divided, and the duties assigned to two or more offices under different names, and the appointment to the offices made in any manner except as authorized by the constitution." See *People v. Albertson*, 55 N. Y. 57. The same observations hold good with reference to our county court system, for the constitution (article 5, § 15) limits the authority of the legislature to the creation of only one county court in each county. The legislature therefore cannot, directly or indirectly, create more than one county court by conferring jurisdiction upon inferior courts, for the constitution has limited the jurisdiction of justices of the peace in criminal matters to cases where the fine imposed does not exceed \$200. It has also placed a limitation upon the jurisdiction of said courts in civil matters. Therefore the justice's court jurisdiction cannot be increased in the face of the constitution, so as to include those offenses where the fine is in excess of \$200 as a punishment. It is true that the constitution has provided that the jurisdiction of county courts may be changed, increased, or diminished, either by local or general law; but this jurisdiction cannot be conferred, as before stated, upon justices of the peace, because the constitution has limited the jurisdiction of justices' courts. Therefore there is but one court mentioned in the constitution upon which the legislature may confer jurisdiction taken from the county court, and that is the district court. The district court, by sections 7 and 8 of article 5 of the constitution, is the only court specifically mentioned in the constitution which could exercise any jurisdiction that might be taken from the county court by local or general laws passed by the legislature for that purpose. It will therefore be seen, if the language of the constitution means what it says, or says what it means, that there may be as many district courts in the state of Texas as the legislature may see proper to create or bring into existence. Then the conclusion is irresistible that under our constitution, if the legislature creates other courts, they can only exercise such jurisdiction as might be exercised by the district court as an original court, or such court with the jurisdiction of the county court conferred upon it by the local or general law passed by the legislature for that purpose. And it follows as a corollary to this, if the legislature cannot create an additional county court to that provided by the constitution, then it cannot create a mayor's or recorder's court with co-ordinate jurisdiction with that court; nor can it create mayors' or recorders' courts, directly or indirectly, justices of the peace courts, and confer upon them jurisdiction appertaining to such courts, because, as before stated, the constitution has set the bounds to their jurisdiction and authority. Then it follows as a logical conclusion, if the legislature can create of a municipal court a state court, it must be

with the jurisdiction pertaining to a district court. So it occurs to me that we reach the inevitable conclusion that our judiciary article prohibits the conferring of jurisdiction upon mayors' or recorders' courts which would make them co-ordinate with county courts or justices of the peace courts. And I believe that the declaration of Judge Roberts in the *Towles Case*, *supra*, is equally as applicable in the construction of our judiciary article of 1891 as it was in the construction of our judiciary article of 1876. The people intended to preserve our judicial system intact. The terms used, in my opinion, can bear no other construction. The district court is the basic principle upon which the entire system is founded; and the whole may be likened to some noble oak, towering with Olympian majesty and imperial supremacy above the lesser trees of the forest. The bole or trunk, vigorous and strong, springing—a graceful colonnade—from the ground, to bathe its leafy foliage in the clouds, fitly represents the district courts. This, supported and nourished by the county courts and commissioners' and justices' courts, may be aptly termed the roots of the system, which strike down deep into the rich alluvial soil of our jurisprudence. The courts of civil appeals stretch their giant limbs above and around, and with their superb setting reach out to catch the winds and dews and sunshine, to give them back again, and to shadow, fertilize, and fructify the soil beneath. While high over all, standing like armed sentinels to guard the sacred domain, crowning the summit, are the supreme court and the court of criminal appeals. Others can be created, but they must be of like kind, and grafted into the system by skillful hands. Thus completed, unique in outline, perfect in symmetry, and vigorous in its strength and growth, this magnificent temple of justice, bulldied by the framers of our constitution, is well fitted to meet and grapple with all the demands of litigation, and to withstand the sinister touch of the fawning sycophant, or the ruder assaults of brute force and unchained power, no matter by whom set in motion.

This brings me to the second proposition or subdivision of the subject, to wit: Did the Dallas city court become a state court by virtue of the creative power of the legislature under the constitution? I am not prepared to say that municipal courts cannot be habilitated, and brought into our judicial system, and made to do double service, both as municipal and state courts, as was done in *Helfreid's Case*, 2 Nott & McC. 233. But when this is attempted it must be done by creative act, and not by merely conferring jurisdiction as upon state courts. By an examination of the various acts of the legislature creating state courts and municipal courts, the difference will be apparent; and it will become evident that the legislature never intended to make any municipal court in the state of Texas a state court. On the contrary, the attempt has

always been simply to confer jurisdiction of state cases upon these courts. By way of example, take the Dallas county criminal district court and the city court of Dallas. In the first it is evident that the legislature went about the performance of its duty under the constitution to create a state court. They exercised a care. It is a general act, and under a proper caption. The jurisdiction of said court is carefully provided for, and made to conform to the other district courts in that county. A seal is prescribed for said court. A judge, and his selection, together with all the officers thereof, are provided for; the terms of said court are fixed; and we know, without question, that here the legislature intended to create a state court. Now, turn to the act creating the city court of Dallas. In the first place, it is a special act of the legislature. (It does not occur to me that the legislature could undertake to perform this duty under a special act.) The caption of said act is, "An act to incorporate the city of Dallas, and grant it a charter." This itself would, under a provision of our constitution, render the attempt to create a state court null and void. See *Ex parte Fagg* (Tex. Cr. App.) 44 S. W. 294, and authorities there cited. The city judge gets his official status not from the state, but from the city, and his compensation is entirely from the city. The very seal of the court is provided for by the city. The process does not run in the name of the state, but in that of the city. Throughout the act it is referred to as a city court, having jurisdiction of city cases by ordinances. Section 27, in providing for process, says that it shall be served and executed in the same manner as process issued from a state court, and the practice and procedure of the state courts shall govern, etc. Now, if it was a state court, why not refer to it as such, instead of referring to it as a city court, and authorizing its procedure to be conducted in some cases as the practice and procedure in state courts, as far as applicable and practicable? It is not necessary to go further into details; but to my mind it is evident that the legislature did not intend to create a state court of this, but a city court, and merely attempted to confer jurisdiction upon it to try certain state cases. If it was an already existing state court, it would have been perfectly competent for the legislature to have done this; that is, to confer jurisdiction upon it. If it was not a state court, before they could confer jurisdiction upon it it was obligatory upon the legislature to create and make of it a state court. I think it is clear, viewing this matter from any standpoint, that the city court of Dallas did not have jurisdiction to try said offense of keeping a disorderly house, neither as an existing state court under our constitution, nor as a state court created by the legislature under that instrument. It may be said that the holding of these acts of the legislature attempting to bestow jurisdiction of state cases upon municipal courts unconstitutional will

be productive of great confusion; but, if this be conceded, it would not justify us in holding that an act deemed unconstitutional should be held valid. The argument *ab inconvenienti* has no place here. I do not, however, agree to the proposition that municipal courts are better fitted to try this character of cases, or any state case, than state courts, and I do not believe that the history of municipal government in this state will show this. It occurs to me that one difficulty in dealing with such offenses has been that the legislature has attempted to confer a dual jurisdiction, thus creating a divided responsibility, which appears to have been shirked more or less by both tribunals. As a result, there has been confusion, and a failure to properly administer the law. I believe that state courts were created for the purpose of trying state cases, and that, when the responsibility is placed alone on them to deal with bawdy houses and gambling saloons in towns and cities, a great forward step will have been made in the administration of law and in the suppression of these vices. As a result, there will no longer be regulation, but suppression; and if the state courts fail to meet the responsibility thus cast upon them, the people will know whom to hold responsible for failure to discharge duty. At any rate, as long as the state laws remain as they are upon the statute books, state offenses must be enforced by state courts; and if it is deemed against public policy that jurisdiction over certain offenses should remain with the state courts, but that the same should be vested in municipal courts, let the constitution be changed, or let the legislature repeal the state laws on certain subjects altogether, and then the cities will have authority, by ordinances, to deal with these offenses.

#### CAMPBELL v. ATWOOD et al.

(Court of Chancery Appeals of Tennessee.  
Nov. 6, 1897.)

EQUITY—DECREE—VACATION—JUDICIAL SALES—  
PURCHASE BY JUDGMENT CREDITOR—REDEMPTION—ATTACHMENT—LIEN—DESCENT.

1. A judgment pro confesso will not be disturbed on the ground that defendant was unable to prepare an answer within the time limited, through impossibility or inconvenience of consulting parties in possession of necessary facts, when there is no showing of diligence.

2. The purchaser of real estate at a judicial sale was the assignee of the judgment under which the sale was made, and bid the amount of the judgment, and added to his bid the amount of several judgments in his hands for collection, but paid no cash on his bid. *Held*, that a grantee of the judgment debtor who was not a party to the proceedings would be permitted to redeem on payment of the amount of the judgment under which the property was sold.

3. The lien of a judgment creditor acquired by levy of an attachment on real estate is not lost by failure to sell the property within a year from rendition of the judgment.

4. Land was conveyed in trust for the use of a married woman, with power on her surviving her husband to convey by will to such persons as she should appoint. She died intestate, leaving four children. On the day of her

death a creditor of one of the children filed an attachment bill against his one-fourth interest in the property, but without joining the trustee. *Held*, that the creditor acquired a lien by the issuance and levy of the attachment.

Appeal from chancery court, Williamson county; Claude Waller, Special Chancellor.

Bill by Hettie P. Campbell against John Atwood and others. From a decree for complainant, defendant Atwood appeals. *Affirmed*.

H. P. Fowlkes, for appellant. D. E. McCorkle and J. C. Eggleston, for appellee.

WILSON, J. The bill in this case was filed November 11, 1896, to establish the right and title of complainant to a one-fourth interest in a designated house and lot in the town of Franklin, Williamson county, Tenn. Process was issued and served on the defendants, and upon their failure to answer at the succeeding term of the court, and for a month or two thereafter, the bill was taken for confessed before the master, March 1, 1897. July 14, 1897, the defendants filed an affidavit, and made a motion asking that the pro confesso be set aside, and that they be permitted to make the defenses to the bill contained in an answer accompanying the affidavit. This application was denied, and the special chancellor, presiding, on July 15, 1897, heard the cause upon its merits, as presented by the averments of the bill. He held, first, that defendant H. H. Cook, by his attachment proceedings in his case against H. D. Campbell, acquired a lien upon the one-fourth interest of said Campbell in the house and lot described in his bill, and that he recovered a judgment on the 15th day of June, 1893, for \$114.45 and the costs, which were declared a lien upon said interest. He further held that the interest of said H. D. Campbell was offered for sale by the master in pursuance of the decree of the court in that cause September 3, 1893, when it was struck off to John Atwood at the price of \$430, but that the sale was not confirmed to him until the June term, 1896, of the court. He further held that Atwood did not comply with the terms of the sale by paying into court the purchase price, but instead satisfied the judgment of H. H. Cook, and then proceeded to advance his bid by satisfying other judgments against H. D. Campbell, which he (Atwood) claimed to hold and own. He further held that, subsequent to the levy of the attachment of the defendant Cook, but prior to the rendition of the judgment in his favor and the sale of the interest of H. D. Campbell thereunder, H. D. Campbell regularly transferred his one-fourth interest in the property to complainant by deed, which was regularly recorded. Upon the averments of the bill the special chancellor held that the judgment of defendant Cook was a valid lien upon the interest of H. D. Campbell, by reason of the attachment proceedings, in the house and lot, and that this lien was not lost by reason of the sale not

being confirmed until the June term, 1896, and upon this basis decreed that the sale of the interest of H. D. Campbell was valid to the extent of the debt and judgment of defendant Cook. He further held that the attempt of Atwood to advance his bid by reason of the other judgments he claimed to own against H. D. Campbell was a nullity, because Atwood was not a bona fide holder of said judgments. He further held that complainant had the right to redeem the one-fourth interest of H. D. Campbell, transferred to her by him. As it appeared, however, that said interest had theretofore been sold by this court for the purposes of partition in the case of J. C. Eggleston against John Atwood et al., and that the proceeds of the sale of the interest of H. D. Campbell were in the hands of the master, the master was directed to pay out of said proceeds the sum of \$114.45, the amount of the decree of defendant Cook, with interest on the same from June 15, 1893. The payment of this sum was directed to be made to defendant Cook or defendant Atwood, in accordance with their agreement made at the time of the transfer of his judgment by Cook to Atwood. The master was directed to pay the balance of the proceeds of the sale of the interest of H. D. Campbell to the complainant, or her order. He taxed the defendant Atwood with the costs of this cause. From this decree defendant Atwood prayed an appeal to the supreme court, which was granted. He has assigned errors. The first decree entered by the special chancellor was set aside, and another decree entered, which, in some respects, modified his first decree. In the final decree entered he held that under the attachment bill of defendant Cook against H. D. Campbell a lien was fixed upon the one-fourth interest of H. D. Campbell in the property to satisfy the claim of Cook presented in that case. He held that the interest of H. D. Campbell in the property was sold by the master to satisfy this decree of defendant Cook, and that at the sale ordered in said cause Atwood became the purchaser at the price of \$430, but that he had never paid any of said purchase price or the cost into court. He further held that at the time of said sale the complainant was the owner of the interest of H. D. Campbell in and to the property described in the bill of defendant Cook. Upon the basis of these facts he held that the complainant had the right to redeem the interest of H. D. Campbell so sold, and purchased by Atwood, by the payment into court of the sum of \$114.45, with interest from the date of the decree in favor of Cook against H. D. Campbell, and directed that said sum and interest be held by the master for the benefit of defendants as their interest may be determined as between themselves. In this final decree defendant Atwood was taxed with the cost, and from this decree Atwood prayed and was granted an appeal to the supreme court, and has assigned errors. The errors assigned are: First, that the court erred in

refusing to set aside the pro confesso; second, the court erred in decreeing that the complainant had the right to redeem the one-fourth interest conveyed to her by H. D. Campbell; third, the court committed error in decreeing that complainant had the right to redeem by paying out of the proceeds of the H. D. Campbell sale the decree in favor of the defendant Cook for \$114.45, with interest; fourth, the court erred in finding that Atwood was not the bona fide owner of the judgments other than that of defendant Cook. It is insisted under this error that the allegation in complainant's bill that he was not the owner of said judgments is in the alternative, and is not positive and complete, because, after alleging that he was not the bona fide owner thereof, she further charges that, if any of them ever had any rights against the property by reason of the judgments, the liens having expired, complainant's title would not be affected. It is further argued that the court held that the lien had not expired, and the complainant leaves the court in doubt, therefore, as to the validity of Atwood's rights under the judgments, by saying, "if he had any rights by virtue of them." This being so, it is argued that her positive declaration as to Atwood having no rights to the judgments is overcome, and that the court will not resolve the matter in favor of complainant.

The first proposition to be determined is whether the court was in error in refusing to set aside the pro confesso. We think the special chancellor committed no error in this respect. The original bill was filed November 11, 1896. Process was regularly issued and served upon the defendants, notifying them to appear and defend at the next term of the chancery court following, which convened on the first Monday in December thereafter. No defense was made at that term of the court. No steps seem to have been taken until the March rules, 1897, when the bill was taken for confessed. July 14, 1897, the defendants Atwood and Cook filed an affidavit asking that the pro confesso be set aside. The sum and substance of the affidavit is that Judge Cook was chancellor of the division, and that an answer could not be prepared without a consultation between Atwood and him, and that it was impossible, or inconvenient, for them to get together, and compare notes, and to state to each other the facts within the knowledge of each. The court judicially knows that Chancellor Cook is chancellor of the division embracing the counties of Williamson and Davidson. No reason is given why counsel of these parties could not have interviewed Judge Cook and Mr. Atwood, and found out all the facts necessary to be embodied in their answer. The affidavit, in our opinion, stated no sufficient grounds for setting aside the pro confesso, and the chancellor committed no error in refusing to set it aside. But, if we were to take the answer of the defendants, which ac-

compained their affidavit, as being true in all its averments, we hardly see how the court could have done otherwise than it did. There is no pretense in this answer that Mr. Atwood was the owner of any judgment against H. D. Campbell except that of Judge Cook. Indeed, the answer leaves it in very great doubt as to whether he was the owner of that judgment. We apprehend that he held it merely as collateral security for a claim or debt due him from Judge Cook. There is no pretense in the answer that he owned the other judgment. Now, as a matter of fact, coming to the averments of the bill, it alleges that this house and lot was conveyed to a trustee for the use of Ann Campbell, free from the control of her then or any future husband, and that upon her death, if her husband, David Campbell, should be then living, in trust for him during his life, and on the death of both in trust to be conveyed to such person or persons as the survivor of them should by his or her last will and testament appoint to take the same, and in default of such appointment then unto their children and the issue of any deceased child of the said Ann and David Campbell. It appears that John B. McEwen, the first trustee under the deed, resigned his trust in 1886, when David Campbell was appointed by the chancery court in his room and stead. After the death of David Campbell, on August 22, 1889, David Campbell, Jr., was by decree of the chancery court appointed trustee under said deed, and clothed with all the rights and powers conferred by said instrument. Ann Campbell survived her husband, David Campbell, and she died August 31, 1892, intestate, and without having named or designated any person or persons to whom her trustee should convey the house and lot, the subject-matter of litigation here. Her failure to thus designate any person to take the property left it to pass under the deed to the children of Ann and David Campbell, of whom there were four, to wit, Mrs. C. C. Cook, Hugh D. Campbell, David Campbell, and complainant, Hettie P. Campbell. So each child was entitled to one-fourth interest in the property.

It appears from the averments of the bill that on the day Ann Campbell died defendant Cook filed his attachment bill in the chancery court at Franklin, seeking to attach the interest of Hugh D. Campbell in this house and lot for the purpose of enforcing the collection of a debt of some \$114 due and owing him by H. D. Campbell. The bill avers that David Campbell, Jr., the then trustee, who held the legal title to the property, was not made a party to the bill of Judge Cook, and that said cause of Judge Cook was proceeded with in all respects as if Hugh D. Campbell owned the legal estate in the one-fourth of said property. It further appears from the averments of the bill that Hugh D. Campbell made no defense to the bill of Judge Cook, and that at the June term of the chancery court, 1893, a judgment or decree was taken by default

in said cause for the amount of the debt sued for by Judge Cook, and that a sale of the one-fourth interest of Hugh D. Campbell in the house and lot was ordered for the purpose of satisfying the decree. It furthermore appears from the averments of the bill that this one-fourth interest was advertised by the master for sale, and was, September 3, 1893, offered for sale to the highest and best bidder, for cash, at the court-house door in Franklin, and that at said sale it was struck off to the defendant Atwood at the price of \$430. It is further averred in the bill that defendant Atwood did not comply with the terms of sale by paying into the office of the clerk and master the amount of his bid, but that he claimed to be the owner of the decree of defendant Cook by assignment, and also to be the owner of certain judgments rendered by the circuit court of Williamson county in favor of C. S. Moss, Neeley & Campbell, and J. W. Harrison against H. D. Campbell; and that said Atwood, claiming to be a bona fide creditor of Hugh D. Campbell, went forward, and satisfied the decree of Judge Cook against H. D. Campbell, but failed to pay to the master any part of the costs in the cause, and then proceeded to advance his bid of \$430 by tacking on the judgments of C. S. Moss, Neeley & Campbell, and J. W. Harrison, above referred to. It is insisted in the bill that all of these proceedings amounted to nothing, because said Atwood was in no sense a bona fide judgment creditor of H. D. Campbell, inasmuch as he had not paid out one cent on account of any of the judgments above named, and that not one of the judgments had been legally transferred to him. The bill contained this averment: "It is true, complainant is informed, that H. H. Cook had by some sort of paper writing transferred the judgment he held against Hugh D. Campbell to said Atwood as collateral security to a debt Cook owed Atwood, and this, as stated, was only by way of security to the debt mentioned, and no attempt was made, or intended to be made, to invest said Atwood with the title to said judgment. Again, no notice of any such transfer was ever given the judgment creditor. So that complainant charges that he could in no sense be the legal owner and holder of this judgment; and complainant charges that said Atwood has not yet paid one cent for this judgment, and has never given Cook one cent's credit on account of sale. Hence he was in no position, on the day of sale, above mentioned, to be treated as a judgment creditor of H. D. Campbell." The bill further avers that he was not the owner of the other judgments mentioned in favor of Moss, Neeley & Campbell, and Harrison against H. D. Campbell, but that he was simply a collecting agent for said parties. It is further averred in the bill that, notwithstanding the sale of said interest was made September 3, 1893, no attempt was made to confirm said sale until the June term of the court in 1896, when the same was reported

and confirmed. Complainant avers that she made no objection to the confirmation, for the reason that she had not been made a party to any of the proceedings in the cause, and that, consequently, she was not in a position to resist the confirmation. She further avers that she had taken no steps in the matter, because she thought that Atwood had abandoned his claim, and, as she was in possession of the property, she was greatly surprised when the matter was resurrected, and a confirmation of the sale made to Atwood in 1896. The bill then avers that on October 15, 1892, soon after the bill of H. H. Cook was filed, H. D. Campbell sold, and by deed conveyed and transferred, to complainant his one-fourth interest in the real estate in question, and that his deed to her was made a matter of record. She exhibits a copy of this deed with her bill, and also a copy of the deed of trust, spoken of in the former part of this opinion. The complainant makes the insistence in her bill that Judge Cook acquired no lien upon the property by his bill and attachment, because the trustee, David Campbell, was not made a party, and that the legal title was in him, and that, inasmuch as Judge Cook proceeded in his bill alone to reach the legal title, his whole proceeding was a nullity. The bill asks, however, that, if mistaken in this view, and the court should hold that Judge Cook did acquire a lien, she be permitted to redeem by paying off his judgment, with interest, and that she be permitted to redeem with the money already in the hands of the master by virtue of a sale of the property for partition. It may be necessary to state, in this connection, that the property had been sold for partition in a proceeding instituted for that purpose in the chancery court at Franklin, and the funds arising from the sale for partition were in court, or at least the funds arising from the sale of the one-fourth interest of H. D. Campbell were in court. As before stated, the chancellor decreed that the complainant had the right to redeem by paying the decree of Judge Cook, with interest. We think, under the averments of the bill, the chancellor was correct. Manifestly, under the averments of the bill, he could not have granted any further or additional relief to any of the defendants. The insistence of complainant that Judge Cook did not acquire a lien, by virtue of the filing of his bill and the levy of the attachment issued in connection with it, which was operative beyond the period of a year after the rendition of a decree in his favor, is not well taken. This proposition seems to rest upon the idea that under our statutes a judgment of a court of record is a lien upon the real estate of the judgment debtor for a year, and that, unless the lien is enforced by a sale of the property within a year, the lien is lost. Quite a plausible argument is made in support of the proposition that the lien acquired by the levy of the attachment is nothing more than the lien of the judgment rendered in the

case in which the attachment is issued. We do not think our statutes support this contention. The real difficulty in the case is to determine whether or not, under the averments of this bill, which was taken for confessed, Judge Cook had any lien for his debt. But, taking all the averments of the bill together, we think it susceptible, and fairly so, of the construction that Judge Cook did acquire a lien, by virtue of the issuance and levy of his attachment in his case; and there are no averments of facts which show that his lien was lost or waived.

It is argued in behalf of defendant Atwood that the decree of the chancellor is erroneous as to him, because the court held that the sale under the proceedings of Judge Cook was valid, and that, this being so, the purchase of Atwood was legal and valid, whether he was a judgment creditor or not. This position, upon the mere statement of it, is correct, but it ignores the vital fact in the case. He did not propose to purchase as an individual merely, but proposed to purchase as a judgment creditor, and to have his purchase price or bid satisfied by the judgments which he alleged he owned. Taking the bill to be true, he owned no judgments. The sale under the terms of the decree of the court was for cash. He failed to pay any cash. He failed to pay the costs of the case, and, so far as this record discloses, makes no proposition to pay the cash. In the meantime, and before his bid was made, this complainant became the owner by purchase and deed of record of the one-fourth interest of H. D. Campbell. There is no error in the decree of the chancellor, under the averments of the bill, which, for the purposes of deciding this case, we are compelled to take as true. The decree of the chancellor will be affirmed, with costs, and each party having appealed will be charged with one-half of the costs of the appeal.

BARTON and NEIL, JJ., concur.

Affirmed orally by supreme court, January 11, 1898.

### WEAVER v. RUHM.

(Court of Chancery Appeals of Tennessee.  
Dec. 11, 1897.)

ESTOPPEL IN PAIS — PRINCIPAL AND SURETY —  
EQUITABLE RELIEF — LIMITATION OF ACTIONS —  
PENDENCY OF LEGAL PROCEEDINGS — PARTIES.

1. A surety on a note given to the clerk and master of the chancery court which states that the money is borrowed in a certain pending case cannot deny liability because the clerk and master was not authorized by the court to make the loan.

2. The fact that a chancery case is no longer carried on the docket will not operate as a termination of the case, setting the statute of limitations in motion, especially where there are still funds in the case to be distributed.

3. The fact that, when the papers in a chancery case are destroyed by fire, no order is made to supply them, does not terminate the case, so as to set the statute of limitations in



motion, especially where funds in the case remain to be distributed.

4. A surety on a note given for funds in the custody of the clerk and master, which states that it was given for funds belonging to a specified case, makes himself a party to the case; and he may not avail himself of the statute of limitations to defeat collection of the note pending suit.

5. One borrowing from the clerk and master a fund belonging to a particular case is estopped from showing that, at the time of making the loan, the fund had been exhausted by previous loans.

6. Equity will not relieve a surety in start of the bar of the statute of limitations unless the obligation has been altered; especially where, as a reason for taking no steps against the estate of his deceased principal, he states that he had no knowledge of the existence of the claim.

7. The fact that a note might have been paid had it been presented to the maker in his lifetime, or that a surety thereon might have secured its payment from the maker had it been presented to the former before the latter's death, affords the surety no ground for relief in equity.

Appeal from chancery court, Davidson county; H. H. Cook, Chancellor.

Suit by Thomas S. Weaver, clerk and master, as successor in office of George K. Whitworth, against John Ruhm. From a decree for plaintiff, defendant appeals. Affirmed.

Nich. D. Malone, for appellant. Stokes & Stokes, for appellee.

WILSON, J. This bill was filed May 9, 1895, by the complainant, as clerk and master of the chancery court of Davidson county, to recover upon the following note, given to George K. Whitworth, his predecessor in office: "\$300.00. Clerk & Master's Office, Chancery Court, Nashville, Tenn., Feby. 4, 1880. One day after date, I promise to pay G. K. Whitworth, clerk and master of the chancery court at Nashville, three hundred dollars, money borrowed of said chancery court in the case of M. W. Allen, Trustee, vs. J. W. Dolbear et al., value received. Payable at the office of the clerk and master, with interest from date until paid in full. John Lawrence. John Ruhm, Security." The bill avers that the loan evidenced by the note was made under orders of the court in the case stated in the note; that no decree had been made in the case calling in the loan; that, while all matters of litigation in the case may have been settled, it was still pending in court; that said Whitworth, clerk and master and receiver and commissioner, was directed to loan out the fund in it, and apply the interest accruing therefrom in a certain way, and for this reason the case had never been finally disposed of, etc.; that John Lawrence, the principal in the note, died several years ago, the owner of no property and insolvent, and that nothing could have been made out of him during his lifetime; that the note, with interest, was past due and unpaid; and that complainant, as the successor in office of Whitworth, had the right to collect the same for the benefit of the parties entitled in

the cause, out of the funds of which the loan was made. The prayer of the bill is for a recovery on the note, with interest. The answer, after alleging that the defendant knew nothing of the money loaned by Whitworth to Lawrence, and of its belonging to the fund in the case mentioned, denies that the case is still pending in the court, and states that it had been ordered off the docket at the April term, 1892, and that it had not been on the docket since. It also alleges that there was never any general decree ordering the fund in the case to be loaned out, nor an order directing it to be loaned to Lawrence. It is stated in the answer that, from information recited, the papers in the case referred to were destroyed by the fire in the Baxter court building in 1888, and that they had never been supplied, nor had any application been made to supply them, but that an examination of the minutes of the court had furnished defendant the dates of the orders and decrees made in the case, which are set out in the answer. It is further averred that Lawrence died more than four years before the answer was filed; that his estate was fully administered years before the bill was filed; that the note or claim sued on was not filed with his administrator or representative; that defendant had no knowledge of the existence of the claim, and hence did not file it with his representative; that the demand as a claim against the estate of Lawrence was barred; that Lawrence was an honorable member of the bar at Nashville, and up to his death prompt in the payment of his debts. It is, moreover, insisted in the answer that, if the loan was made by Whitworth, it was made without an order or authority thereto, and hence was a debt devoid of all trust features, and an individual loan made by Whitworth. The statute of limitations of six years is pleaded as a defense. Proof was adduced by the parties, consisting of depositions and the agreements of parties. The chancellor heard the cause upon the pleadings, exhibits, and evidence, May 21, 1897, and held that the defendant was liable on the note. This resulted in a decree against him for the note sued on, with interest, both making the sum of \$449.25, and the costs. From this decree, defendant appealed, and has assigned errors as follows: (1) The court erred in finding that the clerk and master had authority to loan the fund; (2) the court erred in finding that the money loaned on the note sued on belonged to the fund in the case specified in it, and stated in the bill, since one loan had been made in that case, and no one could earmark notes given for funds in said cause; (3) the court erred in finding that the fund advanced on the note in suit belonged to Dixie Overton's half of the fund; (4) the court erred in not sustaining the plea of the statute of limitations.

The first proposition advanced in behalf of defendant is that there was no decree, generally, in the case of Allen, trustee, against

Dolbear et al., to loan out the funds in it, nor was there any order to loan any of it to Lawrence, and that, this being so, the loan was an individual transaction between Whitworth and Lawrence, the borrower; and upon this basis it is argued that the statute of limitations is a good defense. It is said in the brief of defendant that it has not been held in this state, nor elsewhere, that a surety upon a clerk and master's loan note cannot have the benefit of the statute of limitations, and that there is no difference between such a note and any other note. The case of *Majors v. McNeilly*, 7 Heisk. 302, is cited in support of this proposition. The actual point decided in this case was that a party signing as surety a note to a clerk and master, with the agreement that his suretyship was not to be operative until another solvent surety was procured on the note, was entitled to relief against a judgment by motion on the note, when the additional solvent surety was not procured on the note. It was argued that a clerk and master was not authorized to accept notes upon the condition that other solvent parties sign them. Judge McFarland, in reply to the argument, said: "We cannot see, however, that the obligor in a note to a clerk and master can be governed, in respect to what shall constitute a valid execution and delivery of a note, by any different rules from those that apply to other parties." We see no cause to dispute the correctness of this law. We fail to see, however, its immediate application to the case at bar. If the defendant had signed the note as surety, but upon the condition that he was not to be bound as such unless another party was procured to go on it, his case would come within the principle announced. All this class of cases proceed upon the idea that the obligation of suretyship had not been entered into, because of the nonperformance of the condition upon which it was to become operative. There was no specific decree ordering, generally, the fund in the case mentioned in the note to be loaned out, nor any order to loan it to Lawrence; but there was an order made in January, 1888, to loan the fund to T. D. Overton, on good security, to the satisfaction of the master, on the same terms as any one else who might apply. This was an authority to the master to loan the fund. But it was a fund in the custody of the court, and, if its officer in charge of it loaned it out in his official capacity, we see no sound reason for permitting the party borrowing it to dispute his authority to do so, and thereby defeat its recovery and restoration to the trust. We cannot assent to the proposition that if a party borrow from a trust fund in court, from a clerk and master having the custody of it as clerk and master, giving an obligation to pay it to him as clerk and master, he can convert it into an individual transaction between him and the official by simply showing that the court had not directed the officer to loan it out, or to make the specific loan to

him. And, if the borrower cannot do this, we are aware of no rule of law or equity that will enable his surety on his obligation for the money to do it.

It is agreed that the case of Allen, trustee, against Dolbear et als., from the funds in which the loan was made to Lawrence, as stated in the face of the note, was not still pending in the court. It is true that it appears that the case was not carried on the docket of the chancery court after the April term, 1892; but this does not establish that, in legal contemplation, it was not still pending in court. While all matters of litigation appear to have been settled in it, the case still remained in court for such orders as were necessary to protect and distribute the funds in it. The papers in the case, it seems, were destroyed in the fire in the Baxter building, and were never supplied; nor does it appear that any order was ever made to supply them. But we can find no authority holding that this has the effect to kill the suit as a case pending in court, especially where funds belonging to it are in the custody of the court in which it was pending. If a party borrow from trust funds in the custody of a clerk and master, acting in the matter in his official capacity, or purporting to act in his official capacity, and give his note to the official, specifying therein that the fund borrowed belonged to a specified case, he thereby makes himself a party to the cause; and his note, being in the custody of the court in the pending suit, is not subject to be defeated by the operation of the statute of limitations. This general proposition is, in effect, supported by a number of cases in this state. We cite some: *Gold v. Bush*, 4 Baxt. 579; *Tyner v. Fenner*, 4 Lea, 469; *Ex parte Spence*, 6 Lea, 391; *Epperson v. Robertson*, 91 Tenn. 409, 19 S. W. 230; *Vaughn v. Tealey* (Tenn. Ch. App.) 39 S. W. 868.

It is next insisted that the proof shows that this loan was not made from the fund in the case mentioned in the note, because it is shown that, at the time the loan was made, more loans had already been made apparently from the fund than there was money in the hands of the master belonging to it; and, this being so, it is said that, if the recovery sought be enforced and the money be paid into court, no one can tell who will be entitled to it. In the first place, we do not think a correct construction of the evidence supports this contention as a matter and question of fact. In the second place, a party borrowing a fund in the custody of the court, from its official custodian, as a fund in court belonging to a particular case, is in no attitude to dispute the existence of such a fund. It is his duty to restore it, according to the terms of his obligation, to the custody of the court from which it was borrowed, and let the court settle the question of its future disposition. Courts of equity, as well as the common law, as administered in the law courts, have a tender regard for sureties; but nei-

ther will relieve a surety where his obligation has not been changed or altered in start of the bar of the statute of limitations, especially where he has taken no steps to protect himself by making his principal discharge the debt. The fact that he has forgotten the existence of the note and his suretyship on it constitutes no defense. How this note happened to be overlooked by Whitworth for the period that he held it is not disclosed. While it appears that Mr. Lawrence, the principal, had no property subject to execution when he died, some years since, the evidence discloses that he was prompt in the payment of his debts; and it may be that, if payment of this note had been demanded, it would have been paid. It may be, also, that, if the note had been presented to defendant, he could have taken steps to secure its payment from his friend for whom he had become surety. But these things, hard as they may make the case against him, afford no ground of relief in equity. There is no error in the decree of the chancellor, and we feel constrained to affirm it, with costs.

NEIL and BARTON, JJ., concur.

Affirmed orally by supreme court, March 9, 1898.

#### WISE-KOTTWITZ COMMISSION CO. v. BOND.

(Court of Chancery Appeals of Tennessee.  
Feb. 12, 1898.)

##### FACTORS—TERMS OF CONSIGNMENT—EVIDENCE.

A factor testified that turkeys were consigned to him for sale on commission. The principal testified that he was to receive a certain invoice price, together with any surplus after deducting expenses and commissions, and he was corroborated by his clerk. The factor had not seen the turkeys when the contract was made. They were consigned by the principal to himself. The invoice price was \$141 more than the principal drew for, and no satisfactory reason was offered for failure to draw for the full price. The principal made no claim for the \$141 until the factor demanded a refunding of the difference between net sale price and the amount paid on the draft. No sale was claimed by the principal. It was not necessary for the factor to make such a contract in order to obtain turkeys for his trade. *Held*, that there was a commission consignment with no guaranty as to price.

Appeal from chancery court, Davidson county; H. H. Cook, Chancellor.

Bill by the Wise-Kottwitz Commission Company against B. B. Bond. From a decree in favor of defendant, complainant appealed. Reversed.

Lemuel R. Campbell and John H. De Witt, for appellant. T. F. Layne, for appellee.

WILSON, J. This bill was filed October 9, 1896, by the complainant, a corporation under the laws of the state of Louisiana, and doing business in New Orleans, in that state, to re-

cover from the defendant the sum of \$168.81, and interest thereon from November 26, 1895. The claim of the complainant is predicated upon the averment that the defendant, in November, 1895, consigned to it a car load of turkeys, to be sold upon commission; and when the turkeys were shipped the defendant drew a draft on it for \$700, which it honored; and that the turkeys arrived at New Orleans, and were sold; the proceeds of the sale, after deducting commissions, expenses, etc., only amounted to \$546.19; and that, this being so, it was entitled to recover the difference between this sum and the amount of the draft drawn upon it by the defendant, which it had honored. The bill avers that November 22, 1895, the defendant consigned to complainant a car load of turkeys, to be sold for his account, and that at the same time the defendant drew upon it for \$700, and that it paid the draft November 26, 1895. It further avers that, in addition to the draft, it paid out for account of defendant, in connection with the car load of turkeys, the sum of \$15; that the freight charges, drayage, and its commission amounted to \$135; and that it realized from the sale of the turkeys only the sum of \$681.25. It exhibits with its bill an itemized account, sworn to. The defendant, in his answer, admits that he shipped the car load of turkeys to complainant as stated in the bill, and that he drew a draft on it for \$700, which was honored, but denies that the turkeys were to be sold on his account and risk, but says they were to be sold on account and at the risk of complainant. His insistence is that the car load of turkeys was consigned to complainant under a warranty and guaranty on its part that he should receive for the turkeys not less than the invoice price of the turkeys on board cars at Nashville, Tenn.; that he shipped on the cars at Nashville 1,151 turkeys, weighing 14,024 pounds; that the invoice price on cars here was 6 cents a pound, and hence that their invoice price here was \$841.44; and, this being so, he claims that the complainant is indebted to him in the sum of \$141.44. His further insistence is that under his contract with the complainant he was to base all on the invoice price of the turkeys on board of cars here, after deducting freight and other charges and commissions that might be realized from their sale by the complainant. He avers in his answer that the complainant had often been requested to settle the balance due him,—that is, the difference between the invoice price of the turkeys on board cars here and the amount of the draft which the complainant had paid,—but that it had failed and refused to do so. The answer is not filed as a cross bill, under which a decree is sought for this difference. The parties went to proof on the issues presented by the pleadings. The chancellor heard the cause on the pleadings and evidence August 31, 1897. He held that the complainant was not entitled to the relief sought, and dismissed its bill, with costs. From this decree

complainant appealed to the supreme court, and has assigned errors. The errors assigned are: "(1) The court erred in not granting complainant the relief it sought. (2) It erred in dismissing the bill, and in adjudging the costs against the complainant. (3) The court erred in not holding that the defendant was liable for all loss and damage to the car load of turkeys until delivered to complainant at New Orleans, because the proof shows that the defendant consigned the turkeys to himself at New Orleans, and not to the complainant. (4) The court erred in not holding that the representative of the complainant company soliciting the consignment of the turkeys had no authority to make the guaranty with respect to the sum that defendant alleges he should receive for them, and bind the complainant thereby, if the court should reach the conclusion under the evidence that he, in fact, did make it."

We find the following facts from the record: (1) The complainant is a corporation under the laws of Louisiana, doing business at New Orleans. It is engaged in the business of selling eggs, poultry, and produce on commission. (2) In the fall of 1895, Mr. Kottwitz came to Tennessee, soliciting consignments of produce, etc., to his company at New Orleans. (3) He saw the defendant in November, 1895, in his business house here in Nashville. (4) The defendant, it appears, at that time had a car load of turkeys ready for shipment at Watertown, Wilson county, Tenn. (5) Kottwitz solicited the consignment of these turkeys to his company for sale on commission at New Orleans. (6) The defendant did ship the turkeys to New Orleans, consigned to himself, care of the complainant. (7) When the turkeys were shipped, he drew on the complainant for \$700, and his draft was paid by the complainant. (8) The defendant sent a man, or was to send one, with the turkeys; but he missed the train they were shipped on, and did not get with them until they reached Montgomery, Ala. (9) When the train on which the turkeys were shipped reached Decatur, Ala., it was discovered by the railroad authorities that a number of the coops in which the turkeys were put were mashed in, and that some 30 turkeys were dead. This necessitated the unloading of the turkeys, and the making of some five or six new coops. (10) When the turkeys arrived at New Orleans, some 100 more of them were dead, and most of the others were not in good condition for sale at good prices. (11) They were sold by the complainant at the best price obtainable in view of their condition. (12) The price realized for the turkeys was that stated in the bill. (13) There is no dispute that complainant paid the freight and drayage and the \$15, as stated in the bill. Adding these and the 5 per cent. commissions charged by the complainant to the \$700 draft of the defendant paid by it, and deducting from the aggregate the sum realized from the

sale of the turkeys, and the result is the sum sued for by complainant.

The main point in serious dispute is as to whether the complainant's representative, in soliciting the consignment of the car load of turkeys, obligated it to see that the turkeys realized, over and above all expenses and commissions, the invoice price of the turkeys on board cars at Nashville, which was 6 cents per pound for these fowls, under their invoice here. If it did, the bill was properly dismissed; if it did not, the complainant is entitled to a decree for the sum it claims, and the bill was wrongfully dismissed. The evidence in relation to the controlling feature in the case is in sharp conflict. The defendant swears in positive terms that the complainant, through its representative and agent here, did so obligate it. Mr. Kottwitz, who was here, and solicited the consignment, with equal positiveness denies he made any such guaranty. On the contrary, he swears that the turkeys were shipped to his company at New Orleans, to be sold on commission for the defendant at the best obtainable price, and that he had no authority to make any such guaranty, and bind the company to it. The defendant swears that he expected to ship the turkeys to Chicago, and intended to do so, until, after considerable importuning on the part of the agent of complainant, and the citing of the guaranty that he should receive, over and above all charges, the invoice price of the turkeys on board cars here, he was persuaded to change his purpose, and ship them to New Orleans. He further swears that the guaranty contained the additional promise that he should receive all over said invoice price that might be realized from the sale of the turkeys, after deducting from the excess freight, commissions, etc. The evidence of the clerk of the defendant tends to support the evidence and insistence of the defendant. We have read and weighed the proof in the record. We have gone through it, and read it all more than once. We have been impelled, from an examination and analysis of the evidence, to the conclusion that the position and insistence of the defendant were not sustained by the record. There are certain significant facts, in dispute in the record, which, it seems to us, dispose of his contention. In the first place, these turkeys were at Watertown, Wilson county, when the agent of complainant was here and solicited their shipment for sale on commission to his company, and he did not see the turkeys. In the next place, the car load of turkeys was consigned by the defendant to himself at New Orleans. In the third place, if the guaranty and contract were as claimed by the defendant, it is quite reasonable to suppose that he would have drawn for the invoice price of the turkeys on board cars here, which, under his evidence, was \$841.44, or \$141.44 more than he did draw for; and no satisfactory reason is offered for his failure to draw for the full sum which he

claims that, in any event, he was to receive. And, finally, it appears that he did not set up any claim for this \$141.44 until the complainant claimed a refunding of the one draft. In addition to all this, the defendant does not claim that he sold the turkeys to complainant, and that complainant was to take any pay for turkeys that were dead when they arrived at New Orleans. These facts, taken and weighed in connection with the fact positively sworn to by Mr. Kottwitz that he made no such contract as is claimed by the defendant, and in connection with the further fact, appearing in the record, that it was not necessary for the agent of the complainant to make such a contract in order to get turkeys to meet its approaching Thanksgiving holiday trade, made it reasonably certain, as we think, that no such guaranty and contract was made by the complainant as is made the basis of the defense of the defendant. We find that the car load of turkeys was shipped by the defendant to New Orleans, to be sold by the complainant for and on account of defendant, for the best attainable price, and that no guaranty was made that any specified price would be realized for them. Under this finding of fact there is no trouble about what the law is, and it is needless to state applicable propositions of law and authorities to support them. It is conceded that if the facts be as we have found them, the defendant is liable. The decree of the chancellor is erroneous, and will be reversed, and a decree will be rendered here for the complainant for the sum sued for, with interest. The defendant will pay the costs below and here. The other judges concur.

Affirmed orally by supreme court, February 28, 1898.

#### RAWLEY et al. v. BURRIS et al.

(Court of Chancery Appeals of Tennessee.  
Feb. 19, 1898.)

#### ESTOPPEL TO ASSERT TITLE—MARRIED WOMEN— APPEAL AND ERROR—FINAL DECREES.

1. A married woman, who conveyed her real estate, and afterwards filed a bill to enforce a vendor's lien, asserting that the property had been sold, and that the price was due and unpaid, and obtained a decree for sale, and received the money paid in satisfaction of the decree from a subsequent grantee, and who had knowledge of extensive improvements being made on the property by the purchaser, is estopped to assert title, notwithstanding her privy examination to the deed was never taken.

2. Under Mill. & V. Code, § 3896 (Shannon's Code, § 4911), providing that a writ of error will lie from a final decree of the chancery court to the supreme court, where the court, in a suit for the possession of real estate, grants complainant a decree, and orders a writ to put her in possession, the decree is final, although matters in the nature of balancing rents, taxes, and improvements remain for separate adjustment.

Appeal and error from chancery court, Jackson county; T. J. Fisher, Chancellor.

Suit by Nancy S. Rawley and David A. Rawley against John M. Burris, S. S. Dudley, G. B. Murray, and M. G. Butler. From a decree in part for plaintiffs, plaintiffs and defendant John M. Burris appeal, and defendants John M. Burris and G. B. Murray bring error. Motion to dismiss writ of error overruled, and decree reversed.

Halle & Johnson, for complainants. Gardenhire & Anderson and G. B. Murray, for defendants.

WILSON, J. The bill in this cause was filed February 1, 1895, by Nancy S. Rawley and her husband,—the latter stating that he joined in the bill to enable his wife to sue,—to recover lots 125, 133, 134, 135, and 136 in the plan of the town of Gainesboro, Jackson county, Tenn., and to remove the claims of the defendants as clouds upon the right and title of complainants. Incidental to this relief, an injunction was asked to enjoin some of the defendants from disposing of the lots, that a sale by the master under a decree of the court in a designated case be enjoined, and that a receiver be appointed to take charge of the property pending the litigation. The bill, in substance, avers that September 30, 1887, complainant David A. Rawley, being the owner in fee of lot No. 125 in Gainesboro, sold and deeded the same to defendant John M. Burris for \$325, taking his three notes, each for \$106.33¼ for the purchase money, due, respectively, October 1, 1888, 1889, and 1890, bearing interest from date, and that complainant Nancy S. signed said deed of her husband to Burris, but that she did not do so either freely or voluntarily. The bill further avers that David A. Rawley also conveyed lots 133, 134, 135, and 136 to said Burris for the consideration of \$50, for which his note was executed, due May 1st following, and that the name of complainant Nancy S. was attached to the deed to these four lots. The bill then alleges that complainant David A., December 11, 1889, filed a bill in the chancery court at Gainesboro against Burris, for the purpose, among other things, of collecting said purchase-money notes given by him by a foreclosure of the vendor's lien to secure the same, and that complainant Nancy S. was joined as a complainant in this bill without her knowledge or consent. It is alleged that Burris answered this bill, and that defendant S. S. Dudley filed an attachment and injunction bill in the nature of a cross bill in that case against complainants here and John M. Burris for the purpose of subjecting the money due from Burris to complainants, or a sufficiency thereof, to satisfy a debt due him for \$280.40, for family supplies sold and furnished by him to complainants. It is averred in the bill here that David A. Rawley acknowledged, in writing, the existence of the debt claimed by Dudley, and, for the purpose of paying it, transferred to him the first purchase money collected from Burris, to col-

lect which their suit was pending against Burris; and that Dudney was authorized, if necessary, to enforce the vendor's lien against Burris, and to bid the sum due him on the property, if the same should be sold. The written instrument made by David A. Rawley to Dudney, conveying this purchase money to the latter, is copied in this bill, and it is averred that it was made an exhibit to the intervening bill or cross bill of Dudney in the suit or bill filed by complainants to enforce the vendor's lien against Burris. The bill here also alleges that Dudney, in his bill in the case referred to, averred that David A. Rawley was fraudulently trying to make an arrangement with Burris to get back the lots, in order to defeat the collection of his debt. Complainants here, and Burris, a defendant here, were made defendants to the bill or cross bill of Dudney in that case. It is alleged also in this bill that David A. Rawley filed an answer to the bill of Dudney in that case, and that he joined the name of complainant Nancy S. in his answer, without her consent or knowledge, and in said answer admitted all the material allegations of Dudney's bill, except the amount of the debt claimed by him. It is further alleged in the bill here that David A. Rawley, in his answer to the Dudney complaint aforesaid, claimed homestead in the property or its proceeds. It is also alleged in the bill here that in that case an order was made, by consent, referring the cause to the master to take proof and report on certain questions, and that such steps were taken in that case as resulted in a decree September 21, 1894, to the effect that John M. Burris was indebted to David A. Rawley for the purchase money in the sum of \$304.52; that this sum was a vendor's lien on lot No. 125, which was ordered to be sold, and that Dudney was entitled to \$256.30 out of the proceeds of the sale of said lot when it was sold, his claim for \$256.30 being declared a lien on the purchase money due from Burris. It is averred in this bill that it was decreed in that case that Burris owed as purchase money a balance of \$48.84 on lots 133, 134, 135, and 136, and these lots were decreed to be sold to pay the debt of Dudney. The bill here then alleges that Burris and wife sold the four lots, 133, 134, 135, and 136, to defendant G. B. Murray, and that said Murray is claiming said lots under the conveyance of Burris and wife to him. The insolvency of Burris and Murray is alleged, and the latter, it is charged, is in possession of lots 133, 134, and 136, collecting the rents, and that he had torn down the house on one of the lots. The ground of relief averred in the bill as to lot 125 is that complainant Nancy S. acknowledged the execution of the deed to it under duress and compulsion from her husband, and that her privy examination thereto was not legally taken, inasmuch as it was taken in the presence of her husband. She avers that her privy examination to the deed conveying

lots 133, 134, 135, and 136 was never taken at all, and that these lots belonged to her. It is alleged that all of said lots are not worth \$1,000, and homestead is claimed. M. G. Butler is made a defendant because it is alleged that he was the attorney of David A. Rawley in the bill filed by David A. against Burris to enforce the vendor's lien, and in defending against the claim of Dudney presented in that case, and in that litigation he was decreed to have a lien for his fee on the money coming to complainant from Burris in that suit; and complainant Nancy S. avers that he was not her attorney, and that she had nothing to do with employing him. Under the prayer of the bill an injunction is asked to enjoin the master from selling the property under the decree in the case of David A. Rawley against John M. Burris et al. and S. S. Dudney against J. N. Burris et al.; that a receiver be appointed to take charge of the lots, and rent them out; that Murray be enjoined from interfering with lots 133, 134, 135, and 136; that complainant Nancy S. be decreed these lots; that she be decreed lot 125 as a homestead, and, if necessary, also the other lots as a homestead, all not being worth over \$1,000; and that the deed to Burris and that of Burris and wife to G. B. Murray be declared void, and removed as a cloud upon the title of complainant. There is also a prayer for general relief. The chancellor at chambers granted a fiat for an injunction, under the prayer of the bill.

The bill was demurred to on the following grounds, in brief: (1) The complainant Nancy S. is estopped, under the averments of the bill, from asserting and maintaining the claims presented in it, and to permit her to claim the lots, in view of the facts disclosed by the bill, would be to sanction the commission of a fraud by her. (2) That she does not state sufficient facts to enable the court to judge for itself whether, if they be true, she was coerced into acknowledging the deed to lot 125; that it is not enough to charge, in generalities, that she executed the deed under duress and compulsion, but the facts constituting the duress, compulsion, and fraud must be stated. (3) That she is not the head of the family, and that the head of the family alone has the right to select where the homestead shall be set apart. (4) That it is not averred that the lots mentioned are all the real estate possessed by the complainants. This demurrer was overruled, and the defendants answered. In their answers all the grounds of relief stated in the bill are denied. It is denied that complainant Nancy S. signed and executed the deed to lot 125 under duress, or compulsion, or fraud, or that her privy examination thereto was defective or invalid for any reason. It is denied that she was not a party, knowingly and consenting, to the bill filed by her husband against Burris to enforce the vendor's lien, and to the Dudney litigation connected with this.

suit. The sale of the lots to Burris and the execution of the notes for the same by him are admitted, and it is insisted that she and husband are estopped to set aside the sale, or to question the same, by reason of the suits instituted by them and the result. It is also denied that she was not a party to the bill filed by Dudley, and that she was ignorant of the fact that she had joined in the answer thereto, or that she joined in the bill she and husband filed against Burris. It is denied that she had nothing to do with the employment of M. G. Butler as a solicitor to represent her and husband in that litigation, and that the lien declared in favor of said Butler in that litigation was illegal and invalid as to her. In short, all the material grounds of relief stated in the bill were denied or put in issue. Defendant Murray claims lots 133, 134, and 136 under a conveyance from Burris and wife, based upon the fact that he paid off the decree fixing the balance of the purchase money due from Burris therefor, and that in consequence of this payment it was unnecessary for the master to sell the same under the decree; and it is insisted that complainants got the benefit of the payment made by said Murray. In other words, it is averred that Rawley and wife filed their bill to collect the purchase money due them on these lots; that they got a decree for the amount due them on said lots, and an order for their sale to pay it; and that, the purchase money having been paid, there was no need for the sale. The purchase money having been paid, it is insisted that Burris had the right to convey the lots, and that his conveyance to his vendee communicated a good title. It is further insisted that, having instituted the suit to enforce their vendor's lien on these lots, and having obtained a decree for their sale, and having received the satisfaction of their decree, it is immaterial whether Mrs. Rawley was privily examined to the deed she signed conveying these lots, and that she is now estopped to set up the claim that the four lots belonged to her, and that she was not privily examined to the deed conveying the same. It is further insisted that she stood by and saw the parties putting improvements on these barren and rocky lots, and made no complaint until Dudley won his suit, and that she is estopped by this acquiescence and knowledge that the purchasers were expending their labor and money in improving the lots on the faith that she had parted with all her rights in and to the lots, if she ever had any.

We need not cite the various orders made pending the development of the case below. It is sufficient to say that quite a large volume of proof was taken. The chancellor heard the cause June 2, 1897, upon the entire record. He held and decreed that the deed executed and delivered by Rawley and wife to Burris for the four town lots 133, 134, 135, and 136, in the plan of the town of Gainesboro, Tenn., was void, for the reasons that

the wife was the owner in fee of said lots, and that her privy examination was never taken to the deed. Inasmuch, however, as it appeared to the chancellor that Burris had gone into the possession of the lots immediately after the sale to him, and had put permanent improvements thereon, the value of which was not clear under the proof, and that Burris and Murray had paid taxes on the lots, and that they were entitled to recover for the improvements and taxes paid, the cause was referred to the master to hear further proof, and report as to these matters. The deed to Burris and the deed to Murray were set aside, and it was decreed that Mrs. Murray was entitled to recover these lots, and a writ was ordered to put her in possession. He held that she was entitled to recover rents from Burris until he sold to Murray, and from both Burris and Murray from the date of the sale to the latter to the date of the decree, but that these parties were entitled to set off against these rents the taxes paid by them, and the value of the permanent improvements put on the lots; the taxes and improvements, however, not to exceed the rents. As stated, the master was directed to report in reference to these matters, as follows: (1) What permanent improvements were put on these lots by Burris, and how much they permanently enhanced their value. (2) The reasonable rental value of the lots per year from the date of the deed to Burris. (3) The taxes paid on the lots by Burris and Murray. He was directed to set off the rents against the improvements and taxes, and strike a balance, and make his report to the next term of the court. He taxed Burris and Murray with the costs incident to this branch of the case, and which would not have occurred if only lot 125 had been sued for. It appears that Burris excepted at the time to this decree, and prayed an appeal to the next term of the supreme court. His prayer for an appeal was granted by the chancellor, and, as he lived out of the county of Jackson, he was given 30 days in which to perfect his appeal by giving bond. The chancellor decreed that the deed from Rawley and wife to lot 125 was valid, and conveyed the title to Burris, and the injunction enjoining its sale under the decree in the cases of Rawley and wife against Burris, and Dudley against Burris, Rawley, and wife, was dissolved, and the bill, in so far as it sought relief in reference to said lot, was dismissed; and the master, as special commissioner, was directed to proceed and sell said lot under the decree in the former causes, and to report to the next term. Rawley and wife were taxed with the costs incident to this branch of the cause. To the decree of the court in relation to lot 125 complainants excepted, and prayed an appeal to the supreme court, which was granted. They perfected their appeal. The solicitors filing the bill were declared to have a lien on lots 133, 134, 135, and 136 for their fees. Burris and Murray have brought the

case up as to the decree in relation to the four lots by writ of error, and they have assigned errors to the decree of the chancellor, in so far as it decrees that Mrs. Rawley is entitled to the possession of these lots, and to recover rents for the same, as set out in his decree. The complainants have moved to dismiss this writ of error, on the ground that the writ was not permissible under the law, inasmuch as the decree of the chancellor respecting these lots was interlocutory, and not final. The errors assigned by complainants are: (1) That the chancellor erred in holding that lot 125 was not procured and acknowledged by Mrs. Rawley under duress and coercion from her husband, and that her privy examination thereto was legal, and binding on her. (2) He erred in holding that Burris, the vendee of this lot, was not affected by the fraud, duress, and coercion of the husband upon his wife. (3) He erred in holding that the equities of the bill were not sustained by the proof. (4) He erred, as a matter of law, in holding that, as the certificate to the deed to Burris to lot 125 was in due form, and signed by the proper official, it could only be attacked for fraud or duress, and not for mere irregularity in taking the privy examination, and that it could be attacked for such fraud only as was committed by the conveyee, J. M. Burris, or by his agent in his behalf, and that Burris, the conveyee was not affected by the duress, force, and fraud of the husband of complainant Nancy S. (5) He erred in not holding that the deed from complainant Nancy S. and her husband to Burris to lot 125 and the certificate of privy examination were procured by the duress, force, and fraud of the husband, D. A. Rawley, and that J. M. Burris was not an innocent purchaser, as he paid no part of the consideration. (6) He erred in not decreeing that complainant Nancy S. was entitled to the possession of lot 125 as a part of her homestead. (7) He erred in decreeing lot 125 to be sold for the satisfaction of the debt of S. S. Dudney, assignee of David A. Rawley. (8) He erred in dismissing complainants' bill as to lot 125. Burris and Murray assign 24 errors. For convenience, they may be embraced under the following heads: (1) The chancellor erred in overruling the demurrer to complainants' bill. (2) He erred in holding that complainant Nancy S. Rawley was owner in fee of the four town lots 133, 134, 135, and 136. (3) He erred in holding that the deed from complainants to J. M. Burris to said four lots was void. (4) He erred in not holding that complainants were estopped to set up claim or title to said four lots. (5) He erred in decreeing rents in favor of complainant Mrs. Rawley against Burris and Murray. (6) He erred in holding that Burris and Murray could recover for improvements and taxes only to the extent of the value of the rents. (7) He erred in taxing any of the costs against Burris and Murray. (8) He erred in not holding and decreeing a

restitution of the purchase money paid by Burris to Mrs. Rawley. (9) He erred in not decreeing the rents of these town lots while in the hands of the receiver to Burris and his vendee, Murray. (10) He erred in decreeing that the deed to Burris and wife to G. B. Murray should be delivered up and canceled, and removed as a cloud upon the title of complainant Mrs. Rawley.

We find the following facts: (1) That the deed from complainants, Rawley and wife, to Burris to lot 125 was legal and valid, and binding upon Mrs. Rawley, and that her privy examination thereto was in accordance with the law. We further find that she was not coerced or induced, by fraud or compulsion on the part of her husband, to execute said deed. (2) We find that Mrs. Rawley joined in the conveyance of the other four lots to Burris, but that her privy examination was never taken to said deed. (3) We find that she joined in the bill filed by her husband to enforce the vendor's lien on said lots, and under which bill she and her husband obtained a decree for the sale of the lots to satisfy the purchase money due from Burris, their vendee. (4) We find that she was cognizant of said proceedings and their purport, and that she employed M. G. Butler to represent her, in conjunction with her husband, in said litigation. (5) We find that she was a defendant to the bill of S. S. Dudney, filed in the chancery court at Gainesboro, under which bill Dudney sought to reach the purchase money due from Burris to her and her husband. (6) We find that she filed by her solicitor and that of her husband a joint answer with her husband to the bill of said Dudney, and in that case there was a decree for the sale of the lots for the satisfaction of the purchase money due from Burris, and for a subjection of a sufficiency of it to satisfy the claim of said Dudney sued for by him. (7) We find that Burris went into possession of said lots immediately after his purchase from her and her husband and their deed to him, and that he put permanent improvements thereon, and that the complainants, David A. and Nancy S. Rawley, were cognizant of the improvements and the expenditures being made by said Burris to improve said lots. (8) We find that under the bill of complainants filed to enforce their vendor's lien it was decreed that the sum of \$48 and some cents was due from Burris as purchase money for said four lots, and that they were ordered to be sold in that case to satisfy the decree for the purchase money due thereon. (9) We find that defendant Murray paid off the purchase money due and decreed to be due under the bill filed by complainants, and that after paying the same he took a conveyance to said lots from Burris and wife, and took possession of the lots immediately after his purchase from Burris and wife.

These are the substantial and material facts in the case. The question at once arises as



to whether or not, under the facts stated in the bill and appearing in the proof, Mrs. Rawley is estopped to set up any claim to said four lots. It may be proper to state a further fact, which we infer to be a fact from the proof, and that is, if these four lots belonged to Mrs. Rawley, she presented no record title of her ownership of said lots, but the proof appears to indicate that she was the owner of them, and, for the purposes of this case, we find that she was their owner. It is certain that, under the facts, David A. Rawley is estopped to set up any claim to these lots; and, if the doctrine of estoppel is applicable at all to a married woman, it is applicable in this case to Mrs. Nancy Rawley, and her claim should not be allowed. The doctrine of estoppel has been frequently applied to infants and married women by courts of this state. *Galbraith v. Lunsford*, 87 Tenn. 89, 9 S. W. 365. In this case it is said in the application of the principle of equitable estoppel there is no exception in the case of married women. It is also held in this and other cases, in principle, that a married woman may, by acts in pais, done without any intentional fraud, estop herself to assert title to her realty against persons misled to their prejudice by such acts. *Galbraith v. Lunsford*, supra; *Barham v. Turbeville*, 1 Swan, 437; *Crittenden v. Posey*, 1 Head, 320; *Pilcher v. Smith*, 2 Head, 208; *Cooley v. Steele*, Id. 606-608; *Hamilton v. Zimmerman*, 5 Sneed, 39, 48; *Adams v. Fite*, 3 Baxt. 69; *Stephenson v. Walker*, 8 Baxt. 289; *Howell v. Hale*, 5 Lea, 405; *Herm. Estop.* 1234; *Pom. Eq. Jur.* §§ 814, 815, 817, 818. We had occasion, at this term, in a case from Nashville, to consider this subject, and held, after a full investigation, that the doctrine of equitable estoppel applied, under a proper state of facts calling for its application, to a married woman, who was also a minor. *Bostick v. Trust Co.* (present term), and authorities there cited. The reason underlying the rule is that neither minority nor coverture gives the privilege or license to perpetrate a fraud or wrong upon another. It was said by an eminent lawyer, sitting as a special judge in our supreme court nearly 40 years ago, that "representation in courts of justice is a necessity of civilized society, and the acts or neglects of the representatives must, in some degree, be binding upon the party represented." *Ewing*, special judge, *Winchester v. Winchester*, 1 Head, 485-487. In the case at bar it appears that Mrs. Rawley joined in filing a bill to sell these lots to enforce a vendor's lien on them, asserting that the lots had been sold, and that the purchase money was due and unpaid, and asking and obtaining a decree for their sale to pay it. The decree that she and husband obtained was based upon their averments that the lots had been sold by them, and their decree was paid, and they got the benefit of the payment. Neither will be heard, in a court of equity, to say that their sale was inoperative, and that their decree,

enforced by the collection and reception of its fruits, was ineffectual to divest their title. Clearly, this would be the result, in the absence of an averment and proof of fraud perpetrated upon them. It results, nothing more appearing in the case, that the chancellor was in error in decreeing that Mrs. Rawley was entitled to be restored to the possession of these four lots, and in ordering a writ to issue to put her in possession. He should, in our opinion, have dismissed the bill entirely.

The question remains whether this aspect of the case is properly before us on the writ of error of *Burris and Murray*. As before stated, the complainants moved to dismiss the writ of error on the ground that the decree against these defendants was not a final decree in the sense of the law authorizing a writ of error. The question raised by the motion is a nice one, and may not be free from grave doubt. If the aspect of the case involved in the writ of error is properly before us, by virtue of the writ the whole case, in so far as the title to the property is concerned, is before us, and we can settle all the real questions raised by the pleadings and proof. It is to be remembered that the chancellor decided against complainants as to lot 125, and that they prayed and were granted an appeal to the supreme court from this part of the decree. It was manifestly within the discretion of the chancellor, under the statute, to grant their appeal, and it is questionable if they did not have the right to appeal, as a matter of right. He decreed against *Burris and Murray* as to lots 133, 134, 135, and 136, and ordered a writ to issue to put Mrs. Rawley in possession. Growing out of the improvements put upon the lots, and the taxes paid by defendants, he ordered a reference to ascertain their value and amount, to the end that they might be set off against rents. This was such a decree as the chancellor, under the statute, might grant these parties an appeal from to the supreme court, and he did grant *Burris* an appeal, and gave him time to perfect it by giving bond; but he failed to give the bond in the time prescribed. The question is, "Can he bring it up by writ of error?" Under our statute (*MILL & V. Code*, § 3895; *Shannon's Code*, § 4911) "a writ of error lies from the final judgment of the county court to the circuit or supreme court, and from the circuit and chancery courts to the supreme court, in all cases where an appeal in the nature of a writ of error would have lain." Our supreme court, at an early day, held that, where an appeal in the nature of a writ of error, prayed and granted, had been lost by failure to comply with the requirements of law, the delinquent party might sue out a writ of error, within the time prescribed. *Covington v. Nelson*, 6 Yerg. 475, 476. It is manifest from the statute, and also our cases hold, that a writ of error is allowable only from a final judgment; or, as expressed in some of the cases, only where an appeal would have lain as a matter of

right. *Meek v. Mathis*, 1 *Helak*. 540; *Hume v. Bank*, 1 *Lea*, 220-222. "But," said the eminent judge who delivered the opinion in *Hume v. Bank*, *supra*, in a case in the same volume, "a writ of error lies of right where an appeal, or appeal in the nature of a writ of error, would lie, and sometimes, it seems, where the appeal is properly refused." *Beasley v. Ferriss*, 1 *Lea*, 462. He cites *Code*, § 3176; *Sevier v. Justices*, *Peck*, 334; *Ragsdale v. State*, 2 *Swan*, 416; *Ex parte Chadwell*, 3 *Bart*. 98. The question simply is, "Was the decree against *Burris* and *Murray* such a final decree as, under the statute, they had the right to appeal from?" The suit as to these lots was, in legal effect, an ejectment suit to get possession of them. The court gave complainant a decree for them, and ordered a writ to issue to put her in possession and to put defendants out. The matter of balancing rents, taxes, and improvements was a mere incident of the ejectment action, and, in a sense, was a suit independent of or separate from it. The settlement of these questions was no essential part of the suit to recover possession of the lots and the assertion of title thereto. The decree ordering the writ of possession to put complainant in and the defendants out of possession was, as we believe, under the facts, a final decree in the sense of the statute, from which the parties had the right to appeal. If correct in this, it follows that the motion to dismiss the writ of error is not well taken, and it is disallowed. This holding results in the reversal of the decree of the chancellor as to these four lots 133, 134, 135, and 136, and the dismissal of the whole bill, and it is so ordered and decreed. The cause will be remanded to the court below for proper proceedings in conformity to this opinion for a disposition of the rents in the hands of the master or receiver to the parties entitled thereto under this opinion. The complainants will pay the costs of the appeal and the costs below. The other judges concur.

Affirmed orally by supreme court, March 3, 1898.

**PRESCOTT et al. v. TOWN OF LENNOX.**  
(Supreme Court of Tennessee. Sept. 3, 1898.)  
**MUNICIPAL CORPORATIONS—DIVISION—PROPERTY RIGHTS.**

On a division of a municipality, in the absence of legislative regulation, each portion will hold in severalty for public purposes the public property which falls within its limits.

Appeal from chancery court, Shelby county; Sterling Pierson, Judge.

Bill by D. H. Prescott and others against the Town of Lennox. From a decree in favor of complainants, defendant appeals. Reversed.

J. C. Adams and Adams & Trimble, for appellant. R. H. Prescott, for appellees.

BEARD, J. This is a controversy over the title to a lot, and the right of possession of a

building erected thereon, located in the incorporated town of Lennox. The territory within this municipality originally formed a part of the Eighteenth school district of Shelby county, but was taken therefrom and legally organized into an independent corporation in the year 1896. Before the separation occurred, the lot was acquired, and the building in question was erected, by the predecessors in office of the complainants, who are the present school directors of the Eighteenth school district, for public school purposes, and the bill in this cause was filed to have established the right of the complainants, as such directors, to this property, and to have the board of education of defendant corporation, as well as the municipality, perpetually enjoined from interfering with the control over it. We think the great weight of authority is to the effect that, upon the division of a municipality, in the absence of legislative regulation, each portion will hold in severalty, for public purposes, the public property which falls within its limits. As supporting this proposition, we refer to *Laramie v. Albany*, 92 U. S. 315; *Mt. Pleasant v. Beckwith*, 100 U. S. 525; *County of Chickasaw v. County of Sumner*, 58 *Miss*. 619; *Hempstead v. Hempstead*, 2 *Wend*. 109; *School Dist. v. Tapley*, 1 *Allen*, 49; *Inhabitants of Bloomfield v. Mayor, etc., of Borough of Glen Ridge* (N. J. Ch.; 1896) 33 *Atl*. 926; *School Township of Allen v. School Town of Macy* (Ind. Sup.) 10 N. E. 578. This view was taken by this court in the unreported case of *City of Nashville v. Lawrence*, decided at the December term, 1892 (Nashville), where it was held that valuable property acquired and used for school purposes by the school directors of a school district, situated within the limits of the territory afterwards annexed by legislative act to, and becoming part of, the municipality of Nashville, there being nothing to the contrary in the act of annexation, passed under the control of that city for public purposes.

The complainants rest their claim largely on the case of *City of Winona v. School Dist. No. 82*, determined by the Minnesota supreme court in January, 1889, and being reported in 41 N. W. 539. The question there is the same that is involved here, and that court, in an opinion in which is carefully gathered and criticised many of the cases, reached an opposite conclusion. While conceding the ability of that opinion, and giving full force to its suggestion that some of the cases relied upon as support for the contrary view contain simply dicta, we believe that sound reason and a wise public policy require an adherence to the rule as applied in *City of Nashville v. Lawrence*, *supra*. Municipal corporations are called into being in the interest of the public, and, in order that they may better subserve their purpose, they have the right to create and control all the agencies and appliances essential to the health, safety, and convenience of the communities constituting them. These agencies and "appliances, whether engine house,

school house, hydrants, or sewers, are so distributed as to be of the most efficient service to the public. They are brought into existence to be so used. Now, when the territorial limits of a corporation are diminished by exclusion of a part of its territory, the power of control of the public agent over their appliances we think must be restricted to the newly-defined limits of the corporation, unless the legislature does what is unusual,—confers a power upon its agents to act extraterritorially." *Inhabitants of Bloomfield v. Mayor, etc., of Borough of Glen Ridge, supra.* In the present case it is evident that the property in question cannot now be used for school purposes, unless by the board of education, representing such uses, within the limits of the new corporation; and, if complainants were permitted to control it at all, it would be only on the idea of an ownership which alone could be divested by grant, or by express legislative enactment. Such theory, however, would ignore the fact that the title to such property is only held in trust for the public, and, by the change of municipal conditions, the cestui que trust has become that public, constituting the new corporation of Lennox. We agree that with the facility with which corporations, under the provisions of the Code, may be called into being, injustice may sometimes be worked. This is a matter, however, for legislative correction. But it is impossible to make one rule for corporations thus organized, and another for those created by special grant from the legislature. So, in adopting the general rule already commenced, and making it applicable to all municipal corporations, however created, there will be, we think, the closest adherence to legal principles, and the nearest approach to justice.

In the present case there is no statutory provision under which complainants can exercise any control over this property, and it follows that the decree of the chancellor establishing their right to it was erroneous, and his decree is reversed, and their bill is dismissed, with costs.

### HAYDEN v. CITY COUNCIL OF MEMPHIS.

(Supreme Court of Tennessee. Sept. 8, 1898.)

CERTIORARI — WHEN LIES — MUNICIPAL BOARDS — REMOVAL OF MEMBERS — CHARGES — VARIANCE — JUDGMENT.

1. Const. art. 6, § 10, authorizes inferior courts to issue writs of certiorari on sufficient cause. Shannon's Code, §§ 4853, 4854, provide that the writ will lie on sufficient cause where no appeal is given, or where an inferior tribunal exercising judicial functions has exceeded the jurisdiction conferred, and is acting illegally, or where, in the judgment of the court, there is no other plain, speedy, or adequate remedy. *Held*, that the circuit court may require a city council by certiorari to send up for revision the record of proceedings had on the removal of one of its members.

2. Whether a municipal board, in proceedings for the removal of one of its members, proceeds under Acts 1879, c. 11, § 16, providing for

such removal for certain causes, or in the exercise of its inherent power, formulated charges are essential.

3. In proceedings by a municipal board for the removal of one of its members, where he was specifically charged with asking for a bribe, and he was found guilty merely of failing to disclose to the council that a bribe had been offered him, the variance was fatal.

4. Where the first part of the record of a judgment of motion of a member of a city council recited that the member was guilty of failing to disclose to the council that a bribe had been offered him, and the latter portion recited that the council did not find it necessary to determine whether the member offered to take a bribe as charged, or whether he was offered a bribe, the judgment was without support.

Error to circuit court, Shelby county; L. H. Estes, Judge.

Petition by Alf. T. Hayden against the city council of Memphis. From a judgment dismissing the petition, plaintiff brings error. Reversed.

J. J. Du Bose, for plaintiff in error. Metcalf & Walker, for defendant in error.

BEARD, J. We have no doubt of the supervisory power of the circuit court of Shelby county over the city council of Memphis in the case presented in this record, and that, to determine whether that tribunal pursued legal methods in removing the plaintiff in error as a member of the council, that court could require, by its writ of certiorari, the record of the proceedings for the removal to be brought before it for a revision. Mr. Dillon, in volume 2 (4th Ed.) § 925, of his work on Municipal Corporations, is abundantly sustained by authority in saying that it is well settled in England that courts of superior and general jurisdiction will examine, on certiorari, the proceedings of inferior or special jurisdiction courts or officers; and, in section 925, in stating the unquestionable weight of authority in this country to be, "if an appeal be not given, or some specific mode of review provided, that the superior common-law courts will, on certiorari, examine the proceedings of municipal corporations, even although there be no statute giving this remedy; and, if it be found that they have exceeded their charter powers, or have not pursued those powers, or have not conformed to the requirements of the charter or law under which they have undertaken to act, such proceedings will be reversed or annulled. An aggrieved party is, in such case, entitled to a certiorari ex debito justitia." This court has had occasion frequently to recognize the extensive limits of this writ. In *Mayor v. Pearl*, 11 Humph. 243, it is said: "It [the writ] has been adopted by us as the almost universal method by which the circuit courts of general jurisdiction, both civil and criminal, exercise control over all inferior jurisdictions, however constituted and whatever their course of proceeding, as well where they have attempted to exercise a jurisdiction not confirmed as where there has been an irregular or erroneous exercise of jurisdiction, and

in criminal proceedings as well as in civil. Instead of restricting the use of the certiorari to the proceedings of inferior courts, whose proceedings are not according to the course of the common law, and where, for that reason, a writ of error will not lie, it is held that it lies to remove the proceedings of all tribunals exercising jurisdiction under statutory regulations, whether in a summary way or by a mode of proceedings not according to common-law form." As possibly an extreme illustration of the exercise of this supervisory power, the case of *Durham v. U. S.*, 4 Hayw. (Tenn.) 54, may be referred to, where the proceedings of a court-martial were brought into the circuit court by this writ, and a judgment assessing a fine was held void. Not content, however, with having the right to the writ of certiorari depend upon the principles of the common law, as they had been liberally applied in modern jurisprudence, it was guaranteed to the citizens of this state by the constitution of 1833, and again by the present constitution. In addition, the legislature has sought to make effectual this constitutional right in Shannon's Code, §§ 4853, 4854, so that now it is well established in this state that "the writ of certiorari will lie upon sufficient cause shown, where no appeal is given; where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally; where, in the judgment of the court, there is no other plain, speedy, or adequate remedy." *Tomlinson v. Board*, 88 Tenn. 1, 12 S. W. 414. In the present case we have a municipal board, exercising judicial functions in trying and removing from his corporate office one of its members, from whose judgment of amotion, confessedly, no appeal is given. It only therefore remains to be seen whether "sufficient cause" is shown by the petition for the issuance of the writ. Before considering that phase of the question, it is proper to say that we do not regard the cases of *Wade v. Murry*, 2 Sneed, 50, and *Tomlinson v. Board*, supra, as in the way of this conclusion, for in both of those cases the court found clear evidences of the intention of the legislature that the judgments of the special tribunal called in question there should not be the subject of review in other and superior jurisdictions, and in each case a sound public policy forbade a review of the conclusions severally reached in those cases.

Returning, does the petition assign sufficient cause for invoking the aid of this writ? The petition alleged—and, having been dismissed on motion, its averments must be taken as true—that as a member of the board of public works and of the legislative council the petitioner was notified that he must make answer to the specific charge that he had offered Alsop & Johnson, architects, to secure an acceptance by the board and council of their plans for a market house, if they would pay to him \$800 in installments, and that this proposition was made by him while the question

of the adoption of these plans was still pending; and that in answer to this notice he appeared, and made defense, but that, instead of convicting him of the offense thus charged, he was found guilty of an offense not charged, to wit, of "grossly immoral conduct and of malfeasance of office," in words following: "According to the testimony of said Hayden, one B. C. Alsop did, on the 30th or 31st of March, 1896, offer to pay money to said Hayden for his vote and influence in the question of adopting the plans for the Beale Street Market House submitted to the council by Alsop & Johnson, and then under consideration by the council; and in that said Hayden, after said offer to pay money for his vote and influence, failed to report same to the council, and signed a committee report recommending the adoption of the plans submitted by Alsop & Johnson, and at the council meeting \* \* \* voted for the adoption of said plans. The council reaches this conclusion on the testimony of said Hayden, and does not find it necessary to determine whether said Hayden offered to take a bribe from said Alsop, or whether said Alsop offered a bribe to said Hayden." Upon this finding the board and council thereupon removed Hayden from office and declared his place vacant. Was this judgment of amotion warranted? The provision of the act of the legislature under which this action took place is as follows: "The legislative council shall have power to remove either of said commissioners or either member of the board of public works for malfeasance or misfeasance in office, or habitual drunkenness, or grossly immoral conduct." Acts 1879, p. 27, c. 11, § 16. While there is this legislative authority given, yet this was not essential, as it is well settled that a municipal corporation has the incidental or inherent power to make by-laws for the removal of one of its officers for just cause. This was decided in *Rex v. Richardson*, 1 Burrows, 517, and has been recognized as sound law in England and America in many cases. But, whether acting upon express legislative warrant or in the exercise of inherent power, in the matter of amotion, the corporation must act with some degree of conformity to the rules of the common law. There must first be proved notice given to the accused of the time when and the place where the trial body will meet, in order that he may be present in person and with his witnesses. This notice may be dispensed with, as in the present case, by the appearance of the accused, and his answer to the charges. 1 Dill. Mun. Corp. (4th Ed.) § 254. Then "there must be a charge or charges against him, specifically stated with substantial certainty; yet the technical nicety required in the indictments is not necessary." Id. §§ 5, 255. The text writers, as well as the decided cases, lay emphasis upon this necessity to formulate charges as an essential in all proceedings, where the tribunal has the power of amotion for cause. "The power of removal can only be exercised with

charges are made against the accused." *State v. City of St. Louis*, 90 Mo. 19, 1 S. W. 757. And in *Ham v. Boston*, 142 Mass. 90, 7 N. E. 540, it was held that a board of police could not exercise the right of removal without first assigning a cause, and then giving the accused an opportunity to be heard. To the same effect are *Board v. Darrow*, 13 Colo. 460, 22 Pac. 784; *Hallgrens v. Campbell*, 82 Mich. 255, 46 N. E. 381; *Willard's Appeal*, 4 R. I. 505. It being clear on authority that formulated charges are essential to the regularity of proceedings in such cases, it follows necessarily that a conviction in the absence of such charges, or outside of or beyond the purview of those that are made, cannot be maintained.

As has already been seen, the specific charges made against Hayden and the one he was called upon to answer say that he had offered, upon the payment of money by Alsop & Johnson to him, to secure an acceptance of their plans for the new market house; and he is convicted of the offense—giving the most liberal construction to the finding—of failing to disclose to the common council that a bribe had been offered to him by Alsop for his vote and influence while these plans were under consideration. We think it clear, if the rule requiring specific charges is to be enforced, this is a fatal variance, which necessarily avoids the judgment of the council in this case. But, over and beyond this, we think it clear that the judgment of amotion cannot be sustained upon a record such as is here presented. As will be seen, while in the first or preceding part of its record the council concludes that Alsop did "offer to pay money to said Hayden for his vote and influence," yet in the last portion it is stated that it is not deemed necessary to determine whether Hayden offered to take, or was offered by Alsop, a bribe. It is apparent that, if he neither offered to accept nor was offered a bribe, then this judgment was left altogether without support. No explanation is furnished of these inconsistent recitals, and we have not been able to find any satisfactory mode of reconciling them. For these reasons we are satisfied the petition in this cause presented a sufficient cause for the circuit court's issuing the writ of certiorari, and that its duty in the exercise of its supervisory jurisdiction was to have quashed this judgment of the common council. The judgment of the circuit court in dismissing the petition is reversed, and the judgment of removal pronounced by the common council is quashed by this court.

#### CHERRY v. YORK et al.

(Court of Chancery Appeals of Tennessee.  
Feb. 25, 1898.)

JUDGMENTS—RES JUDICATA—WAIVER—IDENTITY OF ISSUES—JURISDICTION OF JUSTICES OF THE PEACE—EQUITY JURISDICTION—REVIEWING PROCEEDINGS AT LAW—APPEAL—ABANDONMENT.

1. On appeal from a judgment of a justice of the peace in an action for trespass on land, the

circuit court cannot try the question of title, since the justice had no jurisdiction to try it.

2. An answer to a bill to establish a boundary alleged that the same matters were in issue in a prior action of trespass between the parties, in which defendants recovered judgment as plaintiffs therein, but there was no proof of what evidence was introduced in the prior case, or of what the ground of recovery was. *Held*, that a defense of res judicata was not established.

3. The attorneys for a defeated defendant failed to prepare a bill of exceptions through want of time and pressure of business, though an appeal had been taken, and a bond executed. Defendant was not connected with the delay, but he told the clerk not to send up the transcript until he had seen other attorneys. More than 30 days after the rendition of judgment the clerk issued an execution, and about three weeks later defendant procured other attorneys, and filed a bill to enjoin execution of the judgment. *Held*, that defendant had not abandoned the appeal.

4. Where defendant in a bill to establish a boundary answers on the merits, and submits the whole matter for decision, and alleges a confusion as to boundaries, and that complainant has taken possession of part of the disputed territory, and asks that he be ejected therefrom, and that defendant have a decree for damages, it constitutes a waiver of a former adjudication in favor of defendant in an action of trespass, and hence the chancery court, in adjudicating all matters in dispute, does not err as by reviewing proceedings at law.

Appeal from chancery court, Clay county; T. J. Fisher, Chancellor.

Bill by H. W. Cherry against Mary York and Robert Pedigo to have the boundary line between certain tracts of land established, and to have defendants enjoined from proceeding under a certain previous judgment in the matter. From a decree in favor of complainant, defendants appeal. Modified.

John McMillin and Granbery & Marks, for appellants. G. B. Murray, for appellee.

BARTON, J. The subject-matter of dispute between the parties in this cause is a tract of land of about 100 acres, and certain timber cut therefrom. The trouble arose over a difference of opinion as to where the boundary line between a tract confessedly owned by the complainant and one confessedly owned by the defendants is located. The title of both parties is traced back to a grant by the state of North Carolina to one Patrick McGibony of 1,920 acres, out of which grant the tracts claimed by complainant and by defendants are carved. The tract claimed by the defendants is described as follows: "Part of a tract of 1,920 acres granted by the state of North Carolina to Patrick McGibony for his military services by grant No. 3,359, and bounded by lines beginning at a beech marked S. W. on the west boundary line of the aforesaid tract, running thence south 307¼ poles to a dogwood and beech, thence east 200 poles to a poplar, thence north 307¼ poles to a white oak, thence west 200 poles to the beginning; containing 384 acres." The question is as to the location of the last-named line. It is practically conceded that the defendants have good title to all the lands that come

within the calls of their deeds, and that complainant has good title to the land that comes within the calls of his deed. Indeed, the complainant has proven an open, continuous, notorious, adverse, and peaceable possession under his deed, which purports to convey the title in fee simple, for more than 20 years, and this, of course, will give him a good title up to the boundaries of his deed, there being no adverse possession within the disputed territory. So the only question is as to where the boundary line between these two tracts of land should be properly located. We adopt as explanatory of and a part of our opinion the map shown on page 98 of transcript. And the question is whether or not the true boundary line between the parties is the line marked "200 poles," and running from corner marked "Beech and Walnut" to corner marked "White Oak," located some 307 $\frac{1}{4}$  poles north of the corner marked "Beech," southwest corner, which is the line claimed by the complainant, or whether it is the line located some 80 poles north of this line, marked on the map preferred to "Disputed Line," which is the line claimed by the defendants. This is the real subject-matter of dispute between the parties, though the manner in which it is brought before the court, as will be hereinafter stated, is the matter of most difficulty in this case. As to this question of fact as to the proper location of this disputed line, and as to who owns the 100 acres between the two lines contended for, we have but little difficulty in finding the issue of fact in favor of the complainant, and we find as a fact that the true boundary line between these parties was properly located by the chancellor, and is the line as described by him in his decree, being a line located 307 $\frac{1}{4}$  poles—as called for in the defendants' title papers—north from the point marked "Beech," the southwest corner of the 1,920-acre grant and the Mary York tract. The line may be further described as running from a point where there is a walnut stump near where there appears to have been a tree blown up by the roots, and which points 307 $\frac{1}{4}$  north from southwest corner aforesaid; thence east 210 poles to a point where there is a white oak down. It would serve no good purpose to go into a discussion of the evidential facts upon which we base this conclusion, as we are entirely satisfied of its correctness. Among other things, however, we might refer to the fact that this location answers with exactness the calls of the deed. A survey of the tract as thus located discovers marked lines around the entire tract, and the northern boundary line of the York tract as thus located is found to be a marked line. There is some evidence going to show that the line marked "Disputed Line" also had some marks on it; but the weight of the evidence, to our mind, is that these were not landmarks, and this was not the true marked line. But there are many facts and circumstances which might be cited to show the correctness of the chancellor's finding, but we deem it unnecessary to

do so, and need only add we have given all the proof careful investigation, and find as a fact that the true line is as claimed by the complainant.

As to the other issues and questions involved in this case, which we find much more troublesome of solution, they are as follows: It appears that for many years—probably more than 25—the complainant and those under whom he claims had some cleared land and inclosures within the disputed territory. But, outside of that, shortly before this trouble arose, the complainant cut within this disputed territory and on the land which we have found belonged to him certain timber, which he disposed of. Thereupon the defendant Mary York, by her guardian, brought suit against the complainant for damages for the cutting of the timber. This suit was brought before a magistrate, where a trial was had, and judgment in favor of defendant in that case, complainant in this. That case was appealed to the circuit court, where the result of the magistrate was reversed, and a verdict and judgment had in favor of the plaintiff in that case, the defendant in this. Thereupon an appeal was prayed to the supreme court by the defendant in that case, the complainant in this, and shortly thereafter complainant filed this bill to have the matters of dispute between the parties settled, and to enjoin the further prosecution of that suit then pending in the supreme court. The defendant filed a demurrer, which was overruled, and afterwards an answer. The proceedings and judgment in the case before the magistrate, and subsequently determined in the circuit court, are relied on by the defendants as a bar to the proceedings in this case. It therefore becomes necessary to state with fullness and accuracy the state of the pleadings and of the proof on the points thus raised.

The bill in this case alleges the ownership by the complainant of the tract of land described in his title papers, which, as we have found, included the land in dispute. The bill then proceeds: "Your orator further avers and charges that he and those under whom he claims had such possession of said land for more than half a century. Your orator states to your honor that defendant Mary York, who is a lunatic, and to whom R. I'edigo is a regular guardian, having charge of her lands and estate, claims to be the owner of the following described tract of land, which lays near to your orator's tract of land aforesaid, to wit." The bill then describes the tract of land as above stated, claimed by the complainant, and then proceeds: "The tract of land so claimed by Mary York, as aforesaid, does not reach or include any portion of your orator's said tract of land, yet, notwithstanding this fact, defendants are fraudulently setting up claim to a portion of your orator's land, and to a portion of land to which defendants have no right or title or color thereof, and no sort of right, title, or color for said land and the timber there-

on situated. Yet, notwithstanding these facts, on March 31, 1894, by a justice's warrant before H. L. Gist, an active justice of the peace for Clay county, Tennessee, against your orator, they sought to recover damages for alleged trespass by your orator on said lands, to which defendants are fraudulently and falsely setting up claim without title, right, or color thereof. Said suit was tried and determined by said justice, and judgment was by him rendered in favor of your orator and against defendants hereto, and said suit was dismissed, and said defendants were adjudged to pay all the cost, from which judgment defendants hereto prosecuted their appeal to the circuit court of Clay county, Tennessee, where said suit was tried and determined, and judgment rendered on March 1, 1895, in favor of defendants hereto, and against your orator, for \$200 and the cost of suit, which is some \$128, aggregating \$328. From said judgment so rendered against your orator he prayed and obtained an appeal to the December term, 1895, of the supreme court, at Nashville, Tennessee, which was granted to your orator upon his giving bond and security in the penalty and conditions required by law." The bill then alleges that the bond was executed and accepted and the appeal granted, but that, notwithstanding this, the clerk of the court had failed and refused to recognize the appeal, and in positive violation of his duty had disregarded the order granting the appeal, and had issued an execution on the judgment for the judgments and costs, which was in the hands of the sheriff of Clay county, who was threatening and intending to levy the same. It was alleged that by the appeal that cause was transferred to the supreme court, and this action of the clerk was illegal and unauthorized; and it was alleged that the clerk failed and refused to send a certified transcript of the case to the supreme court. The bill alleged fraudulent collusion by the clerk with the defendants. The bill further proceeds: "The trespass suit was brought to recover damages for cutting timber, which the defendants alleged had been cut by your orator on the tract of land hereinbefore described, as the land claimed by the defendants hereto. But your orator avers that none of said timber was cut on said land, nor upon any lands to which defendants have any valid claims or title. Your orator avers that defendants have no deeds, papers, records, or muniments of title whatsoever that cover or include any parts of the land from which any part of the timber was cut or taken that was involved in said action for trespass. Defendants hereto are falsely claiming, and fraudulently so, that the line of their tract as claimed by them covers and includes the land from which said timber involved in said trespass case was taken, and this they claim to reach and lap over and cover said land, and that your orator's line is not where it is claimed to be by your orator; and hence there is confusion of and disagreement be-

tween your orator and defendants as to the true north boundary line of defendants' tract as claimed and the southern boundary line of your orator's tract; and hence it will be seen by your honor that it is necessary, and your orator avers that it is necessary, in order to quiet possession, and to prevent a multiplicity of lawsuits between your orator and defendants for various numerous petty trespasses, that the disputed line of your orator's tract and of the tract of land claimed by the defendants be settled, defined, declared, and established." The bill then goes on to show that complainant's remedy by appeal in the trespass case had been greatly embarrassed by reason of the fact that his lawyers had failed to make out a bill of exceptions in the case, which failure, he alleges, was owing to the fact that the case was decided on Friday of the term, that the court adjourned on Saturday, that the lawyers were pressed with other business, and did not have sufficient time to make out a bill of exceptions. The bill avers that it is necessary, to the attainment of justice, that the further prosecution of the trespass case be enjoined. The prayer of the bill is for injunction, as indicated, to enjoin the execution wrongfully issued by the clerk, and any other proceedings under the judgment obtained in the circuit court, to have said judgment declared void, and to have further proceedings in the supreme court enjoined, and to have the line between the parties declared and established. To this bill the defendants filed a demurrer, stating as grounds: (1) That there was no equity on the face of the bill. (2) The complainant's remedy, if he had any, was by an appeal to the supreme court. (3) The bill showed that the failure to get out proper bill of exceptions was the failure and neglect of the complainant and his attorneys. (4) They demurred to the bill so far as it sought to try the title to the tract of land, because it did not show that defendants had ever entered upon the land, nor did it show what boundaries were in confusion. The demurrer was overruled, and the defendants answered. In the answer the defendants admit that the defendant Mary York, by her guardian, brought suit before a justice of the peace, as stated, on March 31, 1894, against the complainant; that this suit was tried and dismissed; that an appeal was taken to the circuit court, where the case was again tried, and where she, on March 1, 1895, recovered judgment against the complainant for \$200 and costs, as stated, from which judgment it was admitted that the complainant, Cherry, prayed and obtained an appeal to the supreme court. It is stated in this answer that the defendant had brought her suit against the complainant in this case for trespassing on the following described land (the answer then described the tract of land owned by her, as given by us above, and which, as we have found, did not include the territory in dispute); and the answer says that the suit was for removing crops from this land, cutting, removing, and destroying tim-

ber thereon, and converting the crops and timber to his own use. It is denied in the answer that Laishley, the clerk of the court, had failed and refused to recognize the appeal, and had failed and refused to send up a certified copy of the record to the supreme court; but it is averred that complainant had abandoned his appeal, and had directed the clerk of the court not to send up a certified copy of the transcript, which instruction he obeyed, and had thereupon issued an execution. The answer denies that the defendants were in any fault at all on account of the failure of the complainant's attorneys to make out a bill of exceptions, and denies the allegation of the bill (which we failed to state above) that there had been an agreement between the complainant's and defendants' attorneys with reference to making out a bill of exceptions. The answer admits that the complainant claimed the tract of land as set out in the bill, but denies that the complainant was the owner of the same. The answer admits that the north boundary line of the respondents does include a portion of the land claimed by the complainant, and then avers, after admitting the proceedings before the justice of the peace, that there was a judgment rendered in the circuit court, before stated; "that proof was introduced on both sides in the circuit court case as to the matter in controversy in the proceedings in the circuit court, as aforesaid, and said former cause was heard and determined on the merits in favor of the defendants; said circuit court adjudging these defendants to recover off of complainant the sum of \$200 and all cost, for which execution may issue. These defendants plead said former suit, proceeding, and adjudication in bar of the present bill, and that said former proceedings were for the same matters, between the same parties, and to the same effect, and for a like relief, as he (the complainant) does by his present bill demand and set forth in this court." Respondents then state by way of cross bill that complainant had, subsequent to the commencement of the trespass suit on March 31, 1894, committed various acts of trespass, and was now trespassing, upon said land, and threatening to continue to do so, and had actually taken possession of part of the same, and cultivated in wheat and corn about 15 or 20 acres; and that he had, since the beginning of the action against him, as aforesaid, cut and carried off of said land valuable lots of poplar and white oak timber, and other valuable timber, and converted the same to his own use; and, unless restrained by writs of injunction, would still continue to commit acts of trespass, which acts of trespass would be acts of irreparable injury to the freehold. The cross bill further proceeds: "Respondents deny the charge of complainant's claim of the northern boundary line as too far north, and respondents say the true line is where they claim it to be." The prayer of the cross bill is that the complainant, H. W. Cherry be made a party defendant to the

cross bill; that he be enjoined from committing further acts of trespass on said land, and that a decree be entered against Harrison W. Cherry in favor of respondents for the land; and that the lines and boundaries of said land be settled; and that an account be taken as to the amount due from complainant to respondents by reason of the trespass on said land, and for the rents and profits thereof; that respondents be put in possession of the land from which they have been ejected by Cherry, and that full damages be allowed respondents for any and all waste and every injury done said land by complainant, H. W. Cherry; that respondents be given such other and general relief as they might be entitled to. The case was heard before the chancellor, who entered a decree dismissing respondents' cross bill and granting complainant the relief asked in the original bill, except that the chancellor did not enjoin the further prosecution of the trespass suit in the supreme court. The chancellor found the true line between the parties to be as claimed by the complainant. On this subject his decree is: "When it appeared to the court that complainant, H. W. Cherry, and the defendant Mary York each owned a tract of land, said tracts of land lay adjacent to each other, and adjoining each other; that complainant H. W. Cherry's tract lay immediately north of the defendant Mary York's tract of land; and that the southern boundary line of H. W. Cherry's tract was also the northern boundary line of defendant Mary York's tract of land. It further appeared that there was a contention and dispute between complainant, H. W. Cherry, and the defendant Mary York and her guardian, Robert Pedigo, as to where the true dividing line between the two tracts of land was located, and that the bill in this case was filed to settle, declare, establish, and define the true line between said two tracts of land; that it further appeared to the court that the line running due east from the walnut stump near the place where a tree seemed to be torn up by the roots, and at the end of 307½ poles running north from a beech marked "the southwest corner" to the Mary York tract, 200 poles, to the eastern boundary of the Mary York tract, and the line contended for by the complainant, Cherry, is the true dividing line between H. W. Cherry's land and defendant Mary York's land, and is the true southern boundary line of complainant's (Cherry's) land, and the true northern boundary line of Mary York's land; and that H. W. Cherry was the true owner in fee of all lands which lay north of said line." This decree further recites that the judgment upon which was issued the execution enjoined by the bill in this cause had been regularly and legally appealed to the supreme court, and the case had been transferred to the supreme court, and the judgment of the court below thereby vacated; and it was decreed that the execution issued by the clerk of the circuit court was illegally issued, and the same was perpetually enjoined. As stat-



ed, the cross bill of defendants was dismissed. From this decree the defendants prayed a broad appeal, and have assigned errors. The complainant prayed no appeal, but assigns as error that the chancellor did not perpetually enjoin the trespass suit held to be pending in the supreme court.

The only other facts that we need mention in the case is the effect of the evidence regarding the appeal, failure to make out the bill of exceptions, and the failure to send up the transcript. The judgment was obtained on March 1, 1895. The bill in this case was filed on April 26, 1895. The evidence shows that the attorneys who were employed on behalf of the complainant in this case, who were other attorneys than those now employed by him, did not make out a bill of exceptions. The reasons given by them are want of time and the pressure of other business. The evidence fails to show any fraud, or to connect the complainant or his attorneys in any way with the failure to make out a proper bill of exceptions. It is shown that an appeal was properly prayed, granted, and bond given and accepted. The complainant stated that he had not abandoned his appeal, and that he did not direct the clerk not to make out a transcript. The substance of the evidence of the clerk is that he did not issue the execution in question for more than 30 days after the judgment was rendered; that the attorney for the plaintiff in that case, after the expiration of the 30 days, came to his office, and asked him what had been done; that he (the clerk) told him, "Nothing;" that the case had been appealed to the supreme court, and bond executed. He says he then asked plaintiff's attorney, who is the attorney of defendants in this case, what he should do, and that he said to him that he should either issue execution, or send up the record to the supreme court; that he had seen Mr. Cherry, and he had told him not to send up his appeal to the supreme court until further orders from him; that he wanted to see Mr. G. B. Murray, his present lawyer. From all the testimony on this point it appears that the complainant in this case had not positively abandoned his appeal, unless the filing of the bill in this case could amount to such, but had directed the clerk of the court to hold up the making of the transcript. This was doubtless because he was making efforts to remedy the defect in regard to the bill of exceptions.

We do not think that the defense of *res adjudicata* relied on by the defendants is tenable in this case, for several reasons. First, because it appears that this suit was brought before a justice of the peace, while the final judgment was rendered in the circuit court. The jurisdiction could not have been enlarged by the appeal, and a justice could certainly not have had jurisdiction to try the question of title. In the second place, while we may readily infer or suppose on the question as to the correct location of the line, yet it is not so stated in the bill; the averments, in substance,

there contained being that the suit was a suit for trespass for timber cut on land claimed by the defendant, and it is alleged, too, that the complainant in this case, the defendant in that, had cut no timber on the land of defendant. It is true that the answer, in making this defense, says that the same matters were in issue in that suit and between the same parties as are involved in this cause, but there is no proof in the case to show what evidence was introduced, nor in fact to show on what grounds the recovery was had. A number of defenses might well have been made on an action of trespass. In order to make out a defense of *res adjudicata*, it must appear that the parties were the same, and that the matter involved was the same, and it must also appear that the matter was adjudicated in a suit, and before a court having competent jurisdiction to adjudicate the matter. This, as we have seen, does not appear. But, in addition to this, it further appears that from this judgment in the circuit court an appeal had been prayed and granted, and was at the time of the filing of the bill, and is yet, so far as this record shows, pending in the supreme court; and this is true, unless we should find that this appeal had been abandoned or dismissed; and the evidence in the record does not justify this finding upon our part. It is further insisted that in any event this judgment in the circuit court is binding and conclusive, although appealed from, as to the amount for which judgment was rendered, and that that case cannot, in effect, be reviewed by a bill in chancery, unless sufficient grounds were stated showing a basis for attacking said judgment and decree for fraud, or unless some ground for reviewing the judgment and proceedings in that case as for newly-discovered evidence was shown; and it is properly said that no such grounds are alleged or appear in this case. In reference to this last insistence, as well as the other point made that the circuit court judgment was binding as an adjudication as to the title of land, and cannot be reviewed, it may be further said that it appears in this case that the defendant answered on the merits, and submits the whole matter to the jurisdiction of the court, and, indeed, herself alleges a confusion, and shows a dispute as to boundaries, alleges that the complainant has taken possession of part of the disputed territory, asks that he be ejected therefrom, and asks that she have an account and decree for all damages and waste by the complainant committed on this disputed land; thus, in substance and effect, in our opinion, waiving all questions as to the adjudication in that suit in the circuit court, and submitting the entire matters of controversy to the jurisdiction of this court, and for adjudication in this case; being practically, as we think, an abandonment of the former suit. See the case of *Stothart v. Burnet, Cook, 417*, which is to the effect that, although certain matters in litigation may have been tried and

decided at law, if the defendant submits to the jurisdiction of the chancery court on a bill subsequently filed, and goes into the litigation, the complainant will be entitled to the full relief which his case merits. It is also a general principle, when a court of equity takes jurisdiction for one matter, it will take it in all, and settle all points of difference between the parties growing out of the subject-matter of litigation brought properly before the court by the decrees.

It is clear, as we have found, that the true boundary line is located as claimed by the complainant, that the land in dispute belongs to complainant, and that the timber about which the litigation was had was taken from complainant's land, and it would be obviously unjust that he should be held liable therefor; and, the parties having submitted the whole matter to the jurisdiction of the court, we think it should be properly settled here, and to do so will not be to undertake to review the proceedings had in the circuit court, but simply to settle a matter which the parties themselves have, by their course of conduct and pleadings, submitted to the jurisdiction of the court for settlement. The decree of the chancellor will therefore be modified and corrected so as to show that further prosecution of the suit brought before the magistrate and tried in the circuit court, from which there was an appeal, as above stated, is perpetually enjoined. But, inasmuch as the record shows that the complainant, through his attorneys, in the trespass suit in the circuit court, was guilty of negligence, we deem it but just and right, as a condition to the relief granted him in this case, that he should pay the costs incurred in the suit in the circuit court, and to the end that this may be done this cause will be remanded to the chancery court to the end that a reference may be had to ascertain such costs, for which a decree will be rendered by the chancellor against the complainant, H. W. Cherry. The report of the master may be based on a certified statement of the costs made by the clerk of the circuit court after the costs have been properly taxed in that court. The defendants will pay the costs of this cause in this court. The other judges concur.

Affirmed orally by supreme court, March 9, 1898.

### PERRY v. WILLIAMSON.

(Court of Chancery Appeals of Tennessee.  
Nov. 13, 1897.)

VENDOR AND PURCHASER—MISTAKE AS TO QUANTITY—REMEDY OF VENDOR—COVENANTS—WAIVER OF BREACH—PRIVATE ROADS.

1. A vendor intended to sell, and the purchaser to buy, in gross, land embraced within certain boundaries, described as containing a specified number of acres, "more or less," but there was a mutual mistake as to quantity, the acreage being about one-third more than they supposed. *Held* that, there being no superior knowledge or misrepresentation on the part of the

purchaser, the vendor could not recover for the excess in acreage.

2. A purchaser's knowledge of a passway across the land when he purchased does not estop him from objecting to it as an incumbrance, where he did not know that it was a right of way.

Appeal from chancery court, Giles county; W. L. Grigsby, Chancellor.

Bill by William Perry, Sr., against T. J. Williamson. From a decree in favor of defendant, complainant appeals. Affirmed.

H. R. Steele, for appellant. Flournoy Rivers, John A. Pitts, E. E. Eslick, and H. C. Lassing, for appellee.

NEIL, J. This case was tried in the chancery court of Giles county before the Honorable W. L. Grigsby, circuit judge, sitting by interchange. His honor rendered a decree in favor of the defendant, and the complainant thereupon appealed, and assigned errors.

The bill was filed on the 12th day of October, 1895, to enforce compensation for an alleged excess of about 100 acres in a sale of land made on the 5th of December, 1889, by complainant, Perry, to the defendant, Williamson, or to have a reconveyance of the excess. The bill charges, in substance, that the complainant supposed at the time of the sale that the tract contained only 304 acres, and that it was sold on that basis—not by the acre, it is true, but in view of the acreage being about 304 acres—at the price of \$7,000. It further charges that the defendant, Williamson, knew that the land contained 400 acres, or about that amount, and that he withheld this knowledge from the complainant. It further charges that prior to complainant's sale to defendant he conveyed to one Nix a roadway across the land; that this road was staked off, and being used openly as a private passway, and the deed thereto was of record before the sale to defendant; that this roadway does not damage the land sold to the defendant; that defendant, Williamson, had, however, recently brought suit against the complainant in the circuit court of Giles county on the covenants in the deed, on account of the incumbrance of the road. It further insists upon the right of complainant to come into the court of chancery "to have his claim for this excess of land adjudicated and settled, and also to have settled the question of his liability for damages to defendant." Thereupon the bill prayed that the circuit court litigation be enjoined in that court, and be transferred to and settled in the chancery court in the present cause; that judgment be rendered in the present cause in complainant's favor and against defendant for the value of the excess of land at \$23 per acre, or that the surplus of land be decreed to complainant in kind. The answer admits the purchase of the land at \$7,000; avers that defendant offered to have the land surveyed, and pay \$20 per acre for it, at the time the trade was closed, or to give complainant \$7,000 for the entire farm as it lay without a

survey, and that complainant accepted the latter proposition; that he bought the farm at \$7,000, in gross, and there was no sale by the acre, and no estimation made by the acre; that defendant did not know the number of acres in the tract when he bought it. Defendant, in the answer, further denies all liability for the excess, and says the whole tract, even at the 404 acres claimed by complainant, was not worth exceeding the \$7,000 he paid for it. As to the Nix roadway across the land, defendant answers that Nix has a valid roadway across the land by virtue of complainant's deed to him; that when he bought the land he did not know of the existence of this right of way. He admits the bringing of the suit in the circuit court, and insists that the land is damaged by the roadway. Upon these controverted matters a jury was called, and 13 issues submitted to them in the form of questions. The questions, and the answers of the jury thereto, are as follows: "(1) How many acres did complainant estimate the tract of land mentioned in the pleadings to contain when he sold same to defendant, Williamson, and how many did it actually contain, and how did complainant arrive at said estimate? Ans. When sold, 304 acres. It actually contained 404 acres. By a survey made by McConnell. (2) Did defendant, Williamson, at the time he purchased said land, know the tract contained more than the number of acres which complainant estimated it to contain, and, if so, did he withhold said information or facts from complainant? Ans. He did not know how many acres. (3) Did defendant, Williamson, know of the existence of the roadway in controversy over said lands when he purchased the same? Ans. He knew the road was there, but not as a right of way owned by Nix. (4) What is the value of the excess of land in said tract over the estimated quantity? Ans. \$1,750, or one hundred acres at \$17.50 per acre. (5) What is the amount of damage, if any, to said tract of land caused by the existence of said roadway? Ans. Two hundred and fifty dollars. (6) Was said sale made for a gross sum of money for the farm as a whole, or for a sum of money estimated by the number of acres in said farm? Ans. It was sold as a whole, and not by the acre. (7) Was said roadway at said time a well-defined road, or a passway without natural or artificial bounds? Ans. It was a farm passway. (8) At the time of said sale by Perry to Williamson, what was the value of said farm as a whole, as it then stood, incumbered by said right of way? Ans. \$7,000, less \$250 damages by roadway. (9) What was its value, then, without said right of way? Ans. \$7,000. (10) Was the tract of land sold by complainant to defendant upon the basis of an estimated number of acres arrived at by calculations for a certain amount or price, and, if so, what was the number of acres there estimated, and the price to be paid for same, and what was the

actual number of acres contained in the tract? Ans. It was estimated at 304 acres, and sold as a whole for \$7,000, and actually contained 404 acres. (11) Did or not the complainant, Wm. Perry, at or before the sale, show to the defendant the lines and boundaries of the land? Ans. He showed him in a general way. (12) Did the complainant, Wm. Perry, sell to defendant all the land embraced within the boundaries shown (if boundaries were shown), and does the deed embrace any more or other land than that intended to be sold by complainant and bought by defendant? Ans. He did sell all the land within the boundaries, and the deed does not embrace any more than complainant intended to sell and the defendant intended to buy. (13) Was the sale of this land made by complainant, Wm. Perry, to defendant for a gross sum for the whole farm, or by the acre at so much per acre? Ans. For a gross sum for the whole farm." Other facts appearing in the record, and not embraced in the findings of the jury, are as follows: Complainant's deed to defendant was made on the 5th of December, 1889. It describes the land thus: "A certain tract or parcel of land lying in the 16th civil district of Giles county, Tennessee, on the waters of Blue creek, bounded on the north by the lands of Wm. Hollis, Thomas Martin, and Wm. McAdams, on the south by the lands of H. C. Topp and W. H. McMillin, east by the lands of Mrs. R. A. Dougherty and Jno. Klizer, and west by the lands of Mrs. F. L. Johnson and J. W. Irby,—containing about 304 acres, more or less, being the same land on which the undersigned Wm. Perry has resided for a long period of time." Prior to the sale made to the defendant, Mr. Perry had given off of his original tract 254 acres to his daughter, Mrs. Dougherty, and he had sold to one Coor 4 acres, to Cameron or Abernathy 100 acres, to Newton Nix three small tracts, and to Mrs. Hollis 48 acres. When complainant sold to defendant he believed the original tract contained 909 acres. The parcels sold off and given off were surveyed as they were conveyed away. Complainant added together the acreage in the parcels previously conveyed, and subtracted their sum from 909, and the acreage shown as left by the calculation was 304 acres, the amount called for in the deed to defendant. At the time of the sale complainant informed defendant of the above-mentioned method by which he had arrived at the conclusion that there were 304 acres left in the tract. The proof fails to show the exact time when the complainant first learned that there was an excess. It appears, however, that his first knowledge of the fact was in 1894, after a survey was made by one McConnell. The survey was on December 4, 1894. He did not know the exact amount of the excess until it was disclosed by a survey made in the present case. A plat of the land appears in the record, presenting so many angles and showing a shape so irregular that it would be very

difficult, if not impossible, for any person unpracticed in the art of surveying to estimate the number of acres by the eye with any degree of accuracy, and perhaps impossible even to the most skillful surveyor.

Now, summarizing the jury's verdict upon the subject of the sale: The complainant showed the defendant the lines and boundaries of the land in a general way. Neither one of them knew how much land lay within the boundaries, but they estimated it at 304 acres, while in truth the tract contained 404 acres. But it was sold as a whole, and not by the acre. The sale was a sale in gross at \$7,000, of all the land within the boundaries of the deed, and the deed did not embrace any more than the complainant intended to sell and the defendant intended to buy; that is, the complainant intended to sell and the defendant intended to buy all the land embraced within the boundaries set out in the deed, both supposing the tract embraced to contain 304 acres, or about that quantity, of land. The actual value of all the land embraced in the deed (now ascertained to be 404 acres) was only \$7,000 at the time complainant sold to defendant, leaving out of view the incumbrance created by the Nix roadway; and with that incumbrance it was worth only \$6,750 actual value. That is to say, although the parties to the conveyance estimated the tract to contain only 304 acres, and put the contract value in gross at \$7,000, yet it really contained 404 acres, but even with this it was in fact worth not more than \$7,000. On the basis of actual value the 100 acres excess is worth \$1,750; that is, when estimated on the basis of actual value, 100 acres of the tract sold was worth, average, \$1,750, when the tract was sold. But on the basis of the contract value of the 304 acres, 100 acres of the tract was worth \$2,302.60 at the date of the sale.

Our cases upon this subject are as follows:

*Bond v. Jackson*, 3 Hayw. (Tenn.) 190. In this case it appeared that the defendant had sold land to the complainant, and, after waiting some time, they caused a survey to be made, and then Bond executed his obligations for such part of the purchase money as remained unpaid. Jackson at the same time executed a deed for 840 acres of land, which deed, after stating the boundaries, added the words, "to contain 840 acres." Jackson sued upon the last note, and obtained judgment. Bond filed his bill for a deduction equivalent to the deficiency, and the proof showed that there was a deficiency of about 100 acres. The surplus of the purchase money was ascertained at the time of survey by a calculation on the quantity at \$3.50 per acre. Upon this subject the court said: "It is usual and proper, where such is the intent, to state on the face of the deed that the contract is to remain, though the quantity be more or less; and when that is not expressed the fair inference is that a deficiency in the quantity will either dissolve the obligation of the purchaser, if a deed be not yet given, or, if given, it will en-

title him to compensation. In the present instance this idea is much strengthened by an expression used in the deed. After describing the land by metes and bounds, it adds, 'to contain 840 acres.' This amounts to a stipulation that it does contain the quantity mentioned. The sum total of the purchase money was ascertained by a calculation founded on that quantity. A confirmatory circumstance is that the parties could not ascertain the amount of the purchase money, and therefore bonds were not executed for it, till after the survey was made. \* \* \* Decree that the deficient quantity be precisely ascertained by a survey to be made under the direction of this court, unless the parties shall now agree upon the quantum of the deficiency; and that the clerk and master of this court, so soon as the said quantum shall be ascertained by the survey or agreement as aforesaid, shall prepare and present to this court a report, stating the sum which shall be equal to said deficiency, allowing \$3.50 for each acre, and interest thereon from the time that interest began to accrue on the sum mentioned in said bond; stating also the sums received by the plaintiff at law in part of his judgment and costs at law, and exhibiting the sums yet unpaid of said judgment, and what surplus, if any, it will require to be added to the unsatisfied part of said judgment to make up the sum which shall be allowed for said deficiency." It will be observed from this quotation that the court treated this as substantially a sale by the acre.

*Allison v. Allison*, 1 Yerg. 16. In this case the question was whether a warranty of title would bind the warrantor to make good a deficiency in the number of acres called for, where the conveyance described the land by metes and bounds. The court held that such matter did not fall within the warranty.

*Hendricks v. Mosely*, 3 Yerg. 74. Hendricks, in his lifetime, sold and conveyed by deed to Mosely a tract of land stated in the deed to contain 804 acres. On actual survey the tract was afterwards found to contain 866 acres. The deed did not state the tract to contain 800 acres, more or less. The bill sought a reconveyance of the excess, or compensation for it. The answer stated the consideration to be \$5,628 for the whole tract. Said the court: "The surplus does not amount to eight per cent., there being found in the tract called to contain 804 acres about 60 acres surplus. This is not unreasonable. In granting lands, ten per cent. was originally allowable in making surveys by the state; and more surveys were made containing a greater surplus than were found to contain less. Take this case according to the facts, and it was a sale of a tract of land for a given sum of money. The deed, which was to be taken, in the absence of proof of fraud, mistake, or surprise, to contain the contract, is all that we can look to. After this solemn act of making the deed, the parties cannot be let in on slight grounds to open the contract. We will not

say that in no case of surplus would the court grant relief. A case might arise where the quantity would be so great as to be proof of mistake, but that is not the case before us. The decree must be reversed, and the bill dismissed."

*Meek v. Bearden*, 5 Yerg. 467. The facts in this case are imperfectly stated in the opinion, and it is difficult to arrive at the exact result intended to be reached by the decision. As well as we can gather the facts from the opinion, they were these: In May, 1893, Bearden executed a deed to Meek for a tract of land therein described by metes and bounds, and as "containing 640 acres." The last line in the deed was not run when Bearden laid off the tract to Meek, but they both expected that this line would not cross the Holston river, but would run on the south side to the beginning. When, however, this line was run, it was found to cross the river twice in running to the beginning, and to include a part of the land on the north side of the river, called the "Horse-Shoe Tract," which was not owned by Bearden at the time of the conveyance. On the south side of the river there was only about 560 acres. When he made his contract and took his deed, Meek did not expect to get any land across the river, nor did Bearden understand that he was selling any across the river. Meek, in fact, got all the land that he expected to get, or that induced the payment of the purchase money, \$3,000, although the acreage was less than that called for in the deed by about 80 or 90 acres. There was neither fraud nor misrepresentation, and the bill did not ask for a rescission, but only that complainant be remunerated for the deficiency. The purchase was by the tract after a personal examination by the vendee, who got all he wished or intended to buy, or that the vendor intended to sell. The court held that no recovery could be granted.

*Horn v. Denton*, 2 Sneed, 125. This was a case where the master, under the orders of the court, sold 192 acres of land as 172 acres, not having had a survey made, and not knowing of the surplus acreage. The court granted relief to the owners of the land,—it was a sale for partition,—but on the ground that it was the duty of the master to have made a survey, and to have sold by the acre. This case, going on the principle referred to, is no authority for the matters we have in hand.

*Miller v. Bentley*, 5 Sneed, 671. This was a case of sale by the acre, but in comparing this with a sale in gross the court thus states the principle: "It is correctly argued that when a sale is in gross, and not by the acre, and there is no fraud, the purchaser takes at his own risk as to the quantity, unless the deficiency be very great,—so much so as to create a presumption of fraud. \* \* \* Where the boundaries are given correctly in the contract of sale, and there is no stipulation as to quantity, nor any fraud, it is a sale in gross, and no deduction in the price can be made for deficiency in quantity."

*Barnes v. Gregory*, 1 Head, 230. The bill in this case was filed to correct a mistake as to the quantity of land, and claiming that there was an excess of 15 acres, and asking \$35 per acre therefor. The proof disclosed that under the contract between the parties it was a sale by the acre, and, besides, that the defendant had practiced a fraud upon the complainant in withholding the results of the survey made for the benefit of both the purchaser and the seller. Relief was granted, but from the facts stated it is manifest that this case has no bearing upon the present controversy.

*Seward v. Mitchell*, 1 Cold. 88. This case is on the general subject, but has no bearing on the points in controversy here.

*Neal v. Allison*, Thomp. Tenn. Cas. 210. This was a sale by the acre, and does not apply.

*Williams v. Bradley*, 7 Helsk. 54. This was also a sale by the acre, but the disposition made of the matter by the court makes the case instructive on the general question. The syllabus of the case expresses its contents correctly, and is as follows: "The testator directed his land to be sold by his executor at auction, and the proceeds divided among certain married women and infants. The land was purchased as a one hundred acre tract, at \$75.50 per acre, by an adjoining proprietor desirous of adding it to his own tract, and of obtaining its timber. Both the executor and the purchaser were mistaken as to the dimensions of the tract, which in reality contained 135 acres. The bill sought to compel the purchaser to reconvey the 85 acres in excess in a certain manner, or to pay for them at \$75.50 per acre. Held, that to compel the latter would be to decree a contract. The answer sought to rescind the purchase on account of the mistake, alleging that the price paid was a high one for the entire tract. Decreed, that the purchaser should have 100 acres of the tract laid off to him by commissioners in the most convenient form to meet his purpose and expectation of adding to his land, and that the remaining 85 acres should be sold, and the proceeds divided among the parties entitled thereto." The deed described the land by metes and bounds, and as containing by estimation 100 acres, more or less, and recited the fact that it had been purchased for the price of \$75.50 per acre. The testimony showed clearly that there was no fraud, and with equal clearness that the tract of land was sold as containing 100 acres, and that both parties honestly believed, the one that he was selling, and the other that he was buying, 100 acres of land at \$75.50 per acre. The additional acreage was ascertained by a subsequent survey. The court said that it was clear there was a mutual mistake as to the quantity of land contained in the tract, and that the defendant obtained 35 acres more than he purchased, or understood to be within the boundaries at the time; also that the defendant gave for the land \$10

per acre more than it was worth. He was, however, as above seen, denied rescission, and compelled to keep the 100 acres, and to surrender the excess.

*Adams v. Brown*, 4 Baxt. 124. The facts in this case, so far as concerns the present inquiry, are as follows: Adams sold land to Brown, and made a deed calling for 200 acres, more or less. On survey it proved afterwards that there was only 170 acres. Said the court, speaking to this point: "The next objection—that there is a deficit in the quantity of land—is equally untenable. The land is not sold by the acre. The boundaries were shown to defendant, and it was estimated in the deed to Brown, as in the deed to Adam, to contain 200 acres, more or less."

*Shields v. Thompson*, 4 Baxt. 227. This was a sale through the chancery court of a lot in the city of Nashville. The advertisement described the property as on "High street, near the corner of Cedar, known as the 'Shields Property.' The lot fronts 62 feet, and runs back 170 feet to an alley." Then followed a description of the house, and the terms of sale. Persons wishing to examine the premises were referred to certain real-estate agents. The sale was not by the foot, but in gross, the auctioneer, however, repeating the description contained in the advertisement as to the 62 feet front. The property sold for \$12,815. It turned out upon actual measurement that the front on High street was 1 foot and 9 inches less than 62 feet. Speaking to these facts, the court said: "Does this make a case for relief? When the sale of land is by the acre or foot, the purchaser, of course, is only required to pay for the amount of land he received at the price bid. So, also, if the sale be in gross, and the purchaser buy upon the fraudulent representations of the vendor as to the quantity, or the mistake as to the quantity be so gross as to raise a presumption of fraud, relief may be had. It is clear, however, that this case does not come within either of these sales. The sale was not by the foot, but in gross. The representation as to the quantity was not fraudulent in any way, and the mistake as to the quantity was not so great as to raise a presumption of fraud. But it is argued that the relief should be granted upon the ground that the parties acted under a mutual mistake in regard to a material fact touching the subject-matter of the contract. This is certainly a good ground for relief in equity. The principle, as applicable to sales of land, may be illustrated in this way: If the purchaser thought he had purchased a particular piece of land, as a part of a farm, and material to its value, and the vendor thought he had sold it, when in fact the piece in question did not belong to the farm, or pass by the sale, this would be a clear case of a mutual mistake as to the land sold, and would be good ground for relief. See 1 Story, Eq. Jur. § 144. But where the land is correctly described by metes and bounds, or its bounda-

ries known, and a personal examination had, then a mere mistake as to the quantity of land embraced within the boundary will be no ground for relief, in the absence of fraud or misrepresentation, unless, perhaps, the mistake be so great as to raise a presumption of fraud, or shock the conscience of the court. As, for instance, if the land be on an island in the river, the boundaries of which are clearly in view of the parties, and the lines correctly described, the vendor may represent, and both parties believe, that it contained 100 acres. It would be no ground for relief to either party, if it should turn out to contain a few acres more or less, although the difference be material to the price. The reason is that the parties were not mistaken in regard to the land sold and bought, the particular piece contracted about, and amount of it, priced by the acre, the purchaser gets, or thought he was getting; but the parties were simply mistaken as to the number of acres which were embraced within the area, a matter to be ascertained by measurement and calculation,—a fact about which one party was as well informed as the other, and about which either might have satisfied himself. \* \* \* It is not insisted that there was any mistake as to the boundaries of the lot, or as to any particular piece of land supposed to be embraced in it. \* \* \* He could, with great care, have ascertained the exact distance by a simple measurement, if he had so desired. Not having done so, and having purchased the property for a gross sum, he could have no relief."

*Myers v. Lindsay*, 5 Lea, 331. This was a court sale, and, under the authority of *Horn v. Denton*, supra, was treated as a sale by the acre, and does not apply.

*Moses v. Wallace*, 7 Lea, 413. In this case there was a failure of title as to a portion of the land intended to be sold, and an abatement of the price was allowed, notwithstanding the sale was in gross. But the fact that the ground of relief was failure of title to part of the land renders the case inapplicable in its adjudication so far as concerns its use as authority in the present case. There are, however, some observations upon the subject of sales in gross which, by reason of the eminence of the judge who delivered the opinion, are useful, even though mere dictum. He thus states his summary of the authorities in this state upon the subject we have in hand: "It is well settled," says Judge Cooper, "in this state, that where land is sold in gross, not by the acre, without any stipulation as to quantity, and the boundaries are correctly given, the purchaser takes the risk as to quantity, and in the absence of fraud no deduction will be made in the price for a deficiency in quantity, unless the deficiency is so great as to create the presumption of fraud. *Miller v. Bentley*, 5 Sneed, 671. On the other hand, it is equally well settled that, even where the sale is in gross, the vendee may, in equity, have an abatement of the

purchase price for a defect of title to a part of the land actually included in the title bond. *Collins v. Smith*, 1 Head, 252. There are cases intermediate between these two extremes where it has been held that, although there was a failure of title as to a part of the land embraced in the boundaries of the title bond or contract of sale, and the sale was in gross, yet the vendee could not claim in equity an abatement of the purchase price, upon the ground that he knew actually what he was purchasing, and got all that he bargained for. *Meek v. Bearden*, 5 Yerg. 467; *Blakemore v. Kimmons*, 8 Baxt. 470. 'No one,' says the opinion in the first of these cases, 'who has the precise thing expected and intended to be purchased, can have, in a court of equity, an abatement in the price.' To same effect, see *Waters v. Hutton*, 85 Tenn. 109, 1 S. W. 787.

*Foster v. Bradford*, 1 Tenn. Ch. 400. This was an application for relief to the extent of 140 acres in a sale of 2,160 acres; the sale being in gross, and the boundaries of the land being correctly given in the deed or contract of sale. The court denied relief, saying: "It is well settled in this state, notwithstanding an early case looking otherwise (*Bond v. Jackson*, 3 Hayw. [Tenn.] 189), that where the boundaries of land are correctly given in the contract or conveyance, and there is no stipulation as to quantity, although the number of acres supposed to be contained in the boundaries be mentioned, nor any fraud, no deduction in price can be made for deficiency in quantity, and this for the reason, already given, that the purchaser gets exactly what he bargained for,—the land covered by the boundaries."

These are substantially all the cases in Tennessee upon the subject. From the statement of facts it is seen that the complainant sold exactly what he intended to sell,—that is, the land embraced within the boundaries contained in his deed,—and that this was the land the purchaser intended to buy; that the complainant had long lived upon the land, and could, had he chosen to do so, have accurately learned the exact number of acres contained by a survey; that there was no fraud practiced upon him; that there was a mutual mistake as to the number of acres within the area, but that the sale was in gross; that there was in the area, in acreage, about one-fourth more than the parties at the time supposed. Now, it is perhaps true that, in the absence of other circumstances, this excess would be so large as to create a presumption of fraud, and entitle the complainant to relief. But this cannot be true where there are other circumstances in the case which show that there was no fraud. These other circumstances in the present case overcome the presumption created by the mere fact of this large excess. In this case there is nothing to show any misrepresentation on the part of the purchaser, nor any device to throw the complainant off his

guard, nor any superior knowledge upon the part of the vendee of which he took advantage; but, on the contrary, it appears that the complainant had long lived upon the land, and had, therefore, the fullest opportunity to know how much of it there was. This circumstance, connected with the facts shown in the responses of the jury as to the knowledge of the respective parties, and the further facts found by the court as to the method by which the acreage was arrived at, show conclusively that there was no fraud, and rebut the presumption that might otherwise arise from the excess in acreage. From the review of the authorities which we have above made, it is seen that there are only three cases where the court has granted relief for excess in acreage (*Horn v. Denton*, *Barnes v. Gregory*, and *Williams v. Bradley*), and of these the last two were sold by the acre, in terms, and the first was treated by the court as a sale by the acre, in view of the duty devolved by law upon the clerk and master selling the property. It is also observed that of the cases referred to only one (*Hendricks v. Mosely*) showed an attempt to collect for an excess in a sale in gross, and this failed. It is also observed that of the other cases cited four were brought to recover deficiencies in sales by the acre, viz. *Bond v. Jackson* (as we have construed it), *Miller v. Bentley*, *Neal v. Allison*, and *Myers v. Lindsay*; and five were brought to recover deficiencies upon sales in gross, viz. *Meek v. Bearden*, *Adams v. Brown*, *Shields v. Thompson*, *Foster v. Bradford*, and *Waters v. Hutton*; and all these were unsuccessful. This summary is of no value, of course, except to show the trend of the supreme court, and its course of decision upon the subject, and this it shows quite clearly. Certainly it is true that all of these cases might stand, and yet the complainant might recover without the violation of any proper analogy between them and the one we have under consideration. This we grant. But the complainant could not recover without violation of the principles announced in these cases, as we have above pointed out. We have not endeavored to restate these principles, but merely to apply them to the facts of the present case, being content with the enunciation thereof contained in *Miller v. Bentley*, *Shields v. Thompson*, *Moses v. Wallace*, and *Foster v. Bradford*, as above copied into this opinion. The result is that the complainant is entitled to no relief for the excess complained of, and therefore complainant's first assignment of error must be overruled. We may add that our conclusion is in no wise influenced by the fact found by the jury that the whole 404 acres were worth, at the date of the sale, only \$7,000. If the case were such that we could give relief at all, we think the complainant would be entitled to a reconveyance of the excess, or divestiture of title as to such excess, upon ascertainment of its geographical limits by the court; or to a de-

creed at the contract price, according as defendant should elect to take the excess of land or not. But, having held that the complainant is not entitled to any relief, it is unnecessary to go into this matter, or to authoritatively decide it. We may add further, before leaving this branch of the case, that we have very carefully examined the able brief of complainant's counsel, citing very numerous authorities from other states, but believe it unnecessary to review these authorities, or to specially mention them, inasmuch as our own cases settle the principles which govern the controversy.

Complainant's second assignment of error is to the action of the chancellor in rendering a decree in favor of the defendant for the amount of damages, \$250, caused to the land by the existence of the Nix road. There is no objection to the form of the relief, or for the absence of a cross bill. Indeed, as already stated in the beginning of this opinion, the complainant asks that this very matter be settled in this suit, and that the question of his liability for such damages be determined herein. The objection made by the assignment of errors is not one of form, but goes to the substance. The jury found that defendant "knew the road was there, but not as a right of way owned by Nix," and he knew "it was a farm passway." We take this to mean that the deed of complainant to Nix conveyed to him "a passway" across the land, and that when defendant bought the farm he saw the trail or road mark across the land, but did not know that the road belonged to Nix. The error assigned is based upon defendant's knowledge of the physical existence of the trail. It is said that in case of public roads there is no breach of the covenant against incumbrances if there be upon the land a public road known at the time to the purchaser, and that the same rule ought to be held applicable to private roads. In the case of *Haynie v. Investment Co.* (Tenn. Ch. App.) 39 S. W. 860, 867, we held that a public road, fenced up by the adjoining owners, and not in actual use as a public road, yet still legally existent, but its existence unknown to the purchaser at the time of his purchase, was an incumbrance. However, if the public road be open and in use by the public at the time, the result is otherwise. 10 Am. & Eng. Enc. Law, 369. But a private easement upon the land is an incumbrance; as, for example, a right of way in another. 10 Am. & Eng. Enc. Law, 368, and notes; *Huyck v. Andrews* (N. Y. App.) 3 Lawy. Rep. Ann. 780, and notes (s. c. 20 N. E. 581). We need not decide what would be the effect if defendant had known of the legal existence of the easement, as the finding of the jury shows he did not know it. Certain it is that his knowledge merely of the physical existence of a trail across the land would not deprive him of the right to object to the legal existence of this trail as an incumbrance when such existence was subsequently ascertained. Defendant's deed con-

tained covenants of seisin, of general warranty, and against incumbrances. The covenants of seisin and against incumbrances were broken as soon as the deed was made, by virtue of the existence of the incumbrance. Note to *Huyck v. Andrews* (N. Y. App.) 3 Lawy. Rep. Ann. 790 (s. c. 20 N. E. 581), citing numerous authorities; *Haynie v. Investment Co.* (Tenn. Ch. App.) 39 S. W. 867. The second assignment of error is therefore overruled.

There is no error in the decree of the chancellor, and his decree is therefore in all things affirmed, with costs of this court and of the court below.

WILSON and BARTON, JJ., concur.

Affirmed orally by supreme court, February 12, 1898.

### MITCHELL v. VIOLETT.<sup>1</sup>

(Court of Appeals of Kentucky. June 4, 1898.)  
HUSBAND AND WIFE—CURTESY—VESTED RIGHT—  
RETROSPECTIVE LAWS.

Under Gen. St. c. 52, art. 4, § 1, the husband, on the birth of issue of the marriage, acquired a vested right to a life estate in the wife's land upon her death, and the married woman's act of 1894 cannot operate retrospectively, so as to divest the husband of that right; the marriage and birth of issue having taken place, and the land having been acquired, prior to the time at which that act took effect.

Appeal from circuit court, Carlisle county.

"To be officially reported."

Action by J. T. Violet, next friend of Susie Mitchell, against L. S. Mitchell, for partition. Judgment for plaintiff, and defendant appeals. Reversed.

John W. Ray and J. D. White, for appellant.  
Z. W. Bugg & Son, for appellee.

PAYNTER, J. The appellant, L. S. Mitchell, and his wife, Barbara, were married in 1887. The appellee, Susie Mitchell, the issue of their marriage, was born November 24, 1889. In 1889 the land which is the subject of this controversy was deeded to Barbara, the wife of L. S. Mitchell and the mother of Susie. The mother died in June, 1895, leaving surviving her the husband and daughter. The question presented for our determination is whether the husband is entitled to a life estate in the whole tract of land as tenant by the curtesy, or to a life estate in one-third, as provided in the act of March, 1894, known as the "Married Woman's Act." To properly solve the question, it is necessary to determine whether the life estate which the law that was in force at the time of their marriage and the acquisition of the property by the wife gave the husband as curtesy is a vested right. If it is, then the legislature could not deprive the husband of it without his consent.

At common law, as soon as a child of the

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.



marriage was born alive, the husband had the right to hold the wife's land during his life, although the wife died without leaving issue. 2 Bl. Comm. 126. This is such a familiar principle, it is unnecessary to call attention to numerous decisions of courts announcing it as a common-law doctrine. At the time the appellant and his wife were married, and at the time she acquired the land, the General Statutes were in force. Section 1, art. 4, c. 52, Gen. St., reads as follows: "Where there is issue of the marriage born alive, the husband shall have an estate for his own life in all the real estate owned and possessed by the wife at the time of her death, or of which another may be then seized to her use. Such estates shall, however, be subject to the debts of the wife, whether contracted before or after marriage." This statute is declaratory of the common law, except as hereinafter stated. At common law the husband, on their marriage, was given an estate in the land of his wife during her life. This estate as well as his curtesy initiate could be sold by him, or it could be sold by his creditors to satisfy his debts, but the statute which gave the husband the use of the wife's land and curtesy provided that these interests or estates should not be sold to satisfy a liability of the husband. To that extent the common law is changed. Under the statute which we have quoted, as soon as issue of the marriage is born alive the husband has an estate in his wife's land as tenant by the curtesy initiate, and upon the death of the wife his estate in her land is as tenant by the curtesy consummate. When there is an issue born alive, he is tenant by the curtesy initiate, which is a vested estate. Under the statute, a wife cannot dispose of her real estate unless her husband join with her in the deed of conveyance. It is suggested that its language does not give him an estate in her land as tenant by the curtesy initiate; that it does not recognize the existence of such an estate. It is true that the statute does not in terms declare that there is such an estate in the husband, but the language of the statute shows that the husband has curtesy in the wife's land upon issue of the marriage being born alive, which condition at common law gave the husband curtesy initiate. That part of the statute which prevents the husband's creditors from selling his curtesy initiate protects his interest from coercive sale at the suit of his creditors, but the land, including his interest therein, may be sold at the suit of the wife's creditors. The statute only changed the common law so as to make the husband's interest in his wife's land acquired by the marriage liable for her debts instead of his. As against the wife and her heirs, his interest in it is the same as it was at common law. If the land, including his interest, has not been sold by the wife's creditors, the interest in it which the marriage gave him has not been affected. It is said by Bishop on the Law of Married Women (volume 2, § 43) "that, by the birth of a child, the estate, by the mere

marital right, is extended in duration, to become an estate, not for the mere joint lives of himself and wife, but for his own life; and that it is this enlarged estate, not the mere possibility, which is termed 'tenancy by the curtesy initiate.' In this view, the husband's rights cannot constitutionally be taken away after a child is born." Mr. Cooley (Const. Lim. p. 442), in speaking of the husband's rights in his wife's land, says: "He could have a right as tenant by the curtesy initiate in the wife's estates of inheritance the moment a child was born of the marriage, who might by possibility become heir to such estates. This right would be property, subject to conveyance and to be taken for debts; and must therefore be regarded as a vested right, no more subject to legislative interference than other expectant interests which have ceased to be mere contingencies and become fixed." In the case of *Rose v. Rose* (opinion delivered June 3, 1898) 46 S. W. 524, this court held that, where rights of the husband had become vested in his wife's land, it is not within the power of the legislature to destroy that right. Some of the authorities cited in that case apply equally as well to this case and support our conclusions. Where the interest of the husband in the estate of his wife remains in expectancy merely,—that is to say, until it becomes initiate,—the legislature must have full right to modify or even to abolish it. Cooley, Const. Lim. (5th Ed.) 442. As the marriage took place and the land was acquired by the wife before the act of 1894 took effect, the husband takes an estate for life as tenant by the curtesy. The act of 1894 cannot operate retrospectively, so as to divest the husband of his vested rights in his wife's real estate. Although a marriage took place before the act of 1894, still, if the land was acquired by the wife after that date, the husband is not entitled to a life estate in it, but to the use of one-third thereof during his life, as provided by the statute. The judgment is reversed for proceedings consistent with this opinion. WHITE, J., not sitting.

LITTLE ROCK, H. S. & T. RY. CO. et al.  
v. SPENCER et al.

(Supreme Court of Arkansas. April 2, 1898.)

RAILROADS—CONSTRUCTION—LIENS FOR LABOR—PERSONS ENTITLED.

Sand. & H. Dig. § 6251, providing a lien for "every mechanic, builder, artisan, workman, laborer or other person who shall do or perform any work or labor" on a railroad, does not apply to a contractor who does not perform any work or labor personally.

Wood, J., dissenting.

Appeal from Garland chancery court; Le-land Leatherman, Chancellor.

Suit by Spencer & Maney against the Little Rock, Hot Springs & Texas Railway Company and John G. Lonsdale, receiver. From a decree in favor of complainants, defendants appeal. Reversed in part.

Cockrill & Cockrill, for appellants. Greaves & Martin and Rose, Hemingway & Rose, for appellees.

HUGHES, J. This is an appeal from a decree in chancery declaring a judgment a lien upon the roadbed, etc., of the appellant railway. The judgment was for an amount due for building a part of the road. The lien was decreed under the following statute: "Every mechanic, builder, artisan, workman, laborer, or other person, who shall do or perform any work or labor upon, or furnish any materials, machinery, fixtures or other things toward the equipment of, or to facilitate the operation of, any railroad, \* \* \* shall have a lien therefor upon the road bed, buildings, equipments, income, franchises, and other appurtenances of said railroad," etc. Sand & H. Dig. § 6251. It is contended by the railway company that the appellees made no contract with it, but contracted with one Nelson (as agent for whom, it did not appear), and that Nelson was not authorized to contract for the company. Without discussing the evidence in this behalf, suffice it to say that we find from it that this contention is not sustained, and that there was a contract made by the company, through its agent, Nelson, for the building of that part of the road for the building of which the appellees claim that the railway should pay. It appears from the evidence that the appellees had the work done, as contractors,—that they furnished the labor and appliances necessary for the work, and paid for the same,—but it does not appear that they did personally any labor or work upon the railroad. Were they entitled to a lien upon the road, under the section of the statute quoted? It is not an easy undertaking, frequently, to distinguish between the kind of work and labor which is entitled to a lien, and that which is mere professional and supernumerary employment, and not fairly coming within the meaning of the terms used in the statute. It has been held that an architect who furnishes plans and superintends the erection of a building acquires a lien thereon as for work and labor. Stryker v. Cassidy, 76 N. Y. 50; Insurance Co. v. Rowand, 26 N. J. Eq. 389. In determining the question under consideration, it is important to look closely to the act of the legislature, and to consider the policy of such legislation, and the intent of the legislature in passing the act in question. The act is entitled "An act to protect employees and other persons against railroad companies." It will be observed that the act gives a lien only to such "mechanic, builder, artisan, workman, laborer, or other person, who shall do or perform any work or labor upon, or furnish any materials, machinery, fixtures or other thing toward the equipment of or to facilitate the operation of, any railroad," etc. We emphasize the words, "who shall do or perform any work or labor." In Balch v.

Railroad Co., 46 N. Y. 521, it is held that "the term 'laborer' cannot be construed as designating one who contracts for and furnishes the labor and services of others, or one who contracts for and furnishes one or more teams for work, whether with or without his own services, or to the services of others to take charge of the teams while engaged in the service." Gurney v. Railway Co., 58 N. Y. 358; Alkin v. Wasson, 24 N. Y. 482. In Lehigh Coal & Nav. Co. v. Central R. Co., 29 N. J. Eq. 252, it is held that the right of preference under such a statute "is personal, inhering alone in the person who actually performs labor or service." Section 6251 of the Digest, above quoted, was intended to secure and protect only the personal earnings of mechanics, builders, artisans, workmen, or laborers, or other persons, who do or perform any work or labor upon any railroad, or furnish any material, machinery, fixtures, or other things towards the equipment, or to facilitate the operation, of any railroad. It does not apply to a contractor who does not actually perform any work or labor. So far as he may actually labor, he may come within the scope and meaning of this statute. That the purpose of this statute was to give a lien to those named in it for the work and labor by them actually performed is apparent. But its provision is limited to such as actually perform work or labor. "They are usually poor men, dependent on their daily earnings, and can ill afford to lose this, or indulge in the uncertainties of litigation. The employer or contractor is, as a rule, just the opposite, and for this reason the object or purpose of a lien law for one by no means makes an argument for the other." Mohr v. Clark, 3 Wash. T. 440, 19 Pac. 28; Alkin v. Wasson, 24 N. Y. 482. "The right conferred by a lien in favor of laborers is personal, and cannot be availed of by one who furnishes labor." 2 Jones, Liens, § 1630. Considering the language of the statute, and the purpose of its enactment, we are constrained to hold that the judgment and decree in this case, in so far as it declares a lien upon the roadbed, etc., of the railway, is erroneous. So much of the decree of the chancery court as declares a lien upon the roadbed, etc., of the appellant railway, is reversed, and as to this the cause is dismissed. In all other respects the decree is affirmed.

WOOD, J. (dissenting). 1. I insist that, as the law now stands, neither the day laborer upon, nor the contractor and builder of, uncompleted railroads, has any lien. Let us see. In Tucker v. Railway Co., 59 Ark. 31, 26 S. W. 375, the plaintiff, Tucker, sued the company, setting up in his complaint that "he was a laborer and contractor under one Wilson, who had taken a contract from the company to clear off and grub the right of way, and grade its branch road about one mile in length, and as such performed work amounting to the sum of \$317.00, of which

Wilson paid him \$150, leaving the balance sued for as aforesaid"; concluding with the formal prayer for judgment, lien, etc. The cause was heard upon demurrer to the complaint, and this court, in affirming the ruling of the lower court sustaining the demurrer, placed its decision upon the following grounds: "First. That the statute itself in such cases gives the limit beyond which the right to a lien does not exist; that the allegations of the complaint show plaintiff to have been a subcontractor, and as such he was not specifically named in the statute as one of the beneficiaries. Secondly. There must be a privity of contract between the parties [plaintiff and defendant]; otherwise there can be no right of action in the one against the other." The allegations of the complaint showed Tucker to have been a subcontractor. They also showed that he was a "laborer, and as such performed work and labor." So that, on demurrer, while Tucker was not entitled to a lien as a subcontractor, not being specifically named as such in the statute, he was entitled as a laborer or workman who performed work and labor, for the statute expressly mentions such. Therefore the distinctive ground of the decision in *Tucker v. Railway Co.* was that there was no privity of contract between the plaintiff, Tucker, and the defendant company. In the case at bar this court says: "Section 6251 of the Digest was intended to secure and protect only the personal earnings of mechanics, builders, artisans, workmen, or laborers, or other persons, who do or perform any work or labor upon any railroad, or furnish any material, machinery, fixtures, or other things towards the equipment, or to facilitate the operation, of any railroad. It does not apply to a contractor who does not actually perform any work or labor. \* \* \* The right conferred by a lien in favor of laborers is personal, and cannot be availed of by one who furnishes labor." In *Tucker v. Railway Co.*, supra, Judge BUNN, speaking for the court, says: "It is a matter of common knowledge, and of the current history of the times, that the act of 1887 was passed to prevent the worthy, and in many respects defenseless, classes of persons named therein from being deprived of the fruits of their labor." And Judge HUGHES, for the court, in the present case, says: "That the purpose of this statute was to give a lien to those named in it for the work and labor by them actually performed is apparent. \* \* \* They are usually poor men, dependent on their daily earnings, and can ill afford to lose this, or indulge in the uncertainties of litigation. The employer or contractor, as a rule, is just the opposite; and for this reason the object or purpose of a lien law for one by no means makes an argument for the other." After all this, one would naturally expect, in the "round up" of decisions, a construction that would secure to these "worthy,

poor, and defenseless classes" a lien for their labor. As strange as it may seem, such is not the case at all. The judges (except Judge BATTLE) hold that the statute applies to noncompleted as well as to completed railroads. Every one knows that railroads are constructed through contractors or builders, who take the contract, and do the work, not literally with their own hands, for that would be impossible, but through mechanics, artisans, laborers, and workmen whom the said contractors or builders employ. There is no privity of contract between these laborers and the railway company. Then, under the decision in *Tucker v. Railway Co.*, supra, how are they to secure the lien which the court says was the purpose of the law to give them? But that is not so bad. I assented to *Tucker v. Railway Co.* There are strong reasons for the position there taken, and that the act only applies, as held by Judge BATTLE, to completed railroads. But little, if any, harm would result to laborers, etc., upon noncompleted railroads, under *Tucker v. Railway Co.*, because these, who generally work by the day, are usually paid off by the contractor or builder; and, if not, it is within their power to protect themselves from heavy loss by ceasing to work at any time they choose, if their daily wages are not paid. Then, too, laborers, workmen, etc., for completed railroads, usually have privity of contract with the company. Now, be it understood that I have no objection whatever to the decision in *Tucker v. Railway Co.*; and if the present law were construed to embrace contractors, who are really the ones who need it most, *Tucker v. Railway Co.* might still stand. But in order to preserve consistency in the law, and in deference to the last announcement by this court, which must be received as the law, I am willing for *Tucker v. Railway Co.* to be overruled. And I have protested, and do now, most earnestly, that in order that the present decision be not shorn of its power to secure those whom this court designates as a "worthy but defenseless class," who work and labor upon noncompleted railroads, in the lien which the court declares was the purpose of the law to secure to them, *Tucker v. Railway Co.* should be overruled, and must be, before any practical results can come to them.

2. But to my mind the worst feature of the present inconsistent state of the law is that not only is the laborer deprived of his lien, for lack of privity, as we have shown, but likewise the contractor or builder, because, according to the construction here given the act, the contractor is nowhere included within its provisions, except for his own personal labor. I submit that this construction is erroneous, for the following reasons:

(1) In arriving at the intention of the legislature, consideration should be given to the act as a whole. The conclusion reached by the court, that the legislature intended to

provide the laborer and workman a lien, because they are "usually poor men, dependent on their daily earnings, and can ill afford to lose this or indulge in the uncertainties of litigation," and the deduction that the legislature did not intend to provide a lien for the "employer or contractor, who is, as a rule, just the opposite," are both alike, in the light of the whole act, illogical and unsound. Had the act only named "laborers," or a class who only labor in person, there would have been reason for such a conclusion. In the olden times, when the policy of such legislation was to provide for those only who were supposed to need the especial protection of the sovereign, statutes were passed giving a lien to "laborers," "servants," or "apprentices"; thus designating a class who only labor with their own hands, and are usually poor. Hence we find decisions, based upon such statutes, declaring the purpose of such laws to be the protection of this "worthy but defenseless class." We are not surprised therefore, on turning to the decision from which the court takes its quotation declaring that the purpose of our statute was to protect mechanics, builders, artisans, laborers, and workmen only to the extent of the actual manual labor performed by them, to find that it was just such a decision, based on a statute which gives a lien only to "any person who shall do labor upon any farm or land." Of course, every one knows that a statute intending to give a lien to a man who labors on a farm—a farm hand—was intended to be personal, but builders and contractors do not usually or necessarily do their work in person. The court, in the very decision, points out the distinction, where it says: "There is a clearly-defined line between the contractor, the employer, and the laborer; and, although each may labor in his own way, the class to which the laborer belongs is plain, and the contractor or employer certainly does not come within it." See the case of *Mohr v. Clark*, 3 Wash. T. 444, 19 Pac. 28. But the enumeration of the various other classes, to wit, mechanics, builders, artisans, material furnishers, and those sustaining loss and damage, shows that the intention of our legislature was not to provide a lien for laborers and workmen because they are "usually poor and dependent upon their daily earnings," but because they, like the various other classes named, have contributed to the value of the finished product,—the railroad upon which the lien is given. The comprehensive enumeration of the statute convinces me that the legislature intended to give a lien to all those whose work and labor done upon, or materials furnished for, had enhanced the value of the railroad. As was said by Judge Andrews in *Stryker v. Cassidy*, 76 N. Y. 50; "Mechanic's lien acts were originally enacted for the especial protection of this class of persons [laborers], but their scope has been greatly extended. \* \* \* The general principle upon which the lien acts proceed is

that any person who has contributed, by his labor, or by furnishing materials, to a structure erected by an owner upon his premises, shall have a claim upon the property for his compensation." *Avery v. Clark* (Cal.) 25 Pac. 919; 15 Am. & Eng. Enc. Law, 7; Phil. Mech. Liens, § 35; *Cullins v. Mining Co.*, 2 Utah, 219, 222. That eminent jurist, Judge Caldwell, who knows as much as, and perhaps more than, any one else in the state, of the history and purpose of this law, says, "It covers nearly or quite all the liabilities of the company in this state." *Central Trust Co. v. St. Louis & A. T. Ry. Co.*, 41 Fed. 551, 553. Surely there are no more meritorious liabilities of the company than the debt due the builder of the roadbed,—the substructure, so to speak, of the whole institution. It is inconceivable to me that the legislature should have intended to provide for the contractor who might furnish crossties, timber, lumber, stone, iron, engines, and cars, all to go upon and over the roadbed, and not give a lien also to the contractor who had furnished the roadbed itself. The contractor who furnishes the various appointments incident to the building of roadbeds for railroads, such as teams, wagons, barrows, shovels, scrapers, axes, picks, etc., and the men to use them, is no less deserving of protection, and no more able to protect himself, than the "iron barons," "steel kings," and "rolling-stock magnates" who are given a lien under this law. The legislature that would make a discrimination at once so unjust and unreasonable would, in the very act, lay at its door an impeachment for besotted ignorance or gross partiality. Ours cannot be justly convicted of either in the present enactment, for the spirit of the law shows an intention to provide for the contractor who builds the roadbed, and the very letter shows that this intention was carried out, under the term "builder."

(2) If the contractor who builds the roadbed of a railroad is not provided for under the term "builder," as used in the act, or in the words "other person," then he is not provided for at all. As we have seen, we would naturally look for some provision for his benefit in an act of such broad sweep as that under consideration, and an act making no provision for him would certainly be out of the trend of enlightened modern legislation upon the subject; for, as is said by a distinguished author: "The party most generally secured is the contractor" (Phil. Mech. Liens, § 40); and by another: "At the present day, statutes generally allow a lien to contractors either by express terms or necessary implication" (Bolsot, Mech. Liens, § 218). Now, what is the most natural and obvious import of the term "builder," as used in the statute? Mr. Webster defines the word "build" as follows: "To erect or construct, as an edifice or fabric of any kind; to form by uniting materials into a regular structure; to fabricate; to make; to raise." As defined by literary and law lexicographers, "build-

er" is "a person whose business is to construct buildings, vessels, bridges, canals, or railroads by contract." See "Contractor," *And. Law Dict.* p. 146. "One who builds; especially one who follows the occupation of building, or who contracts or directs the actual work of building." *Stand. Dict.* 249. "One who builds, or whose occupation is that of building; specifically, one who controls or directs the work of construction, in any capacity. In the practice of civil architecture, the builder comes between the architect who designs the work, and the artisan who executes it." 1 *Cent. Dict. & Enc.* 712. Civil architecture is "the art or science of building various structures for the purposes of civil life." *Webst. Dict. verbo, "Architecture."* We are talking about a roadbed for a railroad; that is, a structure used for purposes of civil life. What reason is there for saying that the builder thereof is not the one who comes between the civil engineer who designs and lays off the work, and the artisans who execute it? None whatever. On the contrary, there is every reason why we should adopt the meaning of the word as used in building terminology. We are strictly within the domain of civil architecture, where the commonly accepted meaning of the word "builder" is as stated above. If I were to ask any of my brother judges, or the learned counsel for appellants, who built their houses, or was the builder thereof, none of them would think of naming the various carpenters, masons, glaziers, painters, etc., who might have been employed to work on or labor upon the same; but each would answer, giving the name or names of some of the numerous contractors or builders in the city who took the contract and built their houses. So, too, if I were to ask any railroad official, or any one else, acquainted with the facts, "Who built the roadbed of the Little Rock, Hot Springs & Texas Railway?" none of them would think of giving the names of the numerous negroes, Irishmen, or Americans who grubbed the way, dug the ditches, threw up the embankment, etc., but every one would give the names of Spencer and Maney, and such other contractors as made the contracts, furnished the necessary means, men, and implements, and had the different sections of the roadbed built. These were the real builders of the roadbed. The men in their employ to do the work were simply laborers or workmen who worked upon same, but they were not the builders thereof. Again, the word "builder" has been used by lawyers, judges, and courts as synonymous with "contractor," when used in connection with construction or building contracts. This, too, without exception, so far as I know. Mr. Anderson thus defines "contractor": "One who agrees to construct a portion of a work, as a railroad." And, as we have seen, he defines "builder" as "one whose business it is to construct \* \* \* railroads." See *And. Law Dict. verbo, "Builder" and "Con-*

*tractor."* In *Gray v. Walker*, 16 S. C. 143, where a contractor sought to establish a lien, he is designated by the reporter (Shand). In the syllabus, only as a "builder." So, likewise, in *Parker v. Bell*, 7 Gray, 429, and *Weeks v. Walcott*, 15 Gray, 54. In Mr. Lloyd's work on *Law of Building and Buildings*, "builder" and "contractor" are used interchangeably, and "builder" is used only in the sense of "contractor." See pp. 45, 54, 55, 82-85. In *Calkin v. U. S.*, 3 Ct. Cl. 297, under a statute giving a lien for a debt contracted by the "builder" of any ship or vessel, it was held that the man who contracted with the owner for the building of the ship or vessel was the "builder" thereof. A statute of Montana is as follows: "Every mechanic, builder, lumberman, artisan, workman, laborer or other person or persons, that shall do or perform any work or labor upon, or furnish any material," etc., "shall have a lien for his work or labor done," etc. Exactly like ours. One Wortman contracted with Kleinschmidt to build a granite block (which, of course, he could not do in person) for \$26,710. After completing the work, Wortman sued Kleinschmidt for a balance due on his contract, and asked for a lien under the statute. Kleinschmidt contested the claim, and denied the right of Wortman to a lien, as is shown by the following excerpt from the opinion of the court: "Kleinschmidt by his pleadings and testimony asserted that Wortman was not entitled to recover any amount, and that, if judgment were entered against him, the law would not authorize the creation of a lien upon his property to secure its payment." The court, in discussing the question, calls Wortman a "builder," and, after deducting a certain amount from the claim for extras, which it refused to allow on account of a failure on the part of Wortman to comply with his contract as to these, allowed the balance which it found to be due under the contract, and declared a lien to exist for the same, saying, "The respondent is entitled to a lien upon this property, under the statutes, to secure the payment of the sum which is due from Kleinschmidt." And one of the judges, in a separate opinion, in which he concurred with the court as to respondent's right to a lien under this statute, but dissented as to other points, said, "Taking the definitions, both literary and legal, it is plain that in reference to a building, and the law of building, a 'builder' is practically, in effect, a 'contractor.'" The case is precisely in point. *Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. 280. Under a statute of New York (*Laws N. Y.* 1862, p. 956) giving a lien on vessels for a debt "contracted by the master, owner, charterer, builder, or consignee on account of work done or materials furnished," *J. S. Pierce & Co.*, a firm of boat builders, contracted with the owner of a certain vessel to repair same. They procured certain castings and machinery from another, and had the work done. The court of

appeals, in allowing a lien to the one who had furnished materials and done work upon the vessel, says, "It is quite apparent that Pierce & Sons were the builders of the canal boat, within the meaning of the acts of 1862."

So I conclude that the word builder, as used in our statute, is tantamount to "contractor." I dare say no case can be found, where the word "builder" is similarly used in the statute, that holds the contrary. The court cites none, counsel for appellants cite none, and from this fact (with the known ability for exhaustive research) I feel warranted in saying there are none. The only one they cite where the word "builder" is similarly employed is *Blakey v. Blakey*, 27 Mo. 39; and they say that case holds "the contractor had no lien," and cite *Railway Co. v. Callahan*, 49 Ga. 506, and *Mohr v. Clark*, 3 Wash. T. 444, 19 Pac. 28, "to the same effect." A brief review of *Blakey v. Blakey*, *supra*, will discover that instead of being an authority against my contention, it supports it. The syllabus is: "Where a builder contracts to build a house, he can have no lien for services rendered in superintending his own men." Here the "contractor" is called "builder." The facts of the case were that plaintiff sought to establish a lien for materials, and for work done by different carpenters for a certain number of days, at two dollars and a half per day for each hand, in building a house for the defendant, and also for "114 days' service of self, in working and superintending the building from May 1st up to 23rd December, 1856, at \$3 per day,—\$342." The defendant asked this instruction: "That the plaintiff is not entitled to recover, in this action, for superintending the work in the building." In holding this to be a correct instruction, the court says: "It appears that the workmen were employed by the plaintiff as his hands, and that, instead of charging a given sum for the work, he charged the defendant \$2.50 for every day each workman was engaged, though he did not pay any of them that much. If the plaintiff contracted to build the house for a certain price, or for whatever the job might be worth, it is difficult to understand on what principle he could charge the defendant for superintending his own hands; and if he undertook to employ workmen for the defendant, and to superintend them, he ought not to be paid for services as superintendent, and to speculate at the same time on the wages of the workmen." Continuing, the court says: "The law gives the mechanic, builder, etc., who may do or perform any work upon, or furnish material, a lien for the work done and materials furnished; but \* \* \* it cannot be stretched to cover, besides the value of the work done and the materials furnished, a claim for services performed by the builder for himself in superintending his own workmen." The legitimate conclu-

sion from this is that the contractor, called in the opinion "builder," would be entitled to a lien for the value of the work done by the hands in his employ, according to his contract, but not for personal services in merely superintending them. This latter was but a part of his undertaking, for which he received pay when the work done by the men in his employ was paid for. This, it seems to me is cogent authority for my position. There is no pretense that the claim of *Spencer & Maney* is for personal services rendered by them. It is only for the contract price of the section of roadbed built by them through their employes. A brief analysis of *Railroad Co. v. Callahan*, 49 Ga. 506, cited for appellants, will likewise discover a strong authority for appellees. Plaintiffs, who contracted for the building, and had built, a certain portion of a railroad, sought to establish a lien for the balance of the contract price. The defendant "denied that the plaintiffs had any lien as mechanics and laborers, in contemplation of the law, but alleged that they were contractors." The constitution of 1868 of Georgia declares that "mechanics and laborers shall have liens upon the property of their employers for labor performed or materials furnished." The statute of 1869, providing a summary remedy for enforcing these liens, prescribed, "Laborers and mechanics shall have a lien upon the property of their employers for labor performed and for materials furnished." It will be observed that no provision was made for builders or for contractors. The supreme court held that contractors did not come within the provision of the constitution and statute. In its opinion it defines a "mechanic" as "a person whose occupation is to construct machines, or goods, wares, instruments, furniture, and the like"; not one who builds houses or railroads. "Laborer," the court defines: "One who labors in a toilsome occupation; a man who does work which requires little skill, as distinguished from artisan," citing *Webst. Dict.* The court then defines "builder" to be: "One who builds; one whose occupation it is to build; an architect, a shipwright, a mason." The court evidently used "builder" here as synonymous with "contractor," because the argument was to show that contractors were not embraced in the terms "mechanics" and "laborers," as used in the constitution and statutes, and the court defined "builder" in order to show that the contractor who built the railroad was not so included; otherwise there could have been no object in defining the term "builder." We have already shown that *Mohr v. Clark* was based upon a statute giving a lien to those who labor on a farm. One other case cited by appellants' counsel which I regard as supporting the contention of appellees is *Winder v. Caldwell*, 14 How. 434. The statute made "all and every dwelling house, or other building, subject to the payment of the debts contracted for or by

reason of any work done, or materials found and provided by any brick maker, brick layer, stone cutter, mason, lime merchant, carpenter, painter, and glazier, iron monger, blacksmith, plasterer, and lumber merchant, or any other person or persons employed in furnishing materials for, or in erecting or constructing such house or other building." The statute is most comprehensive in the protection of the classes which the whole act shows it was obviously designed to protect, to wit, those "whose personal labor or property have been incorporated in the building, and not the agents, supervisors, undertakers, or contractors who employed them." Of course, it was held that contractors were not embraced in such a statute; for the statute sedulously avoided all reference to builders or contractors, or any terms that could possibly be construed as meaning those who stood in this relation to the owner. The court said: "It was not the merit of the contractor that gave rise to the system. \* \* \* Such persons have an opportunity, and are capable, of obtaining their own securities." Thus showing that the policy of this law was to protect those only who are not able to protect themselves. The court further said: "The contractor is neither within the letter nor the spirit of the act." How different is our statute, where he is certainly within both the spirit and the letter (under the alternative expression, "builder")! But the court does say one thing pertinent to the case at bar, when it uses the expression, "Does a master builder, undertaker, or contractor come within the letter or spirit of the act?" thus using these terms synonymously. The terms "master builder" and "builder" mean the same thing. See Lloyd, Bldg. § 85. A master builder is "a contractor who employs men to build." Stand. Dict. verbo, "Master." In the syllabus of this case, also, the contractor is called "builder" in one place, and "master builder" in another. I have examined critically other cases cited, to wit, *Smallhouse v. Mining Co.*, 2 Mont. 443; *Ames v. Dyer*, 41 Me. 397; *Whitaker v. Smith*, 81 N. C. 340; *Foushee v. Grigsby*, 12 Bush. 75; and *Jones v. Shawhan*, 4 Watts & S. 257. It is sufficient to say that they are all based upon statutes containing restrictive words, which control them; none of them provided for builder or contractor, and the whole of the acts showed that it could not have been the intention of the legislature to include them. These cases are therefore not in point.

It is a well-recognized canon of construction that the whole act, and all of its parts, must be considered, and every word given, if possible, a definite meaning. To "deny a word or phrase its known or natural meaning, in any instance, the court ought to be quite sure that they are following the legislative intention." *Wilson v. Biscoe*, 11 Ark. 44, 48; *Phillips Co. v. Pillow*, 47 Ark. 404, 1 S. W. 686; *Suth. St. Const.* pp. 361, 362, §

279. The word "builder" has a well-defined, "known, and natural meaning." It is unambiguous. We have no warrant for changing it. Especially should we not do so when the obvious intention of the legislature was to provide for the contractor under said term. It is argued that as the word "builder," and also the words "contractor" and "subcontractor," occur in the general law of mechanics' liens (Act April 25, 1873, section 4731, Sand. & H. Dig.), and that as "contractor" and "subcontractor" are omitted from the act under consideration, the intention of the legislature in the latter act was to leave out contractors and subcontractors. Non sequitur. The legislature that passed the law under consideration saw, doubtless, that it would be guilty of inexcusable redundancy in using the words "contractor" and "subcontractor" after having employed the word "builder" and the other words in the statute: for the word "builder" included "contractor," and the other words included all subcontractors. "All persons are considered subcontractors, except those who have contracts directly with the owner or his agents." 15 Am. & Eng. Enc. Law, p. 47; Acts 1895, p. 226. That is the reason why the legislature of 1887 left off these words. For the same reason the legislature of 1895 left out the words "contractor" and "subcontractor," in the mechanic's lien law,—the last enactment upon the subject,—in naming the persons who were given the lien. The first section of that law reads: "Every mechanic, builder, artisan, workman, laborer, or other person, who shall do or perform any work upon or furnish any material \* \* \*," etc., "for any building \* \* \*," etc., "under and by virtue of any contract with the owner or proprietor, or his agent, trustee, contractor, or subcontractor, shall have a lien," etc. Under this section the builder or contractor under contract with the owner, his agent or trustee, has a lien for work done; and, the other persons (subcontractors) have a lien for work done under contract with the contractor, or, if furnishers of material, etc., they have a lien under contract either with the contractor or the subcontractor. Now, while neither contractor nor subcontractor, *eo nomine*, is given a lien in the first section, yet other sections show they were intended to be included. Sections 10, 18. How were they included? Why, under the terms "mechanic, builder, artisan, workman, laborer, or other person." The legislature of 1895, like the legislature of 1887, seems to have understood the word "builder" in its true sense, and used it, accordingly, as synonymous with "contractor." It is asked, why it did not use "contractor." I answer, because "builder" meant the same, and was just as good. But I have no doubt that it would have used "contractor," could it have foreseen that supreme judges and eminent lawyers, or even lesser lights, would differ so greatly about the plain meaning of so very familiar and

common a term in building nomenclature as that of "builder." If "builder" does not mean "contractor," it was superfluous nonsense to have used it at all; for every phase of work and labor incident to the building of railroads was covered by the other words,—mechanics, artisans, workmen, and laborers."

3. The court emphasizes the words "who shall do or perform any work or labor," and concludes from these that the statute, to use the court's language, "does not apply to a contractor who does not actually perform any [manual] work or labor. So far as he may actually labor, he may come within the scope and meaning of this statute." The court here concedes that the contractor may be included, provided he performs labor in person. In other words, the contractor is provided for only as a laborer. In support of this position the court cites *Alkin v. Wasson*, 24 N. Y. 482; *Balch v. Railroad Co.*, 46 N. Y. 521; *Gurney v. Railway Co.*, 58 N. Y. 358; *Lehigh Coal & Nav. Co. v. Central R. Co.*, 29 N. J. Eq. 252. It would be but commendable consistency to cite in favor of the position assumed by the court only cases based upon statutes giving a claim or lien to laborers, or those only who do toilsome manual service under the direction of others; and the cases cited, in point at all, are just such cases. In *Alkin v. Wasson*, the plaintiff, a contractor, sued a stockholder of a railroad, under a statute which provides "that all the stockholders of every such company shall be jointly and severally liable for all the debts due or owing to any of its laborers and servants, for services performed for such corporations." The court said: "The word 'servants' is qualified, and to some extent limited in its meaning, by its association with the word 'laborers.'" The court further said: "It is obvious from the nature and terms of this and other provisions of the act, as well as from a general policy indicated by analogous statutes, that the legislature intended to throw a special protection around that class of persons who should actually perform the manual labor of the company." In *Balch v. Railroad Co.* the court, in construing the same act, said: "The terms 'laborer' and 'labor' were used in their ordinary and usual sense; and the provision was intended to secure the common laborer—one who earned his daily bread by his toil—a compensation for his own work." Continuing, the court cites the case of *Coffin v. Reynolds*, 37 N. Y. 640, and says: "In the latter case the meaning of the same terms used in an analogous statute was restricted, and held not to include skilled artificers, or those rendering service requiring skill, or such as are not regarded as common, ordinary labor." But in *Gurney v. Railway Co.*, also cited, the question (applicable here) arose upon an order of the special term of the supreme court appointing a receiver, and directing him to pay "debts owing to the laborers and em-

ployés of the said defendants for labor and service actually done in connection with the defendant's railways." In passing upon and allowing the claim of an attorney who had rendered service in connection with the defendants' railway, the court of appeals, after citing and commenting upon prior cases, and among them *Alkin v. Wasson*, supra, said, *inter alia*: "It will be observed, in the first place, that the word 'employé,' used in the order, is not found in any of the statutes involved in these cases. This is a word of more comprehensive signification than 'laborers' and 'operatives.' \* \* \* In those cases [*Alkin v. Wasson*, and others] the courts held that it was the policy of the legislature to protect those only who are the least able to protect themselves, and who earn their living by manual labor for a small compensation, and not by professional services, and this supposed legislative policy exerted a controlling influence upon the courts. In this case it was entirely different." So say I of the case at bar. Our statute not only includes laborers,—the special class mentioned in the case cited,—but also includes mechanics, builders, artisans, workmen, and various material furnishers. No one can say that the other classes of persons mentioned in our statute are limited by the term "laborers," upon the principle of *noscitur a sociis*. And the very decisions cited to maintain this position show that had they been based upon a statute like ours, with a broader purpose and a more extended enumeration of classes, the decisions themselves would have been in favor of my position. Indeed, later decisions of the same state based upon different statutes are altogether different. *Stryker v. Cassidy*, 76 N. Y. 50, and *Gurney v. Railway Co.*, supra, for instance. The case of *Lehigh Coal & Nav. Co. v. Central R. Co.*, cited by the court, was based upon a statute which, "in its broadest sense, includes only laborers and employés, and them only to the extent of their wages." Of course, it was held that a contractor was not included in such a statute; for he is neither a laborer, nor, in a strict legal sense, an employé, nor does he work for wages. But see *Insurance Co. v. Rowand*, 26 N. J. Eq. 389, where it was held that an architect came within the purview of an act giving a lien "to any person for labor performed," etc.

If, as I contend, "contractor" is included in the statute, there can be no doubt that the legislature intended to give him a lien for his work and labor performed in the manner in which contractors usually do or perform their work and labor upon railroads. And how is this? Why, it would be impossible for contractors to build railroad beds with their own hands within the time and in the manner required for such work. Their work involves the finished product of what they undertake. This is the sense in which the words "who shall do or perform any work or labor upon" are used. The words "work"



and "labor" here are used to denote the result of what is done, and not the manner of its doing. Under the construction placed upon the words by the court, even if the word "contractor" were used, instead of "builder," still the contractor would have to do the work and labor with his own hands, to entitle him to a lien. If the legislature intended to provide for the contractor, in what more simple or appropriate words could they have done so? What else could they have said? The maxim, "Qui facit per alium facit per se," applies with peculiar force in a case of this kind, where the work to be performed by the contractor can only be done by him through the instrumentality of those in his employ. Under a statute which contains "mechanics," "artisans," "builders," or its equivalent, "contractors," it is not necessary, before establishing a claim for lien, to show that the work was done with the claimant's own hands. *Kneel. Mech. Liens*, § 3; *Hogan v. Cushing*, 49 Wis. 169, 5 N. W. 400; *Blakey v. Blakey*, 27 Mo. 39; *Lester v. Houston* (N. C.) 8 S. E. 366; *Hughes v. Torgerson* (Ala.) 11 South. 209; *Railroad Co. v. Bartola* (Fla.) 9 South. 853; *Central Trust Co. v. Richmond*, N. I. & B. R. Co., 54 Fed. 723, 727; *Newgass v. Atlantic & D. Ry. Co.*, 72 Fed. 712, 716; *Perry v. Railway Co.*, 56 Minn. 306, 57 N. W. 792; *Couper v. Gaboury*, 16 C. C. A. 112, 69 Fed. 7; *Trustees v. Sanford*, 17 Fla. 162; *Malone v. Mining Co.*, 76 Cal. 578, 585, 586, 18 Pac. 772; *Sweet v. James*, 2 R. I. 270, 286; *Lybrandt v. Eberly*, 36 Pa. St. 347; *Singerly v. Doerr*, 62 Pa. St. 9, 13; *Hatch v. Faucher*, 15 R. I. 459, 461, 8 Atl. 543; *Stryker v. Cassidy*, 76 N. Y. 50, 53. The learned counsel for appellants do not controvert this, as I understand, but only contend that "contractor" is not included in our statute. They say, "When the statute expressly gives the contractor a lien, there is no room for construction." This is precisely what our statute does, as I have attempted to show, under the term "builder." Having concluded that a contractor is embraced in the statute, under the term "builder," I need not attempt to show that, if not so included, he is brought within the act under the term "other person."

In the preparation of this opinion I have been greatly assisted by the able briefs of counsel for appellees, and have made liberal drafts upon the same. Indeed, I could not have wished to add anything thereto, for I regard the arguments therein made as exhaustive and unanswerable.

I would not have undertaken this task but for the earnest conviction that the court had fallen into error in the construction of this statute, which, taken in connection with *Tucker v. Railway Co.*, supra, results in its annihilation, so far as both contractors and laborers are concerned on noncompleted railroads. If neither contractors nor mechanics, artisans, laborers, and workmen were

given a lien, they were intended to be; and, if this opinion does no more than call the attention of the legislature to the present somewhat anomalous state of the law, it will, I trust, have served some useful purpose.

#### BRUCE et al. v. BEALL.

(Supreme Court of Tennessee. Sept. 3, 1898.)

#### JURY—IMPANELING—PEREMPTORY CHALLENGES—PLEADING—DECLARATION—WAIVER.

1. It was not error to require the trial to proceed before the regular panel of jurors, when the effort to secure a venire with special qualifications proved fruitless.

2. Shannon's Code, §§ 4687, 5840, provide that where during trial jurors become incapacitated through illness, the sheriff shall "summon, instantaneously, another juror or jurors in his or their place or places, who shall, by the direction of the court, be sworn, and the trial be commenced de novo." Section 5824 provides that either party to a civil action may challenge two jurors peremptorily. *Held*, that the withdrawal of a juror on the trial of a civil cause, and the seating of another in his place, does not enlarge the right of a party to peremptory challenges, where he has exhausted that right on the original panel.

3. A declaration is cured by a plea putting in issue facts improperly omitted from the declaration.

Error to circuit court, Shelby county; L. H. Estes, Judge.

Action by F. J. Beall against W. S. Bruce & Co. for personal injuries. From a judgment in favor of plaintiff, defendants brings error. Affirmed.

Turley & Wright and Watson & Fitzhugh, for plaintiffs in error. Percy & Watkins, for defendant in error.

BEARD, J. This case was before us at the last term of this court, and in an opinion reported in 41 S. W. 446, 99 Tenn. 303, was reversed for an error of law, and was remanded for a new trial. It is again appealed, and many errors are assigned upon the action of the trial judge. While all of these are disposed of in a full memorandum filed with the record, only four will be embraced in this opinion.

1. At the instance of the plaintiff in error, a special venire was ordered by the lower court to try this case. The ultimate action of the court in regard to this venire, as well as the court's reason for endeavoring to secure it, are thus set out in the bill of exceptions, to wit: "In considering the motion [of plaintiff in error for a special jury], the court concludes that he might be able to select men, who, from their vocations and business, would probably be better acquainted with iron, wire cables, their wear and tear and life. The court thereupon ordered a venire of such men as he knew personally to be acquainted with such matters. Upon being presented to the court, they were each personally examined by the court, and found to have a good, valid reason to be excused from serving. When the court had exhausted this venire, all hope of getting such

a jury as the motion originally contemplated was gone. Thereupon the court concluded to try and have a jury, half of whom had not been on the regular panel, irrespective of any special qualifications, to consider this case. The venire was summoned, but their excuses satisfied the court that it would not be right to compel them to sit on this case, and they were excused. The court then ordered that the trial proceed, and tendered a jury from the regular venire, which was excepted to, but the court ordered the trial to proceed. I do not believe the court committed any error in this." It is also stated that the court considered that the regular panel was composed of good men. The action of the court in thus depriving the plaintiff in error of a trial by a special jury, and compelling him to try before the regular panel, is assigned as error.

We think there was no error in this action of the trial judge in requiring the case to proceed before the regular panel, when he discovered the effort to secure men "better acquainted with iron, wire cables, their wear and tear and life," was fruitless. The exercise of his discretion in granting the order for a special venire did not place it beyond his power to revoke it, upon discovery that the order could not be complied with, and there was no vested right in plaintiff in error, that the court should continue in a profitless undertaking. Having, in the end, furnished 12 competent jurors from the regular panel to try the cause, the plaintiff in error cannot now be heard to complain.

2. After the trial began, one of the jurors was excused on account of illness, and another juror was called in his place. Upon his examination, no objection being found to him, the plaintiff in error sought to challenge him peremptorily. This the court disallowed, because the plaintiff in error in making up the jury had already exhausted his two peremptory challenges. It is insisted that this was error. By section 1, cl. 99, Act 1817, brought into Shannon's Code at sections 4687 and 5840, it is provided: "If a trial shall be commenced in any criminal prosecution or civil cause before any court having cognizance of the same, and if, during the progress of the trial, a juror or jurors became so unwell that, in the opinion of the court presiding in the trial, he or they are unable to serve, he or they may by the court be permitted to retire, and the sheriff shall be directed and required to summon, instantly, a juror or jurors in his or their place or places, who shall, by the direction of the court, be sworn, and the trial be commenced de novo." In *Garner v. State*, 5 Yerg. 160, this statute was considered in regard to a state of facts similar to those on this point arising in this case, and it was ruled that the right of challenge on the part of the prisoner *ex necessitate rei* arose upon the presentation of the new juror, although his list of peremptory challenges had been exhausted in making up the jury as originally found. Again, in *State v. Curtis*, 5 Humph.

601, this court say: "By the common law, when a juror becomes sick, the whole jury is broken up, and the same eleven that had before been sworn are put to the prisoner, and may be challenged by him. 1 Chit. Cr. Law, 645; 4 Taunt. 309. But by the act of 1817, a juror is to be summoned instantly, in place of the sick juror, and sworn. The eleven remaining as part of the panel elected are not subject again to challenge, nor are they again sworn. 5 Yerg. 160. The right of challenge is confined to the juror newly summoned alone." It will be observed that these two cases, relied upon by plaintiff in error as authority to support the present contention, were both criminal cases, and that the right of the peremptory challenge of the juror presented in the room of the juror withdrawn is conceded to be one not provided for in this act, but one arising by operation of law. At common law, however, the right to a peremptory challenge had no existence in civil cases. *Thomp. & M. Jur.* § 154. In England no peremptory challenges are even now allowed in civil cases, as a matter of right, though usually it is conceded by the courts as a matter of courtesy. *Creed v. Fisher*, 9 Exch. 472. So it is that where the common law is the basis of jurisprudence, as in this state, such right must rest alone upon statute; and accordingly it was provided for by section 1, c. 60, Acts 1805, which, carried into Shannon's Code, at section 5824, is as follows: "Either party to a civil action tried in the courts of this state may challenge two jurors without assigning any cause." In construing this section of the act of 1817, hereinbefore set out, it has been held that the withdrawing of a juror, as in the present case, does not break up the panel, but the remaining jurors continue as a part of it, neither subject to challenge, nor to the necessity of being resworn; while the act of 1805 (section 5824, Shannon's Code) has been held to mean that each party to a civil suit, whether comprising one or many plaintiffs or defendants, is entitled to but two peremptory challenges. *Blackburn v. Hays*, 4 Cold. 227. Taking these two acts together, and especially in the absence, in such case, of a common-law right to a peremptory challenge, we think the only effect of the withdrawal of a juror during the trial of a civil cause, and seating another in his place, is that, when the new juror is sworn, the trial will begin de novo; in other words, if the party objecting has already exhausted his peremptory challenges in the original panel, the presenting of the new juror will not extend or enlarge his right to such challenge. This view of the operation of these two acts in a civil cause makes it unnecessary for us to consider whether the case of *Lewis v. State*, 3 Head, 127, has overruled, or in any wise modified, the cases of *Garner v. State*, and *State v. Curtis*, supra.

3. Again, it is said the trial court was in er-

ror in overruling the motion of defendants below in arrest of judgment. This question was rested on the ground the declaration did not aver that the plaintiff did not know, or, by the exercise of reasonable care, could not have known, of the defects in the elevator which are alleged to have produced the injuries, nor did it aver that the defendants below had superior knowledge, or means of knowledge, of such defects. Conceding that this was a lack in the declaration which would have been fatal on motion in arrest, the pleas of the defendants, put distinctly in issue the knowledge, or want of knowledge, of the plaintiff, as well as that of defendants, and thus fully supplied the defects of the declaration. This is a sufficient answer to this motion. Where a declaration lying in debt is defective, if the defendant answers one without demurrer or motion, tendering an issue of fact, and a verdict is rendered, a motion in arrest, on the ground that no cause of action is shown, comes too late. *Saulsbury v. Alexander*, 50 Mo. 142. For if facts requisite to constitute a cause of action are necessarily inferable from the pleadings taken in their entirety, judgment will not be arrested after verdict. *Corpenny v. Sedalia*, 57 Mo. 88; *Edmondson v. Phillips*, 73 Mo. 57. In addition, the great weight of authority is that a motion in arrest is too late, when it comes, as in this case, after the enrollment or entry of the judgment. *State v. Kibling*, 63 Vt. 636, 22 Atl. 613; *Gilstrap v. Felts*, 50 Mo. 432; *Keller v. Stevens*, 66 Md. 132, 6 Atl. 533; *Perry v. People*, 14 Ill. 496; *Hilligoss v. Pittsburg*, 40 Ind. 112; *Territory v. Corbitt*, 3 Mont. 50; 2 Elliott, Gen. Prac. 996; 2 Enc. Pl. & Prac. 817. While certainly there is sound reason for this rule, yet we are content to rest our approval of the action of the trial judge in overruling this motion upon the ground that the defendants' pleas fully supplied the defects of the declaration of the plaintiff.

4. In conclusion, without undertaking to state the evidence as developed to the jury, we think it sufficient to say we think that, both in volume and materiality, it sustained the verdict of \$12,000 rendered in this case, and the judgment of the trial court is therefore affirmed.

ALLEN et al. v. SMITH et al., Turnpike Com'rs.

(Court of Chancery Appeals of Tennessee. Feb. 5, 1898.)

TURNPIKES—FAILURE TO MAINTAIN—REMEDY—REPORT OF COMMISSIONERS—BRIDGES—JUDICIAL SALES—RIGHTS OF PURCHASER—DUE PROCESS OF LAW—INJUNCTION—WHEN LIES—PARTIES.

1. Where commissioners acting under Shannon's Code, §§ 1748-1757, authorizing them to condemn a turnpike in bad repair, and throw open its gates, have abused their power, the chancery court has jurisdiction to grant relief by injunction, since there is no remedy at law.

2. A bill for an injunction against turnpike

commissioners, which makes the three active members of the board defendants, is not defective because it does not add the county, or the chairman of the county court, who is an ex-officio member of the board.

3. An individual purchaser at a judicial sale of the rights, immunities, privileges, and franchises of a turnpike company has the right to collect tolls, such right not being a corporate right necessarily.

4. Shannon's Code, §§ 1748-1757, authorizing turnpike commissioners to condemn a turnpike in bad repair, and throw open its gates, until it is put in condition, does not empower those officers to suspend vested rights without due process of law.

5. A turnpike charter providing that a justice of the peace, on information given on oath that a road has been 20 days out of repair, may, on hearing, give judgment opening the gates nearest the point complained of, does not supersede an existing statute (Shannon's Code, §§ 1748-1757) giving turnpike commissioners power to condemn a turnpike in bad repair, and throw open the gates until repairs are made.

6. The charter of a turnpike company required that "the road shall be kept 24 feet wide, with sufficient ditches, culverts, and bridges to drain the water," etc. It also provided that "the company will not be required to build a bridge across the Cumberland river, but a good ferry shall be kept up at any point where said road crosses said river." Held to impose on the company the duty of building bridges where needed over all other streams intersecting the turnpike.

7. A turnpike was described in the charter as "extending from about two and a half miles west of H., and running through the town of H., crossing L. G. creek, in the town of H., running thence on east two and a half miles." The bridge over the creek where the pike crossed the stream was built by the town, and kept in repair until its charter expired. Held, that the bridge was part of the turnpike, and it was the duty of the owners of the pike to keep it in repair.

8. The report of turnpike commissioners of the necessity of a bridge at a point on a toll road is prima facie evidence of the fact, under which finding they are authorized by Shannon's Code, §§ 1748-1757, to order toll gates thrown open until the defect is remedied.

Appeal from chancery court, Trousdale county; J. S. Gribble, Chancellor.

Suit by Mrs. F. E. Allen, in her own right and as guardian of Ethel Allen, a minor daughter, and James C. Allen, her son, against H. C. Smith and others, turnpike commissioners of Trousdale county. A demurrer to the bill was sustained, and complainants appeal. Affirmed, and bill dismissed.

W. C. Desmukes, J. J. Turner, and J. E. Foust, Jr., for appellants. J. S. McMurray, W. B. Hale, M. C. Fitzpatrick, and E. T. Seay, for appellees.

WALLER, J. This is a bill filed by Mrs. F. E. Allen in her own right and as guardian of Ethel Allen, a minor daughter, and James C. Allen, her son, against the turnpike commissioners of Trousdale county, seeking to enjoin them from opening a toll gate of a certain turnpike located in that county. An amended bill was filed, asking that the chairman of the county court of Trousdale county be made a defendant, but it does not appear that any

process was ever issued against him. A demurrer was interposed by the defendants to this bill, and was sustained by the chancellor. An appeal was taken to the supreme court from the action of the chancellor sustaining the demurrer, and the case has been assigned to be heard by this court.

Mrs. Allen is the widow of Arch Allen, deceased, and the other two complainants are his children. It is alleged in the bill that Arch Allen, during his lifetime, in connection with one Thomas J. Day, his partner, became the purchaser at public sale of five miles of the turnpike known as the "Carthage and Hartsville Turnpike." This purchase was made at a sale had under proceedings in the chancery court of Smith county. The decrees and entries relative to this sale are filed as exhibits to the bill, but it is not necessary to set out at any length the details of these proceedings. It is sufficient to say that it appears from these exhibits that the cause was begun by the creditors of the Carthage & Hartsville Turnpike Company in the chancery court of Smith county, and that in the course of those proceedings the chancellor decreed that the turnpike be sold in sections of five miles each, and that on August 23, 1880, what is known as section No. 2 of this turnpike was reported as having been sold to Day and Allen, and this report was confirmed by the chancellor. It is not shown in the bill how the complainants became the owners of Day's interest in this turnpike, but it is alleged that they were, when the bill was filed, the sole owners of this section. The said section No. 2 sold to Day and Allen runs through the village of Hartsville, extending  $2\frac{1}{2}$  miles east and west, and on it is a toll gate, the toll from which complainants claim they are entitled to. This said section also crosses what is termed in the record "Little Goose Creek," in the town of Hartsville, over which there has been for a number of years a bridge. This bridge was destroyed by the high water in the spring of 1887, having for some time previous thereto been in bad repair. It is alleged in the bill that the defendants, as commissioners of turnpikes for Trousdale county, have inspected the said section of turnpike, and have reported it as in reasonably good repair, with the exception of the bridge over Little Goose creek. It is alleged that the turnpike commissioners are threatening, on account of this bridge not having been rebuilt, to open the toll gate in question, under the authority given them by the provisions of the acts of 1835 and 1877. It is alleged that the commissioners have no reason for throwing open this gate, except that this bridge is not kept in repair. Complainants insist that there is nothing in the charter which requires them to build a bridge over this creek. They also allege that as long as Hartsville was an incorporated town the town authorities had full control and charge of this matter, and that the said town built a bridge over this creek, and kept it in repair. It is also alleged that after the charter of

Hartsville was abolished the county court undertook to take charge of this bridge, and entered into a contract with Allen in regard thereto. It is alleged also that the county court of Trousdale county and corporate authorities of Hartsville have for a number of years recognized that it was no part of the duty of complainants to build or keep in repair the bridge in question. The bill seeks to enjoin, under the above allegation, the defendants from opening the toll gate in question.

The first ground of demurrer is addressed to the jurisdiction of the chancery court to enjoin the action of the turnpike commissioners under the acts of 1835 and 1877, carried into Shannon's Code (sections 1748 to 1757, inclusive). These sections provide, in substance, that it shall be the duty of the superintendents or commissioners of turnpikes to examine the turnpike roads of the county in which they are appointed, and to report annually to the county court as to the condition of said roads. Section 1757 provides that whenever, in the opinion of a majority of said superintendents, any road or bridge shall manifestly be in bad condition, they may open the gates of such public way until it is put in good order and condition. That the chancery court has jurisdiction to restrain commissioners from ordering the gate of a turnpike to be thrown open when it appears that the company has complied with all legal requirements as to putting their roadway in repair, seems to have been recognized by the supreme court of this state in *Turnpike Co. v. Marshall*, 2 Baxt. 104. Indeed, when the commissioners have abused their powers, and unjustly condemned a turnpike as being in bad repair, and for that reason ordered its gates to be thrown open, it seems no other remedy is offered to the company than to seek relief through the aid of the chancery court. If it chooses to ignore the orders of the turnpike commissioners, it subjects itself to indictment. It has, under the laws under which the commissioners operate, no right to be heard before them as to whether or not the turnpike is up to the legal requirements of the charter and the general laws of the state relative to turnpikes. The proceedings of the commissioners are *ex parte*. The company has no right of appeal from its action. It has no remedy at law by which the wrongful action of the commissioners may be revised. There must be some remedy by which the company can protect itself against the wrongful acts of the commissioners, and if there be no sufficient, adequate, unembarrassed remedy at law, the complainants are compelled to apply to the chancery court for relief. For these reasons the ground of demurrer based upon the right of jurisdiction must be overruled.

The bill is demurred to also because it is said the defendants are sued individually, and not as the turnpike commissioners of Trousdale county. It is sufficient to say, in reply to this, that the bill clearly shows that the suit is not against the defendants individually.

It shows that they are sued in the capacity of commissioners, and the injunction issued is directed to them as turnpike commissioners of Trousdale county. The subpoena to answer is addressed to them as commissioners of Trousdale county. There is nothing in this ground of demurrer, and it must be overruled.

The third and fourth grounds of demurrer are based upon the fact that neither the county of Trousdale nor the chairman of the county court of Trousdale county, who is ex officio chairman and member of the board of commissioners, is made a party defendant. The county of Trousdale has nothing to do with the orders of the turnpike commissioners, and therefore would not be a proper party to the suit. True, the county court of Trousdale county elects the superintendents and receives their reports and spreads them upon the minutes of their proceedings; but they have no authority to revise these reports, nor have they any jurisdiction over turnpike companies. See *Turnpike Co. v. Marshall*, 2 Baxt. 104. While the chairman of the county court is ex officio member of the board of commissioners, and would have been a proper party to the suit, yet the bill does make the three active members of the board defendants, and all the issues raised in the bill can be as well determined as if the chairman of the court were in fact a defendant. These grounds of demurrer are not well taken, and must be overruled.

It is made the basis of the fifth and sixth grounds of demurrer that complainants do not show in their bill any right to collect toll or to maintain a toll gate. The bill does show that under the proceedings before the chancellor, already referred to, complainants became the purchaser of a section of the turnpike belonging to the Carthage & Hartsville Turnpike Company. The decrees made exhibits to the bill show that in these proceedings all the rights, immunities, privileges, and franchises of the Carthage & Hartsville Turnpike Company were sold. There can be no question but that this carries with it the authority to maintain a toll gate and to collect tolls. Such a privilege is the only valuable right incident to the ownership of such property. It is not necessary that the purchasers form a new corporation in order to exercise these privileges, for the reason that the franchisees to own a turnpike, to maintain toll gates, and to collect tolls are not necessarily corporate rights. Such rights "are capable of existing and being enjoyed by natural persons," and may be assigned. It was held in the case of *Gleaves v. Turnpike Co.*, 4 Baxt. 88, that the chancery court had jurisdiction to sell turnpike property, including the right to collect tolls, for the benefit of creditors. Of course, if the court has the right to decree a sale, the purchaser procures the right to collect tolls. See, also, *Ragan v. Aiken*, 9 Lea, 610; *Baxter v. Turnpike Co.*, 10 Lea, 488. It may therefore be concluded that the complainants show in their bill that they have the

right to maintain a toll gate, and charge and receive tolls by virtue of the purchase made under the proceedings in the chancery court of Smith county.

But the defendants again say that, even if this right to charge and receive tolls exists, yet complainants are charged with all the obligations and burdens which were imposed upon the Carthage & Hartsville Turnpike Company by its charter and the general laws of the state relative to turnpikes, and that they, as commissioners of turnpikes for Trousdale county, having inspected the pike, as it was their duty to do under the acts of 1835 and 1877, and found it out of repair, in that there was no bridge across the creek in question, as there should be, they had the right and were authorized to order the gates to be thrown open, and ought not to be enjoined from so doing. The complainants have several defenses to this position. First, they say that the acts of 1835 and 1877 under which the commissioners claim to be authorized to open toll gates are unconstitutional, because under their provisions the commissioners are empowered to suspend the vested rights of complainants without "due process of law," in that a judgment is rendered against them without any sort of trial, "without witnesses, without jury, without any of the forms common to the courts of justice, and without the privilege of appearing by its agents or counsel." The validity of the act of 1835 was questioned in the case of *Turnpike Co. v. Marshall*, supra. The opinion of Chancellor East was filed with the opinion of the supreme court, and is published in the report of the case. Chancellor East in this opinion attacked the validity of this act, but, finding other grounds upon which he could dispose of the case, the question was not directly determined. The act was again assailed in the case of *B. F. King against Nashville & Duck River Turnpike Company*. This came up from the circuit court of Davidson county. The statute in question was held unconstitutional by Justice McAllister, who was then sitting as judge of the circuit court, but upon appeal to the supreme court, in an oral opinion, this act was held to be valid. See *Minutes* December Term, 1891, p. —. This court is bound by the determination of this question by the supreme court of the state, and it is therefore useless to discuss the constitutionality of the statute in question. In the next place, complainants insist that by its charter the Carthage & Hartsville Turnpike Company was given all the powers and privileges of the Lebanon & Trousdale Ferry Turnpike Company, and was subjected to the same rules, regulations, restrictions, and liabilities imposed upon the latter company by its charter. Section 20 of that charter provided as follows: "On information given by any person on oath to any justice of the peace, that the road has been twenty days out of repair, the justice shall issue a warrant to some constable or the sheriff, against the near-

et gate keeper or the president of the directory, to appear before him at a time and place therein specified, and also commanding him to summons three freeholders to appear before him at the time and place to investigate the complaint. If they find it true the justice shall give judgment that the nearest gate or the two nearest gates in his discretion shall be opened and charge no toll until the road is fully repaired, and also for the costs of the proceedings; on due proof before the justice that the road is repaired, he shall order that the gate be again closed." It is contended that this provision is a remedy exclusive of all other remedies, because it is the one provided by the act of incorporation, and that, therefore, the commissioners are not authorized to proceed against the turnpike company under the acts of 1835 and 1877. This position of complainants cannot be maintained. These are remedies provided by the legislature, and it is a well-settled principle that no one can have a vested right in a remedy of this kind. The charter of this company was granted by the legislature subsequent to the act of 1835, and it must have been granted subject to the general laws of the state relative to turnpike property. It will not be presumed that the legislature has surrendered all control of turnpikes through the operation of general laws, unless there is some provision in the charter necessarily creating that presumption. The legislature, through its police power, has undertaken in the act of 1835 to provide for penalties in case the turnpike is not kept in good repair. The power to act is placed in three turnpike commissioners or superintendents. But the charter provision is a remedy which any patron of the road may invoke. It is certainly a salutary provision. If, for any reason, the commissioners fail to perform their duty, those traveling along the pike may resort to the courts for the purpose of being relieved from paying tolls while the turnpike remains in bad repair. In the case of *Simpson v. State*, 10 Yerg. 525, it was insisted for the defendants that they were not liable to an indictment for keeping their road out of repair, because by the terms of their charter certain commissioners were to inspect their turnpike once within every two months, and if they should deem it out of repair they were authorized to throw open the gates, to the end that the public, during the time it might so remain out of repair, should have the use of the road free from tollage. It was insisted that this was the only penalty to which they could be subjected. But the court held against this construction of the charter. The court says, through Reese, J.: "Is it the meaning of the charter that they may suffer the road to remain out of repair if no toll be received? Surely not. For then it might suit them to suffer the road to continue in bad condition, and the gate to continue open, during half of the year, when there might be but little traveling upon it, and during the oth-

er and more profitable half to put it in repair and close the gate. In fact, there can be little doubt that experience manifested this scheme of enforcing the duty of proprietors of roads by the control of commissioners to be utterly inefficient and nugatory; not because, if the gates, for their default, had been opened, such a measure would have been wanting in energy, but because the commissioners were found to want the vigilance, the firmness, or the integrity to prompt them to the adoption of the measure. If, then, these petty agents of the public shall refuse or omit to do their duty, or shall die or remove, shall the community, who have surrendered their duty of keeping the road in repair to the proprietors, be compelled, not only to travel over bad roads, but be subjected also to tollage?" In the case of *Turnpike Co. v. Marshall*, 2 Baxt. 104, Chancellor East held, in substance, that a remedy in a charter granted subsequent to the act of 1835 was a cumulative remedy, and not an exclusive one. In this connection he says: "Every person and corporation has a right to some remedy, while neither has a vested right to a specific remedy in any sense in which the same may be said to be secured by the constitution." The cases cited by counsel for complainants have been examined, but these cases were all with reference to the remedy of landowners to recover damages for the exercise of the power of eminent domain by railroad and turnpike companies. It was held in these cases that the remedy prescribed in the charter was an exclusive one, and that the landowner could not sue at common law for damages resulting from the exercise of this power. See *Mitchell v. Turnpike Co.*, 8 Humph. 456; *Woodfolk v. Railroad Co.*, 2 Swan, 437; *Railroad Co. v. Adams*, 3 Head, 597. These decisions seem to have been departed from in the case of *Railroad Co. v. Cockrane*, 3 Lea, 478, by virtue of the Code of 1858, giving right of action on the facts of the case. But, however this may be, the principle applicable to the latter class of cases is not at all analogous to the right of the legislature to prescribe several remedies cumulative to each other in the exercise of its police powers. We are therefore of the opinion that this defense of the complainants to the actions of the commissioners cannot be maintained.

It is next insisted by the complainants that they are not bound to keep up the bridge over Goose creek, because the charter imposed no such duty. If the road which crosses this stream is a part of their turnpike, there can be no doubt but that it is their duty to provide a bridge, if one be necessary. The charter requires that "the road shall be kept 24 feet wide, with sufficient ditches, culverts, and bridges to drain the water," etc. It also provides that "said company will not be required to build a bridge across the Cumberland river, but a good ferry shall be kept up at any point where said road crosses said river." These provisions, when taken together, show

that the charter imposes upon the company the duty to build bridges, where needed, over the ordinary streams intersecting the turnpike. Indeed, it would be strange if this duty were not imposed upon all turnpike companies. But complainants insist that the village of Hartsville was an incorporated town when the turnpike company was first chartered, and that the town constructed the first bridge that was built across this stream, and kept it in repair until the abolishment of the charter, in 1879. They say that it has never been the duty of the turnpike company to construct a bridge at this point, because it is within the corporate limits of the old town of Hartsville. This contention can be maintained only upon the hypothesis that that portion of the road within the corporate limits including the bridge across this creek was not in reality a portion of the company's turnpike. In such case the turnpike would end at the corporate limits on one side, and begin at the corporate limits of the other side. Under that state of facts the town would be compelled to keep the intervening portion in repair, provided it was used as a public road or street. But the bill does not show that such a condition of affairs ever existed. It does allege that, as far as the bridge was concerned, the town had control of and kept the same in repair. From the bill it seems that the original company owned all of the pike that was within the corporate limits of the town of Hartsville. That section owned by complainants is described as "extending from about two and a half miles west of Hartsville, and running through the town of Hartsville, crossing Little Goose creek, in the town of Hartsville, running thence on east two and a half miles to what is known as 'Stallcup's Hill.'" It therefore appears from this allegation that complainants claim to own all of this portion of the pike. In our opinion, there is no sufficient allegation in the bill that the road across this creek does not constitute, and has not always constituted, a part of the section of the turnpike belonging to complainants. The fact that the town of Hartsville originally constructed this bridge, and kept the same in repair, would not have relieved the company from responsibility, if in fact this portion of the pike was a part of their road. The town may have kept it in repair for the convenience of their citizens, or in ignorance of its rights, or for other reasons. This does not work as an estoppel against the public or the state to compel the owners of these important franchises to perform the duties required of them under the laws of the state. Again, the bill shows that section 2, owned by complainants was finally sold under the proceedings in the chancery court of Smith county in 1880 after the charter of the town of Hartsville had been abolished. Said section 2 is described in these proceedings as "beginning at the end of No. 1, and running five miles to the Stallcup graveyard." The description is that of a continuous route. There is no reference to any gap

at the town of Hartsville or at Goose creek. Clearly, it was intended to sell, and complainants intended to purchase, the entire five miles of turnpike. This purchase carried with it the burden of keeping the whole of it in proper repair. The mere fact that the corporation of Hartsville, while it was in existence, had kept the said bridge in repair, is not sufficient to relieve these complainants of this duty after the charter of that town has been abolished. The bill shows that it is a part of the section of the turnpike owned by complainants, and they must perform the duties required of them by law. The complainants enjoy the privilege of collecting tolls from those traveling along this turnpike, and as a matter of equity they should construct the bridge, and keep it in repair, if it is necessary that this should be done. The county court, in our opinion, would have no authority to make appropriations for this purpose; and, unless complainants can be compelled in some way to keep up this bridge, those traveling along the pike are put to a great inconvenience, although they are compelled to pay tolls for such privilege. We are of the opinion that the bill fails to allege any facts which show that the crossing over Goose creek is not a part of the section of the Carthage and Hartsville turnpike purchased by Day and Allen in the proceedings had in the chancery court of Smith county; and that, in the absence of such facts, it is the duty of complainants, whatever may have been the action of the town of Hartsville and of the county court of Trousdale county, to keep the bridge in repair. We are further of the opinion that the report of the turnpike commissioners as to the necessity of a bridge at this point is prima facie evidence of such fact, and they are authorized to order gates thrown open, under the acts of 1835 and 1877. The demurrer is therefore sustained, and the bill dismissed.

Affirmed orally by supreme court, February 26, 1898.

#### LOUISVILLE & N. R. CO. v. COMMON-WEALTH.<sup>1</sup>

(Court of Appeals of Kentucky. Sept. 24, 1898.)

APPEAL AND ERROR — RIGHT OF STRANGER TO RECORD TO BE HEARD.

One who is not a party to the record has no right to file a paper styled a "supplemental petition for rehearing," without the consent of the parties.

Appeal from circuit court, Marion county.

"To be officially reported."

Motion by "coal miners and operators" to file supplemental petition for rehearing. Denied.

For former report, see 46 S. W. 707.

C. J. Pratt, for petitioners.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

**LEWIS, C. J.** The question here arising is on a motion made in the case of Louisville & N. R. Co. v. Com., 46 S. W. 707 (decided at the last term of this court), to file what is described as a "supplemental petition for rehearing." The paper is signed by "Clifton J. Pratt, Counsel for the Coal Miners and Operators Named in the Accompanying Resolutions." As the resolutions were not permitted to be filed, and have been withdrawn, the persons for whom counsel appears cannot be readily identified. However, we will assume that counsel has been regularly employed, and has the warrant of attorney to make the motion. The persons now seeking to file the supplemental petition are not parties to the litigation, nor did counsel for them, orally or by brief, argue the case before it was decided by this court. They do not come to now interfere with the litigation with consent of, or even upon notice to, either appellant or appellee. In our opinion, to permit the paper filed under the circumstances would be irregular, unjust to the real parties, and might be a precedent producing mischief and confusion. The petitioners have not the right to file the paper without the consent of the present parties to the litigation. Motion, for the present, overruled.

#### HENDERSON et al. v. BAKER et al.<sup>1</sup>

(Court of Appeals of Kentucky. Sept. 24, 1898.)

#### ATTACHMENT—CLAIM TO PROPERTY — EVIDENCE—TRANSFER TO EQUITY.

1. A contract which apparently shows an abandonment by the claimant of attached property of his claim is admissible as evidence.

2. Where an issue as to the ownership of attached property involves a question of fraud, the court may, of its own motion, transfer the case to equity.

Appeal from circuit court, Hickman county.

"Not to be officially reported."

Action by C. M. Henderson & Co. against J. V. Baker and others. M. L. Chenault filed petition claiming attached property, and, from a judgment sustaining his claim, plaintiffs appeal. Reversed.

W. Ray Moss, George L. Husbands, Thos. G. Poore, and W. S. Pryor, for appellants. J. M. Brummal & Son, for appellees.

**HAZELRIGG, J.** Appellants were attaching creditors, and sought to subject to levy and sale a stock of goods as the property of their debtor, J. V. Baker. Appellee Chenault claimed to own the goods by purchase from the debtor's brother, and at the trial the original pleadings presented the single question of his ownership. The creditors offered to read to the jury a contract which apparently shows an abandonment by Chenault of his claim, and which was quite important on the issue presented. The court refused

to let them read it, and they then tendered an amended answer, setting up the writing, and this was also rejected. We think it was error to reject this testimony and this pleading. It is proper to say, in view of the argument of counsel that the court, on its own motion, might properly have transferred the case to equity, where the question of fraud and the proper distribution of the attached fund could have been tried out more appropriately. It would not be proper to comment on the effect of the testimony as far as it was heard,—a question elaborately argued in the brief of counsel,—except we are convinced that the power of attorney from J. V. to J. C. Baker did not of itself authorize the agent, J. C. Baker, to sell the goods in contest, though whether this power, together with other facts and circumstances, may not have done so, is not and cannot now be determined. Reversed for further proceedings consistent with this opinion.

#### CITY OF LOUISVILLE v. GOSNELL et al.<sup>1</sup>

(Court of Appeals of Kentucky. Sept. 21, 1898.)

#### MUNICIPAL CORPORATIONS—ASSESSMENTS FOR STREET IMPROVEMENTS.

1. In an action to enforce liens on property by virtue of apportionment warrants for street improvements in the city of Louisville, a judgment against the city was proper, where the property was not liable, there being a prayer therefor.

2. The reception of the work by the city engineer, its approval by the council, and the issue of the apportionment warrants, do not conclusively establish the liability of the property.

Appeal from circuit court, Jefferson county.

"Not to be officially reported."

Action by George W. Gosnell and others against Thomas Walston and others to enforce liens on property by virtue of apportionment warrants for street improvements made pursuant to an ordinance approved January 26, 1892, and a contract approved February 18, 1892. Judgment dismissing the petition as to the property owners, and for the recovery against the city of Louisville, which was made a defendant, for the amount of the warrants, and the city appeals. Affirmed.

H. L. Stone, for appellant. Lane & Burnett, for appellees.

**GUFFY, J.** The appellees instituted this action in the Jefferson circuit court, chancery division, against Thomas Walston, etc., and the appellant. Plaintiffs sought to enforce liens on the property of the various defendants under and by virtue of apportionment warrants for improvements made, as alleged, under orders of the city council of Louisville. It was also sought to recover the amount claimed against the appellant in the event that it should be decided that plaintiffs were not entitled to subject the property of the defend-

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ants to the satisfaction of the claim sued on. Several of the property owners made defense, and their answer is a complete traverse of all the averments contained in the petition, so far as their interest is involved. The appellant demurred to the petition so far as a recovery was sought against it, which was overruled by the court; and the action, after proof taken, was submitted to the court, and judgment rendered in favor of the property owners, who made defense, and the petition as to them dismissed, and a judgment rendered in favor of plaintiffs against the appellant for the amount sought to be enforced upon the property of the defendants, who made defense as aforesaid, and from that judgment appellant prosecutes this appeal.

It is the contention of appellant that the reception of the work by the city engineer, and its approval by the city council, and the issuance of the apportionment warrants, establish conclusively all the facts necessary to entitle plaintiff to recover; hence no judgment should have been rendered against appellant. It is the contention of appellees that the work contracted for was not authorized by law, and that quite a large sum of money was included in the apportionment warrants, for which the city alone was liable, under the law then in force. It is also contended by appellees that the engineer purposely denied them a right to object to his reception or approval of the work. It may be conceded that there is some conflict in the testimony introduced, but the chancellor was peculiarly qualified, from his personal knowledge of the witnesses, as well as the law of city improvements, to determine the questions involved. We have carefully examined the authorities cited by appellant, and fail to see that they sustain its contention. The judgment appealed from is therefore affirmed.

#### COMMONWEALTH v. BRAGG.<sup>1</sup>

(Court of Appeals of Kentucky. Sept. 21, 1898.)

##### CRIMINAL LAW—FORMER ACQUITTAL.

An acquittal of the charge of feloniously breaking a storehouse with intent to steal, and feloniously taking goods therefrom, is not a bar to an indictment for feloniously receiving the stolen goods.

Appeal from circuit court, Fulton county.  
"To be officially reported."

Drl. Bragg, being indicted for the offense of feloniously receiving stolen goods, pleaded former acquittal. A demurrer to his plea was overruled, and the commonwealth appeals. Reversed.

W. S. Taylor, Atty. Gen., for the Commonwealth.

DU RELLE, J. The appellee, Bragg, and two others, were jointly indicted under section 1164, Ky. St., charged with feloniously breaking a storehouse, with intent to steal, and feloniously taking goods therefrom, etc. A separate trial being had, the appellee was acquitted, the other defendants pleading guilty. At the same term of court appellee was indicted under section 1190, Id., charged with receiving stolen goods. The second indictment was remanded to the grand jury, and at a subsequent term a new indictment was returned upon the charge of receiving stolen goods, with the addition of the word "feloniously," which had been omitted from the former indictment. Appellee pleaded his trial and acquittal under the indictment for feloniously breaking, etc., in bar of this prosecution, setting out the former indictment, and averring that the acts charged in the second prosecution were degrees of, and included in, the offense for which he had been tried; and alleging further that the offense of receiving stolen goods, knowing them to be stolen, could have been charged in the original indictment. A demurrer to the plea in bar was overruled, and the commonwealth has appealed.

The sole question presented is whether the acquittal under the indictment for feloniously breaking, etc., is a bar to the prosecution of the indictment for receiving stolen goods. It is true that it might be competent to prove certain facts, such as the possession of the stolen property, under an indictment for either offense; but the offenses charged in the two indictments seem to us to be separate and distinct offenses, which not only could not be joined in one indictment, but are entirely incompatible with each other. For, if appellee was present at the breaking of the storehouse, and took the goods at that time and place, he was a party to the house-breaking, and clearly could not be found guilty of receiving stolen property, within the meaning of section 1190. If appellee was guilty of the one offense as to the particular property found in his possession, he could not have been guilty of the other. Moreover, section 126 of the Criminal Code expressly forbids the joinder in one indictment of charges other than those which are grouped together in section 127; and, while the latter section permits the joinder of larceny and receiving stolen property, it does not permit such joinder of burglary and receiving stolen property. The two offenses seem to fall within the rule laid down in Bish. New Cr. Law, § 1051, where it is said that offenses are not the same "when each indictment sets out an offense differing in all its elements from that in the other, though both relate to one transaction." We are of opinion that it was error to overrule the demurrer to the plea in bar, and the judgment is therefore reversed for further proceedings consistent with this opinion.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

**DAVIDSON v. COMMONWEALTH.**<sup>1</sup>

(Court of Appeals of Kentucky. Sept. 21, 1898.)

**RAPE — CAPACITY OF DEFENDANT TO COMMIT OFFENSE.**

A conviction of the offense of rape will not be disturbed merely because the defendant was under 14 years of age, where he was much more than 7 years old, and the jury was authorized by the evidence to believe beyond a reasonable doubt that he was physically capable of committing the crime, and mentally capable of understanding that it was wrong to do so.

Appeal from circuit court, Fayette county.  
"Not to be officially reported."

Robert Davidson was convicted of the offense of rape, and appeals. Affirmed.

Hobbs, Formen & Scott, for appellant. W. S. Taylor, for the Commonwealth.

GUFFY, J. The appellant, Robert Davidson, was indicted by the grand jury of Fayette county. The indictment charges, in effect, that the appellant did unlawfully, willfully, and feloniously attempt to commit rape upon the body of one Lida Cleveland, a female child then and there under the age of 12 years, and by force and against the will and consent of said infant did attempt to have carnal knowledge of the said infant child. The trial resulted in a verdict of guilt, and fixed the punishment at confinement in the penitentiary for the term of five years, and, appellant's motion for a new trial having been overruled, he prosecutes this appeal. The grounds for a new trial are as follows: "(1) The court misinstructed the jury, and refused to properly instruct the jury; (2) that the verdict is against the law, and is not supported by the evidence; (3) that the court permitted irrelevant and incompetent testimony to go to the jury, and excluded competent and relevant testimony." To all of which the defendant objected, etc.

We have carefully considered the very able brief of appellant's counsel, as well as the authorities cited, and fail to see that the court erred to the prejudice of any substantial right of the appellant, either in the admission or rejection of testimony. It seems to us that the evidence introduced authorized the jury to believe beyond a reasonable doubt that Lida Cleveland was at the time of the alleged offense a female under 12 years of age, and the evidence also authorized the jury to believe beyond a reasonable doubt that appellant was guilty of the offense charged. If it be conceded that the testimony showed that the appellant was not 14 years of age, yet it seems clear to us that he was much more than 7 years old, and that the jury were authorized by the evidence to believe beyond a reasonable doubt that he was physically capable of committing the crime of rape, and that he was mentally capable of understanding that it was wrong to do

so; hence it appears that the verdict of the jury is sustained by sufficient testimony.

It is earnestly insisted for appellant that the court erred in the instructions given, because they did not give the whole law of the case. It seems to us, however, that the instructions clearly required the jury to believe from the evidence every fact necessary to establish the guilt of the accused, and the facts necessary to constitute the crime were clearly and fully set out by the judge of the circuit court. It seems from this record that there was first a verdict of guilty, and the punishment of five years in the penitentiary fixed, that on the second trial the jury disagreed, and upon final trial the verdict and judgment appealed from were rendered. Nothing appears in this case to indicate that the appellant has not had a fair, full, and impartial trial, under proper instructions of the court; and, the jury being the judges of the questions of fact under proper instructions, we have no authority to interfere, or disturb the verdict. Judgment affirmed.

**COMMONWEALTH v. RISNER et al.**<sup>1</sup>

(Court of Appeals of Kentucky. Sept. 21, 1898.)

**INTOXICATING LIQUORS—INDICTMENT.**

An indictment charging the sale of spirituous liquors in less quantities than 10 gallons is good, though Ky. St. § 2558, permits liquor to be sold in quantities not less than 5 gallons, under certain specified conditions, as the exception as to 5 gallons stands in a separate clause from the main provision, and therefore need not be negated.

Appeal from circuit court, Morgan county.  
"Not to be officially reported."

An indictment against Lunday Risner and others for selling spirituous liquors was dismissed on demurrer, and the commonwealth appeals. Reversed.

W. S. Taylor, Atty. Gen., and M. M. Redwine, for the Commonwealth.

DU RELLE, J. Appellees were indicted under a special law applicable to Morgan county (Acts 1889-90, vol. 3, p. 1173), forbidding the sale of spirituous liquors in less quantities than 10 gallons. The indictment averred selling in quantities less than 10 gallons, and a demurrer was sustained upon the ground that the general law (sections 2557, 2558, Ky. St.) permitted liquor to be sold in quantities of not less than 5 gallons, under certain specified conditions. But, as held in *Thompson v. Com.* (Ky.) 46 S. W. 492, the exception as to 5 gallons standing in a separate clause from the main provision, it was not necessary to allege facts showing that the defendants did not come within the purview of the exception, for, if they did come within it, that was matter to be shown by them in defense; and the words, "in quantities

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less than ten gallons," may be rejected as surplusage. The judgment, therefore, must be reversed, and cause remanded for further proceedings consistent with this opinion.

### HENRY v. COMMONWEALTH.<sup>1</sup>

(Court of Appeals of Kentucky. Sept. 22, 1898.)

#### CRIMINAL LAW—APPEAL—SUFFICIENCY OF EVIDENCE.

Where the description of a mare bought from defendant tallied closely with that of a mare stolen from the owner the day before, and the mare was sold at a low price, defendant taking the check therefor in a fictitious name, these facts constituted some evidence of guilt, so as to prevent a reversal on the ground that there was no evidence to support a conviction.

Appeal from circuit court, Nicholas county. "Not to be officially reported."

Ed Henry was convicted of horse stealing, and appeals. Affirmed.

John P. Norvel, for appellant. W. S. Taylor, for the Commonwealth.

BURNAM, J. This appeal is prosecuted from a judgment of the Nicholas circuit court sentencing appellant to a term of two years' imprisonment in the penitentiary, based on a verdict of a jury convicting him of the crime of horse stealing. It is contended for him that there is no proof in the record which conduces to establish his guilt of the crime for which he was tried and convicted. The testimony in the case is meager, and, in some respects, wholly circumstantial. William Young, the party whose horse the defendant is charged with having stolen, testifies that on the 8th day of March, 1896, he owned a brown mare, about 21 years old, that was marked with a snip on her nose, star in forehead, and white right hind foot; that she was in his pasture about sundown of that day, with two other horses; that she and the others were missing the next morning; that he next saw the mare some time in April, in a livery stable in Lexington, in charge of some officers; and that he claimed her, and brought her home. J. T. Cecil testifies that on the 9th day of March, 1896, he bought of the defendant, in the city of Lexington, an old brown mare that had some white about her face and a white right hind foot; that he paid defendant \$20 for the mare and a buggy; that at the request of defendant the check given in payment was made payable to William Gillespie; and that he traded her off the same day, and had never seen her afterwards. While George Bradley testifies that he knew the defendant; saw him in Lexington at the time indicated, and at defendant's request identified him as all right to Cecil; and that defendant, as he recollected, was trying to trade Cecil an old bay mare with some white about her face. It is true, there is no positive testimony in the record which conclusively establishes the

identity of the mare stolen from Young, and subsequently recovered by him from the officers in Lexington, with the mare sold by the defendant to Cecil, but the description given by Cecil of the mare bought by him from defendant tallies very closely with that given by Young of the mare stolen from him the day before; and this, coupled with the additional facts that the horse and buggy were sold at an extremely low price, and that defendant, when he sold the mare, did not take the check in payment therefor in his true name, is some evidence tending to show the guilt of the accused of the offense charged. And, as this court has often held, it has no power to reverse a judgment of conviction in a criminal case upon the sole ground that there was not sufficient evidence to sustain the verdict. The question for us is, was there any evidence before the jury conducing to show the guilt of the accused? And as, in our opinion, there was some such evidence, we do not feel authorized to invade the province of the jury; wherefore the judgment is affirmed.

### COMMONWEALTH v. WILLIAMS et al.<sup>1</sup>

(Court of Appeals of Kentucky. Sept. 22, 1898.)

#### RECOGNIZANCES—WHAT CONSTITUTES BREACH.

To authorize the recovery of the penalty in a recognizance to keep the peace, there must have been a judicial conviction of the principal, as provided by Cr. Code, § 391, it not being sufficient that the principal committed a breach of the peace, and was killed by the sheriff in resisting arrest.

Appeal from circuit court, Monroe county.

"To be officially reported."

Petition in name of the commonwealth against T. Williams and others to recover the penalty upon a recognizance to keep the peace. Judgment sustaining demurrer to petition, and the commonwealth appeals. Affirmed.

W. S. Taylor, N. H. W. Aarons, and W. L. Porter, for the Commonwealth. Basil Richardson, for appellees.

BURNAM, J. This is an appeal from a judgment sustaining a demurrer to a petition instituted in the name of the commonwealth, seeking to recover the penalty upon a recognizance to keep the peace, taken under section 393 of the Criminal Code. The petition does not allege a judicial conviction of the principal in the recognizance of any offense involving a breach of the peace, or of a felony, within the time specified in the bond. It is alleged that after the execution of the bond, and within the time specified therein, the principal committed a breach of the peace, and, when forcibly resisting arrest therefor, was shot and killed by the sheriff; and the question is, can the commonwealth, under these circumstances, forfeit the recognizance for good behavior and to keep the peace, executed

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

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by appellees for deceased, and recover the penalty, or is it restricted, by the provisions of section 391 and subsections 1, 2, and 3 thereunder, to a recovery only when it can show a judicial conviction of an offense involving a breach of the bond, or of a felony? The law which permits courts to exact bond from a citizen to keep the peace, or for his good behavior, is regulated by the provisions of chapter 2, tit. 10, Cr. Code, and section 391, and subsections 1, 2, and 3 thereunder, specify the breaches of the bond which authorize its forfeiture and the recovery of the penalty named. One of these conditions is that there must have been a judicial conviction of the defendant of an offense involving a breach of the peace, or of a felony, within the period specified by the bond. See Cr. Code, § 391, subsecs. 1-3. The conviction of the defendant of one of the offenses named is required to enable the commonwealth to maintain the action under the statute, and such conviction must be alleged. As the commonwealth failed and is unable to make this necessary averment in its petition, the demurrer was properly sustained. The judgment is therefore affirmed.

### BUSH v. MONROE.<sup>1</sup>

(Court of Appeals of Kentucky. Sept. 23, 1898.)

#### JUDGMENT—Set-Off.

1. On a motion under Civ. Code, § 377, to set off one judgment against another, the party resisting the set-off cannot, as evidence of his right to the exemptions allowed to a housekeeper with a family, even if such right constitute a defense, read his pleading filed in the former case.

2. The defendant in a judgment may set off against it a judgment against the plaintiff, assigned to him by another.

Appeal from circuit court, Hart county.

"Not to be officially reported."

Motion by W. P. Bush to set off against a judgment in favor of C. E. Monroe against him a judgment against said Monroe, assigned to him by Edwards & Porter. Motion overruled, and W. P. Bush appeals. Reversed.

W. L. Porter, for appellant. W. J. Macey, for appellee.

DU RELLE, J. Appellee, Monroe, brought suit to rescind a contract for the purchase of land from appellant, Bush, and to recover purchase money paid by him, upon the ground that Bush had not title to the property. Bush admitted the defective title, joined in the prayer for rescission, and prayed an accounting of rents and profits during the occupancy of the land by Monroe. Issue was joined upon the questions of the rents and profits during Monroe's occupancy of the land, and the value of the improvements put thereon by him. Upon the issue thus made the court

decided in favor of Monroe, awarding judgment for about \$125. Prior to this judgment, Bush filed an amended and supplemental answer, which was afterwards amended to make it a set-off, setting up an assignment to him of a judgment against Monroe for \$150 and interest in favor of Edwards & Porter, and alleging that Monroe was insolvent. By the judgment referred to, a demurrer by Monroe to the set-off was sustained. After the judgment was rendered, Bush gave notice to Monroe, and moved to set off the judgment in favor of Edwards & Porter, which had been assigned to him, against the judgment in Monroe's favor; the two judgments having been rendered in the same court. This motion was overruled. For this action of the court appellant seeks a reversal, claiming that, under section 377 of the Civil Code, he was entitled to set off the judgment assigned to him, there being no assignment of Monroe's judgment against him at that date.

Section 377 of the Civil Code provides: "Judgments for the recovery of money may be set off against each other, with due regard to the legal and equitable rights of all persons interested therein. The set-off may be ordered upon motion, after reasonable notice to the adverse party, if both judgments are in the same court; or, in an equitable action, in the court which rendered the judgment sought to be annulled by the set-off." On behalf of appellee it is claimed that, without waiving the demurrer to the supplemental answer and set-off, he filed a reply averring that he was a housekeeper with a family; that the purchase money paid to Bush, and the value of the improvements which he put upon the land upon the faith of Bush's representations of title, were all the means of subsistence which he had for himself and family; that he had no provisions, breadstuff, etc., and no other property or means out of which to supply same; and that his claim against Bush was exempt from any claim acquired by the latter since the institution of the suit. Monroe's counsel cites a number of cases upon the question of set-off, all, however, decided before the adoption of the code provision. The question whether the exemption to a housekeeper with a family can be applied in a case where it is sought to annul one judgment by setting off another against it does not seem to us to be presented for decision by this record. Under the code provision referred to, whether the proceeding is by action in equity to set off judgments rendered by different courts, or by motion, upon notice, to set off judgments rendered by the same court,—as in this case,—it is a separate and distinct proceeding from the suit in which either judgment was rendered. All that is necessary to be presented by the party seeking to set off such a judgment is his notice, motion, and the two judgments. It is clear that, no matter which mode of procedure is followed, the pleading of either party filed in the previous case could not be read as evidence in favor of that party.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

In this record it does not appear that, upon the trial of the motion, any evidence was produced, or any claim made to exemption. It would appear, therefore, in accordance with the doctrine laid down in the case of *McBrayer v. Dean* (Ky.) 38 S. W. 508, that the motion to set off should have been sustained, wherefore the judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

### COMMONWEALTH v. HOLLAND.<sup>1</sup>

(Court of Appeals of Kentucky. Sept. 24, 1898.)

#### INTOXICATING LIQUORS—LICENSE—PLACE OF SALE.

1. Ky. St. § 4224, providing that license may be granted to distillers of spirituous liquors to retail such liquors "at their distillery, residence or own warehouse," and to manufacturers of vinous liquors and distillers of peach and apple brandy to retail such liquors "at the place of manufacture or the distillery," does not authorize the granting of license to a brandy distiller to sell at his residence.

2. A license to a distiller to sell at the distillery does not authorize him to sell at the warehouse, from 60 to 100 yards distant.

Appeal from circuit court, Metcalfe county.  
"To be officially reported."

R. U. Holland was acquitted of the offense of retailing spirituous liquors without a license, and the commonwealth appeals. Reversed.

W. H. W. Aaron and W. S. Taylor, for the Commonwealth.

BURNAM, J. Appellee was indicted for retailing spirituous liquors without a license. By agreement a jury was waived, and the case heard by the court on the following agreed facts: In September, 1896, appellee made application to the county court for a license, as a brandy distiller, to sell apple brandy at his residence, in Metcalfe county, in quantities of not less than a quart, which was granted by the court; appellee paying therefor the sum of \$25. Subsequent thereto, and within the time covered by the license, he sold a quart of brandy at his warehouse, which was located within from 30 to 40 feet from his residence, and from 60 to 100 yards from the distillery. The warehouse where the sale was made is on the survey of the distillery premises required by the internal revenue department of the federal government. The residence is not on the distillery premises, but is on the same tract of land.

Section 4224, Ky. St., provides that license may be granted by the county court to persons who are distillers of spirituous liquors in good faith to retail spirituous liquors of their own manufacture at their distillery, residence, or own warehouse, but shall sell at only one of said places, which must be

named and designated in the license, in quantities of not less than one quart, and the liquor not to be drunk on the premises or adjacent thereto, upon the payment of \$75; and by a subsequent paragraph of the same section it is provided that license may be granted to persons who are manufacturers of vinous liquors in good faith, and distillers of peach and apple brandy, to retail liquors of their own manufacture at the place of manufacture or the distillery, in quantities of not less than one quart, not to be drunk on the premises or adjacent thereto, upon the payment of \$25. The application of appellee was for a license to sell brandy of his own manufacture. The statute limits the sale of brandy sold under this license to the distillery or place of manufacture, and it cannot be sold elsewhere, and the county court was not authorized to designate the residence as the place for the sale of brandy under that license. The preceding paragraph of the same section does permit a license to be granted to distillers of spirituous liquors to retail liquor of their own manufacture either at their distillery, residence, or warehouse, but provides that they shall sell at only one of said places, which must be named and designated in the license. It is clearly the intention of the statute to limit the traffic under the license to the distillery or place of manufacture, and to hold that the words, "distillery or place of manufacture" mean "near by" or "in proximity" to the distillery would destroy the manifest purpose of the law. In this case the license to sell at the residence was unauthorized; but even if the place designated had been at the distillery, as directed by the statute, we are of the opinion that a sale made at the warehouse, from 60 to 100 yards distant, would not have been authorized. For the reasons given the judgment is reversed; and the cause remanded for proceedings consistent with this opinion.

### BATES v. HALL et al.<sup>1</sup>

(Court of Appeals of Kentucky. Sept. 23, 1898.)

#### GUARDIAN AND WARD—CLAIM OF GUARDIAN FOR BOARD.

Neither the ward nor his real estate is liable for the claim of a former guardian for his board and maintenance. *Dixon v. Hosick*, 41 S. W. 282, followed.

Appeal from circuit court, Letcher county.  
"Not to be officially reported."

Action by T. H. Bates against Ben Lee Hall and his guardian, Benj. M. Bates, to recover balance due for board and maintenance of the ward. Petition dismissed, and plaintiff appeals. Affirmed.

S. B. Dishman, for appellant. H. S. K. Morrison and D. D. Field, for appellees.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

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**WHITE, J.** The appellant, T. G. Bates, brought this action in the Letcher circuit court against Ben Lee Hall and his guardian, Benj. M. Bates, seeking a judgment for \$354.80 for a balance due for board and maintenance for 10 years while appellant was the guardian of Ben Lee Hall, and also seeking a sale of the real estate of the infant to satisfy the amount due. The petition alleges that the ward had no property except the realty, and that this realty did not, and never had, produced an annual income or any income. A demurrer was sustained to the petition, and appellant prosecutes this appeal. This identical question was fully considered and discussed in the case of *Dixon v. Hosick* (decided May 4, 1897) 41 S. W. 282, and to the conclusions there reached we adhere. Judgment affirmed.

**TAYLOR v. BARKER, Judge.<sup>1</sup>**

(Court of Appeals of Kentucky. Sept. 27, 1898.)

**COURTS—JURISDICTION—INQUESTS OF LUNACY.**

An inquest of lunacy, being a quasi criminal proceeding, is properly within the jurisdiction of the criminal division of the Jefferson circuit court, though its jurisdiction is not exclusive.

"Not to be officially reported."

Motion by Julia Taylor for writ of prohibition against H. S. Barker, judge. Denied.

A. J. Specker, for plaintiff. H. H. Herr, for defendant.

**LEWIS, J.** This is a petition by Julia Taylor for a writ prohibiting Henry S. Barker, judge of the Jefferson circuit court, criminal division, assuming jurisdiction of an inquest whether she is of unsound mind and a lunatic, under section 137 of the constitution. Jefferson county constitutes one judicial district, which is entitled at present to four judges, each to hold a separate court, except when a general term may be held for the purpose of making rules of court, or as may be required by law. It is there provided that "criminal causes shall be under the exclusive jurisdiction of some one branch of said court, and all other litigation in said district of which the circuit court may have jurisdiction shall be distributed, equally as may be, between the other branches thereof in accordance with the rules of the court made in general term or as may be prescribed by law." There is nothing in that section prohibiting the Jefferson circuit court, criminal division, holding inquests of lunacy. Indeed, as such inquests generally involve the question of personal liberty, it is a quasi criminal proceeding, properly within the jurisdiction of the Jefferson circuit court, criminal division. There is, however, an observable difference between mere inquests

which involve an inquiry by the jury whether the person on trial is of unsound mind and a lunatic and the preservation and security of the estate of a person after being found under such disability, generally requiring the interposition of a court of equity. In our opinion, the Jefferson circuit court, criminal division, has jurisdiction of inquests of lunacy, though not exclusive; wherefore the writ of prohibition applied for is denied.

**COMMONWEALTH v. ASBURY.<sup>1</sup>**

(Court of Appeals of Kentucky. Sept. 24, 1898.)

**INTOXICATING LIQUORS—LICENSE TO BRANDY DISTILLER—PLACE OF SALE.**

1. Whether a license to sell liquor authorized the licensee to sell at a certain place was a question of law for the court.

2. Ky. St. § 4224, providing that license may be granted to manufacturers of vinous liquors and distillers of peach and apple brandy to retail such liquors at the place of manufacture or the distillery, does not authorize the designation of the distiller's residence as the place of sale.

3. A license under that statute, fixing the residence as the place of sale, affords no protection to the licensee for a sale of brandy made at his warehouse, 75 yards from the distillery.

Appeal from circuit court, Metcalfe county.

"To be officially reported."

Sam Asbury was acquitted of the offense of retailing apple brandy without a license, and the commonwealth appeals. Reversed.

W. H. W. Aarons and W. S. Taylor, for the Commonwealth.

**BURNAM, J.** The commonwealth prosecutes this appeal from a judgment of the Metcalfe circuit court acquitting appellee of the offense of retailing apple brandy without a license so to do. Appellee testified upon the trial that he sold a quart of apple brandy at his warehouse, which is situated on his premises, about 75 yards from the distillery where the brandy was manufactured; that at the time he made the sale he had a license to sell brandy at his residence, which had been granted to him by the county court upon his application, for which he had paid a license fee of \$25; that his residence was also situated upon the same tract of land; and that he believed, in good faith, at the time he made the sale of the brandy in question, that he had the right to sell at his warehouse under his license. The county court clerk testified that the motion of appellee in the county court was for a brandy license to sell at his residence, and that the license was granted in conformity with his application. At the conclusion of the testimony the attorney for the commonwealth moved the court to instruct the jury as if no license had been granted appellee, which the court refused to do, and gave to the jury instruc-

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tions which left it to them to determine whether the brandy was sold at a place other than the distillery, or place of manufacture. There was no question under the proof as to the place where the sale of the brandy was actually made, and whether appellee was authorized to sell at this place under his license was a question of law for the court, and not one of fact for the jury. Section 4224, Ky. St., provides that license may be granted to persons who are manufacturers of vinous liquors, in good faith, and distillers of peach and apple brandy, to retail liquor of their own manufacture at the place of manufacture, or the distillery, in quantities of not less than one quart, not to be drunk on the premises or adjacent thereto, on the payment of \$25. Under this statute the county court was not authorized to designate the residence as the place for conducting the business under the license, and a license fixing the residence as the place of sale affords no protection to appellee for a sale of brandy made at his warehouse. The fact that the residence, warehouse, and distillery were all upon the same tract of land does not prevent them from being separate and distinct places under the statute governing this case, and the motion of the commonwealth's attorney that the jury be instructed as in case of no license should have prevailed, as it is the obvious purpose of the statute to fix definitely the place where the business under such a license is to be conducted, and to limit the traffic under the license authorized to be granted to brandy distillers to the distillery, or place of manufacture. For the reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent herewith.

#### BRIDGES et al. v. HANNA et al.<sup>1</sup>

(Court of Appeals of Kentucky. Sept. 23, 1898.)

**HUSBAND AND WIFE—CROPS RAISED ON WIFE'S LAND—LIABILITY FOR HUSBAND'S DEBTS.**

Tobacco raised by tenants on land deeded to the wife by the husband in 1891 is not subject to the husband's debts subsequently contracted, the wife being entitled thereto as rent under contracts of renting made by the husband as her agent.

Appeal from circuit court, Shelby county. "Not to be officially reported."

Action by C. A. Bridges & Co. against J. C. Hanna and Sallie Belle Hanna to determine the right to the proceeds of a crop of tobacco sold under execution. Judgment for defendants, and plaintiffs appeal. Affirmed.

L. C. Willis, for appellants. P. J. Foree, for appellees.

**WHITE, J.** The appellants (warehousemen) in the year 1893 advanced to J. C. Hanna various sums of money on a crop of tobacco

(30 acres, so the obligation reads); and after a settlement on that account in June, 1894, there was due appellants a balance of \$260.95. For this balance appellants recovered personal judgment against J. C. Hanna, and an execution on this judgment was levied on a crop of tobacco raised on the farm of Sallie Belle Hanna, wife of J. C. Hanna, in the year 1894. After this levy of the execution it was agreed in writing that the tobacco might be sold by the sheriff, and the proceeds be retained by him, and the right thereto be tested by suit, and for that purpose this action was brought. The uncontroverted facts are that J. C. Hanna in 1891 deeded the land to his wife, Sallie Belle Hanna, and that all the money loaned by appellants was loaned to J. C. Hanna in 1893 and early in 1894, before this tobacco had been grown. It is shown that the tobacco in contest was grown by tenants on the farm under contracts with Mrs. Hanna to give as rental one-half of the tobacco. It is contended by appellants that the money loaned to J. C. Hanna by them was used in betterments of the farm of the wife, and that this was done with her knowledge and consent. This is denied by appellees. It is contended that the husband, J. C. Hanna, simply used the farm as his own, using the wife's name, and made a profit out of it, and that this profit should be subjected to his debts. This is denied, and appellees contend that in J. C. Hanna's actions about renting the farm he acted as the agent of the wife, and that no credit was given him on account of this tobacco or rent, because the credit was given before the crop was grown. The chancellor, on the proof, adjudged the tobacco to be the property of Sallie Belle Hanna, and not subject to the execution against her husband, J. C. Hanna, and directed the fund to be paid to her; and from that judgment this appeal is prosecuted.

The questions presented here are of fact, and we conclude, as did the chancellor, that the property belonged to Mrs. Sallie Belle Hanna, and was not subject to the execution against her husband, and the funds in the hands of the sheriff should be adjudged to her. If this had been a direct proceeding against Sallie Belle Hanna to make her liable to appellants for the loan to J. C. Hanna, by reason of his having used the fund to improve her property with her knowledge and consent, which it is not, then the proof is not sufficient, in our opinion, of such use as to make her liable. We perceive no error in the judgment, and the same is affirmed.

#### LOUISVILLE & N. R. CO. v. SCHMIDT et al.<sup>1</sup>

(Court of Appeals of Kentucky. Sept. 23, 1898.)

**APPEAL AND ERROR—FINAL ORDER.**

One railroad company having been adjudged to be the real party defendant in a

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proceeding nominally against another company, and to be bound by the judgment theretofore rendered against the nominal defendant, an order adjudging insufficient its response to a rule to show cause why it should not be required to report to the commissioner a statement of net earnings on certain business is not final, and therefore not appealable.

Appeal from circuit court, Jefferson county.  
"Not to be officially reported."

Action by Adolph L. Schmidt and others against the Louisville, Cincinnati & Lexington Railway Company to subject to plaintiffs' claim the net profits made on business coming to the line of defendant from the Northern Division of the Cumberland & Ohio. Judgment having been rendered against defendant for the amount of such net profits found to have been made up to the date of the last special commissioner's report in 1890, the Louisville & Nashville Railroad Company was thereafter adjudged to be the real defendant, and to be bound by that judgment. Thereafter a rule was awarded against the Louisville & Nashville Railroad Company to show cause why it should not report to the commissioner a statement of net earnings on the business in question since the date of the last report. The response to that rule being adjudged insufficient, the Louisville & Nashville Railroad Company appeals. Dismissed.

For former reports, see 25 S. W. 494, 26 S. W. 547, 35 S. W. 135, and 44 S. W. 130.

Helm & Bruce, for appellant. Simrall, Bodley & Doolan and Pirtle & Trabue, for appellees.

DU RELLE, J. This case is now before the court upon a motion to dismiss an appeal from an order adjudging insufficient appellant's response to a rule to show cause why it should not be required to produce and report to the commissioner a statement of net earnings on business coming to it from and over the Northern Division of the Cumberland & Ohio Railroad since the date of the last report in 1890; the motion being based upon the theory that the order to dismiss was not a final one. As will be seen by reference to former opinions in this case (95 Ky. 239, 25 S. W. 494, 26 S. W. 547, 35 S. W. 135, and 44 S. W. 130), this was a proceeding to subject to appellees' claim the net profits made on business coming to the line of the Louisville, Cincinnati & Lexington Railway Company from and over the Northern Division of the Cumberland & Ohio. Judgment was awarded against the Louisville, Cincinnati & Lexington Railway Company for the amount of such net profits found to have been made up to the date of the last special commissioner's report in 1890. Since the last opinion rendered in this case (44 S. W. 130) it appears from the records now before the court (as stated in appellant's brief) that the trial court has adjudged the Louisville & Nashville Railroad Company to be the real party defendant in the proceeding, and

to be bound by the judgment heretofore rendered against the Louisville, Cincinnati & Lexington Railway Company. Thereupon appellees obtained the rule in question to compel an accounting by appellant of such net profits made since the date of the last commissioner's report, for the purpose of subjecting such profits to the payment of their claim. On behalf of appellant it is urged that the Louisville & Nashville Railroad Company is not a party of record to this suit; that no averment has been made by plaintiffs below that such net profits have been made since 1890; and that the proceeding is, in effect, an action for discovery, within the meaning of section 685 of the Civil Code, which provides: "No action for a discovery shall be brought, except that, if any person be liable, jointly or severally with others, upon the same contract, an action may be brought against any of them to obtain discovery of the names and residences of others who are also liable. The petition must be verified, and must state that the plaintiff has used due diligence to obtain the information asked to be discovered, and that he does not believe that the persons liable upon the contract, who are known to him, have property sufficient to satisfy his claim."

\* \* \* It is obvious that the merits of the question are not before this court for review; nor can it be now determined whether appellees' pleadings furnish a basis for the procedure adopted, or whether the trial court's action in granting the rule was proper, unless it be first determined that the order in question was a final one, and appealable. Upon this point appellant's counsel relies upon the case of *Bank v. Abell's Adm'r*, 88 Ky. 428, 11 S. W. 300. In that case it was sought to compel a bank to produce its books in an action—to which the bank was not a party—between two persons who had no interest in the bank or its books, for their inspection, in order to enable them to adjust their accounts. The court in that case held that the judgment making the rule absolute was appealable,—it may be presumed upon the ground that the order took from the bank the possession of its property in a suit to which it was not a party. In the case at bar, however, the appellant, as stated in its counsel's brief, has been adjudged to be a party, and bound by the judgment heretofore rendered. The order, whether proper or not, appears to us to be clearly interlocutory, and not appealable, and the appeal is therefore dismissed.

# WILKEY v. COMMONWEALTH.<sup>1</sup>

(Court of Appeals of Kentucky. Sept. 24, 1898.)

RAPE—INDICTMENT—VARIANCE—PROOF OF VENUE.  
1. An indictment under Ky. St. § 1154, defining the offense of rape of a female of and

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.



above 12 years of age, need not use the technical term "ravish"; that term not being used in the statute.

2. The use of the Christian names "Jennie" and "Jane" in different parts of an indictment for rape, in describing the person against whom the offense was committed, is not a material variance.

3. Evidence that the offense of rape was committed in "Rhea's wheat field," about 400 yards distant from the residence of a certain person, is not sufficient proof of the venue; the locality not being presumably within the knowledge of the court and jury.

Appeal from circuit court, Hopkins county.

"To be officially reported."

Frank Wilkey was convicted of the crime of rape, and appeals. Reversed.

J. F. Dempsey and Polk Lafoon, for appellant. W. S. Taylor, for the Commonwealth.

LEWIS, C. J. Appellant was convicted in the Hopkins circuit court under the following indictment: "The grand jurors of the county of Hopkins, in the name and by the authority of the commonwealth of Kentucky, accuse Frank Wilkey of the crime of rape, committed in manner and form as follows, to wit: The said Wilkey, in the said county of Hopkins, on the — day of May, 1897, and before the finding of this indictment, did unlawfully, willfully, forcibly, and feloniously have sexual intercourse with and carnally know Jennie Tyre, a female of and above twelve years of age, without the consent and against the will of the said Jane Tyre, against the peace and dignity of the commonwealth of Kentucky."

The first ground relied on for reversal is the action of the court in overruling the demurrer to the indictment, which counsel contends is defective because there is omitted from the description of the offense charged the technical term "ravish." It is undoubtedly the general rule applicable to common-law offenses, as said in Clark's Criminal Procedure, p. 196, cited by counsel, that "there are certain technical phrases and terms of art which are so appropriated by the law to express the precise idea which it entertains of an offense that they must be used in describing it"; and of these terms the word "ravish" was at common law deemed indispensable in describing the offense of "rape." But unquestionably the necessity for the use in an indictment of that or any like term may by statute be obviated, and other phrases substituted. And this proposition was recognized in *Kaelin v. Com.*, 84 Ky. 354, 1 S. W. 594, in the following language: "In order to keep an intelligent view of the issue before the mind, it must be remembered that the appellant is not accused in the indictment of any crime created by statute, nor of any crime defined by statute, but of the common-law crime of murder, which the statute of the state does not define, but simply fixes the punishment to be inflicted for committing the crime. So, in determining the question of the sufficiency or

insufficiency of the indictment before us, we must of necessity resort to the rules of the common law." And it was therefore held in that case that the failure to allege that the act of killing was feloniously committed rendered the indictment fatally defective. But the crime of rape of a female of and above 12 years of age is defined in section 1154 as follows: "Whoever shall unlawfully carnally know a female, of and above twelve years of age, against her will or consent, or by force, or whilst she is insensible, shall be guilty of rape, and punished by confinement in the penitentiary not less than ten nor more than twenty years, or by death, in the discretion of the jury." It will be observed that by the language of that section the act of rape is as completely defined as if there had been used the word "ravish," which implies nothing more than that the act was done forcibly, and against the will of the woman. Moreover, it is provided that the act therein described, when committed, is rape; and, such being the case, the use in an indictment of the term "ravish," in addition to the words employed in the statute, would be superfluous and unnecessary. That section 1154 was intended to fully describe or define the act of rape on a female of and above 12 years of age is made manifest by section 1152, which simply provides for the punishment of the common-law crime of rape when committed upon the body of an infant under 12 years of age, without an attempt to define it. And therefore in an indictment under that section the crime was intended and must be described as at the common law. It is true, the mere act of rape, and not the intent with which it may be committed, is defined in section 1154; and consequently, as held in *Hall v. Com.* (Ky.) 28 S. W. 8, it must be alleged that, as at and according to the common law, the act was done "feloniously."

Another objection to the indictment is that the proper names Jennie and Jane are both used in the indictment. In our opinion, there was not, nor could have been, any confusion as to the identity of the person upon whom the offense is alleged to have been committed, and therefore the variance is not material.

The next ground of reversal relied on is that there was no evidence to show that the crime was committed in Hopkins county, where the indictment was found, and that the court erred in not giving a peremptory instruction to find for the defendant, as asked. The only proof on that question, as appears from the record, was that the crime was committed in "Rhea's wheat field," about 400 yards distant from the residence of Joe Tyre. In *Com. v. Patterson* (Ky.) 8 S. W. 694, the evidence showed that the crime was committed at the house of the prosecutrix, in Springfield; and it was held that no other proof as to the venue was necessary, because the court and jury are pre-

sumed to know that Springfield is the county seat of Washington county. In *Hays v. Com. (Ky.)* 14 S. W. 833, the evidence was that the crime was committed at the house of John Milburn, in the Hendren district, 16 miles from Springfield. It was there held that as the trial judge and jury knew that Springfield was the county seat of Washington county, it was presumed they knew that Hendren district was in that county. In *Combs v. Com. (Ky.)* 25 S. W. 592, the proof was simply that the offense was committed at the "mouth of Buckhorn, and at Jones & Fields' storehouses"; and it was held to be sufficient evidence to authorize the jury to find it was committed in the county alleged in the indictment. In the first two cases cited the localities proved were, as held, from necessity within the presumed knowledge of the court and jury. In the last case the localities (at least, the mouth of the water course mentioned) evidently were so notorious, as it may be without difficulty presumed, that the court and jury knew they were in the county in which the indictment was found. But there was no evidence in this case whatever authorizing the jury to believe and find that the crime was committed in the county of Hopkins, and it would be going too far to sanction a verdict based upon the existence of an indispensable fact, which the jury did not, nor could, find from the evidence before them to exist. In our opinion, as this record stands, the defendant was entitled to a peremptory instruction. We perceive no other error of law; but for the one mentioned the judgment is reversed, and the cause remanded for a new trial.

#### STATE v. ARNOLD.

(Supreme Court of Tennessee. Feb. 5, 1898.)

##### COSTS—CRIMINAL PROSECUTIONS.

Where one indicted for a felony is convicted of only a misdemeanor, the state must pay all the costs which accrued in attempting to make out the felony, and the difficulty in separating the costs must not result in taxing them to defendant.

Appeal from criminal court, Davidson county; J. M. Anderson, Judge.

James Arnold was indicted for malicious stabbing, and convicted of assault and battery. From the adoption of a report on an application to retax costs, defendant appeals. Reversed.

A. J. Caldwell, for appellant. W. H. Washington, Atty. Gen., for the State.

WILKES, J. This cause is before us the second time upon an application to retax costs. Upon the former hearing the cause was remanded because proper application had not been made and refused in the court below. The indictment was for malicious stabbing. The conviction was for assault and battery; in other words, an acquittal as to the felony, and conviction of a misdemeanor. A fine of

\$75 was imposed by the court. When the cause was remanded to the court below a reference was made to the clerk to report what costs were incurred by witnesses summoned on the part of the state to show malice and prove the felony, and to retax the costs. The clerk reported the entire amount of costs as \$839.14, and that \$28.91 of this amount was incurred in the effort to prove malice and make out the felony, and should be taxed to the state, and the remainder of \$810.23 should be paid by the defendant. The defendant excepted to the report, admitting his liability for various items, amounting to \$105.15, and insisting that the remainder of \$733.99 should be taxed to the state. This exception was overruled, and the defendant appealed.

The case of *Lloyd v. State*, decided at Knoxville, September term, 1877, is a case directly in point,—an indictment for malicious stabbing, with an acquittal of the felony, and conviction of the misdemeanor of assault and battery. It was held in that case that the state must pay all costs accrued in attempting to make out the felony, and that the difficulty in separating the costs that accrued as to proof of felony must not result in taxing them to the defendant. A similar ruling was made in this court in the case of *State v. McBride*, decided at Nashville in 1876, and not reported. It is said that the witnesses examined were, with few exceptions, eyewitnesses, and must necessarily have been examined, whether the case was prosecuted as a felony or misdemeanor. But it is evident that it makes a material difference to a defendant whether he is being tried for a felony or misdemeanor. In the former case he will not be content unless he has exhausted all the evidence, and brought to bear all the defenses he can command, while in the latter he might be willing to submit, or make an inexpensive defense. If the state sees proper to prosecute for a felony, it must take the risk of being successful, or paying costs if it fails; and defendant cannot be required to pay or work them out. In this case the items admitted by the defendant to be legitimately taxable to him are: State tax, \$5; county tax, \$5; attorney general's fee, \$5; fine to county, \$75; and some items of clerk's costs. Without investigating each of the small items, we are satisfied that the defendant should be taxed with no more than he has admitted his liability for. He will therefore be taxed with said sum of \$105.15, and the remainder, and costs of this application and proceeding to retax in this court and court below, will be paid by the state; and the costs are retaxed accordingly.

#### LOUISVILLE & N. R. CO. v. GREEN.

(Supreme Court of Tennessee. Jan. 19, 1898.)

##### NEW TRIAL—THIRD—WHEN PROHIBITED.

Thomp. & S. Code, § 3122, providing that not more than two new trials shall be granted to the same party in an action at law, which

was intended to prohibit more than two new trials on the facts or merits only, precludes the granting of a third new trial where the first new trial was granted on the ground that "the jury disobeyed the instructions of the court, and because the verdict is against the preponderance of evidence," and where no grounds for the granting of the second new trial were assigned by the court, since it will be presumed that the latter new trial was granted on the merits.

Appeal from circuit court, Davidson county; N. D. Malone, Special Judge.

Action by Samuel T. Green against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Smith & Maddin, for appellant. Steger, Washington & Jackson, for appellee.

McALISTER, J. The plaintiff below recovered a verdict and judgment in the circuit court of Davidson county for the sum of \$1,999.99, damages for personal injuries. There had been two former verdicts in favor of the plaintiff, which were set aside by the court. The first trial resulted in a verdict for the sum of \$825, which was set aside by the court upon the grounds recited in the minute entry, to wit, "that the jury disobeyed the instructions of the court, and because the verdict is against the preponderance of the evidence." The second trial resulted in a verdict for the plaintiff for the sum of \$1,300, which was set aside by the court without assigning any reasons upon the record. The third and last trial, as already stated, resulted in a verdict for the plaintiff for the sum of \$1,999.99, which the circuit judge declined to disturb. In overruling the motion for a new trial the Honorable N. D. Malone, special judge, delivered an opinion, in which he reviewed the case, and among other things said, viz.: "There have been two other verdicts against the defendant, which were set aside by the court. In the absence of proof, I must conclude the court's action in setting aside the verdict was based upon the ground that the preponderance of the evidence was against the finding of the jury." The court then said: "The present verdict falls utterly to meet my approval. I believe the weight of the testimony to be against it." Again said the court: "I think the plaintiff, in going in front of a moving car, was guilty of gross negligence." The court found, however, there was some evidence to sustain the verdict of the jury, and hence he was without power to set aside a third verdict of the jury because the evidence preponderated against it.

The tenth assignment of error made on behalf of the company is that the circuit judge erred in overruling the motion for a new trial, for the reason that his opinion showed he was not satisfied with the verdict; that the court expressly stated that: "The present verdict utterly fails to meet my approval. I believe the weight of the testimony to be against it,"—and that the plaintiff was

"guilty of gross negligence" on the occasion of his injury; his refusal to grant a new trial being based on the fact that two new trials had previously been granted in this cause. The act of 1801 provides that not more than two new trials shall be granted to the same party in an action at law, etc. *Thomp. & S. Code*, § 3122. It was settled at an early day that this act was not intended to prevent the court granting new trials for error in the charge of the court, for error in the admission or rejection of testimony, for misconduct of the jury, and the like, and that the inhibition against more than two new trials was upon the facts or merits. *Trott v. West*, 10 Yerg. 499. It was afterwards held that, if the record was silent as to the reasons upon which the first two new trials had been granted, the court would presume they were granted upon the merits, and a third trial would be refused, and if such new trials were granted for other reasons, as for error in the charge of the court, and the like, and the party obtaining them does not want to be precluded from a third, under the statute, he must make the record show the reasons for the action of the court in granting them. *Turner v. Ross*, 1 Humph. 16; *Ferrell v. Alder*, 2 Swan, 77. It is also well settled that this statute has no application to a case where there is no evidence to support the verdict, but that in such case the trial judge may set aside a third verdict, or any subsequent verdict, and upon motion of the same party. *Railway Co. v. Mahoney*, 89 Tenn. 311, 15 S. W. 652; *Railroad Co. v. Woodson*, 134 U. S. 614, 10 Sup. Ct. 628. With these principles in view, the precise point made on behalf of the company is that the statute does not apply in this case, for the reason that the record shows the first verdict and judgment were set aside because the jury disobeyed the instructions of the court, and because the verdict was against the preponderance of the evidence. Counsel admit that, if the entry had simply recited that the verdict was set aside because the weight of evidence was against it, the statute would apply, but insist that it also showed that it was set aside because the jury disobeyed the instructions of the court. It will be observed that the first verdict was not set aside for misdirection of the jury, or error in the charge of the court, but for the reason the jury disobeyed the instructions of the court. In construing this statute in *Trott v. West*, 10 Yerg. 499, this court said: "The act says that not more than two new trials shall be granted to the same party. This means that where the facts of the case have been fairly left to the jury upon a proper charge of the court, and they have twice found a verdict for the same party, each of which having been set aside by the court, if the same party obtain another verdict in like manner it shall not be disturbed." So we think that under this statute, notwithstanding the jury may have disobeyed the

instructions of the court, if the charge was correct, and there was evidence to support the verdict, it cannot be disturbed a third time. We think the precise question now presented was necessarily involved in the judgment of the court in *Burton v. Gray*, 10 Lea, 580. In that case the court says, viz.: "The second verdict was set aside upon the ground that it was wantonly contrary to the evidence and in disregard of the charge, and the third because of the refusal on the part of the jury to regard the charge of the court. It is insisted by counsel that, as the record states the new trial was granted because of the refusal of the jury to regard the charge of the court, such refusal was misbehavior on the part of the jury, within the meaning of the construction given to the act, and hence the circuit judge was authorized to set aside this verdict and grant another trial. It is evident, however, that the meaning of the language used by the judge in the order granting the new trial was that the jury failed to find as he thought they should have found from the charge which he had given them, or, in other words, found against the charge. If such a finding were to be held such misbehavior on the part of juries as would authorize the court to continue to grant new trials *ad libitum*, it would be difficult to conceive of a case to which the prohibition of the statute would apply. \* \* \* The misbehavior of a jury contemplated in the construction given to this statute evidently was some unlawful or unauthorized acts done by them, which would of themselves vitiate their verdict, such as hearing evidence in the jury room, acting upon the knowledge of each other in regard to the case, or the statements of other parties, not having been examined as witnesses," etc. Again the court says, after quoting from *Turner v. Ross*, 1 Humph. 20: "It is unnecessary to make any comment upon this language. It shows clearly that the court recognized the power of juries, under this act, to disregard the instructions of the court and find contrary thereto; and when they do so more than twice in the same case, in favor of the same party, the power of the court is exhausted." These authorities, we think, are conclusive of the question raised upon the record. The recital in the entry that the jury had disobeyed the instructions of the court, without specifying the ground, would simply be equivalent to saying that the jury had found against the preponderance of the evidence, and contrary to the merits of the case. It would not imply that the jury had been guilty of misconduct, in the sense in which this term is understood in motions for new trials, nor would it imply that the court had set aside the verdict upon a ground different and distinct from the other recital, that they had found against the preponderance of the evidence.

Other assignments of error were considered orally and overruled. Affirmed.

# LOUISVILLE & N. R. CO. v. TURNER.

(Supreme Court of Tennessee. Jan. 7, 1898.)

## CARRIERS OF PASSENGERS—TICKETS—CONDITIONS—NOTICE—EJECTION FROM TRAIN—DAMAGES.

1. One who purchases a general ticket, and pays the usual price therefor, is entitled to a passage, unlimited as to time, on any train which, under the usual schedules of the road, stops at the point of his destination.

2. If a local ticket, limited or conditional, is sold to a passenger, it is binding on him only in case of express agreement; the mere stamping or printing of a limitation or condition on the face or back of a local ticket, and the acceptance of such ticket by the passenger, not being sufficient, in the absence of actual notice of such restrictions, and assent thereto, at the time of purchase.

3. The posting of notices in the waiting rooms of depots, and in ticket offices and on the cars, stating that ordinary local tickets will be void if not used for continuous passage, beginning on date of sale, only, is not a proper notice to persons paying the usual price for such tickets.

4. A passenger presented a ticket purchased the day before, which was refused on account of a condition thereon limiting its use to the day of purchase. He made no efforts to obtain money to pay his fare from fellow passengers, and was peaceably ejected not more than eight miles from his destination, which he reached a few hours later than he would have done by train, and without additional expense. *Held*, that he was not entitled to exemplary damages, and hence a verdict for \$300 was excessive.

Appeal from circuit court, Montgomery county; M. D. Smallman, Judge.

Action by J. O. Turner against the Louisville & Nashville Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed and remanded.

Burney & Bailey, for appellant. Daniel & Daniel, for appellee.

**WILKES, J.** This is an action for damages for unlawfully ejecting the plaintiff. Turner, from one of the passenger cars of the Louisville & Nashville Railroad Company. It was commenced before a justice of the peace, and on appeal was tried before the court and a jury, and judgment rendered for the plaintiff for \$300 and costs; and the railroad company has appealed and assigned errors.

The facts are that plaintiff bought what is called a "local ticket" at Guthrie, Ky., for Clarksville, Tenn. Upon its face was stamped or printed the words, "Good for one continuous passage, beginning on date of sale, only." And the date of sale, "June 14/97," was stamped on its back. Plaintiff did not use or attempt to use the ticket upon the day of sale, being unexpectedly detained at Guthrie on business. On the next day he tendered the ticket for passage to Clarksville. The conductor took the ticket in his hand and punched it, and handed it back to plaintiff, with the remark that he could not ride upon it, that the rule of the company was that such ticket was good only on the day of sale, and that he would have to pay fare or get off the train. Plaintiff replied

that he had bought the ticket and paid full price for it, and was entitled to ride upon it, and had no notice of such rule; that he had no money to pay his fare, and would not willingly leave the train, but would have to be put off. At the next station the conductor took him by the arm and led him through the car, and put him off, without any actual force or rudeness. He walked down the railroad three or four miles, and, finding a conveyance going to Clarksville, went in it, reaching that city without further cost about 4 o'clock p. m., when by the train he would have reached there at 11 a. m. of the same day. Plaintiff states that he had no knowledge of the regulation of the road that a ticket must be used on the date of its sale, and had previously ridden upon tickets on days subsequent to the day of sale. It appears that about January 1, 1897, the railroad company had put this rule in force, and had posted notices of it in its various waiting rooms, and among others one was posted near the ticket window at Guthrie. This notice was as follows: "Louisville & Nashville R. R. Co. Notice. On and after Jan. 1/97, local tickets sold by this company, except commutation and mileage tickets, will be void if not used for continuous passage through to destination, beginning on date of sale. Any ticket which cannot be thus used will be redeemed from the original purchaser, if sent to the general passenger agent, at Louisville, Ky., with satisfactory explanation of the cause which prevented its use." Signed by the traffic manager and general passenger agent. This notice was thus posted continuously from the date it went into effect, about January 1, 1897, up to the date of trial; and all local tickets sold after January 1, 1897, had stamped or printed on their face the provision above stated,—"Good for one continuous passage, beginning on date of sale, only." It is not shown that any special damage was done the plaintiff, beyond the indignity of ejecting him from the train, and the inconvenience to which he was put on his journey. Many errors are assigned, but we will not treat them seriatim.

The court charged the jury, in substance, that such a regulation and limitation in regard to tickets as the one in controversy would not be binding on a purchaser, unless the contents and conditions were made known to him when he bought the ticket, or it be shown otherwise that he knew of them, and purchased the ticket with that knowledge; that, in order to charge him with notice, it must be shown that he actually knew of them and consented to them, and the railroad company would be liable, if he bought a ticket without such actual knowledge, and attempted to use it, and was ejected from the train; that the fact that the notice was posted up in the waiting room, near the ticket window, and that the limiting words were stamped or printed on the face of the ticket, would not affect a purchaser with no-

tice, if he bought the ticket in the usual way, and paid the usual price for it, and, if ejected for the refusal to pay fare while tendering such ticket, the road would be liable. This holding and ruling of the court is assigned as error, and it is also assigned as error that there is no evidence to support the verdict, and that the damages are excessive. It is held by this court that a railroad company may make, and by its agents enforce, reasonable rules and regulations for the carriage of freight and passengers, and the transaction of its business generally. *Summit v. State*, 8 Lea, 413; *Lane v. Railroad Co.*, 5 Lea, 126; *Railroad Co. v. Garrett*, 8 Lea, 438; *Railroad Co. v. Fleming*, 14 Lea, 129; *Railroad Co. v. Benson*, 85 Tenn. 627, 4 S. W. 5. As to whether a rule is reasonable or not is a question for the court. *Railroad Co. v. Fleming*, 14 Lea, 128. But such rules and regulations must be reasonable in their requirements, and must be executed in a reasonable and proper manner, so as not to be unnecessarily burdensome to the public. Such rules must not contravene any law or principle of sound public policy, and they must accord with the proper service and conduct of a railroad in its business and duty as a common carrier. The liability of the road cannot be restricted by such rules and regulations, nor can they be so shaped or enforced as unnecessarily to annoy and restrict the traveling public in its rights. 5 Am. & Eng. Enc. Law (2d Ed.) p. 482, and notes. Thus, in *Lane v. Railroad Co.*, 5 Lea, 124, it was held that a railroad company has the right to make regulations requiring passengers to purchase tickets before entering upon a freight train, and authorizing conductors to expel persons not having tickets, though they offer money in payment of fare. In *Summit v. State* it is held that a railroad may make all necessary reasonable rules for the proper and orderly management of its depots and other places open to the public, but not in such way as to infringe upon the rights of the public. A railroad may also make a rule that coupons from tickets shall be detached only by the conductor, and not by the passenger, and enforce such rule in a reasonable manner. *Railroad Co. v. Harris*, 9 Lea, 180. So a railroad may by regulation establish a higher rate of fare if paid on the cars than in the case of a ticket purchased before going on the train. *Railroad Co. v. Guinan*, 11 Lea, 96. It may also regulate the running of its trains, and the stopping of through trains at principal points only, and require passengers who are destined to way stations to ride upon such trains only as under the schedules stop at such stations. *Trottinger v. Railroad Co.*, 11 Lea, 533. It may also require a person, on entering a train for purposes of travel, to exhibit his ticket, and afterwards to surrender it when called upon by the conductor. *Railroad Co. v. Fleming*, 14 Lea, 129. It may also prescribe in what

cars passengers may ride, provided equal and proper accommodations are furnished alike to all passengers holding first-class tickets, as that cars may be set apart for ladies, when alone or accompanied by gentlemen traveling with them; and different cars for colored and white people shall be furnished, under the statute. Railroad Co. v. Benson, 85 Tenn. 627, 4 S. W. 5; Railroad Co. v. Wells, 85 Tenn. 613, 4 S. W. 5. Such rules and regulations, in order to be effective, must be made known to the public in such way and by such means as in the special case may be necessary, and best adapted to serve the convenience and purpose of the passenger as well as of the railroad. As to what notice or publication of rules is required or sufficient in order to reach and affect the public, the authorities are by no means agreed. From the very nature of the case, much must depend upon the provisions of the rule, and whether it is one intended to affect the entire public, and the usual and general business of passenger traffic, or one intended for certain trains and certain circumstances and individuals only. To illustrate: A person desiring to ride upon a freight train or a through train, when his destination is a way station, would reasonably expect regulations different from those affecting travel generally, and would be put on his guard to ascertain the rules by which his passage must be governed, when he would have no occasion to suspect such rules to apply to his passage upon the trains of the road generally. A rule relating to the former might be reasonable which would not be in the latter case, and notice might be sufficient in the former which would not be in the latter. So, in *Lane v. Railroad Co.*, 5 Lea, 124, it was held that, when a railroad company has been in the habit of permitting persons to ride upon its freight trains without the purchase of tickets, it must inform persons personally that its rule has been changed so as to require tickets, if such is the case, until such time as will suffice to acquaint the public with the existence of such rule. So, in *Trottinger v. Railroad Co.*, 11 Lea, 533, it was held that a passenger holding a ticket to a way station had no right to ride upon a through train which did not stop at such station, provided he had notice of such schedule regulations; and it was suggested that if such publicity had been given in the ticket office and on the cars, by posters, that a party of ordinary intelligence by the use of ordinary care and caution could or might obtain all requisite information as to the matters involved, then the passenger would be bound by such regulations; citing 1 *Walt, Act. & Def.* p. 67, and cases there collated, for authority for the latter proposition, as to publication and notice.

These regulations in regard to riding on freight trains and on trains only that stop at certain stations and do not stop at others have been held to be reasonable regulations, but

they apply to only exceptional cases, and not to the general traveling public in passing over the road from one station to another. Such special cases may be regulated by rules, and such rules may very properly be brought to the knowledge of the traveling public by notices of publication; but a rule and notice which is intended to apply to all passengers, and to affect all travel and every individual who applies for passage, stands upon a different basis, and requires more direct notice. A notice which is intended to apply to the entire public should be such as to leave no doubt but that it reaches all who are to be affected by it. While there is a conflict in the cases, the weight of authority is that time limitations or conditions stamped or printed upon the back or face of a general ticket are not binding upon a passenger, unless his attention is called to them when he purchases the ticket, and he assents thereto. *Potter v. The Majestic*, 23 *Lawy. Rep. Ann.* 746, note (s. c. 60 *Fed.* 625); *Ray, Neg. Imp. Duties (Pass. Carr.)* pp. 514, 518; 4 *Elliott, R. R.* § 1593, note; *Cole v. Goodwin*, 82 *Am. Dec.* 506, and notes; *Rawson v. Railroad Co.*, 8 *Am. Dec.* 545. While there may be some uncertainty and even conflict in the authorities, we are of opinion that the correct rule is that a person who purchases a general ticket, and pays the usual price therefor, is entitled to one passage, unlimited as to time, upon any train which under the proper and usual schedules of the road stops at the point of the passenger's destination. If a ticket limited or conditional is sold to a passenger, it can only be done upon an express agreement with him, either oral or in writing, and either based upon a consideration, or with the alternative presented to the passenger of a full and unlimited ticket. A similar rule obtains in regard to contracts for carriage of freight, and it has been held by this court that a carrier must hold itself in readiness to ship with common-law liability, and must offer to shippers a reasonable and bona fide alternative between that mode of shipment and one with restricted or limited liability. *Railroad Co. v. Gilbert*, 88 *Tenn.* 430, 12 *S. W.* 1018. So, in *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 *Wall.* 330, it is said: "Nothing short of an express stipulation by parol or in writing will be permitted to discharge a carrier from the duties which the law has annexed to his employment, \* \* \* and such agreement is not to be implied or inferred from a general notice to the public limiting the obligation of the carrier, which may or may not be assented to." See, also, *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 *How.* 344. We are also of opinion that the mere stamping or printing of a limitation or condition upon the back or face of a ticket, and the acceptance of such ticket by a passenger, without more, are not sufficient to bind him to such condition or limitation, in the absence of actual notice to him of such condition or limitation, and his assent thereto, when he purchases his

ticket. It cannot be presumed that every person buying a railroad ticket for ordinary and general use will, in the hurry and bustle of travel, stop to read and critically inspect his ticket. As a matter of fact, but little opportunity is afforded him to do so. He generally takes his place in the crowd at the ticket window, and produces and hands over his money, with a request for a ticket to destination. His money is received. The ticket is produced, and, after being stamped, is handed to him through the ticket window. He has had no opportunity to see what is upon it, and has no time, in the rush, to stop and read and consider what may be printed or stamped on its face or back; and, when he has paid full fare, there is no occasion for his doing so, inasmuch as he can safely rely upon the contract which the law makes for him. Ordinary local tickets do not generally contain any terms of contract, and are not intended to do so. They are mere tokens to the passenger, and vouchers for the conductor, adopted for convenience to show that the passenger has paid his fare from one place to another,—very much in the nature of baggage checks. The contract is in fact made when the ticket is purchased, and, if it is different from what the law would imply, it must be so stated and assented to when the ticket is delivered. Nor will the posting of notices in the waiting rooms, ticket offices, and on the cars affect purchasers with notice in such cases. Passengers have but little time or opportunity to read such placards; and it would impose quite a serious burden upon travel, to hold that the public must read all these notices thus posted before taking passage on a train upon which they are willing to and do pay full fare. *Rawson v. Railroad Co.*, 8 Am. Rep. 545; *Cole v. Goodwin*, 32 Am. Dec. 505, and note; *Ray, Pass. Carr.* § 145; *Hutch. Carr.* §§ 246, 580, 581; 4 *Elliott, R. R.* § 1593. This rule, which we consider to be settled by the weight of authority and by reason, by no means prevents a railroad company from selling special tickets for special trains with limitations and conditions, such as excursion, round-trip, commutation, and mileage tickets, when the conditions and limitations are known to the purchaser, and assented to by him orally or in writing, and he has paid for such ticket less than the usual fare. When tickets are sold at reduced rates, it has been very wisely said that the purchaser should, in consideration of such reduced fare or greater privileges, expect and look for some conditions, limitations, and terms different from those attaching to tickets generally, and be on his guard to become informed of them. But there is no such obligation upon the ordinary passenger, who pays the usual or full fare, and asks for no reduced rates or special privileges; and he has a right to expect an unlimited ticket.

Under this view of the law, there is ample evidence to support the verdict in this case, and the only question remaining is, are the

damages of \$300 excessive? We do not find from the record any evidence of rudeness on the part of the conductor. The plaintiff declined to leave the car after the whole matter was explained to him, and notified the conductor he would have to put him off. While the record shows that plaintiff had no money to pay his fare, it falls to show that he made any effort to obtain it from any of his fellow passengers. The conductor led him through the train, and put him off at the front end; but it does not appear that this was unusual, or done with any purpose to humiliate the passenger. It was attempted to be shown that the conductor made some remark after he had put the passenger off, but this was properly excluded by the court. The plaintiff was subjected to no pecuniary loss, was put off at a station not more than eight miles from his destination, and reached there a few hours later without any additional outlay of money. We think, under these circumstances, the question of his right to ride being at least doubtful, and the conductor being in the plain discharge of his duty to the road, and performing it in a reasonable manner, it does not present a case of malice and oppression on the part of the railroad which should be punished with excessive damages. The true rule in such cases is laid down in *Railroad Co. v. Guinan*, 11 Lea, 101-106, and in *Railroad Co. v. Fleming*, 14 Lea, 152. For this latter reason we reverse the judgment of the court below, and remand the cause for another trial. Appellee will pay costs of appeal.

#### COURIER-JOURNAL CO. v. SALLEE.<sup>1</sup>

(Court of Appeals of Kentucky. Sept. 28, 1898.)

CONTINUANCE — LIBEL — EVIDENCE — PUNITIVE DAMAGES.

1. It was not an abuse of discretion to refuse a continuance asked by defendant corporation, the publisher of a newspaper, on the ground that prejudice existed against it by a large class of citizens because of its attitude during a recent political campaign.

2. That the author of a libelous newspaper letter was imposed on or innocently mistaken is no defense to an action against the publisher for libel.

3. Where a libelous newspaper publication related to the cause of a personal injury received by plaintiff, it was competent for plaintiff to prove that defendant had received from the same correspondent, and published, only a few days before, a correct account of how the injury occurred.

4. Punitive damages may be recovered for a libel if the words were published recklessly, even without special ill will.

Appeal from circuit court, Lincoln county.  
"To be officially reported."

Action by C. T. Sallee against Courier-Journal Company for libel. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

F. Hagan, for appellant. R. J. Breckinridge and W. G. Welch, for appellee.

**BURNAM, J.** On May 26, 1896, the defendant was a corporation, and published in the city of Louisville a newspaper called the *Courier-Journal*, and the plaintiff was a farmer, residing in Boyle county. On that day the following article appeared in the daily edition of that paper: "Harrodsburg, Ky., May 26. (Special.) It has just been learned from a man of unquestioned integrity, who lives in the neighborhood, that Tom Sallee, of near Parksville, in Boyle county, is expected to die of terrible treatment received a short while ago at the hands of two brothers, both of whom had for some time past suspected their wives of unfaithfulness. They concocted a scheme, and each went to his respective home, and each discovered by stealth another man in his room. One of the men was recognized, but the identity of the other was not learned. The two brothers retreated, and, gathering several friends to their aid, laid in wait the next night at a house where it was thought Sallee would be caught visiting for a similar purpose. The party caught their man, and, despite his appeals, took him to the woods, and horribly mutilated him. The operation was performed in such a barbarous and unprofessional manner that the victim of their vengeance is about to die. Some sensational arrests will likely be made in that vicinity very soon. The entire neighborhood has endeavored to keep the matter quiet, but the serious condition of Sallee has necessitated the best of medical skill, and the affair could not be kept quiet longer. Sallee is a grandson of a prominent Mercer farmer,"—plaintiff claiming that the publication was libelous, and he instituted this suit in the Boyle circuit court to recover damages on account thereof. The answer of appellant company denies the malice charged in the petition, and avers that it was a general rumor in Mercer and Boyle counties, in the neighborhood in which plaintiff resided, that the matters and things set out in the publication occurred and happened; that the report came from credible sources, and was believed by a large number of respectable people to be true; that its correspondent at the town of Harrodsburg, hearing the report from reliable sources, at once investigated it, and, after a careful and faithful examination and full investigation of the report, and becoming satisfied that same was true, telegraphed it to appellant; and that it, relying upon the care, prudence, and honesty of its correspondent, and believing same was true, published it as an item of news, without malice or ill will towards the plaintiff, and without intention to damage him or do him any injury whatever. Plaintiff, in reply, put in issue all the affirmative allegations of the answer. The case being called for trial at the October, 1896, term of the Boyle circuit court, defend-

ant filed motion for a change of venue, which was supported by affidavits in which it was alleged that there existed against it in Boyle county hostility and bias in the public mind because it was opposing the election of candidates nominated by the party with which it had formerly been identified. The motion for a change of venue was sustained, and the case transferred to the Lincoln circuit court, where it was tried on November 10, 1896, against the protest of the plaintiff. The trial resulted in a verdict and judgment in favor of plaintiff for \$2,500, and we are asked upon this appeal to reverse that judgment for a number of alleged errors occurring upon the trial, the more important of which are: First, that the court abused its discretion in overruling defendant's motion for a continuance, based upon the grounds set forth in the affidavits of divers witnesses; second, that the court erred in excluding important testimony for defendant, and in permitting plaintiff and other witnesses to testify to having read in the paper published by defendant, in an issue of that paper published previously to the libelous publication complained of by plaintiff, an account of an accident sustained by the plaintiff in being thrown from a mule; and, third, that the court erred in giving to the jury, on its own motion, instruction marked "A," and refusing instruction "B," asked for by defendant.

We will consider these alleged errors serially. The ground on which the motion for a continuance was based was identical with that for which the change of venue was granted from the Boyle to the Lincoln circuit court, i. e. that some of the citizens of Lincoln county entertained hostile feelings against defendant, growing out of its attitude towards the candidates of the Democratic party in the presidential campaign which had just closed. The propriety of granting a continuance on this ground is necessarily relegated to the discretion of the trial judge, who, from closer contact with the people, is better able to judge of the intensity and universality of the prejudice complained of. Ordinarily, public excitement or prejudice is not deemed sufficient ground for a continuance where the statute authorizes a party to ascertain the state of mind of a juror by examining him preliminary to challenge. See 4 Enc. Pl. & Prac. p. 832, § 5, and cases there cited. There is no claim that there was any prejudice against defendant growing out of the particular publication in question, or that plaintiff exercised any undue influence in the county. An influential newspaper can never hope to be in accord on public questions with all the citizens of any community. There never was, and never will be, a time when a very large proportion of those who differ from its views on political questions will not, with more or less vehemence, disapprove of its course in such matters; and to hold that such disapproval renders it impossible for the proprietors of such a journal to obtain a fair trial in a court



of justice in a civil action, and a good ground for a continuance, would mean indefinite postponement, and would practically render trial by jury in such cases impossible.

We cannot think that the second objection—that the court erred in rejecting evidence offered by the defendant, and in admitting evidence offered by the plaintiff—is urged seriously. The defendant was given the utmost latitude in the introduction of its evidence; as, for example, the defendant was permitted to prove by its correspondent who forwarded the article all the sources of his information with regard thereto, how and from whom he heard the report, and what the parties said to him, although not one of his informants professed to have any personal information as to its truth, or, indeed, to live in the neighborhood of plaintiff. The competency of such evidence may well be doubted in an action against a publisher to rebut malice or mitigate damages, where the article is libelous per se, and was published without any inquiry or knowledge by the defendant on the subject. It certainly had no bearing upon its good faith. It received the libelous article from its correspondent, who was not its agent in the sense that his act was its act, and his information its information; and it could receive no advantage from the fact that he was imposed on or innocently mistaken. See *Moray v. Association* (N. Y. App.) 25 N. E. 160. And it was certainly competent for the plaintiff to prove that the defendant had received from the same correspondent, and published in its journal, only a few days before the publication of the article in question, a correct account of how the injury to the plaintiff which occasioned his confinement had occurred, as bearing upon the question of defendant's good faith in its contention that it was innocent of any intentional wrong. If, as a matter of fact, it had received correct information as to how the injury to plaintiff occurred, it was at least sufficient to put defendant on its guard before publishing as facts stories picked up on the street by its correspondent, to the detriment of plaintiff. We perceive no error in the admission or exclusion of testimony.

The chief contention of defendant is that the court erred in failing to instruct the jury that plaintiff was not entitled, under the facts of the case, to recover punitive damages; and it especially complains that that part of the instruction given by the court authorizing punitive damages was not qualified by the use of the word "malice." There can be no doubt that in all actions for libel the gist of the action is malice, but it must be remembered that the law always presumes that in the publication of an article which is libelous on its face it was published with malicious intent, and this presumption remains throughout the entire case until it is rebutted by proof of the contrary motive, or that the publication was justifiable; and nothing short of the truth of the

matter published will excuse its publication. See *Riley v. Lee*, 88 Ky. 614, 11 S. W. 713. We are aware that the adjudications on this question have not been uniform in all the states, it being held in some of them that only compensatory damages can be recovered. But in this state, in all actions for tort, punitive damages are allowed where the injury is the result of a wanton or grossly negligent act; and intent or purpose to injure is not a necessary ingredient. This is especially true where the words published are actionable per se. The newspaper is a public necessity, and the conditions under which it is required to be conducted should not be unreasonable; but when a publication is made in a newspaper, charging a citizen with disgraceful or criminal practices, it must be at the peril of the publisher. To relieve a newspaper of all liability for a false publication unless actual malice is shown would result in establishing one rule for newspaper publications and another for all other characters of publications, and would result, in effect, in their exoneration from any but compensatory damages, while in all other cases of tort punitive damages may be imposed. Mr. Townshend, in his work on *Slander & Libel* (section 87), says: "As respects the term 'malice,' it is sometimes employed to signify the absence of legal excuse; sometimes as meaning a bad or wicked motive or intent; sometimes as meaning scienter, or knowingly; sometimes as meaning intentionally, or voluntarily; and often without any definite or ascertainable meaning whatever." And then, referring to the distinction attempted to be made between malice in law and malice in fact, he says: "The supposed distinction is unreal and unsound; for, first, there is no distinction between what is inferred and what is proved; what is or is supposed to be rightfully inferred is proved." *Id.* Again, he says: "One meaning in which intent or intention is employed is will. When so employed, it corresponds to what we have described as voluntary; and if, instead of saying intent is necessary to constitute a wrong, we say will is necessary to constitute a wrong, and then keep in view the distinction between will (voluntary) and intent, we at once remove very much of the difficulty which has been supposed to be inherent in the law relating to slander and libel. \* \* \* *Id.* § 89. "The intent—meaning the intent to effect certain consequences—with which an act is done is material on the question of the amount of damages. The absence of a bad intent will mitigate the damages; the presence of a bad intent will aggravate them. The intent of the actor is sometimes material as a link in the chain of evidence to determine whether or not some certain act was or was not done under circumstances constituting a legal excuse; as, when the legal excuse is dependent upon the question, what was the belief of the actor? With these

exceptions, we conceive that intent is never material, and that intent is never an essential element of wrong. No amount of good intention will excuse an act otherwise wrongful, and no amount of bad intent will make wrongful that which is otherwise a permitted act. If intent is not an essential element of wrong, neither, in the sense of bad intent, is malice. If the term 'malice' is to be retained in use as a technical term, it will be only in the sense of want of legal excuse." Id. § 91. The part of the instruction which authorized the jury to give punitive damages required the jury to believe from the evidence that the defendant, in publishing the words, did so without belief based on reasonable grounds, or that the defendant was recklessly indifferent to the natural consequences of such publication. The requirements of the instruction, before the jury were authorized to give punitive damages, were the very essence of malice as defined by the foregoing extracts from Mr. Townsend. The use of the word "malice" in the instruction would have been surplusage; for, if it had been used, and the court had been called upon to define its meaning, it could not have done so in more appropriate words than those used in the instruction. In our opinion, this objection is not well taken. It is true that there is no evidence in the record of any ill feeling on the part of the defendant towards the plaintiff, but this is not necessary in order to support an instruction for punitive damages. If, as a matter of fact, the words published were false, and tended to the injury of plaintiff, and were published recklessly, even without special ill will, defendant is equally guilty, and punitive damages may be recovered. We therefore conclude that the court did not err in refusing the instruction offered by the defendant. It appears to us that the record is free from substantial errors to defendant's prejudice, wherefore the judgment is affirmed.

#### STEPHENS v. COMMONWEALTH.<sup>1</sup>

(Court of Appeals of Kentucky. Sept. 22, 1898.)

#### HOMICIDE — CONTRADICTION OF WITNESS — DYING DECLARATIONS — INSTRUCTIONS AS TO SELF-DEFENSE.

1. Defendant, who had done the killing in attempting, as a peace officer, to make an arrest, having testified that he had not taken one or more intoxicating drinks just before the killing, it was admissible to prove in rebuttal that he had done so; that not being a collateral or irrelevant matter.

2. As deceased was shot through the lung, causing the blood to spurt out when he gasped or coughed, and repeatedly stated that he was going to die, his statements were admissible as his dying declaration.

3. That deceased pulled away from defendant, who was attempting to arrest him, and said, "Let's argue this thing," was admissible as evidence.

4. The error, if any, in admitting the declaration of deceased that he did not think defendant was going to shoot him, was harmless.

5. An instruction authorizing an acquittal on the ground of self-defense only in the event there appeared to defendant, in the exercise of a reasonable judgment, no other safe means to avert the danger, is not objectionable as requiring defendant to avoid the danger by flight.

6. The force which a peace officer may use in making an arrest for a breach of the peace does not extend to the taking of human life.

Appeal from circuit court, Woodford county.

"Not to be officially reported."

Ed. Stephens was convicted of manslaughter, and appeals. Affirmed.

Ed. M. Wallace and J. M. Hoge, for appellant. W. S. Taylor, for the Commonwealth.

HAZELRIGG, J. On the last Saturday night before the November election, 1897, the appellant, who was the marshal of the town of Midway, in Woodford county, shot and killed one Jason Miller. On his trial therefor he was convicted of the crime of manslaughter, and sentenced to the state prison for the term of 21 years. On this appeal he complains of certain alleged incompetent testimony permitted to go to the jury, over his objection, and of the instructions of the trial court. Only a very brief statement of the circumstances surrounding the killing will be necessary in order to consider intelligently the legal questions presented. Miller and a large crowd of other persons were in and about Russell's saloon in the village. It was late at night, and the crowd left the saloon, which was about to be closed. When on the street, the crowd was noisy, and some of them, perhaps including Miller, were shouting for the candidate of their choice. There was no quarreling, however, and the utmost good nature prevailed. Information seems to have been conveyed to appellant, who was several hundred yards away, in another saloon, that there was a disturbance going on, and he hurried to the crowd in front of Russell's saloon, and at once proceeded to put under arrest a number of persons in the noisy crowd. These persons, among whom was Miller, all appear to have expostulated with the officer, claiming that they were not the guilty parties. While the officer had hold of Miller, it appears that he pulled away from him, saying that he wanted to explain or argue the matter with him. The crowd was surging back and forth, all talking, and all, to some extent, under the influence of intoxicants. The officer testifies that the crowd, headed by Miller, "crowded on him" or "rushed on him," and to save himself from imminent peril he shot Miller. To our minds, there is scarcely a shadow of proof to show that the officer was in any danger. It is true that the persons sought to be arrested were reluctant to submit, and in fact pulled away from him; one hugged a tree box and could not be detached from it.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

When Miller pulled away, the officer apparently became excited, and, in a fit of exasperation at his inability to control the crowd, fired the fatal shot, with the belief, it may be, that he was but discharging his duty.

While on the witness stand appellant was asked if he had not taken one or more intoxicating drinks just before the killing. He denied that he had, and the state was then allowed in rebuttal to contradict this, and show that he had been drinking that night. It is insisted on the authority of *Kennedy v. Com.*, 14 Bush, 340, and cases there cited, that this was a contradiction on a collateral and irrelevant matter, and hence not permissible. While the point is pressed with earnestness, it is manifest to us that to show the condition of the appellant's mind—whether he was cool and clear-headed or otherwise—was not at all an irrelevant or collateral matter. It was competent to make this proof in chief, and no less competent to show it in rebuttal.

It is also urged that the dying statements of the deceased were improperly admitted to the jury, because not made under a sense of impending death. The deceased, however, was shot through the lung, and whenever he gasped or coughed the blood would spurt out, and this condition, coupled with his repeated statements, just after he was shot, that he was killed, that he was going to die, etc., make it clear that he anticipated immediate death, notwithstanding the doctor tried to encourage him somewhat. His statements were to the effect that "he did not think Ed. was going to shoot him, and he pulled away from Ed., and said, 'Let's argue this thing, or this case,' and then Ed. shot him." That deceased "pulled away from the officer," and said, "Let's argue this thing, or this case," are facts occurring at the time of the killing, and therefore provable. There may be some doubt as to the competency of the expression, "I did not think Ed. was going to shoot me," but it does not seem to be a material statement, and is not a reversible error, if one at all.

The pith of appellant's objection to the instructions is that there was contained in the one on self-defense the qualifying expression, "And there appeared to him, in the exercise of a reasonable judgment, no other safe means to avert the then real, or to him apparent, danger, if any, at the hands of said Miller, but to shoot the said Miller, then he had the right to shoot," etc. It is contended that this qualification required the officer to avoid the danger, if any was impending at the time he shot the deceased, by flight, etc. We think the jury could not have reached such a conclusion or adopted such a construction. The instructions very admirably pointed out the duty and right of the officer to go upon the ground, and stay there until he made such arrests as were necessary to be made, and gave him—improperly, we think—the right to use such force as was necessary

for the accomplishment of that purpose. We say improperly, because there is no pretense here that anything beyond a mere breach of the peace was being committed, and the force to be used in making an arrest for that offense must at least stop short of that which would result in a sacrifice of human life. See *Head v. Martin*, 85 Ky. 480, 3 S. W. 622; *Dilger v. Com.*, 88 Ky. 550, 11 S. W. 651. We think there was no proof to authorize the court to submit an instruction on the appellant's right to defend himself against those "acting in concert with Miller." It seems to us that the only offense of which either Miller or those acting with him can be said to be guilty was the offense of trying to get away, instead of obeying the officer. We think the accused has had a fair and impartial trial, and the judgment is affirmed.

### KREMER v. MURPHY.<sup>1</sup>

(Court of Appeals of Kentucky. Sept. 23, 1898.)

#### APPEAL AND ERROR—SUFFICIENCY OF EVIDENCE.

As a preponderance of the evidence shows that plaintiff is entitled to only \$800 upon his claim for labor and material furnished in the building of a house for defendant, a judgment in his favor for \$1,000 is reversed.

Appeal from circuit court, Jefferson county. "Not to be officially reported."

Action by J. H. Murphy against Caroline Kremer on a claim for labor and material furnished in the building of a house, and to enforce a lien therefor. Judgment for plaintiff for only a part of his claim, and he appeals; defendant prosecuting a cross appeal. Reversed.

Newton G. Rogers, for appellant. Alfred Selligman, O'Neal & Pryor, and Phelps & Thum, for appellee.

GUFFY, J. It was alleged in the petition that the appellant was indebted to appellee in the sum of \$1,062.36 for work, labor, and material furnished to appellant, for which she agreed and promised to pay said sum, only \$1,541.50 of which had been paid; said work and material being furnished in the erection of a storehouse and dwelling for the appellant. A lien upon the property was asserted, and its enforcement sought. The first paragraph of the answer may be treated as a general denial of all the averments of the petition, as well as a specific denial of the various items set out by plaintiff. In the second paragraph of the answer a specific contract for the erection of the building in question is pleaded, from which it appears that the contract price was \$3,850. And it is further alleged in the answer that the plaintiff failed to comply with his contract in many respects, and finally abandoned the contract, and that appellant had to hire other builders to complete the job. Appellant also pleaded a credit

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

of \$2,541.50 paid to the plaintiff, and prayed judgment over against appellee for the sum of \$1,200. In an amended answer the credit set up was only \$2,400, and a counterclaim asserted of \$1,300. The reply is a traverse of the answer and counterclaim. After the issues were finally made up, and a vast amount of testimony taken, the court finally rendered judgment in favor of plaintiff for \$1,000, with interest from the 3d of March, 1894, and adjudged the enforcement of the alleged lien on the property as described in the petition, from which judgment appellant has appealed, and appellee obtained a cross appeal.

We quote as follows from the second and final opinion of the court below: "This action comes up on a motion for a new trial. I have gone carefully through the record, including the pleadings and proofs, and I am satisfied the judgment does the defendant injustice. The plaintiff is a builder and contractor. The defendant applied to him to build her a house in the city of Louisville, which was intended both for a store and a residence. She presented him plans and specifications by which the house was to be built. The plaintiff claims that he did not bid under the specifications at all; they were so imperfectly and improperly drawn that it was impossible for him to bid under the specifications; that he merely took the drawings of the ground floors, without even the elevations, and made a bid to build the house for defendant for \$3,850; and he was to build her a good house. On the other hand, defendant claims that the plaintiff was to build the house according to the plans and specifications; and I am of the opinion, when the agreement, which seems to have been a parol agreement, was originally entered into, the house was to be built by and according to these specifications. This is the most rational view to take of the matter, as it is difficult to understand how a builder could make anything like an accurate estimate, or even an approximation, of the cost of a building, without any specifications, and without any agreement as to the materials to be used and the character of the work to be performed. The plaintiff was a practical builder and contractor, and it seems to me that there was no excuse or justification for him to undertake to build a house for a contract price, where the plans were not complete, and there were no specifications. If his theory of the contract is correct, then the defendant was completely at his mercy, and he could make the house simply to suit himself, and put in it such material as he saw fit; and yet, with this uncertainty and indefiniteness as to what he should do, he makes a contract for a fixed price, at \$3,850, for the defendant to pay. However, soon after the work had commenced there seemed to be disputes and contentions between the parties pro and con as to the kind of material to be used, and the dimensions and character of work to be done. Whether this amounted to an abandonment of the contract or not, it is difficult to deter-

mine. It is certain that this house was not built according to the plans and specifications. The proof shows that the defendant had to expend a large amount of money—eight hundred or a thousand dollars—to complete the house according to the plans and specifications; that is, including the tearing down and changing of work that was improperly done. It also appears beyond question that the house was not built in a skillful and workmanlike manner. Various portions of it were so constructed that the building inspector of the city of Louisville condemned it, and compelled the work to be changed, which was done at considerable cost and expense to the defendant; and also it is shown, I think, conclusively, by the testimony, that the house was not only defective and unskillfully built, but a great deal of the material was inferior, and not of the quality contemplated by the parties at the time, and the house was very much out of plumb, and unsightly in appearance. While the plaintiff claims that he built the house under the contract, and seems to have taken proof under that theory alone, he has not sued upon the contract at all, but sued upon the quantum meruit. I think that the trend of the testimony shows that the house was not worth more than thirty-three or four hundred dollars when the plaintiff quit work upon it and claimed that he had finished it; and treating the work as having been done upon the quantum meruit, and the contract abandoned, and estimating the value of the work done at the time plaintiff quit at thirty-four hundred dollars, the defendant has paid him, according to the proof, twenty-four hundred dollars, which would leave a balance of one thousand dollars due him. On the other hand, if the suit be treated as one based upon contract, as before suggested, I am of the opinion that the contract was to build according to the specifications; and the evidence shows to the satisfaction of my mind that it was not built according to the specifications, and that the defendant would be entitled to an abatement on the contract price for the materials and labor that she had to obtain in making the changes which had to be made in the work, also for the defective and unskillful manner in which the work had been done, in which event the plaintiff would not be entitled to as much as a thousand dollars. In view of the complications and the uncertainty as to what was the contract between the parties, and as to what changes were made at the instance of the defendant, and what changes were arbitrarily made by the plaintiff, it is impossible to arrive at exact justice between the parties, and the court will only attempt to do what is substantial justice."

The proof in this case is so voluminous that it is impracticable to undertake to cite even the substance of it. It is in many respects contradictory. It is perfectly evident that the appellant was at an expense of more than \$750 to make the house habitable and suitable for the purposes for which it was intend-

ed, as she considered it. The proof tends strongly to show that the plaintiff undertook to build the house for \$3,850, or at least to build a house for that sum. It is also perfectly manifest that much wrangling occurred between the plaintiff and defendant during the time of the erection of the building, as well as since. Taking the proof in this case altogether, it seems to us that the preponderance of the proof is with the appellant, and we are of the opinion that the amount adjudged to plaintiff by the court below is too large. We are of opinion that \$800 was fully as much as he was entitled to recover. The judgment appealed from by appellant is therefore reversed, and the cause remanded, with directions to the court below to enter a judgment in favor of appellee for \$800, instead of \$1,000, and for proceedings consistent herewith. The judgment on the cross appeal is affirmed.

### CHISM v. BARNES.<sup>1</sup>

(Court of Appeals of Kentucky. Sept. 23, 1898.)

#### BILLS OF EXCEPTIONS — LIMITATION OF ACTIONS — NEW PROMISE.

1. An order entered subsequent to the day to which time was extended for filing bill of exceptions, which recites that "the bill of exceptions heretofore tendered by the defendant on a former day of the present term, having been examined by the court," was signed and filed, authorizes the presumption that the bill was tendered within the time allowed.

2. There can be no recovery on a promise to pay a debt barred by limitations, unless the promise is clear, absolute, and unconditional; and therefore it is error to instruct the jury to find for plaintiff if they believe defendant, after the debt was barred, "acknowledged the same as a subsisting demand."

Appeal from circuit court, Monroe county. "To be officially reported."

Action by R. M. Barnes against A. H. Chism on a new promise to pay a debt barred by limitations. Verdict and judgment for plaintiff, and defendant appeals. Reversed.

D. R. Carr, M. T. Flippin, and W. L. Porter, for appellant. Sherman Spears, Bowles & Duff, and Basil Richardson, for appellee.

GUFFY, J. The petition in this action reads as follows: "The plaintiff, R. M. Barnes, alleges that on the 12th day of March, 1866, the defendant, A. H. Chism, by his written promissory note, which he on said day executed and delivered to this plaintiff, promised and agreed one day thereafter to pay plaintiff the sum of \$500, but has paid no part thereof, except the sum of \$100, paid March 14, 1867; and said note, subject to said credit, is now due and unpaid. Said note, in words and figures, is as follows: '\$500.00. Due R. M. Barnes, borrowed money, five hundred dollars. Value recd. 12

March, 1868. A. H. Chism,'—and is filed herewith as part hereof. Plaintiff alleges that in August, 1889, and repeatedly since said time, and within less than five years last past, the defendant, A. H. Chism, has agreed and promised to pay said debt, and has repeatedly recognized said note and debt as a subsisting debt since the same has been barred by the statutes of limitations by reason of the lapse of more than 15 years since the last payment on said note. Now plaintiff, in this behalf, recognizing the fact that the note is barred by the said statutory presumption of payment, does not rely on the note as his cause of recovery, but says that he is entitled to a recovery on the new promise; and upon the same he brings his suit, and asks judgment for the sum of \$500, with interest from March 12, 1866, until paid, subject to a credit of \$100, paid March 14, 1867. Wherefore plaintiff sues, and relies on said new promise to support the original debt, and prays judgment for said original debt, as stated, and interest and costs, and for all proper relief." The answer of the defendant is a denial that he promised in August, 1889, or repeatedly since, or at any time or at all, to pay the note sued on; denies that he has repeatedly or at all recognized said note as a subsisting debt since same has been barred by the statute of limitation. It is further denied that plaintiff is entitled to recover on the alleged new promise, for the reason that he never made any new promise; and he relies on the statute of limitations as a bar to the original note. The reply is, in substance, a denial of the answer. A trial resulted in a verdict and judgment in favor of plaintiff for the amount claimed, and, appellant's motion for a new trial having been overruled, he has appealed to this court.

The grounds for a new trial are as follows:

(1) That the verdict or decision is not sustained by sufficient evidence, or is contrary to law; (2) error of law occurring at the trial, and excepted to by the defendant at the time. It may be conceded that the contention of appellee is correct, so far as the first ground relied on for a new trial is concerned; and that the same is too vague or uncertain to present any question for decision, but it seems to us that the second ground is sufficient to raise the question as to error of the court in regard to giving or refusing instructions.

It is further contended by appellee that there is no legal bill of exceptions, for the reason that none appears to have been filed until after the fourth day of the February term, 1896, of the circuit court; the court having previously given appellee until said time to prepare and tender the bill of exceptions. It will, however, be seen that the court entered a further order on the 8th day of February, 1896, to wit: "The bill of exceptions heretofore tendered by the defendant on a former day of the present term, having been examined by the court, was

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

signed, sealed, and enrolled, and ordered to be filed and made a part of the record; and the defendant prayed an appeal to the court of appeals, which is granted." The legal presumption is that the bill of exceptions had been tendered within the time allowed, and was held up by the court for examination; hence it follows that the bill of exceptions is properly before this court. The only testimony introduced by the plaintiff was his own deposition and that of Mr. Spears. The only portion of Barnes' deposition which at all tends to support his cause of action is a letter filed by him and written by appellant, which letter is as follows: "Tompkinsville, Ky., Aug. 7, 1889. Mr. R. M. Barnes, Mt. Sterling, Ky.—Dear Sir: I rec'd your letter to-day in regard to what I am owing you and am sorry I can't pay you anything now, for the reason that a short time ago our town was set on fire by a lot of thieves, and 19 houses burned and I had the misfortune to loose every thing I had. It left me with about 75 cents or a \$1.00 and since that time I have been working by days work for a living. Now Mr. Barnes, I am working at a pension and I surely will get it and if I do and get enough to pay you you may look for your money. I would like very much to see you and all that I know in your town but I have such poor health and am so poor that unless I get my pension money I do not know that I will ever see any person outside of this county. My atty. says I will get my pension this winter. Twice since I saw you I have tried to save up enough to pay you and twice I have been set as flat as any person you ever heard of. Hope you are in best of health also your family. I am able to walk around but not well. I am Resp'tly, A. H. Chism." G. S. Spears testified as follows: "I received the note sued on by mail in the spring of 1893, and a letter from plaintiff, authorizing me, as an attorney, to collect this note from defendant. I saw defendant in a few days after I got the letter and note, 1893. He told me he would come to my office and see about it. In a few days he came to my office, in 1893, and said he was not able to pay all the note, but that the note was all right, and that he had given it to plaintiff. He offered to give me his individual interest in a tract of pasture land of about ten acres near town, which he and W. G. Hughes owned jointly, and also his interest in a tract of timber land in Monroe county, and said he could not pay more on it, and that this must be taken in full settlement of the debt. I then told defendant I would write plaintiff, and inform him of this proposition. I did write to plaintiff, and he wrote me to not accept the proposition. I then refused to have anything further to do with it, and plaintiff directed me to send it to another attorney, and I did send it to A. W. Scott." The appellant testified as follows: "I heard Mr. G. S. Spears testify in this action, and what he stated is

correct, in substance. I called on Basil Richardson, also, to know what he and Spears were going to do with the note; and he said, if I would give up the land referred to by Spears, and \$300, he would release me of the debt. I then told him that I would not do it, as I was getting old and in poor health, and did not know that I would ever have \$300. I was getting a pension at the time I wrote the letter to plaintiff. I had reference to an increase, in my letter to plaintiff." The deposition of Barnes, together with the letter filed, is not embodied in the bill of exceptions; but, if we concede that it is properly before the court, yet it seems to us, taking all the testimony introduced by plaintiff together, that it was not sufficient to authorize the giving of instruction No. 1 given by the court, which instruction is as follows: "Unless the jury believe from the preponderance of the evidence that the defendant in writing acknowledged the note in evidence as a subsisting debt or demand against him, or promised to pay same, within 15 years next before the filing of this action, or orally acknowledged the same as a subsisting demand against him, or promised to pay same, within five years next before the filing of this action, the jury will find for the defendant." It will be seen from the foregoing instruction that the jury were authorized, under the instruction, to find for plaintiff if they believed from the evidence that the defendant, in writing, acknowledged the note as a subsisting debt or demand against him, or orally acknowledged the same as a subsisting demand against him. In this case the only ground upon which a recovery could be had was upon a promise to pay the debt in question after it had been barred by the statute of limitation. That the note was barred is admitted in the pleading, and a recovery sought alone upon the ground of a promise to pay same. The doctrine is well settled that a promise to pay a debt barred by the statute, or from which the debtor has been discharged in bankruptcy, must be clear, absolute, and unconditional; and yet the jury were told in the instruction that they might find for plaintiff, if they believed that defendant had acknowledged the debt as a subsisting demand. The question under consideration was discussed at some length by this court in *Tolle v. Smith's Ex'r*, 33 S. W. 410. The plaintiff in that case sought to recover in an action against Tolle upon a promise to pay a debt from which Tolle had been discharged in bankruptcy. The court, in discussing the question, said: "The only issue made by the pleadings was on the alleged promise, and upon the trial of it, the verdict being for plaintiff, defendant moved for a new trial upon the ground the court erred in giving and refusing instructions, and that the verdict is contrary to the evidence. It has been settled by this court that although a debtor, upon being adjudged a bankrupt, becomes discharged from all

legal liability to pay prior debts, he still remains under a moral obligation to pay that will support a new promise. *Graham v. Hunt*, 8 B. Mon. 7; *Egbert v. McMichael*, 9 B. Mon. 45; *Carson v. Osborn*, 10 B. Mon. 155. It has been also held that such promise, though made dependent upon a contingency, as to 'pay when able,' may be enforced. But in such case the ability to pay is the essence of the undertaking, and must be satisfactorily proved; otherwise no judgment can be rightfully rendered against the debtor. *Mason v. Hughart*, 9 B. Mon. 480; *Eckler v. Galbraith*, 12 Bush, 71. In this case, however, no allegation was made nor evidence offered to prove defendant's ability to pay the debt sued on. Consequently, as the pleadings stand, the plaintiff is not entitled to recover without proving the promise to pay was, as said in *Egbert v. McMichael*, 9 B. Mon. 45, absolute and unconditional, or, in language used in *Allen v. Ferguson*, 18 Wall. 1, clear, distinct, and unequivocal; and authorities agree that proof of acts or circumstances indicating an intention to pay will not be sufficient, unless the promise actually made is, in terms and meaning, unconditional and unequivocal; and it has been distinctly held that mere partial payments of a debt from which the debtor has been discharged as a bankrupt will not avail to show that such promise was made, and thus fix a liability, unless the promise itself be absolute and unconditional. The plaintiff in this case testified as a witness that, as executor, he made of defendant demand on the note, and was told by him that he would pay it as soon as he could. We see no difference between that promise and one of the debtor to pay as soon as able, for neither amounts to an unconditional promise, or is absolute and unequivocal in terms. Another witness testified defendant directed him to pay the testator, John C. Smith, the sum of \$4, and charged him (witness) particularly to see that the holder of the note entered the credit thereon. That occurrence might authorize an inference that defendant intended to pay the debt, but does not alter or add to the meaning or effect of the promise proved to have been made, which must be in language admitting of but one interpretation." For the reasons indicated the judgment is reversed and remanded, with directions to award appellant a new trial, and for proceedings consistent herewith.

#### FARMER v. PEOPLE'S BANK.

(Supreme Court of Tennessee. Dec. 18, 1897.)

BANKS AND BANKING—DEPOSITS AND COLLECTIONS  
—CHECKS—FORGED INDORSEMENTS.

1. Where a bank accepts a check bearing a forged indorsement, and places it to the credit of one presenting it, and has it collected, it is liable to the true owner, though it acts in good faith and without knowledge of the forgery.

2. Where a check is not delivered to the payee, but his name is indorsed by another, who deposits it with a bank, which collects the proceeds, the payee's ratification by a demand on the bank for the proceeds makes the check his property, and entitles him to recover the proceeds, over an objection of want of privity between the parties.

Appeal from circuit court, Robertson county; A. H. Munford, Judge.

Action by R. W. Farmer against the People's Bank. There was a judgment for defendant, and plaintiff appeals. Reversed.

E. A. Hicks and R. L. Peck, for appellant.  
L. T. Cobbs and A. E. Garner, for appellee.

BEARD, J. This suit was brought to recover the proceeds of a check of which plaintiff in error claimed to be the owner, and which he alleged had wrongfully gone into the possession of the defendant in error, and had been collected by it. The evidence in the case tends to show that Farmer delivered to one Head a small lot of tobacco, to be put in order for market; that, when so prepared, Head sent it to his merchants in Nashville, who, having sold it, returned to him the net proceeds of the sale, in their check on the Fourth National Bank of Nashville,—payable, however, to the order of plaintiff in error; that, instead of delivering it to the payee, Head, without his knowledge or consent, indorsed the payee's name upon it, and delivered it to the defendant bank, whose officers, supposing this indorsement to be genuine, and without suspicion as to the title of Head, placed it to his credit, and permitted him to check it out; that it then forwarded the check to its correspondent, who in due time presented it to the drawee, and, receiving from it the amount thereof, remitted it to the defendant bank. Declining to pay to Farmer the sum so collected, this suit was instituted.

In the course of his charge to the jury, the trial judge said: "If you find from the evidence that the draft in question was drawn by Dortch, Carsey & Company, in favor of plaintiff, on the Fourth National Bank of Nashville, and that his name was indorsed on the back of the draft, but that such indorsement was a forgery, then the draft was not legally indorsed, and should not have been paid; but if the defendant simply received the draft from Riley Head as a deposit, placing it to Head's credit, and afterwards had it collected from the Fourth National Bank, and the defendant acted in good faith, not knowing the indorsement of plaintiff's name was a forgery, then the defendant would not be liable to plaintiff for said draft, and you should find for the defendant." While there is obscurity in the first clause of this paragraph,—the result, no doubt, of clerical omission in the transcript,—in the concluding part the jury are very distinctly told that if they should find the defendant bank simply took this check or draft as bailee for collection, in good faith,

*Collecting Bank*

and without knowledge of the forged indorsement of the payee's name, then it would not be liable, though it had received its proceeds, and paid them over to Head. There was error in giving this instruction, for which the case must be reversed. While the exact question here presented has not been heretofore raised in this state, yet the ultimate principle upon which it rests for determination has been recognized and applied by this court. In *Pickle v. Muse*, 88 Tenn. 381, 12 S. W. 919, the well-settled rule was announced that "a check drawn in favor of a particular payee or order is payable only to the actual payee or upon his genuine indorsement; and if the bank mistake the identity of the payee, or pay upon a forged indorsement, it is not a payment in pursuance of authority, and it will be responsible." To the same effect is *Chism v. Bank*, 96 Tenn. 641, 36 S. W. 387. The logic of this holding, it would seem, must necessarily be that one coming into possession of such paper, either unindorsed or with a forged indorsement of the payee's name, could not successfully resist the title of the true owner, or, if it has been converted into money, a demand for its proceeds. In such a case the rule of law is stated by Morse, in his work on Banks and Banking (volume 1, § 248): "If a negotiable instrument, having a forged indorsement, come into the hands of a bank, and is collected by it, the proceeds are held for the rightful owner of the paper, and may be recovered by them, although the bank gave value for the paper, or has paid over the proceeds to the party depositing the instrument for collection." Cases involving facts similar to these upon which this controversy turns have been considered by a number of courts of the highest respectability, and the rule announced by Mr. Morse has been applied to them. In *Talbot v. Bank*, 1 Hill, 236, a certificate of deposit belonging to Talbot was stolen, and by a forged indorsement came into the possession of the defendant bank, which subsequently collected it from the drawee; and at the suit of the owner the receiving bank was held liable for the proceeds of the certificate, though it acted in the utmost good faith, and without any suspicion of the fraud practiced upon the true owner. *Buckley v. Bank*, 35 N. J. Law, 400, was a case where a check with the name of the payee forged upon it came to the possession of the defendant innocently, and was so collected by it. Having done so, it was compelled to respond to the claim of the true owner, upon his discovery of the loss and fraud, though the bank had already accounted for the proceeds to the party from whom it had obtained possession. In the course of the opinion the court say: "It is clear, then, that nothing passed to the defendant by virtue of the forged indorsement. The plaintiff's right to the check remained precisely as it was before his name was forged. The check, therefore, when the defendant ob-

tained the money upon it, was the property of the plaintiff; and in that case he may, as we have seen, recover the amount in this action, as money received by the defendant to his use." In *Shaffer v. McKee*, 19 Ohio St. 526, a draft payable to plaintiff's order was stolen from the mail, and the thief, having placed a forged indorsement upon it, sold it to McKee, who in good faith collected from the drawee the money, and appropriated it to his own use; and upon these facts it was held that the owner was entitled to recover. To the same effect are *Johnson v. Bank*, 6 Hun, 124, and *Bobbett v. Pinkett*, 1 Exch. Div. 368.

But it is insisted that this action cannot be maintained for the want of privity between the parties. This objection was made in *Talbot v. Bank*, supra; *Buckley v. Bank*, supra; and *Pickle v. Muse*, supra; and in each of these it was held not to be well taken. Although not actually delivered to plaintiff, yet his ratification by a demand upon the defendant for its proceeds, by this suit, if not before, made the check the property of Farmer (*Pickle v. Muse*, supra), so that when, without any lawful right, the defendant converted it into money, it stood in the place of the original paper, and was equally the property of the plaintiff in error. In the one case no more than in the other can the defendant in error resist the right of recovery of the true owner upon the ground of a want of privity; for the action against the wrongdoer does not rest upon privity, but upon the fact that he has intermeddled with property not his own, and, asserting a hostile claim, he has interfered with the lawful use and dominion of the owner of the property. For the error of the circuit judge in the matter indicated the judgment is reversed, and the case is remanded for a new trial.

#### STATE v. SPURGEON et al.

(Supreme Court of Tennessee. Nov. 17, 1897.)

#### DEFAULTING PUBLIC OFFICERS — PROSECUTION — ATTORNEY'S LIEN.

1. Acts Tenn. 1891, c. 60, amending Acts 1879, c. 218, and conferring upon the comptroller the right to appoint attorneys with power to institute suits for the collection of revenue from defaulting officers, does not confer authority on such attorneys to represent the state in the supreme court, and they can have no lien for services so rendered.

2. Where the only provision for the payment of attorneys, appointed by the comptroller to prosecute suits for recovery from defaulting officials, is that found in Acts Tenn. 1879, c. 218, which provide that such attorneys shall receive no compensation other than that allowed by the comptroller, subject to the approval of the governor, and to be paid out of funds collected by them, such attorneys can have no lien for their services.

Appeal from chancery court, Sullivan county; Hugh G. Kyle, Judge.

Action by the state against John R. Spurgeon and others. Judgment for the state.



Motion for the allowance of an attorney's lien. Overruled.

Butler & McDowell, C. J. St. John, Templeton & Cates, and G. W. Peckle, for the State. N. M. Taylor, for lienors. Kirkpatrick, Williams & Bowman, for defendants.

BEARD, J. The defendant, John R. Spurgeon, was a surety on the official bond of one Branscomb, a tax collector of Washington county, who defaulted, in 1874, for a large amount of revenue due the state. The bill in this case was filed in 1893, charging that in view of his liability on the bond of the defaulting officer, and in order to escape it Spurgeon, soon after discovering the amount of this default, made a trust deed of all his property, consisting of valuable real estate lying in Washington and Sullivan counties, and with the purpose, shared in by the beneficiary of the conveyance, of hindering, delaying, and defrauding the state in the collection of its claim; and the prayer of the bill was that this deed might be set aside as void, and the property covered by it be subjected to the payment of the state's demand. Other matters or questions became involved in controversy, brought into the cause by an intervening petition, which it is not necessary to set out. It is sufficient for our present purpose to say that at this term an opinion has been delivered, affirming the decree of the court of chancery appeals, adjudging this trust deed to be fraudulent and void, and ordering the property conveyed by it to be sold, and its proceeds to be applied to the payment of the claim of the complainant. Since this opinion was handed down a decree has been presented to us embodying the conclusions and directions of this court, but reserving a lien on the recovery in favor of a number of solicitors for services rendered in this cause, and a motion has been made that the same be entered. These gentlemen make this claim upon their employment by the comptroller of the state, and the question for determination is, has that officer power to bind the state by entering into such a contract, and, if he has such power, then as to boundaries of it?

It is beyond doubt, until within recent years, that the duty of attending to all litigation in which the state was interested was devolved upon the district attorneys of the several circuit courts and upon the attorney general of the state. In 1865 the first departure from a long-established system was made by the passage of an act providing for the employment of additional counsel to the attorney general or district attorney, when, in the judgment of the governor and attorney general, the interests of the state required it, and for the compensation of such attorneys. This was an emergency statute, possibly made necessary in the liquidation of the Bank of Tennessee with its various branches, though in its second section it was

couched in general terms. In 1879 the legislature made a more radical departure by the passage of an act which, with an act amendatory thereof, will be noticed hereafter. While the office of attorney for the courts of the state having criminal jurisdiction was recognized by sections 5 and 6 of article 6 of the constitution of 1834, that of attorney general for the state was not, but was, as it at present substantially exists, created by chapter 51 of the Acts of 1835. The constitution of 1870, in section 5, art. 6, makes provision for both offices; the latter becoming for the first time what the former had been, since 1830, a constitutional office. This section, however, while providing for the appointment of the attorney general and reporter by this court and for the election of the attorneys of the state for the various districts or circuits, does not prescribe their duties. But the powers conferred to, and the duties imposed upon, the incumbents of these offices had been long defined by general laws, and were at that time thoroughly understood. As to the office of attorney general, the act of 1835 creating it had first fixed its powers and duties. These were afterwards supplemented by other acts. Among these duties so imposed was that of attending to "all business of the state, both civil and criminal, in the supreme court." These statutes were brought, with but slight changes of phraseology, into the Code of 1858, at section 3952, and were in existence at the time the constitution of 1870 was promulgated.

The question has been raised in argument as to how far the legislature can go in stripping these constitutional officers of the functions attached to their respective offices at the time the constitution of 1870 was adopted, and conferring them on others, whether they be appointees of the comptroller or are otherwise chosen, but we are not called upon on this record to answer it. While it is not necessary in this case for us to intimate an opinion on this very important question, yet in this application for the reservation of a lien it does become essential to examine the legislation of the state to ascertain the limits of the comptroller's power in the employment of attorneys in suits like the present.

In 1879 the legislature passed the act above referred to, entitled "An act to facilitate the collection of state revenue." By this act the comptroller was authorized to employ an attorney or attorneys, and send him or them into any county in the state, with full power to investigate the records and books of any officer charged with the duty of collecting revenue, and the attorney or attorneys so employed had, under the act, "full power and authority to bring in the name of the state by motion or otherwise any and all suits necessary to enforce the collection of any revenue due the state and to compromise and settle all suits for or on account of such uncollected revenue," etc. Acts 1879, c. 218.

The legislature of 1891 passed an act (chapter 214 amendatory of the one just mentioned, entitled "An act to amend chapter 218, p. 362, of the Acts of 1879, entitled 'An act to facilitate the collection of state revenue.'") This amendatory statute, in effect a re-enactment of the original act so far as that had conferred the right of appointment upon the comptroller of an attorney or attorneys to be sent by him through the state to look after its officers engaged in the collection of revenue. In important particulars materially increased the powers of those so appointed. As it was upon the authority of these two acts the employment in question was made, it is not necessary for us to consider section 93, c. 1, Sess. Acts 1897, by which the district attorneys and the attorney general of the state are reduced to the position of mere assistants of the revenue agents selected by the comptroller in such suits as they institute within the limits of that section. Upon an examination of the act of 1879 and the amendatory act of 1891, it will be found that the attorney or attorneys commissioned by the comptroller under these acts, while authorized to institute, among others, all suits necessary to enforce the collection of revenue from defaulting officers, yet there was no provision made in them, even if it could constitutionally have been done, for these attorneys representing in this court such of these suits as might be appealed to it. In the absence of an express statute, it will not be presumed that the legislature intended that these appointees should follow litigation so instituted by them into this court. On the contrary, it must be assumed that its purpose was, after these suits reached here, to leave the duty of attention to them, where it was placed by the act of 1835, and where since it has continued by unbroken statutory provisions (unless it be that the act of 1897 makes a change) to rest; that is, upon the attorney general of the state. Taking this view of the statutes bearing upon this question, we are clear there is no authority whatever for the employment by the comptroller of attorneys to represent the state in this court and this, of itself, is a sufficient answer to the motion to reserve a lien for services so rendered.

There are two other objections, however, to this motion, either of which is sufficient to warrant us in declining to entertain it. The first is that the only provision for the payment of the attorney or attorneys employed under the authority of these acts is found in the body of the original act. Acts 1879, c. 218. That provision is in these words: "Be it enacted, that such attorney or attorneys so employed shall receive no compensation other than that allowed by the comptroller subject to the approval of the governor to be paid out of any funds collected" by them, which compensation shall "not exceed fifteen per cent. of the entire amount collected," "to be retained by them, or paid

by the comptroller out of the fund collected before payment into the state treasury." Attorneys so employed must look alone to the terms of this clause to ascertain their right to compensation. Compensation depends upon a collection. Until this is made, they have no claim. When the collection has been made, compensation must be allowed by the comptroller subject to the approval of the governor, and then in no case, and however many attorneys have been employed, can it exceed 15 per cent. of the entire amount collected.

In the next place, even if this statute was not restrictive in its terms, as has just been indicated, a sound public policy would forbid placing such a burden as is here proposed on the state's recovery. All other persons who have claims against the state for services rendered, or resting on any other ground, obtain payment alone on warrants issued upon the treasury; and even then the settled law is that "no money shall be paid out of the public treasury unless the law or laws under which the same may be claimed or demanded shall expressly direct and order that it shall be paid out, and unless the warrant shows the name of the person in whose favor it is drawn and the statute or authority under which it is issued." Shannon's Code, § 287. Independent of every other objection, to grant the present motion, in the absence of an express statute authorizing it, would be to violate the spirit, if not the letter, of this provision of the law. For these reasons the motion is overruled, and a decree will be entered as has been heretofore directed.

#### GIBSON v. GOSSOM et al.

(Supreme Court of Arkansas. June 25, 1898.)  
ADMINISTRATION—SALES—INTEREST OF PURCHASER  
—FRAUD.

Where two lawyers were partners, but the separate business of each was unaffected by the partnership, and the one had nothing to do with the affairs of an estate for whose administrator the other was the attorney, and held himself aloof from all dealings with the administrator, a purchase by him at the administrator's sale of land will not be set aside, though he afterwards conveys it to his partner, bad faith or fraud not being clearly shown.

Appeal from chancery court, Arkansas county; James F. Robinson, Chancellor.

Bill by Emma Gossom and others against James A. Gibson. There was a decree for plaintiffs, and defendant appeals. Reversed.

Cockrill & Cockrill, for appellant. P. C. Dooley, for appellees.

PER CURIAM. The plaintiffs in this cause, the said Emma Gossom et al., by their complaint in equity, seek to have set aside, by decree, the sale of certain lands therein mentioned, by the administrator of their an-

1 Rehearing denied October 8, 1898.

cestor's estate to the said James A. Gibson, and the annulment of the latter's deed to Holt, on the ground that Gibson was the law partner of Holt, who was the attorney of said administrator, and, occupying such relation to Holt, Gibson could not lawfully purchase at the administrator's sale. The evidence is to the effect that, while Gibson and Holt were partners in the practice of law, yet that the old and separate business of each was unaffected by the partnership relation, and that Gibson, under this arrangement, never in fact had anything to do with the affairs of the estate, and held himself aloof from all dealings with the administrator in relation thereto. Gibson was certainly occupying a very delicate position, and one that generally is likely to be the subject of grave suspicion; but we are unable to see that the evidence is sufficient to show bad faith or fraud, or that he occupied, in fact, the relation of attorney to the administrator, directly or indirectly. The evidence to show fraud should be clear, and we think it is not so in this case, but, on the contrary, doubtful and unsatisfactory. The decree is therefore reversed, and remanded, with directions to dismiss the bill.

#### GEARY v. PARKER et al.<sup>1</sup>

(Supreme Court of Arkansas. June 11, 1898.)

EXCEPTIONS—SUFFICIENCY—ABANDONMENT—UNLAWFUL DETAINER—EFFECT OF NOTICE TO QUIT—TENDER—PAROL EVIDENCE.

1. An exception reserved to the giving of "each and every one" of certain numbered instructions is sufficiently specific.

2. Where exceptions to instructions given are specifically reserved in the bill of exceptions, the failure to as specifically note them in the motion for a new trial is not an abandonment, where they are referred to in a general manner in the motion.

3. Under Manuf. Dig. § 3348, providing that when a lessee fails or refuses to pay rent when due, and after demand made in writing for the delivery of possession of the premises, he is guilty of unlawful detainer, the notice to quit does not give the lessor the right to immediate eviction, but gives the tenant a reasonable time to fulfill his contract, or vacate, before suit is brought.

4. In an action of unlawful detainer based on nonpayment of rent, an answer setting up a tender does not admit that the rent is due and unpaid, where the answer denies it. Per Williams, Special Judge, and Bunn, C. J.

5. In an action to evict a lessee for nonpayment of rent, where he denied the failure to pay, and alleged that lessor had failed to put him in possession of all the property leased, having withheld a house occupied by the mother of lessor, evidence concerning the occupancy of the house by the mother was properly admitted, over the objection that it was in conflict with the written contract. Per Williams, Special Judge, and Bunn, C. J.

6. If the full amount of rent due be tendered the landlord before he sues for unlawful detainer, though the tender be not made until after he has demanded the premises for nonpayment of rent, his action must fail. Per Riddick, J.

Battle and Hughes, JJ., dissenting.

<sup>1</sup> Rehearing denied October 8, 1898.

Appeal from circuit court, Garland county; Alexander M. Duffie, Judge.

Unlawful detainer by Arthur Parker and others against John Geary. From a judgment for plaintiffs, defendant appeals. Reversed.

Greaves & Martin, Geo. L. Basham, and Rose, Hemingway & Rose, for appellant. Wood & Henderson, for appellees.

WILLIAMS, Special Judge. On the 9th of November, 1889, the appellee Parker leased lot No. 3 of block 58 of the city of Hot Springs to the appellant, John Geary, for a term of 15 years, at an annual rental of \$70, payable quarterly in advance, the appellant having the option at any time within the 15 years of purchasing it for \$1,100. An action of unlawful detainer was brought by the appellee, the complaint alleging that the appellant entered into possession, and then so continued, but that he failed and refused to pay the rent which became due on the 9th of November, 1890, to wit, \$17.50; that he refused to recognize appellee's rights, and abandoned the contract; that on December 16, 1890, appellee made written demand on appellant for the possession of the lot, which he refused; that, by reason of the failure just named, the appellee was entitled to immediate possession. The appellant interposed a general demurrer, which the court sustained; but, on appeal to this court by the present appellee, this ruling of the lower court was reversed, on February 18, 1892. See 57 Ark. 301, 21 S. W. 472. The appellant, on March 25, 1891, before the case was remanded, filed an answer and motion to transfer to the equity docket, which motion was overruled on April 4, 1891. On May 12, 1893, the appellant filed an answer, denying that he failed and refused to pay the rent due on the 9th of November, 1890, or at any other time, or that he refused to recognize appellee's rights, or had abandoned the contract. On the next day, he filed what he termed an "Amendment to the Substituted Answer to Plaintiff's Complaint." In this he denies that he was indebted to the appellee in the sum of \$17.50, or any other sum, for rent, and that demand was made upon him for rent upon said date. He denied that he failed to pay rent, and that the appellee was entitled to possession at the date of the notice, or at the time of bringing suit. He also alleged that the appellee failed to put him in possession of all the property, having withheld a house occupied by appellee's wife and mother; that the house had a rental value of \$4 per month; and that a greater sum was due him on account thereof than \$17.50. The appellee filed a motion to strike this amended answer, on the ground that it was filed after the trial began, and during cross-examination of the appellee; also, that the alleged eviction of a part of the premises "should not at this stage of the trial be presented as an issue in the case."

It is contended by the appellee that no exceptions were reserved specifically to the instructions given by the court. In the bill of exceptions they were reserved as follows: "To which ruling of the court in giving each and every one of said instructions so numbered 1st, 2d, 4th, and 5th the defendant at the time excepted." In the motion for the new trial as follows: "Because the court erred in giving to the jury, over the objection of the defendant, instructions numbered 1, 2, 4, and 5 as asked for the plaintiff." The cases in our Reports cited by counsel in support of their contention are those in which the exceptions were reserved at the time in the bill of exceptions to the instructions en masse, followed in the motion for new trial in the same manner, or, having been properly reserved in the bill of exceptions, were abandoned by failure to make them a ground of the motion for a new trial. There seem to be none to the effect that, where specifically reserved in the bill of exceptions, a failure to as specifically note them in the motion for a new trial will be an abandonment, if they are referred to in a general manner in the motion. The real reason for requiring specific exception is that the attention of the trial court may be called to the particular error complained of. The exception here is to "each and every one." The word "every," as defined in Anderson's Dictionary of the Law, is: "Each one of all. Includes all the separate individuals which constitute the whole, regarded one by one." The law does not require that an objection to an instruction shall be more specific than this. An exception to an instruction need not state the point of exception. *McCreery v. Everding*, 44 Cal. 246; *Shea v. Railroad Co.*, Id. 415. Specification of the instruction so as to designate it is sufficient. *Rogers v. Mahoney*, 62 Cal. 611. The attention of the trial judge having been directed to each instruction separately by the original exceptions, the motion for the new trial should be taken in connection therewith. The reason of the rule will thus be followed. The instructions stand in separate paragraphs, and each enunciates some rule or rules of law. In the language of the court in *Davenport Gas Light & Coke Co. v. City of Davenport*, 18 Iowa, 237: "If any one was improperly refused, therefore, there was a ruling upon the law or proposition as there stated; and as that particular proposition was called to the attention of the court, and insisted upon by the party asking it as the law governing the case, there is no chance for surprise, nor any fair ground for claiming that the mind of the judge was not called to what it was that counsel would not have him hold." In the case of *Atkins v. Swope*, 38 Ark. 528, 539, looking at the language of the court, it appears that the objection first made was general, and the motion was no better. The court says: "The first ground of the motion for the new trial is that the court erred in giving the 1st, 2d, &c., instructions asked by defendants. The objection made to giving these instructions was

general, embracing all of them in gross." The objections were sufficiently specific.

Some of the instructions given to which exceptions were reserved told the jury that, if they found that any sum of money was due at the time of bringing the suit, they must find for the appellant. In determining the soundness or unsoundness of such instructions, we are called upon to consider and construe section 3348 of Mansfield's Digest, the statute in existence when the suit was brought. It is as follows: "When any person \* \* \* shall lawfully and peaceably obtain possession (of lands and tenements), but \* \* \* shall fail or refuse to pay rent therefor when due, and after demand made in writing for the delivery of possession thereof, \* \* \* such person shall be guilty of unlawful detainer." The appellee contends that under this statute, if the appellant failed to pay upon the day rent fell due, and he was notified in writing to vacate, the right of enforcement of the suit for unlawful detainer became inviolate, and that no tender made after notice and prior to suit could avail to defeat the right. There was no condition of forfeiture in the lease for nonpayment. The decision of this court when the case was here before is cited as upholding this construction. The complaint there was good upon its face, but the answer and evidence present defenses which did not then appear. It was shown by the evidence that the parties to the contract acted harmoniously for one year. When the appellant took possession, he assumed to pay an unpaid balance of a mortgage on the land, and also the taxes, which should be deducted from his rents. These he paid, but just what amount on the mortgage is not clearly shown. He paid \$10 taxes on April 10, 1890. The appellant produced receipts as follows: \$49.90, November 18, 1889; \$16, May 19, 1890; 50 cents, June 12, 1890; 50 cents, July 4, 1890; 50 cents, August 4, 1890; \$2.60, October 2, 1890. These aggregate \$70, the sum due for rent one year. The appellant claimed that the sum paid for taxes did not enter into any of the receipts, and that he was due an additional credit on this account. The appellee says he did not know who paid his taxes for that year, but knows that the appellant had credit for it in his receipts. The appellee went to the house of appellant on November 10, 1890, and demanded rent for one year in advance, but subsequently modified his demands to rent for one quarter in advance. The appellant told him that he would meet him uptown in a few days, and settle; but, failing to do so, he called again, and received substantially the same answer; and he called the third time, and asked for a copy of the lease, as he desired some lawyer to look at it; and the appellant promised to come uptown in a few days, and go to his lawyer, and have the lease explained. This is the version of the appellee. The appellant says that, when the 9th of November arrived, he had not received credit for the taxes he had paid; that the ap-

pellant came and wanted to get the lease, claiming that there was a mortgage in there that ought not to be on it, and that he made no demand for rent at that time; and appellant sent him away with the understanding that, when he came up to town, they would go before the lawyer who drew up the lease, and have him explain the points in dispute. On the 16th of December, 1890, the appellant was served with a notice to vacate the premises, and on the 19th of the same month this suit was instituted. Between the service of the notice and the beginning of the suit, the appellant, who was sick, sent his wife with \$17.50 to the appellee, and tendered it to him; and they went over to the office of appellee's lawyers, under whose advice he refused to accept it. It is apparent from the conduct of the parties that the amounts and dates of payment had no reference to the dates stipulated in the lease throughout the entire year. Notwithstanding this, the appellee claims the right to enforce the contract to the strict letter at the beginning of the second year, without any prior warning to the appellant of his intention to do so, except the notice to vacate, the serving of which, it is claimed, forfeits the rights of the appellant beyond all retrieve, though he is willing to pay, and offers to pay, all that is demanded of him within less than three days after service, and before suit has been instituted. This is claimed because the statute mentions no period of warning to be given. We think the decision in *Granite Co. v. Shall*, 59 Ark. 409, 27 S. W. 562, is in point, and the appellee could not, under the circumstances, ask for a strict enforcement of the contract, unless there is something in the statute which would give him this right. We also think that the instructions asking the jury to find for the appellee if any sum was due from the appellant disregarded the claim of the appellant that he thought a settlement was necessary between them at the beginning of the second year, and that he was entitled to a credit in addition for taxes. If he was really of that opinion, and was actuated in delaying payment until they could come together, this would excuse a prompt payment of itself, unless the statute prevents it. The jury could have passed upon this, but the instructions prevented. They could have said whether his claim was made in good faith, or was a mere subterfuge.

But the appellee contends that any such defenses were eliminated by the tender, which admitted that the money was due. A tender does admit that the sum tendered would be paid, and he would be compelled to pay it, but the admission reaches no further. It does not necessarily admit the existence of the grounds upon which plaintiff bases his right of recovery. That is to be determined by the pleadings. *Griffin v. Harriman*, 74 Iowa, 436, 38 N. W. 139; *Hennell v. Davies* [1893] 1 Q. B. 367. Here the appellant claims that he tendered the money simply because it was claimed, and he was sick in bed, and could

not attend to business, and in his pleadings denied that he really owed it.

While the statute names no period of time to elapse after the service of notice to vacate to be allowed the tenant, yet the question remains whether it was intended that the notice was to serve as an actual and immediate forfeiture of the lease the instant it was served, or whether it was given in order to give him a reasonable time in which to pay or to vacate, and as a notification that the forfeiture would be claimed. "Whenever the intention of the makers of a statute can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seem contrary to the letter of the statute." *Bac. Abr. tit. "Statutes,"* I; *People v. Utica Ins. Co.*, 15 Johns. 380; *Reniger v. Fogossa*, Plowd. 18; *Partridge v. Strange*, Id. 88, 2 Inst. 64; *Rex v. Younger*, 5 Term R. 449; *Margate v. Hannam*, 3 Barn. & Ald. 266; *Edwards v. Dick*, 4 Barn. & Ald. 212. In *Jackson v. Collins*, 3 Cow. 89, 95, a statute prohibited sheriffs or their deputies in whose hands executions were placed from bidding in lands at such sales. A deputy, who was the owner of the judgment, bought in the land at the sale through the officer acting at the sale as his trustee. It was held that the sale was good, although the statute made no exception in such cases. In *Lieb, Herm.* 103, it is said: "There are considerations which ought to induce us to abandon interpretation, or, in other words, to sacrifice the direct meaning of a text to considerations still weightier; especially not to slaughter justice, the sovereign object of laws, for the law itself, the means of obtaining it." Then, as illustrating the idea of the consequences of seeing only the letter of the law, the following case is given: When Lord Bentinck was governor general of India, he abolished flogging in the native army, not having authority to do the same in the British army in the East. If a sepoy professes the Christian religion, he thereby becomes subject to the British military laws proper, evidently to raise him. A Christian sepoy deserted from his regiment, returned shortly afterwards, was tried by a court-martial, and sentenced to be corporally punished. The commanding officer thought himself prohibited from confirming the sentence by Lord Bentinck's order abolishing corporal punishment in the native army. He referred the subject, however, for the opinion of the judge advocate general, who gave it as his opinion that the sentence was correct, and might be carried into effect, as the general order does not extend to Christian drummers or musicians (to which proscribed trade the unfortunate individual happened to belong), and only affects native soldiers not professing the Christian religion. The judgment, according to the letter of the law, was right, but it led to the monstrosity that the profession of the Christian religion should entitle the sepoy to 300 lashes, when the object in making him

subject to the English laws was intended to be a benefit to him.

If the object of the legislature was to declare that all rights under the contract were forfeited by nonpayment, it seems reasonable to suppose that they would have given the lessor the right to immediate eviction. What object the service of notice to quit could have if he had this right, it is hard to perceive. To hold that the mere service of the notice gave this right is to attribute more potency to the serving of a paper than to the failure of payment. The notice could not have been to apprise the lessee that rent was due, because he was bound to know this from his contract. The remedy is not made a summary one. *Crow v. Morris*, 15 Ga. 303. The conclusion is irresistible that in requiring a notice it must have been to serve some purpose, and this purpose must have been to give the tenant time to fulfill his contract before suit would be brought. The legislature left the length of time to the determination of the jury, but, since that statute, have seen fit to take this away from the jury, and make the length of time arbitrary, just as they have done in the service of summons and other notices. The main object, to which all others were subsidiary, was to secure the prompt payment of rent. In *Tuttle v. Bean*, 13 Metc. (Mass.) 275, where money was tendered on the day that notice was served, the court said: "As the main object of the statute apparently is to secure and enforce the payment of rent, there is, perhaps, good ground to hold that if the full amount of rent is tendered at any time before proceedings are commenced, under the landlord and tenant act, it is a good bar to such complaint."

Whether the reading of the first answer of the appellant in evidence was erroneous or not, we see no injury resulting therefrom. The following authorities probably have a bearing upon it: *Newm. Pl. & Prac.* 551, 540, 687; *Blss. Code Pl.* § 342 et seq.; *Pom. Act. & Def.* § 724; *Fain v. Goodwin*, 35 Ark. 109. The evidence introduced concerning the occupancy of the house by the wife and mother of appellee was not improper, nor in conflict with the written contract. If the appellant acquiesced in their occupancy after the making of the contract, it was a matter between him and them; and the jury had the province of determining whether he did or not. For the errors indicated, this case is reversed, and remanded for a new trial.

BUNN, C. J., concurs. BATTLE and HUGHES, JJ., dissent. WOOD, J., absent, disqualified.

RIDDICK, J. I concur in the above opinion and in the judgment of reversal on the ground that the court erred in telling the jury that if any rent was due plaintiff, which defendant had failed to pay at the time the written demand for the possession of the premises was made, they should find for plaintiff. The

defendant claimed to have made a tender before suit was brought, to plaintiff, of all sums due; yet, under the instructions of the court, this tender, however full, was of no avail if made after the demand for possession. If the full amount due plaintiff was tendered to him before suit was brought, I think he had no right of action.

### GEO. G. FETTER PRINTING CO. v. COURIER-JOURNAL JOB- PRINTING CO.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 1, 1898.)

#### CONTRACT FOR PUBLIC PRINTING—RIGHT TO COMPLETE UNFINISHED WORK.

1. Under Ky. St. § 3957, providing that the contract for public printing shall be let biennially and for the period of two years, beginning the first Monday in January, the contractor has the right, after the expiration of his contract, to complete unfinished work of the first class which he had in good faith begun before that time, that work consisting principally of the reports of executive officers required to be laid before the legislature in a few days after the expiration of the contract, and the printing of which had been delayed by the failure of the officers to furnish the manuscript.

2. The office of public printer having expired the first Monday in January, 1894, the rights of the printing contractor whose contract began on that day are fixed by the contract and the law then in force, and his relation to the succeeding contractor is not that of a public officer to his successor.

Appeal from circuit court, Jefferson county.

"To be officially reported."

Action by Geo. G. Fetter Printing Company against Courier-Journal Job-Printing Company for an injunction. Judgment for defendant, and plaintiff appeals. Affirmed.

Bullitt & Shield, for appellant. Carroll & Carroll and D. W. Lindsey, for appellee.

WHITE, J. The appellant, the Geo. G. Fetter Printing Company, brought this action in the Jefferson circuit court, seeking an injunction restraining appellee, the Courier-Journal Job-Printing Company, from completing certain work for the state of Kentucky under a contract made with the state commissioners of printing in 1893, to begin first Monday in January, 1894, and to continue two years, said term having expired; also an injunction commanding appellee to turn over and deliver to appellant certain unfinished work, not then completed by appellee under the contract; and also asked judgment against appellee for \$3,000 in damages on account of profits that appellant would necessarily have made on the work under the contract with the state; also an injunction is sought against S. H. Stone, auditor of public accounts, to prevent said officer from issuing to appellee his warrant in payment for said work, if completed by appellee. There is filed with the petition an order as follows:

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

"Frankfort, Ky., Jan. 10, 1896. To the Courier-Journal Job-Printing Co., Louisville, Ky.—Gentlemen: You will turn over to the Geo. G. Fetter Printing Co. all orders for printing of the first class on which work had not been begun Jan. 6, 1896, and all unfinished work of the same class on hand at said date; your contract with the commonwealth of Ky. having expired, and the contract of the Geo. G. Fetter Printing Co. having come into force on that day. By order of the board of public printing. Respectfully, Geo. W. Long, Secy." The petition alleges that the appellee had contracted with the board of public printing, and that its contract had expired January 6, 1896, and that appellant had contracted with the board for the public printing of the first class for two years, beginning January 6, 1896; and it is alleged that notwithstanding the order of the board of public printing as above stated, and of the expiration of appellee's contract and the beginning of appellant's contract, appellee had failed and refused to turn over to appellant certain work then unfinished and orders for work not begun. A demurrer by appellee to the petition was overruled, and answer was filed and proof was taken. After the proof was taken appellant filed an amended petition, and sought to recover damages of appellee in the sum of \$5,282.77, with interest from that day, this being the amount of profit appellant claims it would have made on the work under the contract it had with the state. The injunction seems to have been abandoned, or, at least, not pressed. The court, on final hearing, dismissed the petition of appellant, and hence this appeal.

The law governing the public printing of the state is found in sections 3942-3990, both inclusive, Ky. St., and the sections applicable here are:

"Sec. 3955. The printing paper, stationery and supplies necessary for the use of the state printing and binding specified in the first class, shall be furnished and paid for by the state, and the commissioners of public printing of the state shall upon the requisition of the contractor from time to time, as the same may be needed, deliver over to the contractor suitable paper, stationery and supplies for the printing and binding which is required by his contract to do. The commissioners shall take and preserve from such contractor a receipt for all paper, and supplies so delivered; and at the annual settlement on the first Monday in Jan. the contractor shall deliver to the commissioners of public printing all paper and supplies so furnished by them, which has not been used in the state printing and binding; and if any such paper or supplies has been wasted or converted to any other use, the contractor to whom the same has been delivered shall be charged with the value thereof, together with the penalty of fifty per cent. and the amount shall be deducted from his account."

"Sec. 3987. The secretary of state shall fur-

nish a correct copy of the laws to the printer thereof, and the clerks of the respective branches of the general assembly shall each furnish to the printer, who is bound by his contract to print the same, copies of the journals, bills, reports and other papers, documents and resolutions, without unnecessary delay.

"Sec. 3988. The contractor for the printing and binding of the first class shall promptly, and without delay, execute all orders of the general assembly, or either branch thereof, for the printing of all bills, resolutions and other matter; and all contractors under the provisions of this act shall promptly and without unnecessary delay, execute all orders to them issued by the general assembly or either branch thereof, or the executive officers of the state."

"Sec. 3978. \* \* \* Nor shall any composition, on any pretext whatever, be paid for a second time upon any report, document or publication, unless the work shall have been actually done, and only when unavoidable necessity compels its resetting."

It is shown in the proof that on January 6, 1896, the day the contract of appellant begun and the day the contract of appellee expired, appellee had on hand, unfinished, a report of the auditor, railroad commissioners, superintendent of public instruction, and volume 96 of Kentucky Reports, in various states of progress, in some a comparatively few pages in type and in others partly printed; that after this action was brought the state board of public printers permitted the appellee to complete all of this work, and accepted same from appellee, and paid for it under the contract with appellee. By section 3957, it is provided that the contract for public printing shall be let biennially, and for the period of two years, beginning the first Monday in January. The pleadings show that appellee contracted for the printing of the first class for two years, beginning first Monday in January, 1894, and ending first Monday in January, 1896. The general assembly of the state met on Tuesday after the first Monday in January, and by section 155, Ky. St., it is provided that the report of the auditor shall be presented to the legislature on or before the sixth day of its session. By section 4380, Ky. St., it is provided that the report of the superintendent of public instruction shall be made on or before the meeting of the legislature. By section 834 it is provided that the report of the railroad commissioners shall be printed and laid before the legislature within the first 10 days of its session. Section 3814 provides that the report of the penitentiary shall be printed for the legislature. In view of these statutes, and the fact that the legislature convened so soon after the expiration of one and the beginning of the other contract, it is perfectly apparent that it was in contemplation of the bidder in making the contract, and the board in awarding the contract to appellee understood, that all of this

class of work would be done by appellee under its contract. By the proof it is shown that the executive officers delayed the work by not furnishing the manuscript earlier, and that as soon as the manuscript came to hand the work was begun in good faith by appellee, and we are of opinion that appellee had a right, under its contract, to do this work, and to complete same after it had actually begun it in good faith. It is clear, by section 3978, quoted, that the state was not authorized to pay for resetting the matter in type that had been set in type by appellee at the expiration of its contract. In order that the state could not be called upon to pay for double composition, it was necessary, and a reasonable construction of the contract and the law under which it was made, that appellee be allowed to complete its work on hand actually begun in good faith, but yet unfinished. It would thus follow that appellant could not recover.

We do not agree with counsel for appellant that the parties stood in the relation of an officer of the state,—public printer,—but that the relation was one of contract. By section 3965, Ky. St., the office of public printer expired the first Monday in January, 1894, the day the contract of appellee began. The rights of the parties are fixed by the contract and the law in force at the time of its execution. This view of the case renders it unnecessary for us to consider the other questions presented by counsel and in the record. We perceive no error in the judgment, and the same is affirmed.

#### HOLMES v. STIX et al.<sup>1</sup>

(Court of Appeals of Kentucky. Sept. 29, 1898.)

##### RECEIVERS—PARTNERSHIP—LIEN OF PARTNERS.

1. Property owned by a debtor jointly with another ought not to be placed in the hands of a receiver unless the equities of the case clearly demand it.

2. Land purchased with partnership funds, and used for partnership purposes, though conveyed to the individual partners, is to be treated as partnership property, so as to give to a partner a lien for the amount of firm debts paid by him which is superior to the lien of a creditor of the co-partner, who takes a mortgage with notice of the partnership character of the property.

3. One who takes a mortgage for a pre-existing debt is not an innocent purchaser.

Appeals from circuit court, Robertson county.

"To be officially reported."

Action by Stix, Krouse & Co. against Throckmorton & Holmes and John W. Holmes to enforce a mortgage lien. Judgment placing property in hands of receiver, and John W. Holmes appeals. Reversed.

J. T. Simon and Simon & Buckler, for appellant. Hanson Kennedy, for appellees.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

GUFFY, J. It appears from this record that Aris Throckmorton, Samuel Holmes, and the appellant, J. W. Holmes, entered into a partnership as a firm for the sale, by retail, of goods, wares, and merchandise in Mt. Olivet, Ky., under the firm name of Throckmorton, Holmes & Co., and continued as such firm until 1891, at which time, by consent of the partners, the firm was dissolved, and the goods on hand divided; at least, appellant took a portion of the goods, as he says, amounting to about \$600, and the other two partners retained about \$2,200 worth. It further appears that the said Throckmorton and Samuel Holmes then entered into a partnership, or rather continued to do business, under the firm name of Throckmorton & Holmes, and as such became indebted to the appellees to the extent of something over \$1,500, which indebtedness appears to have been in existence as early as March, 1894. On the 17th of January, 1895, Throckmorton & Holmes executed a mortgage to the appellees on their two-thirds interest in a storehouse and lot in Mt. Olivet, Ky., which appears to be the same house that had formerly been used by Throckmorton, Holmes & Co., and continued to be used by Throckmorton & Holmes, and also mortgaged their two-thirds interest in a tract of land containing about 124 acres, as property of said Throckmorton & Holmes. There was also included in the mortgage 98 acres of land, the individual property of Throckmorton. This mortgage was executed to secure the indebtedness aforesaid, which was divided into eight notes, one falling due every 60 days, none of which seems to have been paid. On the 18th of November, 1895, the appellees instituted suit in the Robertson circuit court against Throckmorton & Holmes, seeking to recover judgment upon said notes, and for an enforcement of their mortgage lien, and made John W. Holmes a party defendant to said suit. At the December term, 1896, of said court, appellees obtained an order placing the storehouse and lot and the 124 acres of land in the hands of a receiver, and from that judgment appellant has prosecuted an appeal.

After appellant was made a party to the suit, he answered, and alleged that the storehouse and lot and the 124 acres of land were partnership property of the firm of Throckmorton, Holmes & Co., bought and paid for out of assets of the firm, and held and used by said firm as firm property, and that he had paid out for said firm a considerable sum of money, amounting to over \$1,100, for which said firm had executed its notes, which are filed, and a lien claimed upon the partnership property superior to that of the appellees for the amount so paid for the firm of Throckmorton, Holmes & Co. This claim was resisted by the appellees, and the court, upon final hearing, adjudged that appellees had a lien upon the two-thirds interest mortgaged superior to that of appellant, and from that judgment appellant prosecutes an appeal, and



by agreement both appeals are heard together.

It is the contention of appellees that the court was authorized, under the law and facts, to place the partnership property in the hands of a receiver, and that, as appellant owned an undivided one-third interest in said property, it was not error to place the entire property in the hands of a receiver. It appears in this record that the individual tract of land, containing 93 acres, sold for \$651, October 19, 1896. The evidence as to the value of the 124 acres of land conduces to show that it was worth at least \$1,200, most of the witnesses placing the value at a larger amount, and the storehouse and lot were valued at from \$700 to \$1,000. It also appears from the deed to the 124-acre tract that the purchasers paid for it something over \$2,000. The proof also tended to show that it could be divided without detriment to its value.

There can be no question as to the power of the court to appoint a receiver when the law and facts authorize it, but it is in the nature of an extreme remedy, and a party, although a debtor, ought not to be deprived of the control of his property, and subjected to the expense incident to the appointment of a receiver, unless it clearly appears that the equities of the case demand it, and this principle applies with even more force to a joint owner who is in fact not a debtor. We are of the opinion that the court erred in the appointment of a receiver, and the judgment as to the appointment of the receiver and placing the property in his hands is reversed.

It is insisted for appellees that they had no notice of the claim of John W. Holmes at the time they took the mortgage, and that the firm of Throckmorton & Holmes was then solvent, and that as a consideration for the mortgage they extended the time for the payment of their claim, and that during the extension the mortgagors became insolvent, and that in equity they ought not to have their lien adjudged inferior to that of appellant, if, indeed, he has any lien. Appellees also insist that appellant, by his delay in asserting or making known his claim, is now estopped as against them, even if it be a valid claim, and they deny its validity. The deed to the town property, as well as the deed to the 124-acre tract of land, mentions the three several parties individually, and neither of said deeds purports to have been to them as a firm. The mortgage executed to appellees also recites that the two-thirds interest conveyed was free from incumbrance, and it seems clear from the evidence in the case that Samuel Holmes, at and before the execution of the mortgage, had represented to appellees that the mortgaged property was free from incumbrance. It is insisted for appellant that, inasmuch as he paid the firm debts of Throckmorton, Holmes & Co., and that the firm executed to him the several notes filed therefor, he has a superior lien upon the partnership property for the pay-

ment of said notes. He also insists that appellees had sufficient notice to put them on their guard as to his liens or claims. It is pretty clear from the testimony that the firm of Throckmorton, Holmes & Co. had dealings with appellees, and it is shown that part of the money advanced by appellant for the firm was to pay the debt that it owed to appellees during the existence of the firm of Throckmorton, Holmes & Co. It is also in evidence that an agent of appellees came to Mt. Olivet in March, 1894, to investigate the condition of the firm of Throckmorton & Holmes, and that Samuel Holmes rendered to him a written statement of the firm of Throckmorton & Holmes, from which it appears that Throckmorton owned quite a considerable amount of property individually, and that the firm was worth several thousand dollars, including the two-thirds interest mentioned in the mortgage, and stated that the same was free from incumbrance. An attorney or agent of appellees also visited Mt. Olivet just before the execution of the mortgage, and was there at the time of its execution, and was investigating the condition of the firm of Throckmorton & Holmes. There is no evidence of any conversation with appellant in regard to this debt, or the execution of the mortgage, at or before the time it was executed, and appellant testified that he did not know of its execution until about the time of the service of process on him. The testimony shows that appellant made the payments claimed by him, and that the property in question was the partnership property of Throckmorton, Holmes & Co., paid for by firm assets, and held and controlled by the firm as firm property.

It is the contention of appellees that the mortgage lien is superior to that of appellant's lien, and it is the further contention of appellees that appellant's conduct has been such as to estop him from asserting his claim as against that of appellees; but we are unable to see that appellant has, by any act or any statement made by him at any time, misled appellees, or induced them to believe that the property in question was free from incumbrance. Hence it follows that, if he at any time acquired a valid lien upon the property in question, the same has not been lost by any act or course of conduct on the part of appellant.

It is also contended for appellees that, inasmuch as the deeds to the property in question did not show that the vendees constituted a firm, the giving of the mortgage by the other joint owners of their interest passed a superior equity to the mortgaged property; and we are referred to the case of Seeley v. Mitchell's Assignee, 85 Ky. 508, 4 S. W. 190, in support of this contention. The court in discussing the question quotes with approval Jones on Mortgages, as follows: "Land conveyed to members of a co-partnership as tenants in common, but purchased with co-partnership funds and used for co-partnership

purposes, is treated in equity as co-partnership property. The creditors of the co-partnership are in such case entitled to priority of payment out of it in preference to the creditors of individual members of the firm. But if one member of the co-partnership mortgages his apparent interest as tenant in common of such land for a consideration paid him at the time, as for instance for a loan of money, the mortgagee having no notice of the character of the property in equity as co-partnership property, he is entitled to hold it under his mortgage. He may rely upon the legal effect of the conveyance to his mortgagor and upon his apparent title upon record.

\* \* \* If a mortgagee takes a mortgage with knowledge of facts which make the property in equity assets of a firm, then he cannot ask to stand in front of those who have a right to have it applied as partnership assets. He, however, holds as a purchaser, and if he had no notice that it was partnership real estate, then there is no prevailing equity in favor of the partnership or its creditors. It might properly be held, perhaps, that the continued use of the property by the partnership is notice of its equitable right in it, but, in the case now presented, it does not appear that the mortgagees knew, when their mortgages were executed, that the firm of Campbell & Seeley was using the property, or even that such a firm existed." In *Buck v. Winn*, 11 B. Mon. 320, cited by appellees, it is true that Allen & Muir, execution purchasers of the interest of Reaugh, one of the partners in certain lots, which were partnership lots, were permitted to hold the same as against the other partners or firm creditors. The court in discussing the question said: "Notwithstanding their failure to procure a deed from the sheriff, they were, as purchasers under the execution, invested, not merely with an equity, but with an inchoate legal title, which they had a right to consummate at any time by a conveyance from the proper officer. They must be regarded, then, as purchasers for a valuable consideration, having a right to the benefit of their purchase unaffected by any equities in favor of the partners, unless at the time of the purchase they had notice of the existence of the partnership rights. They deny that the property was purchased with partnership funds, or belonged to the partnership, or was conveyed to Thomas and Hiram Reaugh as partners. There was nothing in the situation of the property from which notice can be inferred. It was not used by the partnership, nor is it shown that it was conveyed to the Reaughs in their partnership capacity. \* \* \* It was incumbent upon those claiming it to be partnership property to have established the fact by competent proof; and although that fact may be established by other testimony, if it do not appear in the deed of conveyance, yet, if it do so appear, it would furnish evidence of con-

structive notice to the purchasers. But as the deed has not been produced, and there is an entire absence of all testimony of any notice to Allen & Muir, and nothing appears in the transaction from which notice can be inferred, the creditors of the firm have failed to make out such a case as entitles them to have the property subjected to the payment of their demands."

It will be seen from the foregoing that the cases then under consideration are essentially different from the case at bar. As before intimated, the proof shows conclusively that the property in controversy in this case was in fact the partnership property of Throckmorton, Holmes & Co., bought by the firm, and paid for by the firm, and used by it; and, inasmuch as it further appears that the appellees had business transactions with the firm of Throckmorton, Holmes & Co. prior to its dissolution, they may reasonably be presumed to have had notice that not only the storehouse occupied by the firm, but also the land in question, was owned as partnership property. The doctrine seems to be well settled that where real estate is purchased by a firm, and held as partnership property, it cannot be subjected to the debts of the individual members to the detriment of the firm creditors. That doctrine was substantially announced in *Divine v. Mitchum*, 4 B. Mon. 488. In *Pearson v. Keedy*, 6 B. Mon. 129, it is said: "Each partner has unquestionably a right to have the effects of the firm appropriated to the firm debts, and has in equity, at least, a lien upon those effects to secure, not only this appropriation, but also any final balance in his own favor." In *Wilson v. Soper*, 13 B. Mon. 418, it is said: "One member of a firm has no right to appropriate partnership effects to the payment of his individual debts without the assent of the other partners." It is said in the syllabus in the case of *Lowe v. Lowe*, 13 Bush, 688: "Partnership real estate shall be deemed personality when by agreement, express or implied, the partners intend that it shall be treated as part and parcel of their capital stock, not only for the purposes of the partnership, but for all purposes. When such an agreement or intention is shown, from the nature of the partnership business, the character and extent of the real estate involved, and the partners' mode of treating and considering it, it should be held to be personality, not only for partnership purposes, but for purposes of distribution also. But, in the absence of such facts and circumstances as will warrant the court in finding that it was intended and agreed by the partners that their real estate should be regarded as personality for all purposes, it should only be so regarded for the purposes of the partnership, and, after these are answered, the surplus should be held to be real estate for all other purposes." In *Spalding v. Wilson*, 80 Ky. 589, the question under consideration was whether a tract of

600 acres and 43½ acres of land should be held as partnership property or not. In the opinion the court quoted with approval as follows from Story, § 674: "In a court of equity, in taking an account for the benefit of creditors of partnership effects, the real estate is treated, for all intents and purposes, as a part of the partnership fund, whatever may be the nature of the conveyance." The court, in referring to the case of *Buck v. Winn*, hereinbefore referred to, said: "It is by no means decisive of this case. There the lots were purchased on speculation by the partners, and not used in the partnership, and still this court held the weight of authority to be 'that, in equity, the lots would be considered as forming a part of the partnership assets.'" It is further said: "The doctrine is also well established: 'That the partners must have intended partnership real estate to be treated as partnership assets, and therefore as personalty, so far as might be necessary for the payment of partnership liabilities, must be assumed in all cases, unless a contrary intention is plainly manifested,' etc. Says Chancellor Kent: 'There is no need of any other agreement than that the law will necessarily imply from the fact of the investment of partnership funds by the firm in real estate for partnership purposes.'" It is true that in the opinion *supra* the court used the following language: "If these partners, or one of them, had sold his individual interest in the land to an innocent purchaser, the deed having been made to them not as a firm, there might be some reason for denying to the other partners the right to have the entire land appropriated to the firm debts; but no such case is presented by this record." The last quotation is quite applicable to the case at bar, because no such question as a sale for consideration passed at the time, or that any consideration for the execution of the mortgage passed at the time, between the parties in this case. It is true that appellees extended the time for the payment of the debts sued on, as they say, on account of the mortgage; but, according to their own contention, the firm of Throckmorton & Holmes was abundantly solvent at that time, and the extension must be presumed to have been for the benefit of Throckmorton & Holmes, or possibly for their joint benefit and that of appellees, and was a transaction of which appellant seems to have had no knowledge and in no sense a participant. It is a familiar rule of law that, as between two or more equities, the elder prevails; and, as it is manifest that appellant has the elder equity lien on the property in question, it results that the court below erred in adjudging in favor of appellees. The judgment is therefore reversed, and the cause remanded, with directions to adjudge to appellant a prior lien upon the real estate in controversy, and for proceedings consistent herewith.

# McKILDIN v. McKILDIN.<sup>1</sup>

(Court of Appeals of Kentucky. Sept. 29, 1898.)

## INSURANCE—ASSIGNMENT OF POLICY SET ASIDE FOR FRAUD.

Where a father remitted part of a debt due from his son in consideration of the son's having taken a policy on his life payable to his mother, and the son induced his mother to mortgage her property for his debt, representing that, if he failed to pay the debt, the policy would stand good for it, an assignment of the policy by the mother to the son's wife will be set aside as inequitable; having been procured by the wife on a false representation as to the health of insured, and the further false representation that, if the premium due in a few days should not be then paid, the entire policy would be forfeited, whereas the beneficiary was entitled to paid-up insurance of \$500, of which she was ignorant, and of which the assignee knew, or could have known, having the policy under her control.

Appeal from circuit court, Jefferson county.

"To be officially reported."

Action by Florence B. McKildin against Ella L. McKildin to cancel the assignment of an insurance policy. Judgment for defendant, and plaintiff appeals. Reversed.

Pryor, O'Neal & Pryor and Lane & Burnett, for appellant. Mix Bros. and Phelps & Thum, for appellee.

LEWIS, C. J. April 7, 1890, the Mutual Life Insurance Company of New York issued a policy on the life of Charles E. McKildin for \$2,000, in favor of his mother, Frances B. McKildin, upon which was payable a quarterly premium of \$15.18 on the 7th of July, October, January, and April of each year. In July, 1891, he married appellee, Ella McKildin, but continued to pay the premiums up to October, 1895. In December, 1895, he was found a lunatic, and sent to the asylum at Anchorage, and died there in the evening of January 4, 1896. In the forenoon of that day Frances B. McKildin, in writing, assigned the policy to appellee, Ella McKildin, for the nominal consideration of one dollar. On January 9, 1896, Frances B. McKildin, called in the petition Florence B. McKildin, brought this action to set aside the assignment, on the ground that it was procured from her by coercion and misrepresentation of Ella McKildin, called in the petition Ella L. McKildin. The Mutual Life Insurance Company of New York was also made a party defendant, but makes no defense, having paid \$2,000, the amount of the policy, into and subject to the order of the court.

The evidence satisfactorily shows that Charles E. McKildin was indebted to his father, Sinclair McKildin, who died in January, 1891, about the sum of \$1,000, and that \$500 of that indebtedness was remitted by the father before his death in consideration of or

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

because Charles had obtained the policy of insurance. The evidence further shows that the estate of Sinclair McKildin, of which Charles was administrator, amounted to about \$2,000, which by agreement of all the children, including Charles, was turned over to the mother, Frances B. McKildin. With the proceeds thereof a lot of land in the city of Louisville was purchased, and a dwelling house erected thereon, the title being conveyed to her. In that house Charles and wife and his wife's sister continued to reside with his mother and one of her daughters, who was an invalid, until his death. In February, 1892, Charles McKildin borrowed \$300, and induced his mother to execute a mortgage on the lot to secure the payment of it. That debt was, however, paid off. But in February, 1893, he borrowed the additional sum of \$1,500, and induced his mother to execute a mortgage on the lot to secure the payment of that sum. The latter incumbrance existed, and the debt, or at least \$1,350 of it, remained unpaid at the death of Charles. There is some conflict between the testimony of appellant and appellee as to what took place between them, and representations made by the latter at the time the policy was assigned. But we think there is no room for doubt that Frances B. McKildin was induced to believe, by the representations of Ella McKildin, that the quarterly premium fell due on January 7, 1896, and unless paid by 12 o'clock on that day the entire policy would be forfeited. It also appears that Frances B. McKildin was unable to raise the money to pay that premium, being destitute of means, and Ella, aware of that fact, induced her to make the assignment in consideration that she paid the premium. It further satisfactorily appears that while Frances B. McKildin on that occasion believed, and was induced to believe, that her son Charles would be soon restored to health, and upon his return do her full justice and protect her, Ella McKildin, who had recently visited her husband at the asylum, believed, from her knowledge of his condition and information given her by physicians, that his condition was critical and his early death probable. There is also evidence tending strongly to show that Frances B. McKildin was on that occasion induced by Ella McKildin to believe that the money arising from the policy, in the event of Charles' death, would be applied to the payment of the mortgage debt and the release of the incumbrance upon her home. The policy of insurance remained in the possession of Charles McKildin until he was sent to the asylum, and at the date of the assignment was in the possession and under the control of Ella McKildin. The evidence tends to show that Ella McKildin, who was a woman of intelligence, shrewdness, and business capacity, with her father, preconcerted and prearranged the transac-

tion, procuring from the insurance office beforehand the necessary blanks, and selecting the office of a justice of the peace where Frances B. McKildin was to be taken and the assignment made. The policy of insurance showed on its face that, after the payment of three full annual premiums, the beneficiary was entitled to paid-up insurance, which, by calculation or information at the local insurance office, might have been, if it was not, by appellee ascertained to amount to at least \$500. When, therefore, appellee represented to appellant that, unless the quarterly premium due on January 7, 1896, was paid, the policy would be forfeited, and the entire insurance lost, which we are satisfied from the evidence she did do, a false representation was made, whereby appellant was deceived and induced to do what she would not otherwise have done. And it does not make any difference whether she made the representation knowing it to be false or not, for she had the means and ability to ascertain the truth, and it was her duty to tell it; while appellant had never seen the policy, was not able to read, and unfitted, according to the evidence, to transact any business, and on that account did accept and rely on the representation as true.

By reason of the remission of the \$500 by his father, Charles E. McKildin was under a legal and moral obligation to keep that policy alive by the payment of the premiums as long as he lived; and as appellee confesses that the money, with which she paid the premium on January 4, 1896, before it was even due, was his money, taken out of his pocket, and did not belong to her, the payment must be treated as having been made by her as his agent, and in discharge of an existing obligation resting upon him. Moreover, as appellant consented to incumber her house and lot with a mortgage, upon the distinct understanding and promise of Charles that, in case he failed to pay the debt while alive, the policy would stand good for it, it would be inequitable to permit appellee to appropriate the insurance money by reason of a transaction on account of which she has paid no money, and brought about, if not by actual fraud and coercion, by concealment of the actual condition of her husband at the time, and by a representation that was untrue, and that it was her duty to ascertain and know was untrue. By the transaction appellee has, in an improper manner, acquired the property of appellant, which she cannot conscientiously keep, and a court of equity ought not permit her to hold. Wherefore the judgment in this case is reversed, and cause remanded, with directions to the chancellor to cancel and set aside the assignment of the policy made January 14, 1896, by appellant to appellee, and to adjudge the payment to appellant of the amount of insurance money now in custody of the court.

**LINVILLE v. LANGFORD et al.<sup>1</sup>**

(Court of Appeals of Kentucky. Sept. 30, 1898.)

**STATUTE OF FRAUDS—SUFFICIENCY OF MEMORANDUM—AGENCY—ESTOPPEL.**

1. A memorandum of the sale of land, which does not purport to be made for or on behalf of others is not a contract for the sale of anything except the individual interest of the person signing.

2. Plaintiff is estopped to claim that a contract for the sale of land, signed by R., was made by him as agent for others, it being alleged in the petition that R. had acquired a tax title.

Appeal from circuit court, Pulaski county.

"Not to be officially reported."

Action by F. B. Linville against Rebecca Langford and others to enforce specific performance of a contract for the sale of land. Judgment for defendants, and plaintiff appeals. Affirmed.

O. H. Waddle, for appellant. Denton & Cook and J. W. McAntire, for appellees.

LEWIS, C. J. Appellant brought this action to enforce the specific performance of an alleged contract by the widow and heirs at law of Solomon Langford, evidenced by the following writings:

"\$300. Received of F. B. Linville three hundred dollars on one-half of the Catherine Langford dower and the whole of the Solomon 300-acre survey on Turkey creek. Sept. 27, 1881. Reuben Langford."

"\$50. Received of F. B. Linville fifty dollars and interest, balance Joe Farmer land, which I sold him. This June 15, 1886. Reuben Langford."

The lands the title of which appellant seeks to compel the widow and heirs at law of Solomon Langford to convey to him were, as alleged in the petition, descended from or devised by Stephen Langford, the father of Solomon, Reuben, and other children; the Catherine Langford dower being a tract of 950 acres allotted to the widow of Stephen Langford, in which each of his children had a remainder interest, and the 300-acre tract on Turkey creek, and the Joe Farmer land being tracts allotted to Solomon in the division. It is alleged in the petition that March 29, 1880, Rebecca Langford, the widow, and W. B. Langford, Lizzie Cofer, and Stephen, children and heirs of Solomon Langford, deceased, then residing in the state of Missouri, executed to Reuben Langford a power of attorney to sell and convey all the real estate they owned, or had an interest in, situated in the county of Pulaski. But there is no writing filed, or referred to in the petition, showing that Reuben ever did sell or convey or obligate himself to convey as such attorney any part of the lands mentioned in that power of attorney. The well-settled doctrine of this court is that a written contract for the sale

of land should, in order to comply with the statute of frauds, be so complete and full that the meaning thereof may be ascertained, and it enforced, without the aid of extrinsic testimony. Neither of the papers filed and relied on by appellant in this action as memorandums or evidence of contracts of sale made for or on behalf of the widow and heirs at law of Solomon Langford shows that Reuben Langford sold or undertook to convey any other interest in the lands there mentioned than his own individual interest. Nor can it be implied that the contract was made by him as the agent or attorney of the widow and heirs of Solomon Langford, for the undertakings purport to be, and the memorandums are, signed by him, not as agent, but individually. Indeed, appellant is estopped to aver said sales were made by Reuben Langford as agent or attorney, for it is distinctly alleged in the petition that Reuben Langford had acquired a tax title to the land of his brother Solomon. There being no written evidence of any contract for sale of the lands in controversy by or on behalf of the widow and heirs at law of Solomon Langford, appellant has stated no cause of action against them, and the demurrer to his petition was properly sustained. Judgment affirmed.

**TOWN OF LATONIA et al. v. HOPKINS et al.<sup>1</sup>**

(Court of Appeals of Kentucky. Oct. 6, 1898.)

**PLEADING—AMENDMENT—MUNICIPAL CORPORATIONS—ANNEXATION OF TERRITORY.**

1. It was not error to permit the amendment of a petition against the trustees of a town so as to make the town itself a defendant, the issue not being changed thereby.

2. Under Ky. St. § 3665, which authorizes the court to approve the annexation of territory to a town if satisfied "that less than 75 per cent. of the freeholders of the territory to be annexed have remonstrated, and that the adding of the territory to the town will be for its interest, and will cause no material injury to the persons owning real estate in the territory sought to be annexed," the fact that less than 75 per cent. of the freeholders have remonstrated is not conclusive in favor of annexation.

3. It is not an abuse of discretion for the chancellor to refuse to approve the annexation of sparsely-settled outlying territory, which would receive no substantial advantage from the municipal government.

4. Agricultural lands within the limits of a town are not exempt from municipal taxation, though they derive no benefit from the municipal government.

Appeal from circuit court, Kenton county.

"To be officially reported."

Petition by S. W. Hopkins and others against the town of Latonia and others, remonstrating against the annexation of new territory to the town. Judgment for plaintiffs, and defendants appeal. Affirmed.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Tisdale & Gray, for appellants. M. H. McLean and Wm. Goebel, for appellees.

**BURNAM, J.** The town of Latonia was established by judgment of the Kenton circuit court on July 10, 1896. It belongs to the sixth class, and at the time of its incorporation included within its boundaries 28 acres, and a population of about 275 persons. Immediately upon its organization the town trustees passed an ordinance, under section 3664, Ky. St., annexing 1,050 acres of the surrounding territory. On August 4, 1896, appellees and other freeholders of the territory sought to be annexed filed their petition in the circuit court of the county, setting forth reasons why such territory should not be annexed, and making the appellants, who had been appointed by the Kenton circuit court trustees of the new municipality, defendants in their official capacity. Process issued and was served upon each of them. Subsequently, by permission of the court, the original petition was amended by making the town itself a defendant in its corporate name. The pleadings were made up on the issues raised by the petition of the residents of the territory proposed to be annexed, and a great deal of proof was taken thereon; and upon submission and hearing of the cause it was adjudged that "the territory set out and described in the ordinance of appellant should not be annexed to said town." And we are asked, upon this appeal, to reverse that judgment, on several grounds: First, that the remonstrance against annexation was not filed within 30 days after the passage of the ordinance proposing to annex the territory in question; second, that the failure of the petitioners to make the municipality a defendant in its corporate name was a fatal error, and that the court had no power or authority to permit the amendment in question. We think the court below acted within its power in permitting this amendment, under section 134 of the Civil Code of Practice, as it did not in any wise change the issue, and was in furtherance of justice. Section 3665, Ky. St., provides that: "If the court be satisfied, upon the hearing of a proceeding of this kind, that less than 75 per cent. of the freeholders of the territory to be annexed have remonstrated, and that the adding of the territory to the town will be for its interest, and will cause no material injury to the persons owning real estate in the territory sought to be annexed or stricken off, it shall so find, and the said annexation shall be approved." It is admitted that less than 75 per cent. of the resident freeholders of the territory sought to be annexed failed to join in the remonstrance, but the statute does not make this failure a conclusive fact in favor of the annexation. On the contrary, it requires that the court should be satisfied that the adding of the territory to the town will be for its in-

terest, and will cause no material injury to the persons owning real estate in the territory sought to be annexed. The proof shows that there are from 1,500 to 2,000 inhabitants in the territory sought to be annexed, and that the proposed extension embraces 1,050 acres of land, of which about 600 acres have been subdivided into lots by plats made by syndicates, but that there have been scarcely any streets built even in this portion of it, and that there are houses on only about one in ten of these lots, the balance of the 600 acres being used for agricultural purposes; and that about 450 acres of the 1,050 have never been platted, but have remained absolutely agricultural lands. It also shows that within the limits of the town of Latonia the territory is pretty thickly settled, and that this condition obtains for three or four squares west and for two or three squares east, including Dinsmore Park, and also for two or three squares on the north; while beyond this distance the territory is exceedingly sparsely settled. In our opinion, it would not be a benefit to the town itself to annex such a vast scope of territory, as it would impose upon the municipality the herculean task of providing streets, sidewalks, light, and other necessities of municipal existence; and there can be no doubt but that the annexation would result in very serious injury to the people owning the bulk of this territory, as it would subject them to municipal taxation without receiving any corresponding benefit or advantage therefrom, because lands situated within the corporate limits of a municipality are not exempt from municipal taxation on the ground that they are agricultural lands, sections 171 and 174 of the present constitution requiring taxes imposed by municipalities to be levied and collected from all property situated within the territorial limits of same. See *Board of Councilmen v. Scott* (Ky.) 42 S. W. 104; *Board of Council v. Barick* (Ky.) 43 S. W. 450; and *Gibson v. Board* (Ky.) 43 S. W. 684. Section 3713, Ky. St., provides that "no town shall become incorporated as such unless it contains at least 125 bona fide inhabitants residing within the boundaries proposed to be established for such town; nor shall the boundary of any town or city, when incorporated, exceed one and one-quarter of a mile in each direction necessary to form a square." The legislature intended, by these restrictions as to population and limits, to prevent exactly what is attempted to be done in this case,—the unnecessary extension of town limits so as to include outlying territory which would receive no substantial advantage from the municipal government; and we do not think there was any abuse, in the judgment rendered in this case, by the chancellor, of the discretion given him by the statute, in refusing to approve the proposed annexation. For the reasons indicated, the judgment is affirmed.

KENTUCKY JEANS CLOTHING CO. v.  
BOHN.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 1, 1898.)

ATTACHMENT—VERIFICATION OF AFFIDAVIT OF  
CORPORATION—WAIVER OF OBJECTION.

1. The verification, by the vice president of a corporation, of the affidavit of the corporation for an attachment, is prima facie sufficient, there being no averment by defendant that he was not at the time the chief officer in the county.

2. It is too late, on final hearing of an attachment sued out by a corporation, to object that the officer who verified the affidavit was not the chief officer of the corporation, especially where a motion to discharge the attachment on the face of the papers has been previously overruled.

Appeal from circuit court, Jefferson county.

"To be officially reported."

Action by Kentucky Jeans Clothing Company against Simon Bohn on an account. Judgment discharging attachment, and plaintiff appeals. Reversed.

D. M. Rodman and E. D. Guffy, for appellant. M. A., D. A. & J. G. Sachs, for appellee.

GUFFY, J. The appellant in this case instituted suit upon an account against the appellee, and also obtained an attachment. It appears that the petition contained the necessary allegations to authorize an attachment, which were sworn to by Hardin Wilson, secretary and treasurer of appellant corporation. Afterwards an affidavit authorizing the attachment was signed and sworn to by A. V. Thompson, vice president of said corporation. No defense was made to the account sued on, but the appellee entered a motion, the grounds of which do not appear, to discharge the attachment upon the face of the papers, which motion, after having been postponed for consideration by the court, was overruled. Afterwards the case was transferred to the chancery division of the Jefferson circuit court, and upon final hearing the court rendered a judgment for most of the amount claimed, but discharged or dismissed the attachment upon the ground that the affidavit was not signed and sworn to by the chief officer of the company, and no reason given why it was not so signed and sworn to, and from that judgment this appeal is prosecuted.

It would seem from the judgment of the court that it deemed the evidence sufficient to sustain the attachment, as no reference to insufficiency of the testimony is made in the opinion or judgment; and, inasmuch as the court below was in a position to judge of the sufficiency of the evidence, we are not inclined to hold the evidence insufficient, hence the only question which demands our serious consideration is as to whether the affidavit was made by the proper party, and whether

the appellee was entitled upon final hearing to avail himself of the failure, if any there was, in making the affidavit. It is provided in subsection 3 of section 51 of the Code of Practice that in an action against a private corporation summons may be served in any county upon the defendant's chief officer or agent who may be found in this state, or it may be served in the county wherein the action is brought upon the defendant's chief officer or agent who may be found therein. It is provided in section 117 of the Code, as to verification of pleadings, that the pleading of a county or private corporation must be verified by its chief officer or agent upon whom summons in an action is lawfully served, or may be lawfully served, if it were a defendant. It is provided in section 196 that an order of attachment shall be made by the clerk of the court in which the action is pending in any case mentioned in section 194, subssecs. 1 and 2, if the affidavit of plaintiff be filed or offered showing the existence of grounds for an attachment. Subsection 33 of section 732 reads as follows: "The chief officer or agent of a corporation, which has any of the officers or agents herein mentioned, is first, its president; second, its vice-president; third, its secretary or librarian; fourth, its cashier or treasurer; fifth, its clerk; and sixth, its managing agent." It is the contention of appellee that the affidavit to the petition, as well as the other affidavit as to the grounds of attachment, do not show that the parties swearing to the same were the chief officers of the corporation, nor that the chief officer was absent from the county; hence it is argued that the affidavit is insufficient to authorize the attachment. It is the contention of appellant that either or any of the officers named in subsection 33 of section 732 are authorized to make the necessary affidavit. It is not necessary in this case to determine as to the soundness of either proposition, for the reason that, if appellee desired to take advantage of the insufficiency of the affidavit, or the lack of authority of the party signing and swearing to the same, he should have done so by rule, or by specific motion setting out the ground therefor; and especially is this so in the case at bar, for the reason that a general motion to discharge the attachment on the face of the papers was overruled by the court first having jurisdiction of the case. Furthermore, we are of opinion that the affidavit of the vice president was prima facie sufficient, there being no averment by appellee that he was not at the time the chief officer in the county. It is a familiar rule of law that objections to the verification of pleadings must be taken before the submission of the cause for trial, else the objection shall be deemed to have been waived; and it seems to us that the same rule should apply to the case at bar. It seems to us that, the court having overruled the general motion to discharge the attachment upon

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

the face of the papers made by appellee, without stating any specific grounds, should be taken as determining that, according to the papers filed, appellant presented a prima facie right to have the attachment sustained; or, in other words, that, no technical defects being stated, and after such decision, appellee was not entitled, upon final hearing, to take advantage of the technical defect complained of. For the reason indicated, the judgment of the court below is reversed, and cause remanded, with directions to set aside the judgment as to the attachment, and sustain the same, and for proceedings consistent with this opinion.

### FICENER v. BOTT et al.<sup>1</sup>

(Court of Appeals of Kentucky. Sept. 27, 1898.)

#### APPEAL AND ERROR—PROCEEDINGS AFTER REVERSAL—RECEIVERS—LOSS OF BANK DEPOSIT.

1. The defendant cannot, after the reversal of a judgment, file an amended answer, making a defense which he might have made prior to the original judgment.

2. It was error, on motion of a receiver, to adjudge a reduction of rent, under a lease made by the owner prior to the receivership.

3. A receiver must account for money lost by the failure of a bank in which he had deposited the money without authority.

Appeal from circuit court, Jefferson county. "Not to be officially reported."

Action by John Bott against Emma Ficener and others to enforce a mechanic's lien. Judgment confirming sale, and defendant Emma Ficener appeals. Reversed.

D. M. Rodman, for appellant. Phelps & Thum, for appellees.

GUFFY, J. The object of this action originally was to enforce a mechanic's lien upon certain property of the appellant in Louisville, Ky., upon which appellee Senn seems to have had a mortgage lien, and one Fuchs claimed a lien as execution creditor. A judgment was rendered adjudging a sale of the lots in contest, and from that judgment an appeal was prosecuted to this court, and the opinion is reported in 29 S. W. 639. It appears from that opinion that the judgment confirming the sale was reversed, for the reason that both lots had been sold together, when they should have been sold separately. It is in effect adjudged in that opinion that the appellant owed the debts in controversy. Upon return of the case the appellant renewed her motion to file an answer and supplemental and amended answers, which motion was overruled by the court below, and a judgment finally rendered in favor of the several creditors, adjudging a sale of the lots separately, as required by the opinion of this court as aforesaid; and, the exceptions to the

sale, etc., having been overruled, appellant has again appealed to this court.

It is the contention of appellees that all questions except the one of sale of the lots in contest were adjudicated and settled by this court in the opinion supra, and that no error of the circuit court in regard to the filing of pleadings can be now considered on this appeal. It seems to us that this contention is well taken, and must be sustained. It was the duty of the appellant to present in the court below all the defenses available prior to the rendition of the original judgment appealed from, and it does not appear in this case that she could not with reasonable diligence have been aware of all the defenses offered to be pleaded in the case after the decision of the former appeal. The question of homestead and distribution of the proceeds of the sale of the lots in question was reserved by the court below; hence those questions are not before us, as no decision has been rendered thereon. The judgment of the sale and confirmation of report thereof must therefore be affirmed.

It, however, appears that the report of the receiver was excepted to, as well as the judgment thereon. It seems that the appellant had certain portions of the property rented out, at a rental value of \$40 per month, prior to the same having been placed in the hands of a receiver, and that the court, on motion of the receiver, adjudged a reduction of the rent for a certain period of time, which reduction amounted to the sum of \$48. This order was unauthorized, and should not have been entered. It further appears that the receiver deposited \$385 in the Louisville Deposit Bank, which broke, and the money was thus lost; and as a matter of fact, in law, he was not authorized to deposit same in said bank, and he should not have been credited with that amount. The exceptions of appellant to the receiver's report as to that item should have been sustained. The judgment overruling the exceptions of plaintiff to the commissioner's report and to the judgment confirming the same are reversed to the extent of the \$385, and the cause remanded for further proceedings consistent with this opinion.

### LOUISVILLE & N. R. CO. v. CHISM.<sup>1</sup>

(Court of Appeals of Kentucky. Sept. 27, 1898.)

#### EXCESSIVE VERDICT—RAILROADS—INJURY TO CHILD TRESPASSING ON TRACK—PUNITIVE DAMAGES.

1. A verdict for \$5,500 for injuries to a small boy requiring the amputation of his arm and leg is not excessive.

2. Evidence that plaintiff, a small boy, had been warned not to go upon defendant's track, where he was injured by a passing train, is not admissible.

3. The servants in charge of a train owe to a trespasser on the track the duty to exercise

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ordinary care to avoid injuring him after his peril is discovered.

4. To require the jury to find "willful" instead of "gross" negligence, in order to give punitive damages, is harmless error.

Appeal from circuit court, Franklin county.  
"Not to be officially reported."

Action by Weston Chism, by Mat Chism, his next friend, against the Louisville & Nashville Railroad Company, to recover damages for personal injuries. Verdict and judgment for plaintiff for \$5,500, and defendant appeals. Affirmed.

A switchman and engineer were asked whether they had warned plaintiff to keep off defendant's track at the point where he was hurt, but the court refused to permit them to answer the question.

Ira Julian, for appellant. J. A. Scott and W. C. Marshall, for appellee.

WHITE, J. This is an action for personal injury, brought by appellee in the Franklin circuit court. The injury is claimed to have occurred within the corporate limits of Frankfort, and by a train of six cars that were detached from any engine, and were running on a downgrade of their own momentum, and that the appellee, Weston Chism, a boy, was struck near a turnpike road crossing, and his arm and leg crushed and injured so as to require amputation. Damages were claimed in the sum of \$25,000, punitive as well as actual damages being claimed. Appellant, for defense, denied all negligence on the part of its employes, and pleaded contributory negligence on the part of appellee. The case was tried before a jury, and resulted in a verdict for appellee for \$5,500. After appellant's motion for new trial had been overruled, it prosecuted this appeal. The reasons assigned by appellant for a new trial are: That the damages are excessive; that the verdict is not sustained by sufficient evidence, and is contrary to the evidence and the law; that the court erred in refusing to permit appellant to prove that appellee had frequently been warned of the danger of playing or going on appellant's track; and in refusing to permit appellant to prove that appellee had been in the habit of putting pins on the rails to be run over by its trains; and in refusing to permit appellant to prove that shortly before the accident appellee had gotten on a car of appellant, and had ridden down the track; and that the court erred in giving instructions, and in refusing instructions asked for by appellant.

Considering the injuries that appellant sustained, we are not prepared to say the damages awarded are excessive.

As to the evidence claimed to have been excluded, we are of opinion that it was not competent, and there was no error in its exclusion. However, there appears no error in the bill of exceptions as to what any witness would testify, so as to inform this court properly as to his testimony. Certain ques-

tions the witnesses were not permitted to answer, but as to what their answers would have been we are left to conjecture; yet, taking the answers to be most favorable to appellant, they were properly excluded.

The defendant asked the court to instruct the jury as follows: "(1) The court instruct the jury that the plaintiff, Weston Chism was a trespasser on defendant's track at the time of his injury, and, unless the jury believe from the evidence that plaintiff's injury was caused by the wanton and willful negligence of defendant's servants, after the discovery he was in a perilous situation, they should find for the defendant. (2) Although the jury may believe from the evidence that plaintiff was discovered by the defendant's employes standing on the side of the railroad track, and near enough to the rail to be struck by the approaching cars, in time to have stopped said cars before reaching him, yet if they further believe from the evidence that the plaintiff saw said approaching cars in time to have stepped off of the track before they reached him, or could have seen them by ordinary care, then the defendant's employes had the right to assume that he would step off the track in time to avoid injury, and they were not bound to stop or check said cars to protect the plaintiff, unless they saw, or could have seen, by ordinary care, that he did not intend to leave the track in time to have avoided the injury. (3) If the jury believe from the evidence that plaintiff was standing far enough from the iron rail on the track to permit the front car of said train to pass him without injury, while the cars were approaching him, and suddenly went near enough to the track to be struck by the front wheels or trucks of the front car, after the train was too near him for the employes to avoid the injury, they should find for the defendant. (4) If the jury believe from the evidence that plaintiff approached the moving cars after the front trucks of the front car had passed him, and placed himself so near the moving cars as to be struck by the wheels, trucks, or any portion of the moving train in the rear of the front wheels of the front car, then they should find for the defendant." The court refused to give these instructions, and on his own motion gave instructions as follows: "(1) If the jury believe from the evidence that the defendant, by its agents and employes, carelessly and negligently ran its cars on and over plaintiff, whereby he was injured, they ought to find for the plaintiff in damages in such sum as will reasonably compensate him for his physical and mental suffering, and loss of time, if any, and for his loss of power to earn money, if any, caused by said injury; and if the jury further believe from the evidence that said injury was the result of the reckless and willful carelessness and negligence, they may, in addition to such compensatory damages as above indicated, award, in their discretion, punitive

damages not exceeding in all twenty-five thousand dollars, the amount claimed in plaintiff's petition. (2) But if the jury shall believe from the evidence that the plaintiff saw the approach of said cars, or by the exercise of ordinary care could have seen the approach of said cars, in time to have gotten out of the way of same, or was warned by defendant's employes, or any of them, of the approach of said cars, in time to get out of the way of same, and carelessly and negligently failed or refused to get out of the way, they ought to find for the defendant. (3) If the jury believe from the evidence that the plaintiff, after the front end of the train of cars had passed him, approached the railroad track on which said cars were moving, and placed himself in the way thereof, whereby he was struck by said cars, and injured, he cannot recover, and the verdict of the jury ought to be for the defendant. (4) Although the jury may believe from the evidence that defendant's employes saw plaintiff on or near its track, yet they had the right to believe that he would remove himself beyond the reach of danger from said cars, and they were not required to stop said cars, or check their speed, until after they ascertained he would not do so, and after they, or any of them, discovered his peril or danger, if they did discover it, used ordinary care and diligence to prevent said injury, they ought to find for defendant; but if they did discover his peril, and by the exercise of ordinary care could have prevented the injury, the law is for the plaintiff. (5) If the jury believe from the evidence that defendant's employes in charge of said moving cars saw plaintiff as the same approached plaintiff, and saw that plaintiff had put himself beyond the reach of danger from said cars, and so remained until said cars got near or opposite to him on said track, said employes had the right to believe he would remain in safety; and if plaintiff afterwards changed his position, and went nearer the track, and was injured, the defendant is not liable, and said employes were no longer required to be on the lookout for plaintiff, and they ought to find for defendant. (6) 'Willful negligence,' as used in these instructions, means the intentional disregard of a plain or manifest duty, in the performance of which the public or person injured has an interest. (7) 'Ordinary care,' as used in these instructions, means such care as an ordinarily prudent person would use under the same or similar circumstances."

We are of opinion that there was no error in refusing the instruction No. 1 asked by defendant. By that instruction appellant was not liable, even if its employes failed to exercise ordinary care to avoid the injury after they discovered the peril of appellee.

There was no reversible error in refusing 2 and 3 asked for by appellant, for the reason that the full substance of both instructions was given by the court on his own motion.

As to the instructions given, appellant complains of only the first in brief of counsel, although an exception was reserved to each. This instruction would be correct in every particular, in our opinion, if it used the word "gross" instead of "willful," as applied to negligence, and permits punitive damages; and while the use of the word "willful" is error, it is not prejudicial error to appellant, as it authorizes punitive damages only upon the belief of a greater degree of culpability than the law requires. If appellee was required by the court to prove more than he ought to have been, it cannot be prejudicial to appellant, and it will not be heard to complain.

We do not approve of instructions 2 and 3, given. They point out special facts and circumstances proven, and are objectionable in that particular; but each of these is more favorable to appellant than it was entitled to under the law, and the error in giving them is not prejudicial to appellant, and for that this court will not reverse. We perceive no error in the record prejudicial to appellant, or of which it will be heard to complain. The judgment is therefore affirmed, with damages.

#### BEST et al. v. SWIFT et al.<sup>1</sup>

(Court of Appeals of Kentucky. Sept. 24, 1898.)

#### WILLS—CONSTRUCTION—RIGHTS OF GRAND-CHILDREN.

A testatrix, after making specific bequests to certain of her five children, directed her executor to sell her real estate when the youngest child should reach 21 years of age, and divide the proceeds, "except as hereinafter stated," equally between her then living children, "or the heirs of their body respectively," and by the next clause bequeathed to the two children of a deceased son \$200 each, to be paid out of the proceeds of the real estate when sold. *Held*, that the two grandchildren are entitled to \$400 out of the proceeds of the real estate before a division is had, and then to a child's share of what remains.

Appeal from circuit court, Jefferson county.  
"To be officially reported."

Action by Carrie Swift and others against George Best and others. Judgment for plaintiffs, and defendants appeal. Reversed.

James T. A. Baker and John Roberts, for appellants. Geo. G. Briggs and Jas. C. Poston, for appellees.

HAZELRIGG, J. Charlotte Best was the mother of six children, five of whom were living when she died, in 1885. The remaining one, a son, had died several years before his mother, leaving two children. She was the owner of but little personal estate, but owned real estate of the value of some \$25,000 or more. The proper construction of her will is the sole question presented on this appeal. After providing for the payment of her debts

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

and funeral expenses, she directs that her children, or such of them as may be unmarried, shall continue to live together at the family residence until the youngest should arrive at the age of 21 years; that the sons George and Phillip should continue the business of keeping and operating the barbershop and bathroom attachments; and to them she gives the furniture, fixtures, and good will of that business, and the full use of the entire house, free of rent, for a family residence, for all the children who may be unmarried and choose to dwell there until the youngest reaches the age of maturity. To her son Charles she gave the sum of \$300, to be paid to him as soon as the executor may deem best. To her two daughters, Charlotte and Mena, she gave the parlor and bedroom furniture, wearing apparel, etc., and provided that, if any of the children under 21 should be sick, the expenses were to be paid out of the general estate. The remaining clauses of the will, except the tenth, which merely named her executor, furnish the grounds of this controversy, and are as follows: "Clause 7. It is my will that my executor will, when my youngest child reaches the age of twenty-one years, sell my real estate, consisting of my house and lot on \* \* \*, and also my house and lot on \* \* \*, at public or private sale, and divide the proceeds, except as hereinafter stated, equally between my then living children, or the heirs of their body respectively; and until said time no one of my children can sell, mortgage, or in any manner incur his or her interest in my estate; and until said time, any one of my children dying without leaving issue, his or her share shall form part of my general estate. Clause 8. To Ludd and Carrie Best, the children of my deceased son, Christopher, I will and bequeath the sum of two hundred (\$200) dollars each, to be placed in bank for them when my real estate is sold and paid for, to be paid them when they respectively arrive at the age of twenty-one years; but, should any of them die before that age, the share of either or both so dying shall be equally divided between my then living children and their descendants. Clause 9. It is my will that my executor will at the time of the sale and distribution of the proceeds of my real estate, and after paying necessary expenses, divide all the rest and residue of my estate not herein disposed of, equally between my then living children and their heirs." It was the opinion of the chancellor that the two grandchildren were entitled to share in the proceeds of the sale of the real estate, and were entitled to one-eighth each, it appearing that two of the five children living at the death of the testatrix had died without issue, and the youngest having arrived at the age of maturity. From this judgment, the children have appealed. From the grandchildren's portion taken under the seventh clause was to be taken the

sum of \$400 given them in the eighth clause, and from this portion of the judgment they have prayed a cross appeal.

It is the contention of the appellants that the testatrix intended to give to her children proper her entire estate, save the pittance set apart for the two grandchildren in the eighth clause; that their father had died in 1876, and she knew that he had left these two grandchildren, yet she nowhere mentions them except in the eighth clause. It is argued that she meant, if all of her children living when she made her will, in 1885, were living when the final distribution took place, the proceeds of the sale of the property should be divided equally among them, but if any of them were dead, leaving issue, that issue to take the share of the parent. We cannot concur with counsel in this contention. The testatrix contemplated and made provision for a division of her estate at a future time, when some of her children would be living, and some of them probably dead, leaving issue. The children then living were to take, but not only so. The heirs of their body, respectively, were also to participate in the division. It cannot be she meant "the heirs of the body" of the children then living. They would have no heirs. She referred, therefore, to the heirs of the body of such of her children as might be dead. We perceive no reason for saying she intended to limit the devise to the heirs of the body of a part only of her children. She meant, therefore, "the heirs of the body" of all her children who might be dead, leaving such heirs. We think, further, that by providing against an equal division of the proceeds of the real estate, as was done by the use of the expression "except as hereinafter stated," the testatrix clearly indicated that she numbered the grandchildren of her deceased son in the class among whom the division was to be made; otherwise, the clause is entirely senseless. The division was to be equal among the class, the living and the heirs of the dead, except that (eighth clause) the grandchildren were to have \$200 each out of the proceeds before the division was made; and this, we may suppose, was in entire accord with the perfect equality intended, certain specific legacies and benefits having already been provided for the children. It is to be noticed that the division is to be equal after the \$400 are set apart to the grandchildren, and we think, therefore, that this sum is not to be taken from the shares of these grandchildren, as indicated in the chancellor's opinion. They get their specific legacies just as the children get theirs, and then all share alike in the proceeds of the real estate. And this, we think, is true of the division of the personal estate provided for in the ninth clause. Wherefore the judgment is affirmed on the original and reversed on the cross appeal, for further judgment in accordance with this opinion.

ILLINOIS CENT. R. CO. v. COMMON-WEALTH.<sup>1</sup>

(Court of Appeals of Kentucky. Sept. 30, 1898.)

## CRIMINAL LAW—JURISDICTION—OBSTRUCTION OF HIGHWAYS BY RAILROAD TRAINS—IRREGULARITY IN RETURN ON SUMMONS—VARIANCE.

1. The circuit court has jurisdiction to try the offense of maintaining a common nuisance by obstructing a public highway.

2. An indictment alleging that defendant railroad company "did unlawfully, willfully, repeatedly, continuously, and for long and unnecessary and unreasonable periods of time, and for longer than five minutes at any one time," suffer its trains to stand coupled across the public road, is good.

3. Irregularity in the officer's return on a summons on an indictment is not ground for quashing the process.

4. Where an indictment for obstructing a highway alleges that the obstruction was near a certain town, evidence that the obstruction was within the town constitutes a material variance, for the reason that obstructions within the town and those outside the town are governed by different laws.

Appeal from circuit court, Hardin county. "To be officially reported."

The Illinois Central Railroad Company was convicted of the offense of obstructing a public highway, and appeals. Reversed.

Jas. Montgomery and Pirtle & Trabue, for appellant. Weed, S. Chelf and W. S. Taylor, for the Commonwealth.

HAZELRIGG, J. Upon the principles decided this day in the case of the commonwealth against the present appellant, from Carlisle county (47 S. W. 258), the circuit court had jurisdiction to try the offense charged against appellant, viz. that of maintaining a common nuisance by obstructing a public highway. The indictment in this case, however, differs materially from the one there under consideration. Here it is charged that the company "did unlawfully, willfully, repeatedly, continuously, unreasonably, and for long and unnecessary and unreasonable periods of time, and for longer than five minutes at any one time, allow, permit, and suffer its freight and passenger trains to stand and remain coupled and hooked together over and across the public road," etc. The demurrer was properly overruled.

Further complaint is made that, because of some alleged irregularity in the return of the officer as indorsed on the summons, the court should have sustained appellant's motion "to quash the process." As the form of the process was entirely regular, and is the usual form, the motion to quash it was properly overruled. Had the motion been to quash the officer's return, it might have been entertained, but the opportunity would have been afforded for correcting the return before quashing it. The further complaint is urged that while the indictment described the high-

way as the "Brandenburg road" and as "the Big Spring and Elizabethtown road where the appellant's railway crosses said public highway near the town of Vine Grove," the proof disclosed that the point of the alleged obstruction was in fact within the limits of the incorporated town of Vine Grove. This variance, we think, is wholly immaterial so far as it is supposed to have misled appellant as to the exact locality of the crossing alleged to have been obstructed. The misdescription as such is insignificant. But while to obstruct a public highway, within as well as without a town or city, is a common-law offense, and punishable as a nuisance, yet the highways without are under the control of the general laws and the county courts, while within such limits they are within the control and supervision of the governing authorities of the town, and the special laws applicable thereto. There may be, and there usually is, in their charters and ordinances, a full regulation of the subject of obstructing the streets and public ways of towns and cities; and ordinarily they are so definite and specific as to leave no room to doubt that they supersede the common-law punishment. We think, therefore, that the appellant was entitled to be informed in the indictment whether the point alleged to be obstructed was within or without the town or city limits. The variance was material and fatal, for the reason given, and judgment should have gone for the defendant. Reversed for proceedings in accordance herewith, and dismissal of indictment unless further proof may disclose the point of obstruction to have been without the town limits.

BULLITT v. SELVAGE et al.<sup>1</sup>

(Court of Appeals of Kentucky. Sept. 29, 1898.)

## MUNICIPAL CORPORATIONS—ASSESSMENTS FOR STREET IMPROVEMENTS.

1. A street assessment was not void, as amounting to confiscation, though it equaled the present value of the lots sought to be charged, and though the grade of the street was so raised, as to render one or more of the lots worthless unless filled at considerable cost.

2. The owners of abutting property sought to be charged with the cost of a street improvement cannot question the necessity of the improvement, the city being the sole judge of that matter.

3. As abutting property cannot be charged with the cost of keeping a street in repair, a street assessment will not be enforced to the extent of 10 per cent. retained by the city as security for the contractor's undertaking to keep the street in repair for five years.

Appeal from circuit court, Jefferson county. "Not to be officially reported."

Action by C. P. Selvage and others against Joshua F. Bullitt to enforce a lien for a street assessment. Judgment for plaintiffs, and defendant appeals. Reversed.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

W. B. Dixon, for appellant. Lane & Burnett, for appellees.

GUFFY, J. The appellees instituted this action in the Jefferson circuit court, chancery division, seeking a judgment for the enforcement of an alleged lien upon certain lots in the city of Louisville, the property of the appellant. The alleged lien amounted to something over \$1,300, and was the amount due and chargeable, as alleged, under apportionment warrants issued by the city council on account of improvements on St. Catherine street, from the center line of Swan street to the northwesterly line of Dandridge avenue. It appears that the petition contained the necessary averments as to the several ordinances directing the improvement, as well as the contract and reception of the work, and apportionment of the cost against the several property owners. The first paragraph of appellant's answer is, in substance, a denial of all the averments in the petition, showing a right on the part of plaintiffs to recover. The second paragraph of the answer reads as follows: "For further answer herein, this defendant says that Dandridge avenue runs in a direction east of northeast and west of southwest, so as to make the eastern part of the lot owned by this defendant and the third described in the petition an acute angle; that the line of said lot, which lot is in the shape of a triangle, bordering on St. Catherine street, is 323 feet in length, while the western line of said lot, which is perpendicular to St. Catherine street, is only about 210 feet in length. This defendant says that the distance from Swan street to Dandridge avenue, along St. Catherine street, is much greater than the distance of an ordinary square, and is at least 1,450 feet; that said distance is greater than the distance of two ordinary squares. This defendant further says that it is true, as alleged in the petition, that there is no street east of the territory between St. Catherine and Kentucky streets east of Swan street; that the territory east of Dandridge avenue is unbuilt upon, and is what is ordinarily called commons; that the lots on St. Catherine street, between Swan street and Dandridge avenue, are mostly vacant, and those that are built upon have on them only cheap cottages. This defendant says that Dandridge avenue is but a short distance from the limits of the city of Louisville, and that St. Catherine street ends at the intersection of said Dandridge avenue; that the improvement of St. Catherine street from Swan street to Dandridge avenue with vitrified brick was not necessary or beneficial to the city of Louisville, nor to the lots along said improvement; that the cost of said improvement, as set out in the petition, is so excessive that, should this defendant's lots be charged with the payment of the respective sums alleged in the petition to be a lien upon them, it will amount to spoliation. This defendant

says that the value of the lot third described in the petition does not exceed \$1,087.57, the amount plaintiffs seek to charge against it; that the value of the lot fourth described in the petition does not exceed the sum of \$238.25, the amount plaintiffs are seeking to charge against it. This defendant says that the said improvement was two or three times as expensive as the improvement of other streets in the same vicinity, and which are in a more populous part of the city, and on which there is more travel; that so expensive an improvement as this on St. Catherine street, between Swan street and Dandridge avenue, was not demanded by the growth of the city of Louisville; that there is very little or no traffic upon said St. Catherine street between Swan street and Dandridge avenue; that the ordinary limestone pavement there would have answered every purpose, and would have been not more than half so expensive; and that the said improvement was contrived for the benefit of the plaintiffs, and in fraud of this defendant's rights. This defendant says that the grade of St. Catherine street has been raised, to wit, 30 or more feet, in front of his lot fourth described in the petition, and that access to said lot has been thereby cut off, and said lot rendered almost, if not entirely, valueless. This defendant says that, if his said lots are charged with the payment of the aforesaid sums, it will be necessary for the whole of said lots to be sold to raise said amounts." The third paragraph of said answer reads as follows: "This defendant says that the plaintiff C. F. Selva did not commence work upon said improvement until after the 1st day of July, 1893, and after it had been provided by law that no public way should be constructed in the city of Louisville except by ordinance recommended by the board of public works. This defendant says that none of the ordinances mentioned in the petition were recommended by the board of public works. This defendant says that the said improvement on St. Catherine street has not been inspected or received by the board of public works or its deputy or deputies; nor has the board of public works, by one or any insertion in one of the daily newspapers published in said city, given any notice of the time or place fixed for the inspection or reception of the work by the board or its deputy or deputies; nor have the owners of the lots fronting on St. Catherine street between Swan street and Dandridge avenue, or their agents or representatives, been given any opportunity to appear or be heard as to whether said improvement has been made in accordance with the ordinance alleged to authorize same, or the contract therefor. This defendant says the said improvement was not authorized by law, and, having fully answered, prays that the petition be dismissed." The reply of the appellees is a traverse of the second and third paragraphs of the answer. Upon final hearing, the court rendered a

judgment enforcing the liens as claimed by appellees, and from that judgment appellant has appealed.

It seems that the ordinance directing the improvement to be made required the contractor to keep the street in repair for five years; and it is insisted by appellant that the council had no authority to charge the abutting property owners with the cost of keeping the street in repair, and he cites *Fehler v. Gosnell* (Ky.) 35 S. W. 1125, as sustaining his contention. Appellant also earnestly insists that the testimony in this case shows that the improvement ordered and made amounts to spoliation or confiscation of his property, and for that reason the apportionment warrants create no lien upon the property in question. The testimony introduced by appellant conduces to show that the amount charged to his property, especially to one or two of the lots, is fully equal to the present value of the same, and that it approximates the value of the other lots. It will be seen from the proof that the street was made with vitrified brick, and it is near the line of the city, and little or no business is transacted on said street, and the buildings on the street are by no means costly, being mostly one-story frame houses. It also appears from the testimony that the grade of the street was so raised as to leave one or more of appellant's lots so far below the grade as to make it worthless unless it was filled up, which would cost a very considerable sum of money. There is some proof introduced by appellees which tends to contradict the proof relied on by appellant.

The most important question for decision is whether, under the facts in this case, the city council, instead of exercising a legitimate power for the improvement of streets, did in fact impose, or attempt to impose, upon appellant such an unreasonable cost as to bring the case within the rule announced by this court in *Howell v. Bristol*, 8 Bush, 495; *City of Covington v. Southgate*, 15 B. Mon. 494; *Baptist Church v. McAtee*, 8 Bush, 517; and *Preston v. Rudd*, 84 Ky. 155. It seems to be true that the amount charged to the property of appellant in this case appears to be very large; yet we are not prepared to say that it is so much as to amount to confiscation or spoliation; hence this case does not come within the rule announced in the decision above referred to. As to the propriety or necessity for the improvements in question, it is sufficient to say that the law seems to be well settled that the city government of Louisville is the sole judge of the necessity of such improvements. But it appears that, as part of the contract, the contractors were required to keep the street in repair for five years, and 10 per cent. retained as a guaranty or security for the faithful performance of that undertaking, which stipulation in the contract is illegal and not enforceable against the property holders, as has been decided in *Fehler v. Gosnell* (Ky.) 35 S. W. 1125; and

for that error alone the judgment appealed from is reversed, and the cause remanded, with directions to set aside said judgment, and render a judgment for only 90 per cent. of the amount apportioned or charged to the property of appellant, and for proceedings consistent herewith.

# MERGENTHAL v. SOUTH COVINGTON & C. RY. CO.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 6, 1898.)

## APPEAL AND ERROR—FINAL ORDER.

An order granting a new trial is not a final order, from which an appeal can be taken, though the court may have intimated that on another trial a peremptory instruction would be given.

Appeal from circuit court, Campbell county. "To be officially reported."

Action by John Lewis Mergenthal against the South Covington & Cincinnati Railway Company to recover damages for personal injuries. Order setting aside verdict for plaintiff and granting new trial, and plaintiff appeals. Dismissed.

Wilson & Henlenger and Thos. P. Carrothers, for appellant. Simrall & Galvin, for appellee.

BURNAM, J. This is an action by appellant to recover damages for an injury received by him through the alleged negligence of appellee. The issues were made up, and a trial had, resulting in a verdict for appellant. Motion for a new trial was made, and numerous grounds therefor were filed. The trial court sustained the motion, and set aside the verdict of the jury, and granted a new trial, and this appeal is prosecuted to reverse the order granting the new trial.

The question upon appeal is, was the order of the lower court, granting a new trial to appellee, such a final order as can be reviewed by this court upon appeal? It is contended by appellant that, as the trial judge, at the time he granted the motion for a new trial, made use of these words: "I cannot account for the jury finding that such a boy as appellant did not have sufficient intelligence to understand that there was danger in getting on a flat car and riding down hill on it, unless they were carried away by their sympathy for the little chap, whose unfortunate condition appealed so strongly to all who saw him that the court feels hardly less than the jury must have; but it cannot let that influence it in the administration of the law."—this means that the court would give a peremptory instruction on the next trial, and was in reality a final disposition of the cause of action by the trial judge. The question whether this court has jurisdiction to review this order upon appeal depends upon whether it was a final order, and this must be de-

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

terminated by the condition in which it left the parties to the litigation, as to their rights, and not by the remarks of the judge at the time the order was given. A final judgment is one that either terminates the action itself, or decides some matter litigated by the parties, or operates to divest some right in such manner as to put it out of the power of the court making the order, after the expiration of the term, to place the parties in their original condition. See *Helm v. Short*, 7 Bush, 624; *Turner v. Browder*, 18 B. Mon. 826; and *Winn v. Dry-Goods Co. (Ky.)* 43 S. W. 436. It is evident that there has been no final determination of the rights of appellant. The case still remains upon the docket of the trial court, undetermined, and is not the subject of review in this court upon an appeal prosecuted from the order granting a new trial. See *Schweltzer v. Irwin's Ex'x (Ky.)* 41 S. W. 265; *Christman v. Chess, Wymond & Co. (Ky.)* 43 S. W. 426; *Miller v. Ashcroft (Ky.)* 32 S. W. 1085; and *Judd's Adm'x v. Railway Co. (Ky.)* 37 S. W. 842. For the reasons indicated, this appeal is dismissed.

**COMMONWEALTH v. ILLINOIS CENT.  
R. CO.<sup>1</sup>**

(Court of Appeals of Kentucky. Sept. 30,  
1898.)

**HIGHWAYS — OBSTRUCTION BY REMOVING BRIDGE  
OVER RAILROAD—JURISDICTION TO  
PUNISH OFFENSE.**

1. Ky. St. § 4306, giving to the fiscal court of each county general charge and supervision of public roads, and requiring it to prescribe "the necessary rules and regulations for repairing and keeping same in order, and for the proper management of all roads and bridges," does not interfere with the jurisdiction of the circuit court to punish the offense of obstructing a public road.

2. Neither Ky. St. § 4325, providing for the punishment of any corporation which shall fail, after notice, to repair any damage it has done "by unusual use of a road," nor section 4335, which provides for the punishment of any person who shall willfully obstruct, injure, or destroy any public road or bridge, applies to a railroad corporation which fails to restore within the shortest practicable time a bridge over its track which it has removed from a highway in order to make repairs; such offense being punishable only as a common-law nuisance.

3. An indictment charging that defendant railroad company took down its bridge forming part of a highway, and kept it down for three months, resulting in the obstruction of the public road, does not charge an offense in the absence of any allegation showing that the bridge was not replaced within the shortest practicable time.

Appeal from circuit court, Camble county.  
"To be officially reported."

The Illinois Central Railroad Company was indicted for a nuisance, and from a judgment sustaining a demurrer to the indictment the commonwealth appeals. Affirmed.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

H. J. Moorman and W. S. Taylor, for appellant. Bugg & Wickliffe and Pirtle & Trabue, for appellee.

**HAZELRIGG, J.** Indicted for maintaining a nuisance by tearing down and keeping down for three months an overhead bridge where a public road crossed its track, the appellee succeeded in having its demurrer to the indictment sustained upon the ground that chapter 110 of the Kentucky Statutes on the subject of "Roads and Passways," has repealed and supplanted the common-law remedy for the obstruction of public roads, and has vested exclusive jurisdiction of such offenses in county and quarterly courts. The first section of that chapter, to which we are referred as tending to support this conclusion, is that wherein the fiscal court of each county is given "general charge and supervision of the public roads and bridges therein," and is charged with prescribing "the necessary rules and regulations for repairing and keeping same in order, and for the proper management of all roads and bridges." Section 4306. This section is clearly no departure from the old law on the same subject, and we think has no reference whatever to the jurisdiction of such criminal courts as may be charged with the enforcement of the penal statutes on the subject of obstructing public roads. We are also referred to section 4325, Ky. St., which is as follows: "Any corporation, company or individual who may, by unusual use of a road, materially damage the same, shall repair all damages caused by the use of such road or roads. The supervisor or overseer of roads shall, at any time when necessary, notify said corporations, companies or individuals of their duty as provided in this section; and should the said parties so notified fail, in a reasonable length of time, to be filed in the notice, to make such repairs, such parties shall be deemed guilty of obstructing the public roads, and shall be subject to a fine of not exceeding one hundred dollars, to be applied to road purposes." We do not think this statute has any application to the case at hand. To tear down, and keep down unreasonably long, the overhead bridge which constituted a part of the highway over the railway track, is not an "unusual use of a road," within the meaning and intent of this section. It is not a use of the road at all, but a total destruction of it, presumably for the purpose of repairing it. Such a "use," if we so call it, was entirely proper; and the offense, if one was committed, was in allowing the bridge to remain down unreasonably long. But, even if the section applies, there is nothing in its language to prevent the circuit court from exercising jurisdiction over the offense, and inflicting the punishment prescribed by indictment in the usual way.

The next section relied on is section 4335: "Any person who shall willfully obstruct, injure or destroy any of said public roads or bridges, \* \* \* or who shall without right take

possession of or use or appropriate the same, shall be fined for each offense not less than five nor more than fifty dollars, to be recovered in like manner as fines against contractors, and shall also be made liable in a civil action for double damages to the county, or any person aggrieved or injured, to be recovered in any court in the county having jurisdiction of the amount claimed. It shall be the duty of the supervisor or overseer and his assistants, and of all constables, town marshals and sheriffs, to report promptly to the county judge or some justice of the peace, all violations of this act." As "fines against contractors" are to be recovered under section 4316 by warrant in the name of the commonwealth, issued by the judge of the quarterly court, it is insisted that the fines denounced in the section quoted are in like manner to be recovered by warrant before the quarterly court judge. Even if we admit that the offense defined in this section is punishable only by warrant in the quarterly court, still, unless the offense committed by the appellee is the offense denounced by this section, it does not follow that the quarterly court has exclusive, or any, jurisdiction of it. And we think the offense with which appellee is charged is not the offense denounced by this section. As we have already indicated, the company did not willfully obstruct, injure, or destroy this bridge. It is not so charged. It is charged with taking down the bridge,—its own bridge,—and permitting it to stay down for three months, thereby obstructing the public travel for that time. The duty the company owed the public under these circumstances was to tear down its bridge, if it was dangerous, and to restore it for safe use within the shortest practicable time. This duty may not be prescribed by any positive statute, but such was its duty at the common law. *Paducah & E. R. Co. v. Com.* 80 Ky. 149; *Shear. & R. Neg.* § 452. The failure to perform this duty, resulting, as it must, in unnecessarily obstructing the public travel, is a common-law offense,—a nuisance at the common law, and punishable on common-law principles. In case of ordinary obstructions to public roads, such as we conceive the statute embraces, the supervisor or overseer has the right of entering on the road, and of removing the obstructions; but it will not do to say that he may interfere in any way with the overhead bridges of railways or other crossings erected by such companies where the lines of public highways and railroads intersect. The obstruction in such case, if any there be, is on the company's right of way, and, ordinarily, its agents only may correct the evil, and abate the nuisance. Cases might arise, it is true, where the abatement could be made otherwise. We think the common-law remedy in the class of cases under consideration, and in all cases of obstruction of public ways by railroad companies on their right of way, was not intended to be interfered with by the

section quoted, or by any provision of our statutes on the subject. The court therefore should not have sustained what is termed in the order the "special demurrer to the jurisdiction of the court," or dismissed the indictment for that reason. But whether it ought not to have sustained the general demurrer of the company presents a different question. If it should, then the dismissal of the indictment was proper, although for the wrong reason.

It was not a public offense for the company to have taken down its bridge; nor can we know it was such an offense for it to have kept it down for three months, even if this resulted, as charged, in the "obstruction of the public road," and in the "inconvenience of the traveling public." The offense in such a case, as we have seen, consists in suffering its bridge to remain down an unreasonable length of time, or in not replacing it within the shortest practicable time. See *Louisville & N. R. Co. v. Com.* (Ky.) 40 S. W. 913. There is no such charge in the indictment, and no language from which such charge can fairly be inferred. At last, therefore, a demurrer was properly sustained, and the indictment properly dismissed. Therefore the judgment is affirmed.

# CHESAPEAKE & O. RY. CO. v. PERKINS.<sup>1</sup> (Court of Appeals of Kentucky. Sept. 30, 1898.)

## RAILROADS—LICENSE TO USE TRACK—DUTY TO TRESPASSER.

1. The simple acquiescence on the part of a railroad company in the use of its track by the public does not amount to a license to so use it.

2. A railroad company owes to a trespasser on the track only the duty to use reasonable care to avoid injuring him after discovering his danger, except that it must keep a lookout along its tracks in cities where persons are likely to be found trespassing, and, after the discovery of a trespasser in a place of danger on the track, to give the usual signals to warn him of the train's approach, and, when necessary to avoid striking him, to slacken the speed or stop the train.

Appeal from circuit court, Fayette county.  
"Not to be officially reported."

Action by William M. Perkins against the Chesapeake & Ohio Railway Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

John T. Shelby, for appellant. Bronston & Allen, for appellee.

BURNAM, J. This action was instituted by appellee to recover damages of appellant for having carelessly and negligently run an engine and car against him while he was walking carefully and prudently on the track of appellant, causing him to suffer great physical injury and mental anguish, and crippling him for life. Appellant answered, and said that the injuries complained of by appel-

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.



lee were directly caused by the carelessness and negligence of appellee; that, at the time mentioned, appellee carelessly and negligently stepped on the track of appellant in front of its engine and cars, and in such close proximity thereto that such act was necessarily dangerous; and that, without any fault or neglect on the part of appellant, he was struck by its engine, and sustained the injuries complained of. The facts which preceded the injury are these: Appellee, at the time of the accident, was in the employ of appellant as a bridge carpenter and painter, but, owing to sickness and other causes, had not been at work for about a month. He lived in Lexington, in a small house fronting the right of way of appellant, near where Ellerslie avenue runs into the right of way; and, on the morning of the accident, he left his home for the purpose of joining the crew of workmen with which he had been connected, who were at work some distance outside of the city. To do this, he started to walk up the right of way, intending to board the regular passenger train leaving the city at 11:40 a. m., when it stopped at the register box before crossing the track of an intersecting line of railway, where he had been in the habit of boarding the train in order to get to the place on the line of appellant's road where his crew was at work. He testifies that, after he had gotten a short distance east of Ellerslie avenue, he got upon the main track of appellant's road, and walked in the direction of the register box, and that, when he got to a point almost directly in front of Nelson's Elevator, he was struck, as he walked with his back towards the approaching train. The claim of appellant, on the other hand, is that appellee, as he went towards the elevator, was not walking upon the main track at all, but was on a space between the main track and a side track, which space was about six feet wide, where he was entirely safe from any danger of being struck, and that, when the train was only about 15 feet from him, he suddenly stepped from the space where he was walking between the two tracks onto the main track, immediately in front of the engine, and was struck before anything could be done to avoid the collision.

The proof conclusively shows that the right of way of appellant from Ellerslie avenue to the Winchester pike had been habitually used for a long time by the employés of appellant and the public generally in walking to and fro between those points, without objection on the part of appellant, and that such use was not confined, as claimed by appellant, to the space between the side and main tracks, but that both tracks had been used in this way as well. But, as was said by the court in *Brown's Adm'r v. Railroad Co.*, 44 S. W. 648, we do not think that simple acquiescence on the part of a railroad company in the use of its track in this way confers any authority or right or amounts to a license to so use it. Decedent can be

regarded only in the light of a trespasser upon appellant's track at the time of the injury, and the only duty which the appellant owed to him was, after becoming aware of his danger, to use all reasonable care to avoid injuring him. But this has been extended by the decisions of this court to include the duty on the part of the railroad company, its agents and employés, to keep a lookout along its tracks in cities where persons are likely to be found trespassing on its right of way, and, after the discovery of the presence of a trespasser in a place of danger on the track, to give the usual and customary signals to warn such trespassers of the approach of the train and his danger, and, when practicable, —when necessary to avoid striking him,—to slacken the speed or stop the train.

It seems to us that this case narrows itself down to a question of fact: Was the appellee, as contended by him, walking on the main track of appellant's road for some distance before he was struck by the engine, in full view of the engineer and fireman, in a dangerous position, ignorant of the approach of the train; or was he, as contended by appellant, walking between the tracks until the engine was within 10 or 15 feet of him, and did he suddenly step on the track immediately in front of the engine, at a time when it was impossible for appellant, by the use of ordinary appliances, to avoid inflicting the injuries complained of? The testimony is conflicting. Appellee testifies that he was walking between the rails of the main track from a short distance east of Ellerslie avenue, where he had stopped and talked with the witness Rogers; that he did not get off the main track, and that he was in plain view of the engineer for several hundred yards before he was struck; that he did not hear any of the usual signals of the approach of the train —blowing of the whistle or ringing of the bell —until the train was immediately behind him, when the engine gave the short sharp whistle usually given to warn trespassers of danger; and that he immediately attempted to get off the track, but was hit before he succeeded in doing so. His testimony on this point is corroborated by that of Rogers, who testifies that he met appellee walking along the right of way, a short distance east of Ellerslie avenue; that he stopped, and had a short conversation with him; and that appellee was standing on the ties while he was talking; and that, after the interview terminated, appellee walked upon the main track. It is corroborated also by the testimony of William Seals, who was near the furnace door of the elevator when appellee was struck, and who testifies that appellee was on the main track of the road; that the train gave none of the usual warnings of its approach until it had gotten within a few feet of appellee, but that he heard the whistle blow for the crossing of Main street, several hundred yards further west. And this testimony as to the failure of the appellant to give the usu-

al signals is corroborated by the testimony of Mrs. Snelling. While, on the other hand, John Cabbins, the engineer, states that he first saw appellee walking along in the space between the two tracks when he was near Ellerslie avenue, and that he continued to walk up between the two tracks until the engine came to within 12 to 15 feet of him, when he suddenly stepped on the track in front of the engine; and that he reversed his engine, and put on the air brakes, gave the danger signal, and did all he possibly could to avoid the injury. His testimony on this point is corroborated by that of the fireman and other employés of appellant, who testified that the usual signals were given.

There seems to be no reasonable ground to doubt that if appellee was (as contended by him) walking on the main track, in sight of the engineer, from the time the train passed Ellerslie avenue, considering the rate of speed at which the train was traveling (four to six miles an hour), the engineer would have had no difficulty at any time in stopping the train within a very short distance, if it became necessary to avoid striking him. In fact, the proof shows that the train was stopped within 20 to 25 feet from the time the air brakes were applied; but if, on the contrary, the appellee was walking between the tracks, in a place where he was in no danger, and suddenly, and without the engineer having any reason to believe that he intended to do so, stepped upon the track in front of the approaching train, it was manifestly impossible for appellant to have avoided striking him. The testimony was quite conflicting as to the time when appellee got upon the main track before he was struck by the engine, and also as to the character of notice that was given of the approach thereof by the agents of appellant in charge thereof. Assuredly, the testimony does not present a record on these vital points where all reasonable men must come to the conclusion either that appellant was guilty, or that the appellee was free from negligence; and, in such conflict of proof, it is the province of the jury, in our system of jurisprudence, to pass upon the question of negligence; and it only remains to inquire whether the case was given to the jury under proper instructions as to the law.

By the first instruction the jury were told that "if the agents of defendant in charge of the train failed to give such notice of the approach of the train, and that by reason of said failure, and without negligence on the part of plaintiff, the plaintiff was ignorant of the approach of said train, and was thereby struck and injured, the jury should find for plaintiff." By the second instruction the jury were told: "The jury should find for the plaintiff if they believe from the evidence that defendant's employés and servants in charge of its train saw that plaintiff was in danger of being struck by the locomotive, and, after so seeing his danger, said agents and employés failed to use every means at

their command, consistent with the safety of themselves and their train, to avert the threatened collision, if by the use of such means said collision could have been averted; and this is true whether due notice of the approach of said train had been given or not." But the court qualified this instruction by telling the jury that "the defendant's agents and employés were not required to stop the train to avoid striking the plaintiff, even if they did see him on the track, if at the time they saw him the plaintiff, by the exercise of reasonable care, could have known of the proximity of the train, and have still avoided it; but the duty of such agents and employés did arise when they saw, if they did see plaintiff, that plaintiff was in such proximity to said train that he probably could not avoid said train unless its speed was checked or said train was stopped, in which event it was the duty of said employés and agents to check the speed of said train or stop it, if they could do so consistent with their own safety and the safety of the train." By the third instruction the jury were told that "it was the duty of plaintiff to use his senses both of sight and hearing to know of the approach of a train on said track, and to avoid said train by getting off the track when said train approached. And if he failed to use ordinary care, and by reason of such failure did not know of the approach of said train until at a time when it was too late for him to avoid said train, the jury must find for the defendant, unless they also believe from the evidence that, after the agents and employés of defendant in charge of the said train discovered that he was in danger of being struck by said train, they could, by the exercise of the means then at their command, have stopped said train in time to avoid striking the plaintiff." It appears that these instructions give the law to the jury very favorably to the appellant. The first instruction not only requires the jury to believe that the agents of appellant failed to give proper notice of the approach of the train, but also that appellee himself must have been free from negligence in not knowing of the approach thereof, before they were authorized to find in his behalf. The second instruction required the jury to believe from the evidence that appellant's servants in charge of its train saw that appellee was in danger of being struck by the locomotive, and, after so seeing his danger, failed to use all means at their command, consistent with the safety of the train, to avert the threatened collision, before they could find for the appellee. In the third instruction they were told that it was the duty of appellee to use his senses of sight and hearing to avoid being struck, and that, if his failure to use ordinary care kept him from knowing of the approach of the train until too late to avoid the collision, they must find for the defendant, unless those in charge of the train discovered his peril, and could have, by the exercise of the means at their command,

stopped the train in time to avoid striking him. In our opinion, these instructions present fully the conditions upon which plaintiff was entitled to recover, and to have given to the jury a series of instructions presenting the converse of the propositions contained in the instructions given would not have assisted them in determining the questions submitted to them, but, on the contrary, would, in our opinion, have tended to confuse them. Perceiving no error in the instructions, the judgment must be affirmed.

### STORMES v. COMMONWEALTH.<sup>1</sup>

(Court of Appeals of Kentucky. Sept. 28, 1898.)<sup>2</sup>

#### INTOXICATING LIQUORS—LOCAL OPTION—LICENSE TO DRUGGIST—FAILURE TO PAY TAX.

1. Druggists are exempt from the operation of the local option law, unless the petition for the vote and the notice and order of election include druggists.

2. The act of May 5, 1880, providing that in localities where the sale of liquors was prohibited a druggist might procure a license to sell, has been supplanted by the local option law of March 10, 1894.

3. A license to a druggist to sell liquors without the payment of the tax of \$50 required by Ky. St. § 4224, affords him no protection for a sale made, even on the prescription of a physician, where the liquor is unmixd with other ingredients.

Appeal from circuit court, Garrard county.  
"To be officially reported."

M. D. Hughes and William Herndon, for appellant. W. S. Taylor, for the Commonwealth.

HAZELRIGG, J. The indictment in this case charges that the appellant "did unlawfully sell at retail spirituous and vinous liquors to W. T. West, without having obtained and procured a license therefor and paid the tax thereon as required by law"; and the agreed facts on which the case was tried by the court, and judgment rendered against appellant, are substantially as follows: At the date of the sale charged in the indictment, the defendant was a registered pharmacist and druggist, in good faith, in the town of Lancaster (a town of the fifth class), in Garrard county, and that for some years prior thereto he had continuously been such druggist, and that within one year next before the finding of the indictment he had procured from the Garrard county court a license to sell spirituous, vinous, and malt liquors as a druggist, for which he paid nothing, except the clerk's fees for issuing same. That, on the day charged in the indictment, appellant, on the prescription of a regular, practicing physician, sold to West one pint of whisky, unmixd and untinctured with any drug or other thing, and that whisky is recognized by the medical profession as a

medicine. That theretofore, at an election held for that purpose, the legal voters of the district including the town had voted against the sale of liquors, and this fact had been duly certified for record, and recorded in the proper office.

At the outset it is proper to say that in our opinion the vote putting in force what is known as the "Local Option Law" does not in any way affect the questions involved. That law specifically exempts druggists from its operation, unless the petition for the vote, and the notice and order of election, shall include druggists. This was not done here, and the law does not apply.

The indictment was evidently drawn under the following provisions of the Kentucky Statutes: "Sec. 4224. Before engaging in any occupation, or selling any article named in this and section 4225 of this article, the person desiring to do so shall procure license and pay the tax thereon, as follows: \* \* \* To persons who are druggists in good faith, to retail spirituous and vinous liquors at the drug-store in quantities not less than a quart, the liquor not to be drunk on the premises or adjacent thereto, and to sell in quantities less than a quart, for medicinal purposes only, on the prescription of a regular practicing physician, fifty dollars." It is the contention of the state that before the appellant could, as a druggist, retail whisky at his drug store in quantities not less than a quart, or in less quantities, for medicinal purposes, and on the prescription of a physician, he must procure a license so to do, and pay therefor the sum of \$50; that the plain letter of the law is that he "shall procure license and pay the tax thereon"; that his duty is to know the law, and to know that the procurement of the license is not all the law requires; "tax thereon" must be paid. It is claimed for the appellant that his license was granted to him under the provisions of the act of May 5, 1880 (Gen. St. 1888, p. 502), where it was provided that in localities where the sale of spirituous, vinous, and malt liquors was prohibited, nevertheless a druggist might procure a license to sell, etc. We think it manifest, however, that this law has been supplanted by the present statutes. The law now provides that the vote is not to apply to the druggist, unless on the conditions we have already named. If the petition, notice, and order do not include him, he needs no license, so far as the local option law is concerned; and, if these do include him, there is still no provision in this law for his obtaining a license. We think the contention of the commonwealth is fully sustained by the case of *Com. v. Fowler*, 96 Ky. 166, 28 S. W. 786, where the sections of the statutes now involved were elaborately considered, and their validity upheld. In *Com. v. Hawkins* (Ky.) 32 S. W. 409, a case relied on by appellant, the sole question before the court was whether the druggist was required, under the provisions of section 4203, Ky. St.,

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

<sup>2</sup> Rehearing pending.

to give notice of his application for a license. The court decided that such notice was necessary, but used in the discussion of that question this language: "By the provisions of section 4205, a druggist, in his business as such, may sell in quantities less than a quart for medicinal purposes only, on the prescription of a regular, practicing physician; and this he may do, in our opinion, without a license, and free from any of the requirements or provisions of section 4203." If this expression is to be construed as authorizing druggists to sell, without a license, whisky unmixed with other ingredients of a prescription, it is not the law, and is overruled. At most, however, it seems to be the expression of the writer's opinion, only, on a point not involved in the case. It is true, the expression was quoted in the later case of *Lindsay v. Com. (Ky.)* 35 S. W. 269, but its application there was to quite a different state of facts. The whisky sold was by a physician and druggist, and constituted merely one ingredient in a prescription, in which respect the case was similar to the condition suggested in the second *Fowler Case*. It is sufficient to say of these cases, when whisky was used as only one ingredient of a prescription, that no such case is now before us; and, whatever construction may be put on the language used in those cases, it can have no bearing here. We think the appellant has violated the statutes, requiring him to obtain and pay for a license, and the judgment is therefore affirmed.

### GORLEY v. CITY OF LOUISVILLE.<sup>1</sup>

(Court of Appeals of Kentucky. Sept. 30, 1898.)

**MUNICIPAL CORPORATIONS—POLICE DEPARTMENT—REMOVAL OF OFFICER—CONSTITUTIONALITY OF SPECIAL LIMITATION LAW—RECOVERY OF SALARY BY REMOVED OFFICER.**

1. Under Ky. St. § 2874, part of the charter of cities of first class, the board of public safety has no power to remove a police officer except after notice and investigation, unless he has been voluntarily absent for five consecutive days, or is disabled by mental unsoundness; as the board has no authority except that contained in the statute, and it must follow literally the course there pointed out.

2. Ky. St. § 2882, providing a special limitation of six months as to actions against cities of the first class by members of the police force to recover any salary withheld for any cause, or for reinstatement to the force or department, is both a local and special act, within Const. § 59, providing that the general assembly shall not pass local or special acts to regulate the limitation of actions.

3. A city officer who has been removed, and whose place has been filled by another, to whom the salary has been paid, cannot maintain an action against the city to recover alleged salary accruing subsequent to his removal until there has been an adjudication, in a direct proceeding, declaring him entitled to the office, and his successor a usurper.

Appeal from circuit court, Jefferson county. "To be officially reported."

Action by James T. Gorley against the city of Louisville to recover salary as member of the police force. Judgment for defendant, and plaintiff appeals. Reversed.

H. S. & M. S. Barker, for appellant. Henry L. Stone and H. L. Stone, for appellee.

BURNAM, J. Appellant in this action claims that he was unlawfully dismissed from the detective department of the police force of the city of Louisville, on the 31st day of August, 1896, without notice or trial, by the board of public safety of that city; that he has been ready and willing to discharge the duties of his office ever since; but that he has been wrongfully deprived of the privilege of doing so; and he seeks in this action to recover his salary from the date of the alleged unlawful dismissal until the institution of this suit. Appellee denies the allegations of the petition, and in the third paragraph of its answer alleges that the plaintiff has been employed in other pursuits during the period for which he seeks to recover salary, and that the plaintiff had, for a large part of the time, by his voluntary acts, placed it out of his power to render any service for the appellee as a detective; and by the fourth paragraph it pleads the provisions of section 2882, Ky. St., limiting the time when actions of this character can be brought to six months from the date of the accrual thereof. The law and facts having been submitted to the court on the issues, the court rendered an opinion holding that appellant was entitled to notice of the charges against him, and was entitled to be present and heard at the trial thereof, and that he had been unlawfully dismissed by the police force, but further holding that the plaintiff's action for salary was barred by the limitation of six months fixed by the statute; and, in pursuance to this opinion, judgment was rendered dismissing appellant's petition, from which this appeal is prosecuted.

By the provisions of the act of March 23, 1894, known as the "Metropolitan Police Law," which was an amendment to charters of cities of the first class, the government of the police department and of the police force of the city of Louisville was vested in the board of public safety, who are authorized and empowered by section 2 of that act (which is now section 2874 of the Kentucky Statutes), "to make, adopt and enforce rules, orders and regulations for the government, discipline, administration and disposition of the police department and police force and the members thereof. The board shall have power, and is authorized to adopt rules and regulations for the examination, hearing, investigation and determination of charges made or preferred against members of the said police force, but no member or members of the police force (except as provided in

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

this chapter) shall be fined, reprimanded, removed, suspended or dismissed from the police force, until written charges have been made or preferred against him or them, nor until such charges have been examined, heard and investigated before said board, upon such reasonable notice to the member or members charged, and in such manner of procedure, practice, examination and investigation as the said board of safety may, by rules and regulations, from time to time, prescribe." It will be observed that the only exception in the statute of the necessity of notice and investigation is when a member of the force is voluntarily absent for five consecutive days, or is disabled by mental unsoundness. Section 2882, Ky. St., provides the causes for which stoppages of pay, suspensions, and dismissals from the force may be made, and further provides that "no action, suit or proceeding, either at law or in equity, shall be commenced or maintained against the city, board of public safety, or any member thereof, or against the mayor, or member or members of the general council, by any member or officer, or former member or officer of, or belonging to, the police force or department of said city, to recover or compel the payment of any salary, pay, money or compensation for or on account of any service or duty, or to recover any salary, compensation or moneys, or any part thereof, forfeited, deducted or withheld for any cause, or to restore or re-instate to the police force or department, any member or officer thereof, unless such action, suit or proceeding shall be commenced within six months after such cause of action shall have accrued." It is evident from these provisions of the statute that the board of public safety exceeded their authority when they undertook to remove appellant from his office as policeman in the detective department, without charges, notice, or trial. All the authority given them in this matter is contained in the statute, and they are bound to follow literally the course pointed out therein when they undertake to sit in judgment upon, and discharge, one of the force, and they could not legally render a judgment against him in any other way. We are of the opinion that section 2882, Ky. St., which requires actions of this character to be brought within six months after the cause of action accrues, is in conflict with subsection 5 of section 50 of the constitution, which provides that "the general assembly shall not pass local or special acts concerning any of the following subjects or for any of the following purposes, namely: To regulate the limitation of civil or criminal causes." This provision of characters of cities of the first class, it seems to us, is both local and special, as it applies locally only to cities of the first class, and specially only to members of the police department. The constitution withholds from the general assembly the power to legislate on the subject of or concerning special or local statutes

of limitation, and, in our opinion, the six-months limitation is clearly in conflict with the provision of the constitution on this subject.

But a more serious question for the plaintiff is raised by the general demurrer filed by defendant. There is no allegation in plaintiff's petition that his title to the office in question has been determined in his favor by a competent tribunal, in a direct proceeding instituted for that purpose. This, in our opinion, is a necessary allegation to enable him to maintain this action, as he cannot maintain an action against the city for alleged salary accruing subsequently to his removal if at the time of his removal another person was selected and appointed to fill the office, to whom the salary has been paid, until there has been an adjudication as to plaintiff's right, in a direct proceeding declaring him entitled to the office and his successor a usurper. This question has frequently been the subject of judicial construction. Judge Dillon, in his work on Municipal Corporations (3d Ed., § 831), says: "Where the salary or fees of an office of a municipal or public corporation may, like other debts, be recovered by an action at law against the corporation, this ordinarily is the remedy, and not mandamus; but, if the officer cannot sue the corporation, he may, where entitled, compel payment by means of this writ, unless another is in possession under color of right, in which case the title to the office cannot ordinarily be determined on mandamus or in any collateral proceeding." And in *Selby v. Portland*, 14 Or. 234, 12 Pac. 377, this identical question was carefully considered. That was an action to recover the amount of salary alleged to be due to the plaintiff as chief of police, and for the salaries of five other policemen, which had been assigned to him. The officers had been regularly appointed, and served their time; and, while so serving, the mayor of the city displaced them, and appointed others in their places. The action was brought to recover their respective salaries from the date of their being displaced until the time of the commencement of the action. Judge Thayer, in the opinion rendered in that case, said: "It looks to me very much as though a public confidence was abused in the transaction, and that appellant and his assignors were shamefully trifled with. But it occurs to my mind that they have neglected to take proper steps in the matter, and have lost the remedy they could have invoked successfully. They might have commenced an action in the nature of a quo warranto against the persons designated to succeed them, and been reinstated in their positions. \* \* \* I cannot, however, believe that they can maintain an action therefor while other parties have kept their places, have qualified as policemen, and are recognized as such. 'It seems very evident to me that their right to the office would have to be judicially determined in a proceeding before such action.

It may be said that the action of the mayor and common council in the matter was a flagrant violation of the law and the rights of these officials, but, nevertheless, other persons were nominated in their places, confirmed by the common council, took the oath, and were regularly inducted into their places, and became officers de facto in their stead. The title of the office had to be tried, as preliminary to the right of action for salary. \* \* \* Courts will not entertain a case in favor of a party to recover for the use and occupation of real property against one who is in possession thereof adversely, but remit such person to his remedy by ejectment; and I think there would be less reason for entertaining a case of the character of the one in question than in that referred to. To allow an officer in such a case to remain wholly passive for a number of years, and then bring an action to recover the amount of his salary, which had been all the time accumulating, without attempting to dispossess the incumbent, would result in a pernicious practice, and tend to overturn a well-established rule of law regarding the trial of the right to an office. No precedent for such a course has been furnished. It has long been a mooted question whether the payment of a salary to a de facto incumbent would exonerate the government or political body for the payment thereof to the de jure officer. Numerous authorities have been cited upon both sides of that question, \* \* \* but neither class of cases sanctions the right of the de jure officer to recover the salary while out of possession of the office, until he obtains a determination of a competent tribunal in favor of his title, in a direct proceeding instituted for that purpose." And the court proceeds to recite a large number of cases from the courts of last resort, which it would be unnecessary to refer to here, winding up with the conclusion that "none of the cases referred to indicate that an action to recover the salary of an office could be maintained while occupied by a de facto officer, until the right to the office has been determined by proper adjudication. Such a determination could not properly be had in this case, as it would determine the rights of parties not before the court. It would be a determination that the incumbents who succeeded the appellant and his assignors were intruders and usurpers, when they were not before the court. Upon this ground, the appellant was not entitled to recover, and the circuit court should have dismissed the complaint, instead of trying the case on its merits." This doctrine has been approved in the recent case of *Lee v. Mayor*, etc., in the court of errors and appeals of Delaware, reported in 40 Atl. 663. The reasoning and conclusions of these cases are manifestly sound, and, when applied to this case, prevent the appellant from maintaining this proceeding, if, as a matter of fact, the place from which he has been removed has been filled by a de facto officer, who has con-

tinued to draw the salary from that time. Although there is no case exactly in point on this question, so far as we know, in the adjudications of this court, the uniform practice has been, where there has been a dispute about the title to an office, that this question should be determined before the question of salary could be properly considered. The demurrer should have been sustained. For the reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

### SOUTH COVINGTON & C. ST. RY. CO. v. HERRKLOTZ.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 5, 1898.)

PLEADING—CONTRIBUTORY NEGLIGENCE OF CHILDREN—NEGLECT OF PARENT NOT IMPUTED TO CHILD—MEASURE OF DAMAGES FOR CHILD'S DEATH—NEGLECT OF STREET-RAILROAD COMPANY.

1. An answer denying that any injury was inflicted through the carelessness or negligence, or by the fault of defendant, does not deny the damage or the injury.

2. It is harmless error to sustain demurrer to a plea of contributory negligence where the evidence shows that plaintiff was of such tender years he could not be guilty of contributory negligence.

3. A child of less than four years of age cannot be guilty of contributory negligence.

4. In an action by a young child to recover damages for personal injuries, the negligence of the parent cannot be imputed to the child.

5. A street-railroad company is liable for injuries to a child less than four years old run over by a car where the motorman might, by having his attention on the street in front of the car, have discovered, in time to stop the car, that the child was about to cross the track.

6. Where injuries to a child on a street-car track were caused by the motorman's reversing the car when an ordinarily prudent person would not have done so, the company is liable.

7. Defendant cannot complain of an instruction fixing the measure of damages for injuries to plaintiff, a young child, at a sum equal to the difference between what he will earn after he is 21 years old and what he would have earned after reaching that age but for such injuries.

Appeal from circuit court, Campbell county.

"To be officially reported."

Action by George Adam Herrklotz, Jr., by next friend, against the South Covington & Cincinnati Street-Railway Company to recover damages for personal injuries. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

L. J. Crawford, O. B. Simrall, John Galvin, and Bromwell & Bruce, for appellant. Wright & Anderson, for appellee.

GUFFY, J. It is alleged in the petition in this action that the appellant, by its agents and servants, carelessly and negligently, and without the exercise of ordinary care, ran one

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

of its said cars against plaintiff with great force and violence, so that the wheels thereof passed upon and over his left arm, and thereby said arm was crushed, cut, and mangled, and almost entirely torn from his body, so that it became and was necessary, in order to save his life, to amputate said arm; and upon the same day of the injury his arm was amputated at a point at about two inches below the elbow. It is further alleged that he expended \$103.10 for medical and surgical services. Plaintiff also alleged that by the loss of said arm he had been permanently disabled for life, and thereby injured and damaged in the sum of \$10,000, and prayed judgment for the sum of \$10,103.10. It is further alleged in the petition that the plaintiff is four years old.

The first paragraph of the answer is a denial of all negligence upon the part of appellant. The second paragraph pleads contributory negligence on the part of plaintiff, and upon the part of his parents, and also contains an averment tending to show that it used all means reasonably within its power to prevent the accident, after it saw the danger of appellee; to which second paragraph a demurrer of the plaintiff was filed and sustained with leave to amend. Thereupon appellant filed an amended answer, which more specifically pleaded the negligence of the appellee, and that of his parents, to which a demurrer was also sustained. Thereupon appellant filed the second amended pleading, consisting of two paragraphs, the first of which pleaded negligence, setting up wherein it consisted, of the parents, and the second pleaded contributory negligence of the appellee; to which plaintiff's demurrer was sustained. A jury trial resulted in a verdict and judgment in favor of appellee for \$2,500, and, appellant's motion for a new trial having been overruled, it prosecutes this appeal. The first grounds for a new trial contain fifteen separate reasons or grounds, and the additional grounds consist of eight separate reasons or grounds for a new trial, some of which, however, are the same in substance as those embraced in the first grounds.

We deem it unnecessary to recite in detail the several grounds relied on, many of which are not seriously contended for in appellant's brief. It is immaterial whether appellant's motion to strike out the \$103.10 for medical services was properly overruled or not, as no proof was directed to that question, and the jury were not authorized by the instructions to find anything on that account, nor do we think that the court erred to the prejudice of appellant's substantial rights in the examination and formation of the jury. We think the evidence in the case entitled plaintiff to have the case submitted to a jury, and we cannot say that the verdict is excessive, or flagrantly against the evidence. It is insisted, however, by appellant, that there was no evidence given by any witness showing that amputation of the arm was necessary, or in

fact that it had been amputated, nor any evidence showing affirmatively any damage that plaintiff had sustained. It, however, seems to us that the answer fails to deny either the amputation, or the damage, or the injury. The answer, when properly construed, is a denial that any injury was inflicted through the carelessness or negligence, or by the fault of appellant. That being true, and taken in connection with what evidence was presented, we think sufficient to authorize the jury to reach the conclusion that the injury complained of had been inflicted upon the plaintiff, and the facts and circumstances in the case were sufficient to authorize the jury to find that plaintiff had been damaged to the extent of \$2,500.

It is also insisted for appellant that the proof showed that appellant was not at fault, and that it could not, with ordinary care, have avoided the injury. But it seems clear to us that some of the testimony conduces to show want of proper care, and it was the province of the jury to determine from all the facts the question of negligence.

Appellant also complains of error of the court in sustaining the demurrers to the several amended answers, and suggests that the negligence of the appellee should have been taken into consideration; or, in other words, that the court erred in sustaining the demurrer to the answer so far as it pleaded contributory negligence on the part of the infant. If there had been a sufficient denial of the age of the infant, followed by any sort of conflict of testimony as to his age, the contention of appellant as to this question would have to be sustained. But if we concede that the age of the plaintiff was denied by the answer, yet, if the uncontradicted testimony showed him to have been of such tender years that he could not be guilty of contributory negligence, it then follows that the error, if error it was, complained of, was in no sense prejudicial to the substantial rights of the appellant. It is the contention of appellee that a child of less than four years of age—and the uncontradicted proof shows plaintiff to have been less than four years old at the time of the injury—cannot be guilty of negligence, and that as a matter of law the court should so hold. We have been referred to the case of *Canal Co. v. Murphy's Adm'r*, 9 Bush, 52, as bearing upon this question. In that case the injured party was a child of about five years of age. In discussing the question involved in the case, the court used this language on page 530: "The child, by reason of its tender years, cannot be said to be guilty of any negligence. She was non sui juris, and her conduct, if negligent, must be regarded as the negligence of the parents, and not that of the infant." In *Railroad Co. v. Hanlon*, 53 Ala. 81, the supreme court of Alabama quotes with approval the following: "And while there is some conflict in the authorities, it seems to us that it should be regarded as settled by the weight of authority

in this country that when a child of tender years to whom judgment and discretion cannot be imputed, but who is presumed incapable of their exercise, is injured by the negligence of an adult, that contributory negligence shall not be considered as available in defense of his rights to redress. Whart. Neg. §§ 309, 310." In *Iron Co. v. Brawley*, 83 Ala. 374, 3 South. 556, the court said: "A child between 7 and 14 years of age is *prima facie* incapable of exercising judgment and discretion, but evidence may be received to show capacity. If capacity be shown, the general rule of contributory negligence is applicable, whether the action is prosecuted on behalf and for the benefit of the child, or by the father for his own benefit. \* \* \* The proof shows that the child was a few months over seven years of age, but there was no evidence tending to show the requisite capacity. In such case the presumption of incapacity prevails." In *Westbrook v. Railroad Co.*, 66 Miss. 560, 6 South. 321, we quote from the syllabus: "An infant four or five years old, in an action brought on his own behalf, is not, as a matter of law, to be charged with contributory negligence because of failure to exercise reasonable care to avoid injury. A child of such age is *prima facie* exempt from responsibility; but, if he is of exceptional maturity or capacity, this fact must be properly pleaded, in order to charge him with contributory negligence; and then testimony is admissible to show his ability for taking care of himself, and the question of capacity is one of fact for the jury, and not one of law for the court to decide." In the case of *Stone v. Railroad Co.*, 115 N. Y. 104, 21 N. E. 712, the court said, in substance: In administering civil remedies the law does not fix any arbitrary period when an infant becomes sui juris. When the inquiry is material, it becomes a question of fact for the jury, unless the child is of so very tender years that the court can safely decide. In the case of *Nagle v. Railroad Co.*, 88 Pa. St. 39, the court, in discussing the question under consideration, said: "At what age, then, shall an infant's responsibility be presumed to commence? This question cannot be answered by referring it to the jury. That would furnish us with no rule whatever. It would give us a mere shifting standard, affected by the sympathies or prejudices of the jury in each particular case. One jury would fix the period of responsibility at fourteen, another at twenty or twenty-one. This is not a question of fact for the jury. It is a question of law for the court. Nor is its solution difficult." In view of the foregoing authorities, as well as upon sound reason and principle, we conclude that the court did not err in sustaining the demurrer to the plea of contributory negligence upon the part of plaintiff; and it also follows that the court did not err in refusing the various instructions offered by appellant, submitting to the jury the question of contributory negligence upon the part of plaintiff.

It is further insisted by appellant that the court erred in sustaining the demurrer to the plea of contributory negligence upon the part of the parents, and also in refusing the several instructions offered on that subject. It is said in the briefs in this case that the question as to whether the negligence of the parent can be imputed to the child in suits to recover on its own behalf for injuries has never been directly decided by this court, and we have not been referred to any decision of this court that does expressly decide the question in dispute. It may be conceded that quite a number of the courts of last resort have decided that in actions by infants to recover for injuries sustained by them the negligence of the parent can be imputed to the child, and its recovery thereby defeated. So far as we are advised, this doctrine was first announced by the supreme court of New York in *Hartfield v. Roper*, 21 Wend. 615. This court, however, was not the court of last resort in the state of New York; the court of last resort in New York being styled the court of appeals. But it is true that the court of appeals of New York has followed the doctrine announced in the case *supra*, and the same has been followed in Massachusetts and a number of other states; but it seems to us that it is not consistent with reason nor the principles of equity. To say that an infant incapable of controlling its own actions, or judging of what is proper, prudent, or right, should be deprived of the right to recover for injuries inflicted upon it through the negligence of others simply because its parent or custodian had failed to discharge the duty resting upon him seems to us absurd, and opposed to natural justice. It will also be found that many of the courts of last resort have repeatedly repudiated the doctrine announced in *Hartfield v. Roper*. We quote as follows from Bish. Noncont. Law, §§ 581-583, inclusive:

"581. There is a doctrine prevailing in a part of our States—possibly also in England, but the question there is not free from doubt—to the effect that, where a young child is in the care of an older person, particularly the parent, the negligence of this person shall be imputed to him, as his contributory negligence, in his suit to recover compensation for an injury inflicted by a third person. The one in whose care he is, it was said in an early case on the subject, 'is keeper and agent for this purpose; and, in respect to third persons, his act must be deemed that of the infant, his neglect the infant's neglect,'—reasoning which, we have just had occasion to see, is not sound in law. On the other hand—

"582. Looking into the reasoning of the law, we discover that it does not sustain this doctrine. The doctrine is a new one, brought forward long after the system of the common law, with its many principles, had become consolidated. And in this system, unlike some former systems wherein the child was



treated substantially as the father's chattel, having few or no rights separately its own, the minor, from the first drawing of the infantile breath, is invested with all those rights of an adult which can give him anything, and protected simply by such disabilities as can protect, yet by none which are capable of working him harm. Now, this new doctrine of imputed negligence, whereby the minor loses his suit, not only where he is negligent himself, but where his father, grandmother, or mother's maid is negligent, is as flatly in conflict with the established system of the common law as anything possible to be suggested. The law never took away a child's property because his father was poor, or shiftless, or a scoundrel, or because anybody who could be made to respond to a suit for damages was a negligent custodian of it. But by the new doctrine, after a child has suffered damages, which, confessedly, are as much his own as an estate conferred upon him by gift, and which he is entitled to obtain out of any one of several defendants who may have contributed to them, he cannot have them if his father, grandmother, or mother's maid happens to be the one making a contribution. In these and other respects, it is submitted, the established principles stated in a preceding section are conclusive of the proposition that the doctrine now in contemplation does not belong to the common law. And—

"583. Though the erroneous doctrine is upheld by courts as respectable as any among us, the contrary and sounder view is sustained by courts not less respectable, as well as by the law's established reasons. To enter upon a count of the states on the respective sides of this question would be to resort to the lowest kind of argumentation ever found in a law book; yet, even from this sort of reasoning, it is believed the doctrine which refuses to impute a parent's sin of negligence to the child would not suffer."

It is said in 2 Thomp. Neg. p. 1185, § 85: "The harshness of the rule is very much modified in its application in several states which profess to follow it. Thus, in Maryland it is held that a child non sui juris will not be prevented from recovering in consequence of the negligence of his parents if the jury find that the consequences of such negligence could have been avoided by the exercise of ordinary care or prudence on the part of the defendant." A similar remark is also made in regard to California. The supreme court of Alabama, in *Railroad Co. v. Hanlon*, 53 Ala. 82, in discussing this question, said: "The parent is entitled to the custody of the child, and the law demands from him care and maintenance, and protection commensurate with his ability and the child's wants. But we know of no principle of law which will justify a denial of those legal rights because of the failure of the parents to extend to him the protection which the law demands. When the parents fail in

this duty there would seem to be greater reason for extending to the child a higher degree of civil protection. It is certain that under the law of this state the parent cannot, by any act or omission, impair any right of property which the child may have. When the child sues to recover damage for a personal injury, the father cannot dismiss, release, or compromise the suit. \* \* \* It seems repulsive to our sense of justice that because the parent is negligent of his child, others may, with impunity, be equally negligent of its helplessness, and equally indifferent to its necessities. The law may not compel active charity for relief of the child, but it does shield him from positive wrong by neglect. Without inquiring, therefore, whether negligence can be imputed to the parents of the plaintiff because they permitted him to go into a crowded street of a populous city, unattended except by a brother incapable of protecting him, we do hold that, if it were negligence, it cannot be charged to the plaintiff, or affect his right of recovery in this case." The same court, in the case of *Iron Co. v. Brawley*, 83 Ala. 374, 3 South. 555, reaffirmed the doctrine announced in the case supra. The court, in the latter case, said: "If the plaintiff is of such tender years that he is conclusively presumed incapable of judgment and discretion, and of owing a duty to another, neither contributory negligence on his part nor that of the parent can be set up to defeat a recovery." The supreme court of Vermont, in *Robinson v. Cone*, 22 Vt. 224, speaking through Judge Redfield, said: "And we are satisfied that although a child, or idiot, or lunatic may, to some extent, have escaped into the highway through the fault or negligence of his keeper, and so be improperly there, yet, if he is hurt by the negligence of the defendant, he is not precluded from his redress. \* \* \* We have not felt bound to go into an extended review of the case of *Hartfield v. Roper*, 21 Wend. 615, for the facts in that case and the finding of the jury in this case have so wide a difference in the two cases that one is no guide to a determination of the other. The case of *Hartfield v. Roper* is, so far as it has any application to the present case, altogether at variance with that of *Lynch v. Nurdin*, 41 E. C. L. 422, and far less sound in its principles, and infinitely less satisfactory to the instinctive sense of reason and justice." The supreme court of Texas, in *Telegraph Co. v. Hoffman*, 80 Tex. 424, 15 S. W. 1048, expressly decided that the negligence of parents cannot be interposed as a defense brought for the benefit of a minor child. The supreme court of appeals of Virginia, in the case of *Railroad Co. v. Groseclose's Adm'r* (opinion delivered July 16, 1891) 88 Va. 267, 13 S. E. 454, discussed at considerable length the question under consideration. In that opinion the court said: "When the suit is by a parent for the loss of service caused by an injury to the child, the contributory negli-

gence of the plaintiff is a good defense; but such negligence is not imputable to the child, and is, consequently, not to be considered, when the suit is by the child, or his personal representative [quoting several authorities]. The doctrine of *Hartfield v. Roper*, 21 Wend. 615, has been repudiated in this state, as in many other states of the Union, and the doctrine established as just stated [quoting numerous authorities]. \* \* \* Of course, it is essential to the recovery in any case that negligence on the part of the defendant be shown. But when that is proven in a suit by the child, the parent's negligence is no defense, because it is regarded not as a proximate, but as a remote, cause of the injury. And the reason lies in the irresponsibility of the child, who, itself, being incapable of negligence, cannot authorize it in another. It is not correct to say that the parent is an agent of the child, for the latter cannot appoint an agent. The law confides the care and custody of a child non sui juris to the parent; but, if this duty be not performed, the fault is the parent's, not the child's. There is no principle, then, in our opinion, upon which the fault of the parent can be imputed to the child. To do so is to deny to the child the protection of the law." The supreme court of Mississippi, in *Westbrook v. Railroad Co.*, 66 Miss. 560, 6 South. 321, in a well-considered opinion held that the negligence of the parent or custodian of a child cannot defeat a recovery for injury sustained by the child. The court said: "It is the duty of the parent to guard and protect his infant child from danger, and this duty is more imperative in proportion to the weakness and incapacity of the child. Failure of the parent to discharge such duty is negligence, and, if such negligence contributes directly or essentially to the child being injured, the parent is a concurrent wrongdoer with the party inflicting the injury, and his negligence, with the exceptions above stated, would be a bar to his own suit. But when the action is brought, as in this case, which was brought by the infant, and for his benefit, the better rule is that the negligence or misconduct of the parent or custodian of the child shall not be imputed to the child [quoting *Beach*, *Contrib. Neg.* § 43, and authorities there cited]. To charge the child with the negligence of the parent or custodian in such case would be, as said by the supreme court of New York in *Lannen v. Gaallight Co.*, 46 Barb. 264, 'to visit the sins of the father on the child to an extent not contemplated by the Decalogue, or in the more imperfect digest of human law.' Infants have legal rights distinct from the parents, which are carefully protected by law; and among these is the right to secure it from personal injuries caused by the negligence or willful wrong of others. Indeed, it seems that the negligence or dereliction of the parents or custodian of the child, instead of being a justification to others to use or misuse the child, should have the contrary

effect, both in law and in morals." The supreme court of North Carolina, in *Bottoms v. Railroad Co.*, 114 N. C. 609, 19 S. E. 730, in a lengthy and well-considered opinion, reviews the authorities upon this question, and entirely repudiates the doctrine announced in *Hartfield v. Roper*, 21 Wend. 615. We quote as follows from the syllabus: "An infant 22 months old is incapable of contributory negligence so as to relieve a railroad from liability for the negligent act of its employes. The negligence of the parent or guardian in allowing a child of tender years to stray or wander on a railroad track cannot be imputed to such child, so as to relieve the railroad company from responsibility for the negligence of its employes in an action brought by or on behalf of the child." The supreme court of New Jersey, in *Newman v. Railroad Co.*, 52 N. J. Law, 446, 19 Atl. 1102, decided that an infant of tender years is not to be charged with the negligence of the person having it in charge. Chief Justice Beasley delivered the opinion of the court, and, after referring to the case of *Hartfield v. Roper*, said: "In fact, this doctrine of the imputability of the misfeasance of the keeper of a child to the child itself is deemed to be a pure interpolation into the law, for, until the case under criticism, it was absolutely unknown; nor is it sustained by legal analogies. Infants have always been the particular objects of the favor and protection of the law. In the language of an ancient authority this doctrine is thus expressed: 'The common principle is that an infant, in all things which sound in his benefit, shall have favor and preferment in law as well as another man, but shall not be prejudiced by anything in his disadvantage.' 9 Vin. Abr. 374. And it would appear to be plain that nothing could be more to the prejudice of an infant than to convert, by construction of law, the connection between himself and his custodian into an agency to which the harsh rule of respondeat superior should be applicable. The answerableness of the principal for the authorized acts of his agent is not so much the dictate of natural justice as of public policy, and has arisen, with some propriety, from the circumstances that the creation of the agency is a voluntary act, and that it can be controlled and ended at the will of its creator. But in the relationship between the infant and its keeper all these decisive characteristics are wholly wanting. The law imposes the keeper upon the child, who, of course, can neither control nor remove him; and the injustice, therefore, of making the latter responsible, in any measure whatever, for the torts of the former, would seem to be quite evident. Such subjectivity would be hostile, in every respect, to the natural rights of the infant, and, consequently, cannot, with any show of reason, be introduced into that provision which both necessity and law establish for his protection. Nor can it be said that its existence

is necessary to give just enforcement to the rights of others. When it happens that both the infant and its custodian have been injured by the co-operative negligence of such custodian and a third party, it seems reasonable, at least in some degree, that the latter should be enabled to say to the custodian, 'You and I, by our common carelessness, have done this wrong, and therefore neither can look to the other for redress;' but when such wrongdoer says to the infant, 'Your guardian and I, by our joint misconduct, have brought this loss upon you, consequently you have no right of action against me, but you must look for indemnification to your guardian alone,' a proposition is stated that appears to be without any basis, either in good sense or law. The conversion of the infant, who is entirely free from fault, into a wrongdoer, by imputation, is a logical contrivance, uncongenial with the spirit of jurisprudence. The sensible and legal doctrine is this: An infant of tender years cannot be charged with negligence; nor can he be so charged with the commission of such fault by substitution, for he is incapable of appointing an agent; the consequence being that he can, in no case, be considered to be the blamable cause, either in whole or in part, of his own injury. There is no injustice nor hardship in requiring all wrongdoers to be answerable to a person who is incapable either of self-protection or of being a participator in their misfeasance. Nor is it to be overlooked that the theory here repudiated, if it should be adopted, would go the length of making an infant in its nurse's arms answerable for all the negligences of such nurse while thus employed in its service. Every person so damaged by the careless custodian would be entitled to his action against the infant. If the neglects of the guardian are to be regarded as the neglects of the infant, as was asserted in the New York decision, it would, from logical necessity, follow that the infant must indemnify those who should be harmed by such neglects. That such a doctrine has never prevailed is conclusively shown by the fact that in the reports there is no indication that such a suit has ever been brought. It has already been observed that judicial opinion touching the subject just discussed is in a state of direct antagonism, and it would, therefore, serve no useful purpose to refer to any of them. It is sufficient to say that the leading text writers have concluded that the weight of such authority is adverse to the doctrine that an infant can become, in any wise, a tortfeasor by imputation. 1 Shear. & R. Neg. § 75; Whart. Neg. § 311; 2 Wood, Ry. Law, p. 1284. In our opinion, the weight of reason is in the same scale. It remains to add that we do not think the damages so excessive as to place the verdict under judicial control." In *Railway Co. v. Gravitt*, 93 Ga. 369, 20 S. E. 550, the supreme court of Georgia considered and reviewed the authorities bearing upon the question, and decided

that the negligence of the parent could not be imputed to the child. This case was decided at the October term, 1893, opinion being delivered by Justice Lumpkin. The opinion is an instructive and exhaustive review of the entire question, covering more than 40 pages in the report. The great length precludes an attempt to publish extracts sufficiently copious to do justice to the opinion.

We are clearly of the opinion that the negligence, if any, on the part of the parents of the plaintiff cannot be imputed to the plaintiff when it is shown with the view of defeating or lessening the recovery. It therefore follows that all the instructions offered by the appellant submitting any such question to the jury were properly refused, and so many as were offered by appellant, correctly presenting the law of the case, were, in substance, embraced and covered by the instructions given by the court upon its own motion, which are as follows: "(1) If the jury believe from the evidence that the plaintiff, Adam Herrklotz, by his manner of starting to cross the street indicated an unconsciousness of the car, or an intention to cross in front of it, and that the motorman saw, or by having his attention on the street in front of his car might have seen, Adam so start, or so crossing, in time to have stopped the car with the appliances on it, and avoided running over him; or so believe that the motorman, when he saw, or was warned of Adam's peril, not only stopped the car, but reversed it, and that it was by reason of so reversing the car that Adam was run over, and that an ordinarily prudent person would not, with the knowledge of the circumstance then possessed by the motorman, have reversed the car,—they will find for the plaintiff; otherwise they will find for the defendant. (2) The court instructs the jury that if they find for the plaintiff, the measure of damages is a sum of money equal to the difference between what plaintiff will earn after he is 21 years old and what he would have earned after his arrival at said age had he not received the injuries described in the proof, not exceeding, however, ten thousand dollars."

Perceiving no error to the prejudice of appellant's substantial rights, the judgment appealed from is, therefore, affirmed.

#### CLIFT et ux. v. NEWELL.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 4, 1893.)  
PLEADING—IMPROPER DESIGNATION OF DEFENDANT AS GUARDIAN.

A petition which states a cause of action against defendant individually is good, though he is improperly designated in the caption as guardian.

Appeal from circuit court, Mason county.  
"To be officially reported."

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Action by C. B. Clift and Letitia Clift, his wife, against William R. Newell, guardian of Letitia Clift. Judgment for defendant, and plaintiffs appeal. Reversed.

E. L. Worthington and A. A. Wadsworth, for appellants. Cochran & Son, for appellee.

LEWIS, C. J. By the will of Robert H. Newell, probated in 1865, he devised specifically to each of his four sons and one daughter real property, valued by him at \$1,000, giving to his executors the power to manage and control such property during the minority of each of them, and generally all his other property. But by a codicil he provided that when each of his children arrived of age, and received his or her portion of his estate, the special devise of real estate should be valued by three disinterested persons, chosen by his executors or appointed by the court; and if their valuation differed from his, and would make such child's portion unequal, the amount of such inequality was to be made up or deducted from such one thus arriving at age and receiving his or her portion, and so on until each child arrived of age and until a final distribution was made. It was also provided his children should be in charge of his executors, who were in terms appointed their testamentary guardians during their minority in connection with their executorship of his will. Charles B. Coons and his widow, Eliza Jane Newell, were appointed executors, but no bond was required of them. Subsequently, the widow having died, John A. Nelson was appointed sole administrator with the will annexed. But in 1874, W. R. Newell was appointed administrator with the will annexed, Nelson having resigned or been displaced, and assumed the sole control of the estate and duty of executing the will. In 1893, Letitia N. Clift, daughter and devisee of Robert H. Newell, united with her husband, C. B. Clift, brought this action against W. R. Newell to recover the following sums: (1) \$1,400, which she alleged in her petition W. R. Newell, as administrator with the will annexed, illegally took from her portion of the estate, and paid over to her brother Simon Newell, without any previous valuation by appraisers selected or appointed as provided in the will, which is filed as an exhibit of the petition; (2) \$2,000, alleged amount of rents of her portion of the estate collected by him during her infancy and unaccounted for; (3) \$600 devised to her by her mother, Eliza Jane Newell, and collected by him and unaccounted for,—it being alleged in the petition that, although he was not appointed administrator with the will annexed of his and her mother's estate, he took possession of and controlled it, as if administrator duly appointed and qualified. There is filed with the petition, as an exhibit, a copy of a settlement with the county court of the accounts and transactions of W. R. Newell, administrator with the will annexed of Robert H. Newell. By that settlement he is credited with the \$1,400 sued for, but to that ex-

tent appellant seeks to have said settlement surcharged and corrected. But in said settlement he is charged with the \$2,000 sued for. To the petition a general demurrer was filed, and from the judgment sustaining the demurrer and dismissing the action this appeal is prosecuted.

The only ground for that demurrer suggested by counsel is that, as appears alone from the caption, this action was brought against appellee as guardian, when in fact he was not, as appears from the petition and exhibits, her guardian. That caption is in form as follows: "C. B. Clift and Letitia Clift, His Wife, Plaintiffs, against Wm. R. Newell, Guardian of Letitia Clift, Defendant. Pet. in Equity." Waiving the question whether, when he qualified as administrator with the will annexed, he became simultaneously, without so qualifying, testamentary guardian of appellant, it is unquestionably true, according to the allegations of the petition, that he did, in virtue of his office as administrator, take possession and control during her infancy of the estate devised to her, and therefore became accountable to her for the amount that went into his hands. This, however, is not an action on a guardian's bond, for he never executed one, nor on his bond as administrator, for he was not required to execute one, whereby the rights of third parties as sureties would be involved, but the facts, as stated, constitute a cause of action against him individually; and being summoned, and having notice of such cause of action, it is immaterial that he is designated in the caption as guardian. The ground, and only ground, of a general demurrer to a petition, is that it does not state facts sufficient to constitute a cause of action against the defendant. In this case the facts stated do constitute, *prima facie*, three distinct causes of action, properly united in one petition, against appellee individually, and it was error to sustain the demurrer. Wherefore the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

#### BROOKS et al. v. TROUTMAN.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 4, 1898.)<sup>2</sup>  
GUARDIAN AND WARD—LIFE ESTATE OF GUARDIAN—LIMITATION OF ACTION.

1. Where land in which a guardian had a life estate, remainder to his wards, was sold in an action brought by the guardian, who executed the bond required by statute, and the proceeds were paid to him without any order of court as to their disposition, no right of action accrued to the wards, and limitation did not run in favor of the surety in the bond, during the life of the guardian, he being entitled to the use of the proceeds for life.

2. The guardian having made an assignment for the benefit of creditors, and in an action to settle the assigned estate a certain amount

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

<sup>2</sup> For opinion on petition for rehearing, see 47 S. W. 877.

having been paid to the wards, subject to the guardian's life estate, it was error to render judgment against the surety in the guardian's bond for the full amount of the balance, without deducting the value of the guardian's life estate.

Appeal from circuit court, Bullitt county.  
"To be officially reported."

Action by O. F. Troutman, trustee of Emma Brooks, against S. N. Brooks and others, on a guardian's bond. Judgment for plaintiff, and defendants appeal. Reversed.

Jno. S. Jackman, for appellants. Chas. Carroll, for appellee.

**PAYNTER, J.** As guardian of three of his infant children, W. B. M. Brooks instituted a suit to sell certain real estate owned by himself and his wards. He was entitled to the use of the land during his life as tenant by the curtesy, and his wards owned the interest in remainder. A judgment was rendered in 1868, directing the land to be sold; but, before entering it, the court required the guardian to execute a bond, the terms of which were as required by the provisions of the Revised Statutes. The court did not make an order as to what disposition should be made of the proceeds of the sale at that time, nor did it do so until 1895. The money was held by the guardian subject to the order of the court. One of the infant children of W. B. M. Brooks died, and the two remaining wards, Emma and Anna, inherited that interest; and the proceeds of the sale, subject to the father's use during his life, belonged to them. The land sold for \$5,511.82, one-half of which being \$2,755.91. W. B. M. Brooks made an assignment for the benefit of his creditors; and, in the action to settle the trust estate, there was paid to the trustee of the children of Emma (she having married and died) \$1,660.30, to be held subject to his life estate.

This action was instituted by the trustee of the children of Emma King (née Brooks) to recover of the representatives of the surety (he being dead), on the bond which the guardian had given, the sum of \$1,095.60, the balance alleged to be due on account of the sale of the real estate. Emma, the mother of the children for whose benefit this suit was prosecuted, became 21 in July, 1873, married in October, 1882, and died in July, 1890. It is therefore claimed that her cause of action accrued when she arrived at the age of 21. This contention is based upon the idea that this money should have been paid to her on her arrival at that age, and that, therefore, the cause of action then accrued. It is true, the petition did not describe specifically the father's interest in the land; yet it substantially alleges that the land belonged to him and his wards. The court did not in its order declare what were the respective rights of the father and his children in the land, or in the proceeds of its sale.

We are of the opinion that there was nothing

in that proceeding which deprived the father of his right to the use of the land or its proceeds during his life. The court did not make an order as to the disposition of the fund, and, until the guardian disobeyed the order of the court with reference to the disposition of that fund, no cause of action accrued to the wards, even to have the money reinvested or held so as to secure to them its payment on his death.

We are of the opinion that no cause of action accrued to the mother of the children for whose benefit this action was prosecuted and therefore the statute of limitation did not begin to run. The court gave judgment for the sum of \$1,095.60, against the representatives of the surety in the bond. It was (in part), in effect, giving judgment against the surety in the bond, in favor of the principal, for the principal's default. The principal in the bond was entitled to the use of the money during his life, and the trustee of the children was not entitled to recover any interest which their father had in the fund. From the facts as they appear, the court should have ascertained the value of W. B. M. Brooks' life estate in the fund, and have deducted that from the amount for which judgment was given. W. B. M. Brooks was also entitled to the use of the \$1,660.30 which seems to be in the hands of the trustee of the children. If the trustee of the children still holds that fund, then the value of W. B. M. Brooks' life estate in the \$2,755.91 should be ascertained, and deducted from the amount which the plaintiff seeks to recover in this case. The condition of the \$1,660.30 fund will have to be made to appear by appropriate pleadings before the court would know the exact amount which should be credited in this proceeding, by reason of W. B. M. Brooks' interest in that part of the fund. The judgment is reversed for proceedings consistent with this opinion.

#### WATERS-PIERCE OIL CO. v. McELROY et al.<sup>1</sup>

(Court of Civil Appeals of Texas. June 15, 1898.)

##### CITY ORDINANCE—VALIDITY.

San Antonio Charter, § 103 (Sp. Laws 1885, p. 11), authorizing the passage of ordinances necessary for the trade, commerce, health, and good government of the city, not contrary to the constitution, does not authorize the passage of an ordinance requiring vendors of illuminating fluids to pay the city oil inspector fees for inspecting such fluids.

Appeal from district court, Bexar county: J. L. Camp, Judge.

Action by the Waters-Pierce Oil Company against George S. McElroy and others to enjoin the prosecution of certain suits against plaintiff and to vacate a city ordinance. There

<sup>1</sup> Writ of error denied by supreme court.

was a judgment declaring the ordinance valid, and enjoining the prosecution of some of the suits, and plaintiff appeals. Reversed in part.

Lane & Hicks, for appellant. Stayton & Berry and B. F. Baugh, for appellees.

NEILL, J. This suit was brought on June 21, 1897, by appellant, the Waters-Pierce Oil Company, against the appellees, the city of San Antonio and George S. McElroy, to vacate and have declared void the ordinance passed by the council of the city of San Antonio set out in our conclusions of fact; to enjoin and restrain the appellee McElroy from prosecuting separate suits against appellant upon claims which he then had or might have thereafter under said ordinance against appellant by virtue of inspecting its illuminating fluids of which petroleum formed a part, sold and offered for sale by appellant in the city of San Antonio; to restrain said appellee from further prosecuting the suits mentioned in our fifth conclusion of fact, pending in the justice court of precinct No. 1 of Bexar county, Tex., against appellant, for inspection fees claimed to be due said appellee by virtue of said ordinance; and to enjoin said appellee from instituting in future suits for fees claimed by him under said ordinance for an amount less than the whole of the amount claimed by him as an inspector against appellant at the time of the institution of such suit; and for damages. A temporary writ of injunction was issued as prayed for, which was afterwards, on the 21st day of June, 1897, so modified as to allow appellee G. S. McElroy to proceed in the prosecution of the two suits in the justice's court. No answer was filed in the case by the city of San Antonio. The appellee George S. McElroy, after admitting the passage of the ordinance and his appointment and qualification as inspector thereunder, answered that, by reason of his appointment of oil inspector under said ordinance, authorizing and requiring the inspection of illuminating fluid offered for sale and intended for sale in the city of San Antonio, there were due him for inspecting illuminating fluid of appellant, by virtue of said ordinance, fees from appellant amounting in the aggregate to \$500, for which amount, with interest, he prayed judgment against appellant. The case was tried by the court without a jury, and a temporary writ of injunction, as modified by order of June 23, 1897, was perpetuated, and the appellee George S. McElroy was enjoined from bringing any suit for fees under the ordinance of the city of San Antonio regulating the inspection of illuminating fluids of which petroleum formed a part against appellant for a less sum than the full amount of fees claimed to be due at the time said suit may be filed. The ordinance mentioned in our conclusions of fact was decreed valid in all its parts, and judgment was rendered in favor of the appellee George S. McElroy on his cross action

against the appellant, Waters-Pierce Oil Company, for the sum of \$560. All costs of the suit up to the time George S. McElroy filed his cross action were adjudged against him. The appellant has appealed from the judgment holding the ordinance valid, and from the judgment in favor of McElroy on his cross action.

#### Conclusions of Fact.

(1) The appellant, the Waters-Pierce Oil Company, is a private corporation, organized under the laws of the state of Missouri, and has a permit from the state of Texas to transact its business in said state. Louis Fries is the agent of said corporation in the city of San Antonio, Tex. Appellant is, and has for a long time been, engaged, in the city of San Antonio, Tex., in the business of selling illuminating fluids of which petroleum forms a part, and sells and offers for sale annually in said city 432,857 gallons of illuminating fluids of which petroleum forms a part, which fluids are shipped to San Antonio from the state of Missouri in tank cars, each containing about 6,000 gallons. After the arrival of the fluid in San Antonio, it is transferred to storage tanks containing from 7,000 to 8,000 gallons each, and, as it is needed for trade, is drawn from storage tanks to a tank wagon, and also into barrels, cases, cans, and other packages, and sold and offered for sale daily to various merchant consumers in said city in quantities varying from 5 to 150 gallons. The illuminating fluid so sold and offered for sale in said city by appellant is above the test of 110 deg. Fahrenheit, fire test, so far as the same has been tested by appellee George S. McElroy, and all of it was inspected before shipment to Texas by the oil inspector of the state of Missouri. About one-third of the illuminating fluid which appellant brings to San Antonio, and offers for sale, is purchased by merchants doing business in towns in Southwest Texas, and, while the same is offered for sale by appellant in San Antonio, it is sold to people living outside of the city, and is not used or consumed by residents of said city.

(2) The city of San Antonio, a municipal corporation incorporated by special act of the legislature of Texas, on the 12th day of October, 1896, by its common council, passed and published the following ordinance:

"An ordinance regulating the storage and sale of illuminating fluids, creating the office of city oil inspector, defining the duties and fees of said office and providing for the appointment of an incumbent and repealing sections one, two, three, four and five of chapter twenty-seven of the Revised Criminal Ordinances of the City of San Antonio.

"Be it ordained by the city council of the city of San Antonio, as follows:

"Section 1. Not more than 100 gallons of illuminating fluid shall at any one time be kept in a room or contiguous rooms occupied

by one person, firm or corporation within the outer fire limits of the city except in an entirely fire-proof vault situated apart from other buildings.

"Sec. 2. No illuminating fluid in which petroleum forms a part shall be sold or offered for sale in this city unless it is first inspected in this city by the city oil inspector herein-after provided for, and when the fire point is below one hundred and ten degrees Fahrenheit the vendor shall conspicuously attach to each and every bottle, can or vessel in which such illuminating fluid is conveyed from him, her or it, a label having printed or plainly written thereon in English the words, 'Highly Explosive,' and the name of vendor and his or its place of business.

"Sec. 3. That the office of city oil inspector be and the same is hereby created.

"Sec. 4. A chemist competent to make the inspection herein provided for and residing and having an office in this city shall be appointed by the mayor as city oil inspector, subject to removal by the city council, and whose duty it shall be to inspect all illuminating fluids coming under this ordinance, and he may demand as fees of office to be paid by those whose illuminating fluids are inspected under the provisions of this chapter not exceeding fifty cents for the first 100 or less gallons, and twenty-five cents for each additional 100 or fraction thereof, provided that the fee for inspection of car, tank or vessel shall in no case exceed ten dollars for one tank or vessel, and it shall be his duty to furnish certificates of the fire point of the same.

"Sec. 5. The inspector shall inspect any illuminating fluid suspected by him of being sold in violation of this ordinance and shall make complaint of all violations of the same to the recorder.

"Sec. 6. Any person or persons violating any provision of this ordinance shall upon conviction thereof before the recorder be fined not less than ten dollars and not more than one hundred dollars for each and every violation.

"Sec. 7. Where any person, firm or corporation shall violate any provision of this ordinance, any and every officer of such corporation, partner of such firm or agent or servant of such corporation, firm or person who may in any manner act, assist or be concerned in such violation shall be guilty of an offense and shall be fined as hereinbefore provided.

"Sec. 8. That sections one, two, three, four and five of chapter twenty-seven of the Revised Criminal Ordinances of the City of San Antonio be and the same are hereby repealed."

(3) By virtue of said ordinance the appellee George S. McElroy was by the mayor appointed city oil inspector, and his appointment was duly confirmed by the council in 1896, when he qualified as such officer, when he commenced to act as such and has continued acting in such capacity ever since. All inspections and demands for fees made

by said appellee for inspections of illuminating fluid of appellant have been made by virtue of said ordinance. He has inspected illuminating fluid of appellant in the manner hereinafter set out on the different days and dates as claimed in his answer, and the fees demanded under said ordinance of appellant for such inspection amount to the sum of \$580. If said appellee should inspect the illuminating fluid which appellant annually sells in San Antonio while the same is contained in tank cars, and charge the fees therefor provided by ordinance for inspection of such fluid in car lots, appellant would be compelled to pay him annually \$750 in fees. Appellant annually makes about 20,000 sales of such illuminating fluid in said city, in quantities of from 5 to 150 gallons at each sale.

(4) In December, 1896, and for several months thereafter, appellant refused to allow McElroy to inspect its illuminating fluid sold and offered for sale in the city of San Antonio, for which reason he, as inspector, made affidavit against Louis Fries, agent of appellant, for violation of said ordinance before the recorder's court of said city, upon which complaints Fries was tried before said court, convicted in more than 10 cases, and fined \$10 in each case. Such prosecutions were continued until Fries, under protest and fear of arrest, agreed to allow inspections, but refused to pay the fees demanded by appellee McElroy. All inspections of the illuminating fluid sold and offered for sale by appellant made since May 1, 1897, have been made over its protest.

(5) There are two justices' courts in precinct No. 1 of Bexar county, Tex., and that Phillip Shook is justice of the peace of one of said courts; and E. G. Jones of the other, and that these courts have concurrent jurisdiction, and each court has a term each month; that on the 10th day of March, 1897, appellee McElroy had claims against appellant for inspection of illuminating fluid of appellant under said ordinance amounting to \$80, and no more, and being for inspections of eight cars of such oil, at \$10 per car, made prior to said 10th day of March, 1897; that on said date appellee filed a suit against appellant in the court of which Shook is justice for the sum of \$10 for an inspection made prior to March 10, 1897, No. 226 on the docket of said court, and appellant, being duly cited, appeared and defended said suit, and on the 4th day of June, 1897, judgment was rendered against appellant, and in favor of appellee, for said sum of \$10 and costs, which appellant paid; that on the 13th day of March, 1897, appellee filed a suit against appellant in the court of which Jones is justice for the sum of \$10 for an inspection made prior to March 10, 1897, No. 298 on the docket of said court, and appellant, being duly cited, appeared and defended said suit, and on the 26th day of May, 1897, judgment was rendered against appellant, and in favor of appellee, for said sum

of \$10 and costs, which appellant paid; that on the 28th day of May, 1897, appellee filed a suit against appellant in the court of which Jones is justice for the sum of \$10 for an inspection made prior to March 10, 1897, No. 377 on the docket of said court, and appellant was duly cited, and said suit was pending in said Jones' court when this suit in the district court was filed; that on the 8th day of June, 1897, appellee filed a suit against appellant in the court of which Shook is justice for the sum of \$10 for an inspection made prior to March 10, 1897, No. 337 on the docket thereof, and appellant was duly cited, and said suit was pending when this suit was filed in the district court; that at the time appellee filed his first suit against appellant in Shook's court, on March 10, 1897, all the claims subsequently sued on in both justice courts were then due, and appellee at no time filed any one suit in either of said courts for a sum amounting to as much as \$20, nor did he have pending at any one time suits in any one court which upon consolidation would amount to as much as \$20, and at the time this suit in the district court was filed appellee was about to file other suits in said justice courts for \$10 each for inspection fees, and at said time, to wit, June 21, 1897, appellee had claims against appellant for inspection fees arising under said ordinance to an amount of \$90, which had not been paid in any court; that the appellee McElroy has not offered to or insisted on the inspection of each and every sale of oils sold and delivered by appellant to its various customers, but has only inspected, or insisted on inspecting, the oils of said appellant in bulk. It was further proved that appellant pays its occupation tax to the city and state as a merchant.

#### Conclusions of Law.

Municipal corporations possess and can exercise only such powers as are granted by the legislature in express words, and those necessarily and fairly implied or incident to the powers expressly granted, and those essential to the declared objects and purposes of the corporation. *Railroad Co. v. Town of Crown Point*, 146 Ind. 421, 45 N. E. 587; *Dillon, Corp.* §§ 89, 90. There is no express authorization in the charter of the city of San Antonio for an ordinance prohibiting the sale in the city of illuminating fluid of which petroleum forms a part, unless it is first inspected by the city oil inspector. Section 103 of the charter provides: "The council shall have power to pass, publish, amend or repeal all ordinances, rules and police regulations not contrary to the constitution of the state and necessary for the order or good government of the city or the trade, commerce or health thereof, or that may be necessary and proper to carry into effect the power

herein vested in the corporation or any of its officers." Sp. Laws 1885, p. 11. It may be conceded that such authority is necessarily implied from the power given by this section of the council to pass ordinances necessary for trade, commerce, or health of the city. But can the authority of the council to charge those whose illuminating fluids are inspected, under the provisions of the ordinance, with the fees of the inspector, as provided, be necessarily or fairly implied or incident to the powers granted by the section of the charter quoted? We think not. The question is not whether the city has the right to require the inspection of illuminating fluids of which petroleum forms a part before sold or offered for sale in the city, but whether it has the right to compel those whose fluids are inspected under the provisions of the ordinance to pay the expenses of such inspection. It is not enough to show that the city is given the right to require such inspection, but it must be shown that it has the power to compel those selling, or offering for sale, such illuminating fluids, to pay the costs of such inspection. This authority is not shown, nor can it be implied from any provision of the charter that has come to our notice. The fees assessed by the ordinance are for services rendered the city, and not for those who sell, or offer for sale, illuminating fluids containing petroleum; and, in the absence of any authority for the levy of such charge upon business such as appellant is pursuing, we must hold that the ordinance, in so far as it burdens trade with such charge, is void and cannot be enforced. The fees provided by the ordinance are in the nature of a tax levied upon every gallon of illuminating fluid of which petroleum forms a part sold, or offered for sale, in the city of San Antonio, and, in the absence of express authority given by the legislature for the imposition of such charge upon the property of business of appellant, it cannot be upheld. Nor can the judgment rendered in favor of the appellee George S. McElroy, upon his cross action against appellant for fees accruing by virtue of said ordinance, be sustained.

The judgment of the district court, in so far as it perpetuates the injunction, is sustained; but its judgment declaring the ordinance valid in all its parts, and in favor of appellee McElroy on his cross action, is set aside, and judgment is here rendered declaring so much of said ordinance as authorizes the city oil inspector to demand the fees of his office to be paid by those whose illuminating fluids are inspected under its provisions null and void, and setting aside the judgment in favor of the appellee George S. McElroy on his cross action against appellant, upon which cross action judgment is here rendered in favor of the latter. Affirmed in part and reversed and rendered in part.



**WILLIAMSON v. HUFFMAN.<sup>1</sup>**

(Court of Civil Appeals of Texas. June 11, 1898.)

**MORTGAGES — DEED — AGREEMENT TO RECONVEY.**

Defendant, in order to procure a loan on land, conveyed it, without other consideration, to plaintiff, who loaned him the money, and, in accordance with an agreement, immediately reconveyed the land to him, retaining a vendor's lien for the amount of the note given ostensibly for the purchase price of the land. *Held*, that the legal title remained in the defendant.

Appeal from district court, Dallas county; Edward Gray, Judge.

Action by J. A. Williamson, executor, against J. E. Huffman. Judgment for defendant, and plaintiff appeals. Affirmed.

J. A. Williamson, as executor of the estate of one Mrs. C. C. Brown, deceased, as plaintiff, by a first amended original petition sued upon a note for \$500, alleged to have been made and delivered by defendant to plaintiff's testatrix, alleging that it had been given as consideration for, and purchase money of, the lands in controversy; and plaintiff prayed for judgment for the amount due on the note, with foreclosure of the vendor's lien reserved in the deed from plaintiff's testatrix to the defendant. To this amended pleading the defendant answered: (1) By general denial. (2) By special plea of the statute of limitation of four years against the note sued upon. And (3) defendant alleged in his defense that plaintiff's testatrix was never, in truth, the real owner of the land in controversy; that she never, in reality, owned or possessed the title to said land, and was never the bona fide vendor thereof, nor in possession; and defendant therefore alleged that she was in reality never anything more than a mortgagee, out of possession, of said land, as security for the note declared upon by plaintiff, for this: That on December 31, 1891, defendant was the owner, as he for many years prior thereto had been, of all of said lands, and has been such owner continuously since and in possession thereof. That on said date defendant, being in actual and exclusive possession of said land, and being desirous of effecting a loan of money and borrowing the sum of \$500, applied to plaintiff's testatrix for a loan, and she then agreed to loan defendant said money, the repayment thereof to be secured by lien upon the land in controversy. That for the sole purpose of carrying out the agreed transaction and accomplishing such purpose, and to effect and secure the said loan of money only, the defendant did execute and deliver his deed of conveyance to plaintiff's testatrix to said land, for which no consideration whatever was paid to him (defendant). That such conveyance was made solely in pursuance of the agreement between him and plaintiff's testatrix aforesaid, and to enable her to reconvey the land to defendant,

and recite in her conveyance back to defendant the reservation of a vendor's lien to secure the loan of money aforesaid. Thereupon plaintiff's testatrix received defendant's deed, but as a part of the same transaction reconveyed the identical land back to defendant, reciting, as was agreed, the consideration to be \$500, to be paid one year after date, according to the tenor of a certain note then executed by defendant to plaintiff's testatrix; and thus the said loan of money was effected. That the entire transaction out of which sprung the note sued upon was in truth and in law only a device to secure the repayment of borrowed money, and but a mortgage lien upon the lands in controversy. That said note so given, and herein sued upon, was barred by the statute of limitation of four years; and hence that the lien upon the land aforesaid had elapsed, and become null and void, and plaintiff had no right to or interest in said land. That neither plaintiff nor his testatrix had ever been in possession of any part of said land, but, as was always intended, the defendant had continuously been, and was then, in exclusive possession of said land, and plaintiff's testatrix was never at any time anything else than mortgagee, out of possession of said land, and that her mortgage had become lost and had terminated by reason of the facts aforesaid, and because the debt was outlawed. The plaintiff, by first supplemental petition filed in reply to defendant's said answer, pleaded that defendant, by said answer, had lost his "right of redemption" to the land in controversy, and sued the defendant in the ordinary form of trespass to try title to recover the lands in controversy. Defendant, by first supplemental answer, excepted to this pleading, and then answered by a general denial and plea of not guilty; and then by special plea renewed his defense that plaintiff's testatrix was never in reality the bona fide owner or vendor of the land in controversy to the defendant, but that the entire transaction between plaintiff's testatrix and defendant was nothing more than a device to secure the loan of \$500 made by plaintiff's testatrix to defendant, and which loan of money had lapsed, and plaintiff's cause of action had become barred by the statute of limitation of four years. Wherefore plaintiff had lost all lien or right in or to the lands in controversy. Upon trial before the court without a jury judgment was rendered for defendant, from which judgment this appeal is prosecuted by appellant, Williamson.

The evidence upon which the judgment is based is set forth in the statement of facts as follows: Plaintiff introduced in evidence a deed with general warranty clause, executed by Mrs. C. C. Brown to J. E. Huffman, describing and purporting to convey the land in suit; the deed showing the consideration to be \$500, evidenced by a note made by J. E. Huffman to the order of Mrs. C. C. Brown, of even date with the deed, due in

<sup>1</sup> Writ of error denied by supreme court.

one year from date, with interest at the rate of 10 per cent. per annum from date, for the sum of \$500; the vendor's lien to secure said note being reserved in said deed, said deed being dated December 31, 1891, and acknowledged on same date before J. D. Fouraker, notary public; the clerk's file mark and certificate of registration thereon showing that said deed was filed in the office of the county clerk of Dallas county, Tex., December 31, 1891, at 11:15 a. m. Plaintiff next introduced the note described in his second amended original petition herein, and also described in said deed, being a note signed by J. E. Huffman, dated December 31, 1891, to the order of Mrs. C. C. Brown, for the sum of \$500, with 10 per cent. interest from date, due in one year, and retaining the vendor's lien upon the land described in plaintiff's petition and involved in this suit to secure its payment. Said note was indorsed and credited by annual payments of interest each year up to, but not including, the year 1897, which note is unpaid, and barred by limitation. Said deed above described was the original deed, and was produced on the trial by defendant's counsel, upon notice given to them by plaintiff, and it was admitted by defendant's counsel that said deed was brought to them by the defendant. The defendant, as his evidence, introduced the same deed above described, and then called upon plaintiff's counsel, pursuant to notice theretofore given to said counsel, to produce the original deed described in the defendant's pleadings, from the defendant J. E. Huffman to said Mrs. C. C. Brown, describing the land involved in this suit, the said deed reciting a cash consideration of \$500; said deed being dated December 31, 1891, acknowledged before J. D. Fouraker, notary public, on same date; and the clerk's file mark and certificate of registration showing that it was filed in the office of the county clerk of Dallas county on December 31, 1891, at 11:15 a. m. Defendant then proved by Kenneth Foree, county judge of Dallas county, as his witness, that he knew Mrs. C. C. Brown during her lifetime; that he knew her well; that he had once drawn a will executed by her, which will was, however, afterwards revoked; that Mrs. Brown for many years lived with witness' mother-in-law, Mrs. Fisher, in Dallas county, and there the witness frequently saw her, and she conversed with witness about her business affairs; that the said Mrs. C. C. Brown conversed several times with the witness about the transaction with the defendant, Huffman, always stating that she had made a loan of \$500 to Huffman, and that she held his note, and a mortgage therefor; that on one occasion Mrs. Brown produced and handed witness the deed above described from J. E. Huffman to her, stating that that was her mortgage to secure the loan of \$500. Witness examined the paper, and stated to Mrs. Brown that she was mistaken about that being a mortgage; that it was a deed; but Mrs. Brown insisted that it was a mort-

gage to secure the loan by her to the said defendant, Huffman, of \$500. The witness Foree further stated that he had known Huffman for many years, and had known the land involved in this suit for 15 years. Witness knew the location of the land involved in this suit. It is a part of the Huffman farm, on which Huffman lives, and Huffman has been in continuous possession of the land, cultivating it as a farm, for some 10 years or more. Said land, in December of 1891, was worth from \$40 to \$45 per acre at the market price and on the market. That Mrs. Brown in talking to witness mentioned several loans of money that she had made; among others, one to Mr. Fisher, witness' father-in-law, and one to Mr. Smith; and in that connection spoke of the loan she had made to defendant, Huffman, and discussed with witness his solvency, and ability to pay. By J. D. Fouraker, another witness, who took the acknowledgment of the deeds above described, defendant proved: That the defendant, Huffman, in December, 1891, came to witness' office, and stated that he was going to borrow \$500 of Mrs. Brown, and wanted to secure her by lien on his land, and told him that he (Huffman) wanted witness to draw the deed from himself to Mrs. Brown, and also a deed back from Mrs. Brown to Huffman, and also a note for \$500, due in one year,—all of which was done by witness under instructions from Huffman. That the deeds were acknowledged, respectively, by Huffman and Mrs. Brown, before the witness, one December 30 and the other December 31, 1891, as shown by the deeds themselves,—which witness then held in his hands. That said deed, however, and the note, were all delivered at the same time. Witness' recollection was clear that all three of the instruments were delivered to Huffman. Witness did not recollect having had anything to do with Mrs. Brown, except that she signed one deed and he took her acknowledgment. Huffman paid witness for drawing those instruments and the taking of the acknowledgments. Huffman told witness that he wanted the papers drawn in order to get a loan of money from Mrs. Brown for one year, and the papers were drawn under defendant's directions. That there was no consideration for the deed from J. E. Huffman to Mrs. C. C. Brown, that witness knew anything about. Witness never saw any money or other thing paid by Mr. Huffman for the deed, but may have seen Mrs. Brown give Huffman \$500 in money, or by check, when all the papers were delivered. On cross-examination by plaintiff's counsel witness stated that if Mrs. Brown gave the defendant, Huffman, a check for \$500, it might have been a consideration for the deed. The defendant was then proceeding to introduce other witnesses, having called one Mrs. Lower to the stand; and thereupon the court asked plaintiff's counsel if he took issue with the defendant's counsel upon their contention and position that the transaction evidenced by the deed and

note introduced in evidence was in reality but a method of securing a loan of money from Mrs. Brown to defendant, and that the note was made without an intention of affecting said land, otherwise than as security for said loan; and thereupon plaintiff's counsel in open court answered that he did not controvert that position, but admitted that the deeds and note were drawn and delivered over for the purpose of securing to the said Mrs. Brown a loan of money which she then made to the defendant, Huffman; and thereupon the court stated to defendant's counsel that he did not care to hear any further testimony on that issue, and no further testimony was introduced, save upon the issue of the value of the land in controversy herein; whereupon the defendant introduced the following witnesses: Mr. Browder and defendant, Huffman, by whom it was shown that the land was worth from \$30 to \$45 per acre in December, 1891; and then the plaintiff introduced the following witnesses: Mr. Chinault, J. A. Williamson, and Mr. Fisher, whose testimony was to the effect that the land, in December, 1891, was worth from \$15 to \$35 per acre.

This evidence necessarily leads to these conclusions of fact: (1) Mrs. Brown was not the owner of the tract of land in controversy at the time she executed the deed to Huffman. (2) The transaction between Mrs. Brown and Huffman was simply a loan of money by Mrs. Brown to Huffman, and Huffman deeded the land to Mrs. Brown with the understanding that she should immediately deed it back to him, taking his note for \$500 to cover the loan, and reserve in the deed a lien upon the land to secure the payment of the \$500, reciting it to be purchase money for the land. These conveyances were not intended to pass and vest title, but only to secure the loan of \$500 made by Mrs. Brown to Huffman. There is no controversy as to the facts. Only questions of law are involved, and presented for decision.

Thomas & Turney, for appellant. Kearby & Muse and McCormick & Spence, for appellee.

FINLEY, C. J. (after stating the facts). Appellant contends that the legal title to the land passed to Mrs. Brown by the deed from Huffman; that her reconveyance to Huffman left the legal title in her; that Huffman had only the equitable right to redeem the title by payment of the \$500 loaned, which these conveyances were intended to secure; and that, having pleaded the statute of limitations to the debt, forfeited that equity, and Mrs. Brown should recover the land upon her legal title. In *Duty v. Graham*, 12 Tex. 427, it is held that a mortgage is a mere security for debt, and the mortgagor remains the owner of the land, entitled to the possession, and the mortgagee cannot sustain an action of trespass to try title against the mortgagor; and, further, that when the debt is barred by limitation, the creditor cannot maintain

a suit for the debt and foreclosure of the mortgage. In *Mann v. Falcon*, 25 Tex. 272, the doctrine of the *Duty* Case was affirmed, and it was further held that a deed absolute upon its face may be shown to be a mere mortgage by parol evidence of the intention of the parties, and that this may be done simply under the plea of not guilty. These principles are reaffirmed in other cases, and have never been overturned by any of our decisions. In the case of *McKeen v. James*, 87 Tex. 193, 25 S. W. 408, and 27 S. W. 59, Mr. Justice Gaines expressed his individual disapproval of the holding in *Mann v. Falcon*, but recognized that the doctrine was established in this state, and should be adhered to as a rule of property. If the question were an open one, the judgment of the writer would lead him to the same conclusions expressed by Mr. Justice Gaines. It would serve no good purpose, however, to discuss a legal question which our supreme court has announced to be so thoroughly settled as to become a rule of property. In the *McKeen* Case the plaintiffs sued in trespass to try title, claiming under a deed absolute on its face. The defendants claimed by purchase from the assignee of the grantor in such deed, and they pleaded specially that the conveyance was intended by the parties to be simply a mortgage given to secure a debt. The plaintiffs then amended their pleadings, and asked that, in the event it was determined that the conveyance was merely a mortgage, they have judgment for foreclosure of the mortgage lien; to which plea the statute of limitations was interposed by defendants. It was found by the jury that the conveyance was simply a mortgage, and that the debt was barred by limitation; and it was held that the plaintiffs could not recover the land, because they did not own the title, and that they could not have a foreclosure of the mortgage lien, because the debt was barred by limitation. See same case in 23 S. W. 460, for opinion of the court of civil appeals, referred to in the opinion of the supreme court, for a full statement of the facts and discussion of the principles involved in the case. We think these cases settle the question involved in this suit, and that the distinctions sought to be drawn by counsel for appellant between the cases discussed and this case are not well founded. This view leads to the conclusion that the proper judgment was rendered by the court below, and that the assignments of error presented are not well taken. Judgment affirmed.

#### DENISON & P. SUBURBAN RY. CO. v. SMITH.<sup>1</sup>

(Court of Civil Appeals of Texas. May 14, 1898.)

EMINENT DOMAIN—ACTION—PARTIES—PLEADING—MEASURE OF DAMAGES.

1. Where property claimed to be damaged by a railroad is of sufficient value, after such

<sup>1</sup> Writ of error denied by supreme court.

damage, to secure a lien thereon, the lienholder is not a necessary party to an action against the railroad company for damages.

2. An objection of misjoinder of parties must be raised by plea in abatement.

3. The title to mortgaged land remains in the mortgagor.

4. In an action against a railroad company for injury to property, where the amount of damage is alleged, it is not necessary for plaintiff to allege the difference in the value of the property on account of such railroad in order to entitle him to an instruction that the measure of damages is the difference in value just before and just after the construction of the railroad.

5. The fact that some time after the construction of a railroad, which plaintiff claimed injured his property by obstructing his means of egress, a bridge was built across the cut in which the track was laid, so as to lessen the inconvenience suffered by plaintiff, will not change the rule that the damages will be the difference in the values of the property just before and just after the construction of the road, when such fact is not pleaded in mitigation.

Appeal from district court, Grayson county; Don A. Bliss, Judge.

Action by Ed. Smith against the Denison & Pacific Suburban Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This suit was instituted on August 25, 1896, by appellee against appellant, to recover damages alleged to have been caused to lots 4 and 5 in block 15, Dumas' addition to the town of Denison, by the construction of defendant's railroad in a cut adjacent thereto. A trial before a jury on October 12, 1897, resulted in a verdict and judgment in favor of plaintiff for the sum of \$550, from which judgment this appeal is prosecuted, defendant having given notice of appeal and filed bond and assignment of errors in compliance with the statute and rules.

Conclusions of fact: From the evidence we conclude that the appellee was the owner of the property described in his petition, and that the same was damaged by the making of the cut in Munson street, and the building of defendant's railroad therein, by the cutting off of the means of ingress and egress to and from plaintiff's property, and that thereby he sustained damages in the amount found by the jury.

T. J. Freeman and Head, Dillard & Muse, for appellant. C. B. Randell and J. W. Finley, for appellee.

BOOKHOUT, J. (after stating the facts). Appellant's first assignment of error reads: "The court erred in refusing to allow defendant to show that there was a valid lien outstanding in favor of the building and loan association upon the property which plaintiff claims in this case to have been damaged." The proposition urged under this assignment is that a lienholder is entitled to the damage caused to the property to the amount of his lien. There was no plea by defendant that there was a lien on the property, and that the

lienholder was a necessary party to the suit. The record shows that upon the trial of the cause, while plaintiff was upon the witness stand, the defendant offered to prove by him that the building and loan association had a valid subsisting lien on the lots which are alleged to have been damaged to an amount more than the verdict in this case. There is no contention made that the property, after the damage done to it by defendant, is insufficient to satisfy the lien upon it. The undisputed evidence shows that the property, after the building of defendant's railroad, was worth not less than \$800. The verdict is for \$550. Under this state of the record, it would seem that the property, after the damage, was ample security for the debt. Again, it has been held that, if the defendant desired to raise the question of nonjoinder of parties, it must do so by plea in abatement. *De Prez v. Everett*, 73 Tex. 433, 11 S. W. 388; *Railroad Co. v. Le Gierse*, 51 Tex. 189.

Appellant further contends that the allegation of ownership of the land by plaintiff is disproved by showing a valid outstanding lien upon the land in a third party. In this state a mortgage upon land conveys no title to the mortgagee. The mortgage is but a security for the debt, and the title to the land remains in the mortgagor. *Willis v. Moore*, 59 Tex. 628. Not only does the mortgagor retain the legal title, but also the equitable title. *Fuller v. O'Neil*, 69 Tex. 351, 6 S. W. 181; *Duty v. Graham*, 12 Tex. 427. The evidence was not admissible to show ownership of the land in the holder of the lien.

Appellant's second assignment of error complains of the verdict of the jury as being excessive. The evidence is amply sufficient to sustain the verdict, and this assignment is overruled.

The third assignment of error is as follows: "The court erred in charging the jury that the measure of plaintiff's damages would be the difference in the value of the property just before and just after the construction of defendant's road, there being no allegation in plaintiff's petition of such difference in value." The petition alleges the fact of the construction of the railroad by the defendant and the making of the cut extending from the southern limits of the city of Denison across certain streets to the depth of 25 feet and 25 feet wide, and that thereby the means of ingress and egress to and from plaintiff's property was shut off, and the property injured. The petition set out in detail the location of plaintiff's property, and the means of approach thereto, and the manner in which said approach was interfered with by the making of the cut by defendant and the building of its railroad, and alleged damages thereby in the sum of \$1,500. The rule for the measure of the damage was not set out in the petition. It was not necessary that this should be done. The damages were alleged. The court, in its charge, gave the correct rule

as to the measure of damages. *Railway Co. v. O'Maley* (Tex. Civ. App.) 45 S. W. 225, 227; *Railway Co. v. Hall*, 78 Tex. 169, 14 S. W. 259.

Appellant insists that there was evidence that about 10 months after the making of the cut in the street and the building of the railroad by defendant, a bridge was constructed over the track on Munson street, and thereby the damage was greatly lessened, and that there is evidence in the record tending to show this. There is no evidence in the record to sustain this contention. There is evidence that the approach to plaintiff's property before the construction of the railroad was by an alley in the rear of his property; that this alley was cut off, and could not be used by reason of the cut made in the building of defendant's railroad. This alley leads into Munson street, in which the railroad is constructed in a cut therein. About 14 months after the making of the cut and the building of the railroad in Munson street a bridge was constructed over the cut and track, across Munson street. The evidence does not disclose what effect the building of this bridge had on plaintiff's damage. There was no pleading by defendant that the building of the bridge lessened the damage. If the defendant relied on a defense which would take the case out of the general rule of damages, or modify such rule, it should have pleaded the same. We do not think, in the condition of the record, there is any merit in appellant's third assignment, and it is overruled. Finding no error in the record, the judgment is affirmed.

#### DENISON & P. SUBURBAN RY. CO. v. EVANS.<sup>1</sup>

(Court of Civil Appeals of Texas. May 14, 1898.)

#### RAILROADS—DAMAGES FOR CONSTRUCTION—MEASURE—INSTRUCTIONS.

1. In an action for damages sustained by reason of the construction of a railroad in a street adjacent to plaintiff's property, it is not error to refuse defendant an instruction that any amount due on the property should be deducted from the damages thereto, where defendant had not asked by its pleadings any relief on such account.

2. A bridge was built across a cut made by defendant in constructing its road in front of plaintiff's property, but plaintiff claimed no damages by reason of its construction, and the court's charge authorized no recovery therefor. *Held*, that it was not error to refuse defendant an instruction that no damages should be allowed for obstructing the street in front of plaintiff's property in constructing the approach for the bridge.

3. In an action for damages for the construction of a railroad in a street adjacent to plaintiff's property, the court instructed that the measure of damages was the difference in values of the property immediately before and immediately after the construction. A bridge had been constructed across defendant's road in front of plaintiff's property some time after the construction of the road. *Held*, that the

measure of damages was correctly stated, there being no plea, nor evidence showing, that the building of the bridge diminished the damages.

Appeal from district court, Grayson county; Don A. Bliss, Judge.

Action by D. Evans against the Denison & Pacific Suburban Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

T. J. Freeman and Head, Dillard & Muse, for appellant. C. B. Randell and J. W. Finley, for appellee.

RAINEY, J. This suit was instituted by D. Evans, appellee, against appellant railway company, to recover damages alleged to have been caused by the construction of defendant's road in a street adjacent to plaintiff's property. A trial of the cause resulted in a judgment in favor of the plaintiff, from which judgment the railway company prosecutes this appeal. We conclude from the evidence that plaintiff owned a lot in the town of Denison, on which was situated a four-room house, with other improvements; that defendant's road was constructed on a street adjacent to said property, by reason of which plaintiff's property was damaged to the extent found by the verdict of the jury.

Appellant's first assignment of error complains of the court for refusing to give the special charge asked by the defendant to the effect that "any amount still due on the notes mentioned in the deed to plaintiff and his wife should be deducted from the amount of damage to the property." The evidence shows that there was a lien existing upon the said property, but we do not think that the court erred in refusing to give the instruction requested. The defendant did not ask, by its pleading, any relief by reason of said lien, nor that the holder thereof be made a party, that his rights might be adjudicated herein. Having failed to do this, defendant is not in an attitude to complain. *Railway Co. v. Smith* (this day decided by us), 47 S. W. 278.

Appellant's second assignment of error is: "The court erred in refusing the second special charge requested by this defendant, to the effect that no damage should be allowed for obstructing the street in front of plaintiff's property in constructing the approach for the bridge on Munson street, there being no allegation of such damage in plaintiff's petition." The evidence shows that a bridge was built across the cut made by defendant in constructing its road in front of plaintiff's property; the approaches to said bridge being several feet higher than the grade of the street. There was no damage claimed by plaintiff by reason of the construction of this bridge, nor did the charge of the court authorize a recovery therefor; and, under the circumstances, it would have been improper to have given this charge, as it was not warranted, either by the pleading or the evidence.

<sup>1</sup> Writ of error denied by supreme court.

Appellant also complains of the court in charging the jury that "the measure of plaintiff's damages would be the difference in the value of the property immediately before and immediately after the construction of defendant's road, the undisputed evidence showing that such damage was much greater immediately after the construction of defendant's road, and while Munson street was thereby obstructed, than it was after the bridge was placed on Munson street over defendant's road, which was ten months or a year after it [defendant's road] was constructed." Ordinarily the rule as to the measure of damages is the difference in the value of the property immediately before and immediately after the injury received, and we see no reason in this case why a different rule should prevail. There was no plea that the building of the bridge diminished the damages, nor was there any evidence introduced which tended to show that the construction of the bridge diminished the damage to plaintiff's property. Such being the evidence, the measure of damage was correctly stated by the court. It is also insisted that the verdict of the jury is excessive.

We think the evidence is sufficient to sustain the finding of the jury, and the judgment of the court below is affirmed.

#### ALVARADO WATER-SUPPLY & LIGHT CO. v. ADOUE et al.<sup>1</sup>

(Court of Civil Appeals of Texas. April 30, 1898.)

##### APPEAL—REVIEW—ASSIGNMENTS OF ERROR.

Assignments of error relating to a refusal to give special instructions or to admission of testimony cannot be considered in the absence of a statement of facts.

Appeal from district court, Dallas county; Edward Gray, Judge.

Action by J. B. Adoue and others against the Alvarado Water-Supply & Light Company to recover money due for digging an artesian well. Judgment for plaintiffs, and defendant appeals. Affirmed.

Ramsey & Brown and Harris, Etheridge & Knight, for appellant. J. N. Wharton, for appellees.

RAINEY, J. At a former day of this term of court we sustained a motion to strike out the statement of facts because same did not conform to the rules. The record is therefore before us without a statement of facts. All the assignments of error relate either to the refusal of the court to give special charges requested by appellant, or the admission of certain testimony offered by appellee over the objection of appellant. These assignments cannot properly be considered in the absence of a statement of facts, which necessitates an affirmance of the judgment, there

being no fundamental error appearing of record. We will state, however, that we find from the presentation of the facts as contained in appellant's brief that the same result as to the disposition of the case would have followed, had not the statement of facts been stricken out. Judgment affirmed.

#### CENTRAL COAL & COKE CO. v. HENRY et ux.<sup>1</sup>

(Court of Civil Appeals of Texas. May 7, 1898.)

##### HUSBAND AND WIFE—COMMUNITY—HOMESTEAD—PARTIES.

A wife is not a necessary party to an action involving the title to land purchased with community funds, and this though it is occupied as a homestead.

Error from district court, Bowie county; John L. Sheppard, Judge.

Action by F. M. Henry and wife against the Central Coal & Coke Company. There was a judgment for plaintiffs, and defendant brings error. Reversed.

Hudgins & Estes and H. C. Hynson, for plaintiff in error. Henry & Henry, for defendants in error.

RAINEY, J. This suit was brought by defendants in error against plaintiff in error to remove cloud from title to the land in controversy, etc. Defendant answered by plea of not guilty, *res adjudicata*, and disclaimed "title to or possession of any land which may be within plaintiffs' inclosure and sued for by plaintiffs herein, except such as is described in said judgment," which is the basis of the plea of *res adjudicata*. There was sufficient evidence to show title in defendants in error to the land in suit, aside from the question of *res adjudicata*; and we conclude the court would have been justified in so holding, had not the plea of *res adjudicata* been sustained by the proof. Said plea has for its basis a judgment rendered against F. M. Henry, the husband alone, in the case of Whitaker et al. against Henry, which involved the land herein claimed by plaintiff in error. To neutralize the effect of this judgment, it is insisted that said land being the homestead of Henry and wife, and the wife not having been a party to that proceeding, said judgment is not binding. The controversy in that suit, as well as in this, involved the title to the land. In determining that issue the question of homestead had no controlling effect. No rights had accrued under it, and had the wife been made a party, and pleaded her claim to a homestead, it would have availed her nothing. In discussing this question in *Jergens v. Schiele*, 61 Tex. 255, Chief Justice Willie said: "To such a suit the wife was not a necessary party, and her presence in the cause would

<sup>1</sup> Writ of error denied by supreme court.

<sup>1</sup> Writ of error denied by supreme court.

not have made the decree rendered in it any more binding than if obtained against the husband alone, unless she was an essential party by reason of the fact that the homestead was located on the premises. If there was any defense that could have been urged, growing out of her homestead rights, which would have defeated the action, then she was a necessary party in the cause." The case from which we have just quoted is on all fours with this case, and is conclusive that the wife was not a necessary party to the Whitaker-Henry Case, and therefore the plea of *res adjudicata* should prevail. The judgment of the court below is reversed, and judgment here rendered for plaintiff in error.

(May 21, 1898.)

Defendants in error have requested the filing of conclusions of fact, which we here do: (1) Defendants in error were husband and wife in 1879, when the land in controversy was decided to them. They then took possession of same, and have been occupying it as a homestead ever since. (2) The land here in controversy is the same as that involved in the suit of Whitaker et al. against F. M. Henry in the district court of Bowie county, wherein judgment was rendered against F. M. Henry, one of the defendants in error herein, which said judgment is still in force. To that litigation the wife of said Henry was not a party. (3) Such interest as the wife of F. M. Henry had in the title to the land was none other than community, the same having been purchased with community funds. (4) The possession of the land by defendants in error was peaceable and adverse for more than 10 years, except as interrupted by the suit of Whitaker et al. against F. M. Henry, in which judgment was rendered on March 25, 1890, as above stated, and affirmed by our supreme court October 30, 1891.

Our opinion heretofore filed expresses our views on the law of the case.

#### McGHEE v. ROMATKA.<sup>1</sup>

(Court of Civil Appeals of Texas. Oct. 12, 1898.)

##### JUDGMENTS—MOTION TO VACATE—GROUNDS.

Exceptions are properly sustained to a petition to vacate a judgment alleging that the petitioner was not sued or made a party, made no defense, and was a stranger to the judgment.

On petition for rehearing. Overruled.

For former opinions, see 44 S. W. 700, and 45 S. W. 552.

COLLARD, J. The motion for a rehearing, which has been considered by the court, notwithstanding it was not filed in the time required by law, must be overruled. The facts set up in the petition of plaintiff in error to vacate and set aside the judgment in

the original suit show and declare that he was not sued in the original action, nor made a party in any of the forms known to the law, that he made no defense, and that he was a stranger thereto. The court properly sustained exceptions to his motion to vacate the judgment. Had he alleged the facts as they were shown to be in cause No. 1,997 on the docket of this court, the main question in which we certified to our supreme court (45 S. W. 552), he would have pleaded himself out of court, by showing that he was served with citation and copy of petition in the original suit, 5,249, and that he appeared by counsel and filed an answer, thus establishing the fact that he was bound by the judgment rendered. We cannot supply the deficiencies of the record in this case by reference to the record in another case in this court. We refer to the record in cause No. 1,997 merely for comparison and argument, as might be done in any case. We are still of opinion that the court below did not err in sustaining exceptions to plaintiff in error's motion to vacate the original judgment upon the ground that he was a stranger to the suit. The motion for a rehearing is overruled. Overruled.

#### MISSOURI, K. & T. RY. CO. v. TRAUB.<sup>1</sup>

(Court of Civil Appeals of Texas. May 21, 1898.)

##### RAILROADS—FRIGHTENING TEAMS—NEGLIGENCE.

Where employes in control of an engine near a thoroughfare negligently permit it to "pop off" steam and make an unusual noise, knowing that passing teams might be frightened, the owner of a team so frightened may recover of the company for damages resulting; and this, though the employes did not see the team.

Appeal from district court, Hunt county; Howard Templeton, Judge.

Action by Fred Traub against the Missouri, Kansas & Texas Railway Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

T. S. Miller and Head, Dillard & Muse, for appellant. B. Q. Evans and Yoakum & Vaughan, for appellee.

RAINEY, J. Suit by appellee to recover damages for personal injuries alleged to have been caused by the negligence of appellant by permitting steam to escape from the engine of appellant, which frightened appellee's team which he was driving, causing the team to run away, and inflicting injuries upon appellee. Appellant pleaded general denial, contributory negligence, and specially that appellee's team was not gentle, but was wild and unruly, and was frightened by causes other than the engine. Judgment was rendered for appellee, from which this appeal is taken.

The evidence shows that appellee was driv-

<sup>1</sup> Writ of error denied by supreme court.

<sup>1</sup> Application for writ of error dismissed for want of jurisdiction. See 47 S. W. 520.

ing a team hitched to a wagon along one of the main thoroughfares in the city of Greenville. Appellant's engine was standing on the railroad track, and, when appellee got near where said engine was standing, "it popped off, the steam escaped," and caused appellee's team to run away and injure him. The steam was supplied with a gauge from which the amount of steam pressure in the boiler could be ascertained. It was also supplied with an escape valve, which relieves the pressure of the steam on the boiler before it reaches the danger point. One of the witnesses, whose testimony on this point was uncontradicted, stated that "there is no steam that escapes from an engine but what the engineer, by looking at the gauge, can tell it before it commences escaping, and the safety valve is where it escapes from the boiler, and the gauge indicates the amount of steam in the boiler. As before stated, it begins to simmer at 135. As to how long before it will explode after that depends on what kind of fire is in the boiler. With an ordinary fire it will not be very long; probably ten or fifteen minutes. During this time the escape could be prevented." From this we conclude that, by the proper care, an engineer could prevent the escape of steam from his engine.

Appellant assigns error as follows: "The court erred in refusing to give the jury defendant's special instruction No. 1, because the entire proof in the case showed no liability so far as defendant was concerned, for the reason that there was no proof tending to show that the employes of defendant either intentionally caused the steam to escape, or that they permitted it to escape in such quantities or volume, knowing or having reason to believe that thereby the team of plaintiff would become frightened and run away and injure him." The court charged the jury on this phase of the case, which is complained of by appellant, as follows: "If you believe from the evidence that the plaintiff desired to cross the track of the defendant company at Washington street, crossing with his wagon and team, and that said crossing was a public street in the city of Greenville, and that when he was traveling along a public street, was approaching the crossing for that purpose, there was an engine of defendant company on the track near the crossing; and if you further believe that the employes of the company in charge of said engine, knowing that by doing so teams passing the crossing might become frightened thereat, unnecessarily or negligently caused or permitted the popping off of steam by or from said engine, and that the team that plaintiff was driving was thereby frightened, and ran away in consequence, and that plaintiff, to avoid threatened or apparent injury, jumped from the wagon, and was injured; and if you further believe that plaintiff's act in jumping from his wagon, under the circumstances, was the act of a person of ordinary prudence, and that a person of ordinary prudence, who

was acquainted with the disposition and qualities of plaintiff's team, would have driven the team at the place and in the manner plaintiff drove them, and that plaintiff was not guilty of negligence that caused or contributed to the injuries; and if you further believe that said acts of the employes of the defendant company in causing or permitting the popping off of steam as aforesaid, by or from said engine, was negligence, as that term is hereinbefore defined, and that but for the same the injury would not have been sustained by plaintiff,—then you should find for plaintiff." There was no proof that the employes of defendant intentionally caused the steam to escape, but there was testimony tending to show that the noise made by the escape of the steam was greater than usual, and did frighten appellee's team, and cause them to run away.

The issue of negligence on the part of appellant is duly raised by the foregoing assignment. The effect of appellant's contention is that, to make it liable, the employes must have caused the steam to escape, knowing or having reason to believe the team would become frightened and run away, and that the evidence is wholly insufficient to authorize a recovery by appellee. In support of this contention, the case of *Hargis v. Railway Co.*, 75 Tex. 19, 12 S. W. 953, is cited as directly in point. The principles there announced, we think, are correct; but we are of the opinion that the facts are not exactly the same as presented in this case. In that case the party had driven across the track, and stopped his team, when the engineer blew the whistle to signal the train crew that he was going to back the train. The court presumed that the whistle is necessarily used as a signal in operating trains, and, in discussing the care to be exercised at crossings, uses the following language: "It would seem to follow that persons in control of teams easily frightened, and unaccustomed to such noises, should exercise care in approaching trains, and should not unnecessarily stop in close proximity to them. The companies have a right to expect that this care will be exercised, and are not required to take steps to provide against the consequence of a failure to do so. However, we do not say that, if the employes of a railroad company become aware that an unmanageable team is halted near the track, it is not their duty to desist for a reasonable time from making such noises as may be avoided consistently with their other duties." Also: "It is not to be seriously contended that a person, by voluntarily stopping an unsafe team near a train, could make it the duty of the employes of a railroad company to await his pleasure in driving on before resorting to the usual signals for starting the train. They would have the right to conclude that he knew his own business best, and that he had his team under his control." The jury found against the plaintiff in the above-mentioned case, and the court seems to base its



opinion on the want of proof of negligence on the part of appellee, and that there was contributory negligence on the part of Hargis. The court, in reaching a conclusion in that case, was governed by the facts presented; and, under the evidence, it was fully warranted in holding as it did. But we apprehend the court did not intend to hold that under all circumstances, in order to constitute negligence, the employé must be present, and see the team, and judge from its action whether or not it is safe to blow the whistle, allow steam to escape, etc. While in the case before us the evidence fails to show that an employé saw appellee, or knew of his danger, yet it does show that the engine was allowed to stand near a public thoroughfare; that steam was allowed to escape, which was calculated to frighten horses not accustomed to same, and which escaping of the steam could have been prevented by the exercise of ordinary care. It was shown that the trainmen were instructed not to let engines pop any more than could be avoided around depots, public crossings, and public highways. There was no evidence tending to show that the escape of steam at the time shown was necessary in the operation of the train, or that it could not have been avoided; but the contrary was shown. The situation was sufficient to cause a reasonably prudent person to believe that the escape of steam would frighten the horses of any one traveling along the thoroughfare, and thereby cause injury. We think the evidence was sufficient to warrant the charges of the court complained of, and the refusing of the special charge asked by appellant, and sufficient to support the judgment rendered.

There are several other assignments, complaining of the charge of the court and the refusal to give special charges; but none are well taken, or necessary to be discussed, as the foregoing discussion covers the pivotal point in the case. Judgment affirmed.

#### MISSOURI, K. & T. RY. CO. OF TEXAS v. FISHER et al.<sup>1</sup>

(Court of Civil Appeals of Texas. May 14, 1898.)

#### APPEAL—AGREED STATEMENT OF CASE—INSTRUCTIONS.

1. Under Rev. St. 1895, art. 1414, providing that the parties may, without setting out all the facts, agree on such a statement of the facts as shall in their opinion enable the appellate court to determine whether there has been any error in the judgment, if evidence relied on by the parties was introduced on the trial, the statement should so state.

2. Where the charge of the court is copied in the agreed statement of the pleadings and proof, but it does not appear that the parties thereby intended to admit the statements contained in the charge, as to what the evidence disclosed as true, such statements cannot be considered as part of the agreed statement of

facts made under Rev. St. 1895, art. 1414, providing that the parties may agree on such statement of the facts as will enable the appellate court to determine whether there was error in the judgment.

Error from district court, Dallas county Edward Gray, Judge.

Action by A. L. Fisher, as next friend of Lula and Jerry Moore, minors, and another against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment in favor of plaintiffs, defendant brings error. Affirmed.

This suit was brought by A. L. Fisher, as next friend of the minors Lula Moore and Jerry Moore, and as husband of Lucy E. Fisher, joined by his wife, said Lucy E. Fisher, in form of trespass to try title and for damages to a strip of land 100 feet wide and 3,163 long, against the Missouri, Kansas & Texas Railway Company of Texas, said land constituting the right of way of said road over the J. W. Kenn survey, in Dallas county, Tex. The petition described the land specifically, and contained the usual averments for a recovery in an action of this form, and also prayed for damages in the sum of \$2,000. The defendant pleaded general denial, not guilty, and that on August 4, 1886, the present wife of plaintiff A. L. Fisher (who was then a widow, by name Lucy E. Moore), for a valuable consideration, conveyed the right of way to the Dallas & Greenville Railway Company and its successors, and that the defendant did legally succeed to the rights of said Dallas & Greenville Railway Company. It was alleged that at the time of the conveyance Lucy E. Moore was the surviving wife of J. C. Moore, and that the property was their community property. There was a trial, which resulted in a judgment for the plaintiffs Lula Moore and Jerry Moore for an undivided half interest in said land, and for the plaintiffs for damages in the sum of \$365. A motion for new trial on the part of the defendant was overruled by the court. Defendant filed its petition for error, assignments of error, and has duly prosecuted its writ of error to this court. Additional facts for the understanding of the points discussed and decided will appear in the opinion.

Alexander, Clark & Hall, for plaintiff in error. Henry & Crawford, for defendants in error.

BOOKHOUT, J. (after stating the facts). Plaintiff in error, under its first and second assignments, submits the following proposition: "Damages to the remainder of land, the result of inconvenience or increased difficulty of communication between parts of the farm severed by a railway, occasioned by an embankment, fencing, or other construction, when not the result of negligence in construction, are included in the assessment of damages in condemnation, or in the sale where the right of way is acquired by purchase."

<sup>1</sup> Writ of error denied by supreme court.

This proposition, we think, may be regarded as sound; but we do not think it can be invoked in this case. It is contended that the record shows a purchase of the right of way through the land described in the petition by the Dallas & Greenville Railway Company from the plaintiff Mrs. Lucy E. Moore, previous to her marriage with defendant in error A. L. Fisher, and therefore there can be no recovery of damages by her.

The case is brought to this court upon an agreed statement, as provided by article 1414, Rev. St. 1895. The record fails to show that any such conveyance was introduced in evidence. It was shown that the 120 acres of land described in the petition was purchased by J. C. Moore on August 22, 1879; that J. C. Moore and defendant in error Mrs. Lucy E. Fisher were then husband and wife; that J. C. Moore died intestate, leaving defendants in error Lula Moore and Jerry Moore his children, and his wife, Lucy E. Moore, his sole heirs at law; that there was no administration upon his estate; that the said 120 acres was the community homestead of the said J. C. and Lucy E. Moore; that, after the death of said J. C. Moore, his wife and children continued to live, and now live, upon said land, without making any disposition whatever thereof. The Dallas & Greenville Railway Company constructed a railroad across said 120 acres of land, taking 7.21 acres of the same, and thereafter fenced said right of way. Plaintiff in error succeeded to all the rights, and became liable for all the liabilities, of the Dallas & Greenville Railway Company; and the evidence as to the amount of the damages fairly sustains the verdict.

The court charged the jury, among other things, as follows: "The uncontroverted evidence in this case shows that the farm involved in this suit was the community property and homestead of J. C. Moore and his wife, Lucy E. Moore; that J. C. Moore died, leaving, surviving him, Mrs. Moore and two children, Lula and Jerry; that Mrs. Moore sold, and by her deed conveyed, in 1886, to the Dallas & Greenville Railway Company and its successors, the right of way herein; that said railway and its successors, one of whom is defendant, has been in possession of and used said right of way for railroad purposes since said purchase; that Mrs. Moore has now in said farm such interest as is sufficient to more than remunerate said minors for their interest in said right of way, and therefore the sale by Mrs. Moore is confirmed, and you will return a verdict for the defendant." The defendants in error contend that the charge of the court in stating that the undisputed evidence shows a conveyance by Mrs. Moore to the Dallas & Greenville Railway Company is not supported by the record, and is contrary to the agreed statement, in that said statement recites that "after his [J. C. Moore's] death his said wife and said children continued to live, and now live, upon said land, without making any disposition

whatever thereof, and that in 1886 the Dallas & Greenville Railway Company entered upon and took possession of said right of way, and constructed a railroad thereupon," without indicating that they entered thereon by any claim of right. There is force in this contention. If such a conveyance was introduced in evidence, the agreed statement of the facts should so state. Rev. St. 1895, art. 1414; McDowell v. Fowler, 80 Tex. 587, 16 S. W. 431; Whitaker v. Gee, 61 Tex. 217. It is true, in this case the court's charge is copied in the agreed statement of the pleadings and proof; but it does not appear that it was thereby intended by the parties to admit the statements contained in said charge, as to what the evidence disclosed, as true. The statute does not contemplate that the charge of the court shall be copied into the agreed statement. Rev. St. 1895, art. 1414. The issues to be passed upon by this court are not agreed upon in the agreed statement. Under this condition of the record, the proposition urged by plaintiff in error is not applicable to this case, and said assignments of error 1 and 3 are overruled.

The propositions urged by plaintiff in error under its second and fourth assignments of error are based upon the theory that the agreed statement of facts shows a conveyance by Mrs. Lucy E. Moore to the Dallas & Greenville Railway Company. As we have already held that the agreed statement of facts does not show such a conveyance, we overrule said assignments of error. Judgment of the court below affirmed.

#### EASTERWOOD v. DUNN.<sup>1</sup>

(Court of Civil Appeals of Texas. May 21, 1898.)

TRESPASS TO TRY TITLE—COMMON SOURCE—JUDGMENTS—RES JUDICATA.

1. Where defendant in trespass to try title disclaimed all interest, and judgment was rendered on his disclaimer against him for the land, and in his favor for costs, he is estopped to set up a title acquired prior to the judgment by a deed from his co-defendant in defense to a subsequent similar action for the same land brought by one claiming title from the same source.

2. A defendant in trespass to try title, who claims the land in controversy under a common source with the plaintiff, cannot defeat the action by showing a superior outstanding title.

Appeal from district court, Van Zandt county; J. G. Russell, Judge.

Trespass to try title by James A. Dunn against W. E. Easterwood. From a judgment for plaintiff, defendant appeals. Affirmed.

Wynne, Greer & Smith and W. A. Bonner, for appellant. Kearby & Kearby, for appellee.

BOOKHOUT, J. This suit was instituted in the ordinary form of trespass to try title,

<sup>1</sup> Writ of error denied by supreme court.

and for damages and rents, on February 12, 1896, by James A. Dunn against W. E. Easterwood. On October 13, 1896, plaintiff, Dunn, filed his first amended original petition, alleging that on December 14, 1895, he was in lawful, peaceable, quiet, and undisputed possession of the lands described in his original petition, which were again described in his amended petition, and that he was and is the lawful owner of the same, in fee simple, and entitled to the use and occupancy of same; that on December 13, 1895, defendant with force and arms unlawfully entered upon said lands and premises, and ejected plaintiff therefrom, and unlawfully occupied the same, and withholds the possession of the same from plaintiff, to his damage in the sum of \$1,000. And he further alleged that the rental value of said premises was reasonably worth the sum of \$500 per annum, and that defendant was using said land, and appropriating the rents and benefits derived from the same, from the date of his alleged entry to the time of filing said amended petition. Plaintiff further alleged that, if defendant ever had any title or interest in said land, he charges that said right and title was finally adjudicated and settled in a suit in the district court of Van Zandt county, at its fall term, 1894, styled "Mrs. Julia A. Shamblin v. M. T. Nix et al. (No. 1,822)," wherein said defendant, Easterwood, was one of the defendants, and in which the said Easterwood disclaimed any interest in the land in controversy, and recovered nothing in said suit; that the land involved in said suit No. 1,822 involved the same land involved in this suit, and plaintiff pleads the disclaimer of said Easterwood in bar of his recovery herein. And he further alleged that, after the result of the suit of Shamblin against Nix et al., plaintiff purchased the land in controversy, and paid a good price for the same, in good faith, and without any knowledge of defendant's claim thereto. Defendant answered by plea of not guilty, and further answered that he had been in possession of said premises, and that he had held the same under a regular chain of title from the sovereignty of the soil, and had in good faith made valuable improvements thereon, aggregating the sum of \$570, and prayed that, in the event plaintiff recovered the land, defendant have judgment for the value of his improvements as charged. The cause was tried November 17, 1897, without a jury, resulting in a judgment against the defendant, Easterwood, and in favor of plaintiff, Dunn, for the land in controversy, and for costs, from which judgment defendant appeals.

The trial court filed the following conclusions of fact, which we find supported by the evidence, and the same are adopted: "On July 4, 1893, M. T. Nix conveyed to the defendant, W. E. Easterwood, an undivided interest of one hundred and seventy-six acres of the Isaac Killough survey, in Van Zandt county. On March 27, 1894, there was a suit

pending in the district court of Van Zandt county, in which Julia A. Shamblin et al. were plaintiffs, and M. T. Nix et al. were defendants, for the recovery of the said Killough survey. The defendant, W. E. Easterwood, was a party defendant in that suit, as were other vendees of the said M. T. Nix, who had conveyed to them undivided interests in the said Killough survey. On March 27, 1894, the defendant, Easterwood, filed a disclaimer of 'all interest, claim, title, right, possession or right of possession whatever, as well at law as in equity,' in the land sued for in the said case of Shamblin against Nix et al., as aforesaid. On this disclaimer there was entered a judgment in due form for the plaintiffs in that suit for the land, and for the defendant, Easterwood, for the costs. In this same judgment plaintiffs recovered judgment by default against M. T. Nix. This case of Shamblin against Nix et al. still remained on the docket of the district court of Van Zandt county until November 12, 1894. On said November 12, 1894, there was another, and what appears to be a final, judgment in the suit of Shamblin against Nix et al., in which the filing of the aforesaid disclaimer by the defendant, Easterwood, is recited, and in which the plaintiffs are again decreed the land as against Easterwood, and Easterwood recovered costs. That judgment also provides that M. T. Nix, one of the defendants in that suit, and the vendor of the defendant in this suit, Easterwood, shall recover a certain specific one hundred acres of the land. On November 12, 1894, the day of the rendition of said judgment, M. T. Nix conveyed this 100 acres to C. M. McCain, and this deed was the same day filed for record, to wit, November 12, 1894, the day of its execution. On November 17, 1894, C. M. McCain and wife conveyed said 100 acres to the plaintiff herein, Jas. A. Dunn, and this deed was filed for record December 13, 1894. There is nothing in the record to show that McCain on November 12, 1894, or that the plaintiff, Dunn, on November 17, 1894, had any notice that the defendant, Easterwood, had any intention to abandon his disclaimer, or to assert title to the land. After November 12, 1894, there were negotiations between M. T. Nix and defendant, Easterwood, looking to a settlement of Easterwood's claim on the 100 acres of the land decreed to Nix in the judgment of November 12, 1894, in which Easterwood agreed to abandon his claim thereto for \$100 in money, or a vendor's lien note for \$100; but these negotiations never resulted in a settlement on account of Nix's failure to comply with the terms of the agreement. There is no proof to show that McCain or Dunn knew of the pendency or the result of the negotiations. The court further finds that on January 24, 1890, M. T. Nix conveyed an undivided interest of 200 acres of the Killough survey to J. W. Poindexter; that said Poindexter conveyed his interest of 200 acres to A. B. Thomas, October 22, 1890; that A. B. Thomas

conveyed to Henry King, October 19, 1893; and that Henry King reconveyed said 200 acres to said M. T. Nix, July 14, 1894. On March 17, 1890, M. T. Nix conveyed to R. F. Nix an undivided 200-acres interest of the said Killough survey; and there is nothing in the record to show that the said 200 acres so conveyed to R. F. Nix has ever been divested out of him, but the title to the land appears to be still outstanding in the said R. F. Nix. It was agreed that the defendant has placed a fence around the entire 100 acres in controversy, and that it was reasonably worth \$1 per acre to fence the same, and that he broke and put in cultivation 20 acres of said land, and that it was reasonably worth \$2 per acre to so break and put the same in cultivation, and that the rental value of said land does not exceed \$75 per annum."

Appellant's first assignment of error reads: "The court erred in its conclusions of law wherein it finds that the defendant, W. E. Easterwood, was estopped in this suit from asserting title as against the vendees of M. T. Nix by reason of the entry of the judgment which recited that he disclaimed any title to the land in the suit of Julia A. Shamblin et al. against M. T. Nix et al., as a disclaimer only admits that plaintiff has a superior title, and acts as an estoppel only as to the plaintiff or the plaintiff's vendees." The suit of Shamblin et al. against Nix et al. was a suit of trespass to try title to the Isaac Killough survey of 640 acres, in Van Zandt county. M. T. Nix and W. E. Easterwood were defendants in that case. The defendant, Easterwood, in that suit held a warranty deed from M. T. Nix, dated July 4, 1893, for an undivided interest of 176 acres in the Killough survey. In March, 1894, W. E. Easterwood filed a disclaimer in that case, whereby he disclaimed "all interest, claim, title, right, possession or right of possession whatever, as well at law as in equity," to the land therein sued for. Thereafter, on November 12, 1894, without any other pleading having been filed by said Easterwood, a judgment was rendered in that case that the plaintiffs recover for all the land in the Killough survey, except 100 acres, which was decreed to M. T. Nix; the judgment describing said 100 acres by metes and bounds. Judgment was rendered against Easterwood on his disclaimer, the judgment reciting the disclaimer, and in favor of Easterwood for costs. On the same day M. T. Nix conveyed the 100 acres recovered by him in said judgment to C. M. McCain, which deed was filed for record on the day of its execution. On November 17, 1894, McCain conveyed said 100 acres to James A. Dunn. Neither McCain nor Dunn at the time of their respective purchases had any notice that Easterwood set up any claim to the land, and each paid value for the land. Appellant contends that a disclaimer filed by a defendant in a suit is an estoppel against him only as to the interest claimed by plaintiff in that suit, and does not affect him as to the claims

of other parties. His position is that he held a general warranty deed from M. T. Nix, and that, upon judgment being rendered in the suit of Shamblin et al. against Nix et al. in favor of M. T. Nix for 100 acres of land in the Killough survey, by reason of the warranty he became entitled to the same. Upon the effect of the disclaimer of Easterwood filed in the Shamblin-Nix suit, appellant refers us to the case of Wootters v. Hall, 67 Tex. 514, 3 S. W. 725. The facts shown in the Wootters Case were that in 1874 the heirs of Kercheffer brought an action of trespass to try title against Robert Hall, W. T. Hall, and J. H. Burnett. In that case W. T. Hall and J. H. Burnett filed a disclaimer. In 1879 a judgment was rendered in favor of the defendant Robert Hall, and in favor of defendants W. T. Hall and J. H. Burnett for costs on their disclaimers. Subsequently J. C. Wootters instituted a suit of trespass to try title against W. T. Hall and S. C. Arledge to recover the land. Wootters claimed title under a conveyance made by the heirs of Kercheffer, and also under a deed made to him by Robert Hall on March 8, 1882. The supreme court, speaking through Mr. Justice Stayton, in reference to the disclaimer filed by W. T. Hall, uses the following language: "As between persons claiming under the heirs of Kercheffer and persons claiming through Robert Hall through conveyances made since September 19, 1879, it must be held that Robert Hall had the superior title to the land at that date. The plaintiff holds whatever title Robert Hall had at that time, so far as the record shows. It therefore only remains to consider the effect of the disclaimer filed by W. T. Hall in the former action in connection with the judgment which he took in that case. A disclaimer admits the title of the plaintiff to the land, which, nothing further appearing, would entitle plaintiff to a judgment for it, and the defendant to a judgment for costs. A plaintiff, however, may assert that the defendant was in possession of or claiming the land when the action was brought, and, if this be found in his favor, the defendant will not be entitled to his costs. The judgment in the former action determines that W. T. Hall neither had adverse possession of the land nor asserted title to it pending the former action; for he took judgment on his disclaimer for costs, which he could not have done had he been asserting an adverse claim or possession. Having taken such a judgment on his disclaimer, he is now estopped from setting up title against one claiming through the heirs of Kercheffer, unless he can show that he has acquired title since the former action was decided." *Id.*, 67 Tex. 515, 3 S. W. 728. The facts of the above case are quite similar to those of the case before us. Mrs. Shamblin was seeking to recover the Killough survey. M. T. Nix and Easterwood were defendants. Easterwood disclaimed all interest in the land. Judgment was rendered on

his disclaimer against him for the land, and in his favor for costs. Judgment was rendered in favor of Nix for 100 acres of the land. That judgment determined that Easterwood neither had adverse possession of or asserted title to the land at the time of its rendition. In the case of *Herring v. Swain*, 84 Tex. 525, 19 S. W. 774, Mr. Justice Gaines, speaking for the court, as to the effect of a disclaimer under our system, says: "It is an admission upon the record of the plaintiff's right, and a denial of the assertion of title on the part of the defendant." We conclude that under the facts of this case the court did not err in holding that the appellant, Easterwood, was estopped from setting up his title acquired prior to November 12, 1894, to defeat a recovery by plaintiff.

Appellant insists, in his second assignment of error, that the record shows an outstanding legal title in R. F. Nix, and that the trial court erred in holding appellant estopped from setting up such title to defeat plaintiff's recovery. It was agreed that M. T. Nix was the common source of title, under whom both plaintiff and defendant claimed. The Killough survey contained 640 acres. On March 17, 1890, M. T. Nix conveyed to R. F. Nix an undivided 200 acres of this survey, describing the 200 acres by metes and bounds. The judgment in the Shamblin suit decreed to M. T. Nix 100 acres of land in this survey, describing the same by metes and bounds. The deeds from M. T. Nix to McCain and from McCain to Dunn describe this 100 acres by metes and bounds. The record does not show that there is any conflict in these two tracts of land, or that the field notes of one embrace any part of the other. Easterwood does not in any way connect himself with the title of R. F. Nix. The record does not affirmatively show that this outstanding title never vested in the common source. Under these facts, the trial court did not err in holding that defendant could not defeat a recovery by plaintiff because of an outstanding title in R. F. Nix. *Rice v. Railway Co.*, 87 Tex. 90, 26 S. W. 1047; *Prouts v. Thompson* (Tex. Civ. App.) 27 S. W. 904; *West v. Keeton* (Tex. Civ. App.) 42 S. W. 1034. Judgment affirmed.

#### On Rehearing.

In the conclusions of fact filed by the trial court, and adopted by this court in our opinion rendered May 21, 1898, appears the recitation that: "On March 17, 1890, M. T. Nix conveyed to R. F. Nix an undivided 200-acres interest of the said Killough survey; and there is nothing in the record to show that the said 200 acres so conveyed to R. F. Nix had ever been divested out of him, but the title to the land appears to be still

outstanding in the said R. F. Nix," are not fairly borne out by the record. The only evidence offered in reference to this matter was the deed from M. T. Nix to R. F. Nix. The appellant did not show that this title never vested in the common source, nor did he connect himself with it. This deed to R. F. Nix conveyed an undivided interest of 200 acres, describing the same by metes and bounds, but the field notes described the entire Killough survey. It did include the land in dispute. The statement in the opinion that there was no conflict shown between the land conveyed to R. F. Nix and the land embraced in the suit is error. The conclusions of fact will be corrected as herein indicated, and appellant's motion for rehearing is overruled.

#### COLUMBIA CARRIAGE CO. v. HATCH.

(Court of Civil Appeals of Texas. May 21, 1898.)

#### CONTRACTS — RESTRAINT OF TRADE — AGENCY — SALES—BILLS AND NOTES—ILLEGALITY OF CONSIDERATION.

1. A carriage manufacturer, by a contract executed in Texas, granted exclusive territory for the sale of his carriages; and the other party agreed to handle and sell such carriages to the exclusion of others of like grades. The contract further provided that all goods shipped on consignee's orders were to be settled for with customers' notes indorsed by him. The consignee afterwards executed notes in consideration of purchases made of the company under the contract. *Held*, that the contract was one of sale, and not of agency, and hence within Sayles' Rev. Civ. St. Supp. p. 905, prohibiting trusts and conspiracies against trade.

2. Notes given for the price of goods purchased in pursuance of a contract illegal because a conspiracy against trade, within Sayles' Rev. Civ. St. Supp. p. 905, though based on ample consideration outside the contract, and though no aid from the contract is required to establish the right to recover thereon, are not enforceable.

Appeal from district court, Dallas county; Edward Gray, Judge.

Action by the Columbia Carriage Company against W. H. Hatch. From a judgment for defendant, plaintiff appeals. Affirmed.

This is a suit by the plaintiffs, T. L. Curley and R. L. Hedges, citizens of the state of Ohio, partners under the name and style of the Columbia Carriage Company, against W. H. Hatch, defendant, for \$4,998.68, besides interest and protest fees, alleged to be due on two promissory notes—one for \$2,412.18, dated July 22, 1895, and due at four months, and the other dated October 3, 1895, for \$2,586.50, due at four months after date—executed by the defendant. After first settling out the contract in full, which was afterwards introduced in evidence, the defendant specially pleaded "that said contract was executed and delivered to him by plaintiff at Dallas, Texas, where he resided; that said

1 Writ of error denied by supreme court.

contract was signed by defendant, and accepted and ratified then and there by the plaintiff; that in pursuance of said contract plaintiff sold and delivered to defendant goods amounting to several thousand dollars; that the defendant executed the notes mentioned in plaintiff's petition for goods which had been shipped to the defendant under the contract heretofore set out in this answer; and that the notes so executed were the notes contemplated in the contract at the time said contract was executed. Defendant further says that the contract set out and entered into is prohibited by the statute of the state of Texas, by the act of March 30, 1899, entitled 'An act to define trusts and provide for penalties and punishments of corporations, persons, firms and associations, to promote free competition in the state of Texas,' which act is found on pages 905 and 906 in the Supplement of Sayles' Revised Civil Statutes, and here made a part of the answer; that the contract entered into, and heretofore set out in this answer, embodies a combination of capital and skill, and was created for the purpose of carrying out restrictions in trade, and to prevent competition by the plaintiff for the sale of its goods in the state of Texas, which contract obligated this defendant to purchase from the plaintiff to the exclusion of all similar grades of goods, and which the plaintiff obligated itself to furnish to this defendant, and to no other person except this defendant in the state of Texas, save in the town of San Antonio, which contract this defendant pleads and relies upon as a defense to plaintiff's cause of action, being in violation of the said statute law of the state of Texas, and defendant says that all action taken thereunder is void, in so far as this defendant is concerned, and in so far as this plaintiff seeks to establish any liability against this defendant, and this plaintiff has no right to further prosecute this suit against this defendant, and for this, defendant puts himself upon the country, and prays to be dismissed with his costs. The defendant further pleads damages and partial payments in set-off; his payments being on the notes sued on by plaintiff, in full, except the sum of \$1,958.49, which payments are specially set out, and consist, among other just credits, of customers' notes indorsed by this defendant in accordance with the terms of the contract, amounting to the sum total of \$2,538.19."

These facts were proven on the trial:

The plaintiff read in evidence the two notes sued on,—one due November 22, 1895, for \$2,412.18; the other due February 3, 1896, for \$2,586.50. Plaintiff also read in evidence, and surrendered for cancellation, a note for \$2,387.75, dated September 16, 1895, and due at four months; the last note mentioned being the one described in defendant's answer, and alleged to have been paid. Defendant read in evidence the following contract:

"Dallas, Texas, October 29, 1894. Columbia Carriage Company, Hamilton, Ohio—Dear

Sirs: In consideration of your giving me the exclusive sale of the vehicles you manufacture for the state of Texas, excepting therefrom the town of San Antonio, from January 19, 1894, and up to October 30, 1895, I agree to handle and sell your work free of all expense to you, and to the exclusion of all similar grades of work, at prices, terms, and conditions herein mentioned. I further agree to canvass the state thoroughly, by correspondence and personal solicitation of my traveling salesmen, making all possible efforts to sell your vehicles to responsible dealers throughout the state. I further agree to forward settlements for all goods shipped on my orders within thirty days from date of shipments, by remitting for same in cash, less five per cent., or by responsible customers' notes, indorsed by me, according to terms and conditions herein mentioned. W. H. Hatch.

"Accepted by Columbia Carriage Co., per J. E. Wright.

"Prices, Terms, and Conditions. Numbers 25, 26, 27, 28, 33, 34, 35, 36, 37, 38, 39, 40, 49, 50, 55, and 56, Miami grade leather quarter-top buggies, complete with plated seat rail, dash rail, stump joins, prop nuts, and hub bands, split-leather quarters and back stays, cushions and back to be either split or leather or cloth. Numbers 51 and 52, 63 and 64, of Miami grade, \$2.50 over above styles. We also agree to build a Concord spring buggy in this grade at a price to be mutually agreed upon hereafter. Split-leather roof and back curtain on any of above styles, \$2.50 additional. We will also furnish any of above styles in our Columbia grade, with panel spring back and cushion, for \$7 each over above prices. Leather roof and back curtain on this grade, \$4 additional. Above styles furnished in our best grade leather quarter top (name of above grade to be furnished Mr. Hatch as soon as possible). \$10 additional. Number 75, leather quarter top, and number 76, canopy top phaetons, Columbia grade, with wing dash and rail, plain body, \$87. Same style, fancy bodies, \$1.50 additional. Numbers 85 and 86, phaetons, finished same as numbers 75 and 76, \$2.50 extra. Numbers 80 and 81, loop-front phaeton, \$77. Fancy bodies, \$1.50 additional. Numbers 90 and 91, loop-front phaeton, \$79.50. Fancy bodies, \$1.50 additional. Numbers 105 and 110, surreys, Columbia grade, complete with spring back and cushion, lamps and double fenders, \$75. Numbers 106 and 111, surreys, Columbia grade, leather quarter extension top, \$82.50. Leather roof and back curtain for extension top surreys, \$7.50 additional. Leather roof and back curtains on all styles phaetons, \$4 additional. Number 125, surrey, Columbia grade, complete with spring backs, lamps, and double fenders, \$90. Number 126, surrey, \$7.50 additional over No. 125. Number 128, surrey, \$7.50 additional over No. 126. Number 150, carriage, Columbia grade, complete, \$115, with

leather quarter top. Shafts, per pair, Miami grade, \$2.50. Shafts, per pair, Columbia grade, \$3. Poles and yokes, complete, \$4. All other extras, 25 per cent. from Columbia Carriage Co.'s printed price list. W. H. Hatch.

"Accepted by Columbia Carriage Co., per J. E. Wright.

"Terms and Conditions. All goods are to be settled for with customers' notes, indorsed by Mr. W. H. Hatch, running not over four months, for all goods shipped on Mr. Hatch's orders. Mr. Hatch is to have the privilege of making the terms on all car-load orders that are taken for shipment during the months of January, February, and March, four-months notes, with privilege of renewing same for four months on all goods unsold; said renewal notes to bear interest at 8 per cent. per annum. Terms on car-load shipments made during April and May are to be four-months notes, as above, with privilege of renewing for two months at the above-mentioned rate of interest on all goods unsold. All of the above renewals to apply only to full car-load shipments made directly to customers. Mr. Hatch is also to have above privileges on renewal on all goods shipped during above months to him at Dallas. W. H. Hatch.

"Accepted by Columbia Carriage Co., per J. E. Wright."

It was shown by Mr. Hatch, the defendant, that the contract was executed in Dallas, Tex. Under this contract, and in pursuance of the terms thereof, Hatch purchased certain goods from the plaintiff, and the notes sued on were executed in payment for the goods so purchased. It was proven that the defendant had made various payments on the notes sued on, as alleged in his answer, and that on December 5, 1895, said notes had all been paid, except the sum of \$1,958.49. Upon these facts the trial judge pronounced the legal conclusion that the contract was in violation of the statute law of this state, defining trusts and combinations in restraint of trade, and gave judgment for the defendant.

Crawford & Crawford, for appellant. Porter & Cohron, for appellee.

FINLEY, C. J. (after stating the facts). The first question presented for consideration and decision is this: Is the contract between Hatch and the Columbia Carriage Company in violation of our statute against trusts and conspiracies against trade, namely, article 5313, Rev. St. 1895? If the contract is to be construed as one regulating and controlling the purchase and sale of articles of merchandise between the contracting parties, Hatch and the Columbia Carriage Company, it is quite clear that it would come within the prohibitions of the statute. Upon the one hand, it provides that Hatch is to handle no goods of this character from any other factory, and, upon the other, that the Columbia Car-

riage Company is not to permit any of the goods to be handled by other persons in the state, except at San Antonio. By these provisions competition with Hatch is prevented, and the exclusive privilege to sell to Hatch is secured by the Columbia Carriage Company. In *Fuqua v. Brewing Co.*, 90 Tex. 298, 38 S. W. 29, 750, such a contract of sale was held violative of the statute, and void. See, also, *Coal Co. v. Lawson*, 89 Tex. 394, 32 S. W. 871, and 34 S. W. 919. If, however, the contract is to be construed as entered into for the purpose of creating an agency, under which Hatch was to sell the goods of the Columbia Carriage Company as its agent, then it would not come within the terms of the statute, and could not be deemed violative thereof. *Welch v. Windmill Co.*, 89 Tex. 653, 36 S. W. 71. This brings us to the construction of the contract. The court below treated it as a contract for purchase and sale, and found, as a fact, that Hatch purchased goods of the Columbia Carriage Company under it, and in pursuance of its terms, and that the notes sued on were executed in consideration of the goods so purchased. There is no assignment of error questioning the correctness of this finding of fact. The contract is clearly not one of immediate sale and purchase. If any sale and purchase are therein contemplated, they are to be made in the future. It is equally clear that an agency is not expressly created by the terms of the contract. We must therefore look to the substantial elements of the contract to determine the intent and purpose of the parties. Was it the intention of the parties that Hatch should become the agent of the Columbia Carriage Company for the sale of the articles named in the contract? Ordinarily, a contract of agency expressly declares that one of the parties is thereby made the agent of the other, states the object of the agency and the powers to be exercised, and provides for the compensation of the agent for his services to be rendered for the principal. We do not mean to say a contract of agency must contain all such provisions, but only that such are the usual provisions. Where the agent is to be intrusted with the possession and power to sell the personal property of the principal, we usually find some provision for the return of the property in case the sale is not effected. In the contract under question we find none of these indications of agency. The contract fails to expressly declare the agency. It does not provide that the title of the property is to remain in the Columbia Carriage Company, it makes no provision for the return of the property in case it be not sold, and it does not appear therefrom that Hatch is to be compensated for his services by commissions or money to be paid by the Columbia Carriage Company. On the other hand, it clearly appears from the terms of the contract that the Columbia Carriage Company is to ship to Hatch, and others upon his order, the articles which are

the subject of the contract, and that Hatch is to become personally bound and make settlement therefor. These are characteristic elements of contracts for purchase and sale of articles of merchandise between merchants; and, in the absence of other provisions in the contract which would neutralize their effect, we think they should control in determining the question. *Williams v. Tobacco Co.* (Tex. Civ. App.) 44 S. W. 185, and cases there cited. The parties to the contract treated it as a contract for purchase and sale, as we learn from the findings of the court that the notes sued on were executed in consideration of purchases made by Hatch of the Columbia Carriage Company under and in pursuance of the terms of the contract. As before stated, there is no assignment of error attacking this finding of fact as not warranted by the evidence, and we must treat the fact as established. In our opinion, the contract should be treated as an agreement, entered into by the parties, intended to govern and control contemplated future purchases and sales of the articles mentioned. This conclusion leads us to the further determination that the contract is in violation of our statute against trusts and conspiracies against trade, and for that reason void.

2. It is further contended that the illegal character of the contract should not defeat a recovery upon the notes, as no aid from such contract is required to establish plaintiff's right to recover upon such notes; citing the cases of *De Leon v. Trevino*, 49 Tex. 93; *Pfeuffer v. Maltby*, 54 Tex. 461; *Brooks v. Martin*, 2 Wall. 70. If these notes, as found by the court, were executed for articles purchased under and in pursuance of the terms of the contract, then the provisions in restraint of trade contained in the contract become part of the consideration, and those provisions, being in violation of our statute, tainted the transaction, and rendered the notes void. In the case of *Wegner v. Biering*, 65 Tex. 509, Mr. Associate Justice Robertson said: "It is obvious that there is ample valid consideration to support the promise sued on; yet, if, to the abundance of valid consideration, there has been added a taint of what is illegal, the whole contract is tainted. Story, Cont. § 583; Bishop, Cont. § 471; Pollack, Cont. § 318. If a debtor, in payment of an account for \$100, and in consideration that his creditor will refrain a duty or do an illegal act, executes his note only for the amount of the account, the note is nevertheless void. The good consideration has no virtue to cure the bad, but the bad corrupts the whole." See, also, *Shelton v. Marshall*, 16 Tex. 353; *Seeligson v. Lewis*, 65 Tex. 215; *Wiggins v. Blisso*, decided by this court at present term.<sup>1</sup> We do not think this case comes within the cases cited by appellant in support of its proposition. We are of the opinion that the notes sued on were tainted by the illegal considera-

tion entering into them, and that the court below correctly held that no recovery should be had thereon. Judgment affirmed.

### MCGHEE v. ROMATKA.<sup>1</sup>

(Court of Civil Appeals of Texas. Oct. 12, 1898.)

INFANCY—ACTIONS—NAMES—JUDGMENTS—VACATION—CONCLUSIVENESS.

1. A judgment against an infant is only voidable, and is binding until set aside in a direct attack thereon, even where the infant was sued, and a guardian ad litem appointed for him, under a wrong given name.

2. Where a judgment is rendered against an infant under a wrong given name, and after coming of age he files an application in his correct name in the action wherein it was rendered to vacate it, which is denied, because he is a stranger thereto, the judgment denying his application, being on the merits, is a final adjudication of his right to set aside the judgment.

Appeal from district court, McLennan county; Marshall Surratt, Judge.

Action by Jinks McGhee against Joseph Romatka. There was a judgment for defendant, and plaintiff appeals. Questions were certified to the supreme court, and answered. 45 S. W. 552. Affirmed.

This is a suit of appellant, Jinks McGhee, against Joseph Romatka, brought in the district court of McLennan county, for 80 acres of land, the N.  $\frac{1}{2}$  of quarter section No. 3 of section 28 of the university lands, situated in McLennan county. The petition was filed July 16, 1896. Upon trial by the court without a jury, judgment was rendered for Romatka, the appellee, from which the plaintiff below, Jinks McGhee, has appealed.

The court certified the principal question involved in the appeal to our supreme court upon the following statement, which we reiterate as a correct statement of the case and the facts:

"On August 24, 1875, Alpheus McGhee made application in accordance with the act of the legislature approved April 8, 1874, in regard to the sale of university land, to purchase the land in dispute, 80 acres of university land in McLennan county, at \$2 per acre, a total of \$160, paying \$16 cash, and executing his obligation to pay the remainder, with 10 per cent. interest per annum, in 10 equal annual installments. On January 24, 1876, and February 23, 1877, he made two other payments, amounting to \$32 on the principal and \$17.88 on the interest. Alpheus McGhee died in 1876 or 1877, leaving surviving him his wife, M. A. McGhee, and one child, the plaintiff in this suit, the appellant, by name Jinks McGhee, the only child of himself and wife, M. A. McGhee. After the death of Alpheus McGhee, his widow, M. A., married F. T. Wood, and Wood and the vendee of himself and wife made all the rest of the payments due the state for the land. September 17, 1879, F. T. Wood and M. A.

<sup>1</sup> Reversed in supreme court. See 47 S. W. 637.

<sup>1</sup> Writ of error denied by supreme court.



Wood, husband and wife, conveyed the land by general warranty deed to C. E. Kingsbury, and on November 4, 1879, Kingsbury conveyed the land by special warranty to defendant below (appellee here), who went into possession thereof, and has since continuously occupied the same. After he (Romatka) had paid in full all the purchase money due the state on the land, on February 15, 1890, he brought suit in the court below in cause No. 5,249 to clear his title to the land against the plaintiff in this cause, but by the name of Alpheus McGhee, describing him as a minor, son of Alpheus McGhee, Sr., and M. A. McGhee, who had, after the death of Alpheus McGhee, Sr., intermarried with F. T. Wood, alleging his title as above stated. Citation issued in the cause No. 5,249, and, together with certified copy of the petition in that suit, it was served upon the plaintiff in this suit, in Taylor county, Texas, who at that time was about 16 years of age; and he thereupon requested one Reed, who lived near the land in McLennan county, to look after the matter for him, and pursuant thereto Reed procured counsel to represent the minor in the suit, who, on October 10, 1890, filed an answer therein in the name of Alpheus McGhee, as sued. At the October term, 1890, the court appointed one T. C. Smith, Esq., an attorney of the court, guardian ad litem, to represent the minor in the cause No. 5,249, and he thereafter appeared and answered as such guardian ad litem, all the proceedings being as against defendant in the name of Alpheus McGhee. December 4, 1890, the cause was tried, and final judgment rendered in favor of the plaintiff; Romatka, for the land sued for in the present suit, as follows: 'Joseph Romatka vs. Alpheus McGhee. Thomas C. Smith, Guardian ad Litem for Defendant. December 4, 1890. This day came the parties, by their attorneys, defendant represented by guardian ad litem, T. C. Smith, Esq., heretofore appointed to represent him, a jury being waived, submit all matters in controversy, as well of fact as of law to the court, all demurrers having been first overruled, and evidence and argument of counsel having been heard and fully understood, it is considered and decreed by the court that Alpheus McGhee, Sr., is dead; that he left surviving him his widow, M. A. McGhee, who afterwards married F. T. Wood, and this defendant as their son and only child, as his sole surviving heirs; that said M. A. Wood and her husband sold the land herein described to C. E. Kingsbury, who sold it to Joseph Romatka, with the greater part of the purchase money of said land unpaid and owing to the state of Texas, and that said M. A. Wood, joined by her husband, filed right to sell said land in liquidation of the community debt existing, as aforesaid, against the same, and that plaintiff recover of the defendant the premises described and bounded as follows: [Then follows a description of the 80 acres of land, and the

judgment proceeds]; and that all title be divested out of said defendant and invested to plaintiff to said land, and that execution issue in favor of the officers of the court against plaintiff for all costs of the court, including a fee of \$25 allowed said guardian ad litem.' On the 23d of July, 1891, a patent was issued by the state to Joseph Romatka, assignee of Alpheus McGhee, for the land, he paying the patent fees. April 23, 1896, the attorney for Jinks McGhee, not knowing that his name was Jinks, but supposing it was Alpheus, after said Jinks McGhee had reached his majority, filed a motion in cause No. 5,249 against Joseph Romatka, to have the judgment of December 4, 1890, vacated. That petition was amended July 10, 1896, in the name of Jinks McGhee, setting up the same grounds for vacating the judgment as in the original petition, and showing his name to be Jinks McGhee; that there was no such person as Alpheus McGhee, son and heir of Alpheus McGhee, Sr., deceased. That proceeding was answered by Joseph Romatka, and the court sustained his exceptions to the suit to vacate the former judgment, upon the ground, as stated in the ruling, that 'the court being of the opinion that Jinks McGhee, being a stranger to said judgment, should not interfere therein.' The attorney that filed the suit to vacate the judgment, at the time of filing the suit, was not advised that 'Jinks' was the name of his client, but that the minor heir of Alpheus McGhee desired the judgment vacated. Hence he made the application to set the judgment aside in the name of the original defendant, Alpheus McGhee. He afterwards learned the facts that there was no Alpheus McGhee, but that Jinks McGhee was the heir, and he amended his suit accordingly; the court below holding, as stated, on exceptions, that he was a stranger to the suit, and could not interfere in setting the judgment aside. There was, in fact, no such person as Alpheus McGhee, sued originally as the heir of Alpheus McGhee, Sr., deceased, son of the senior McGhee and his wife, M. A. McGhee. The plaintiff in this suit, Jinks McGhee, was that son and heir, and was never known or called Alpheus McGhee. He was, however, the very person upon whom the citation, with copy of petition in the original suit of Romatka against Alpheus McGhee, was served; and Reed, for him, secured the services of Pearce & Boynton, attorneys, to file answer for him, which they did, but had no further connection with the suit. The guardian ad litem was appointed in the original suit for the defendant therein, Alpheus McGhee, and not for Jinks McGhee. The suit was filed by Jinks McGhee for an undivided half of the 80 acres of land recovered by Romatka in the original suit against Alpheus McGhee, described in the petition as the minor son of Alpheus McGhee, who applied for the purchase of the land and who paid a part of the purchase price thereof. The case was tried by the court without a jury, and judgment was

rendered for defendant, Romatka, for the land, etc., upon the ground that the judgment of the court of December 4, 1890, in cause No. 5,249 was not void as to Jinks McGhee, the plaintiff herein, and was not subject to collateral attack; that the suit brought by plaintiff in April, 1896, to have the judgment set aside and vacated, was a direct attack upon the first judgment in the cause No. 5,249; and that the judgment of July 10, 1896, upon the demurrer, was a final adjudication against plaintiff of his right to have the judgment set aside, which, not having been reversed, is final between the parties in this suit. Wherefore the court concluded that the matters now in suit are res adjudicata, and judgment was accordingly rendered for the defendant, Romatka, for the land.

"Now the court of civil appeals of the third supreme judicial district of the state of Texas, by its chief justice, hereby certifies the following question arising in the case now on appeal to this court, to wit: Under the facts stated, were the judgments in the original suit, No. 5,249, res adjudicata as to the parties to this suit and the matters now in dispute, and binding upon the present plaintiff, and authorizing judgment against him in this suit, the court having decided in the suit to vacate the original judgment that Jinks McGhee was a stranger to that suit, and had no right to set the judgment aside?"

The supreme court, upon the issues presented, then said (45 S. W. 552): "The judgment of December 4, 1890, was not void as to, but was binding upon, Jinks McGhee, unless and until set aside in some direct attack thereon; the fact that he was sued by the wrong name 'being available only by plea in abatement' in that suit (*Insurance Co. v. French*, 18 How. 404; *Parry v. Woodson*, 33 Mo. 347), and the fact that the guardian ad litem was appointed for Alpheus McGhee being at most an irregularity not affecting the power of the court to render the judgment, since it would have had such power if no appointment had been made. *Martin v. Weyman*, 26 Tex. 400; *Montgomery v. Carlton*, 56 Tex. 361; 1 Black, Judgm. § 193. The motion filed April 23, 1896, in the name of Alpheus, and amended July 10, 1896, in the name of Jinks, McGhee, was a direct attack upon the judgment. The exception challenged the right of Jinks McGhee to attack the judgment for any cause, evidently for the reason that he did not appear upon the face of the record to have been party thereto, and could not be shown to have been such by parol evidence. The court, in sustaining such exception, necessarily held that Jinks McGhee could not attack the judgment for any cause, and therefore had no cause of action. It follows that the ruling was upon the merits of his case. If the court erred in law in so holding, he should have had such erroneous decision set aside. Until he does so, he is precluded thereby from making this similar attack (*Clayton v.*

*Hurt*, 88 Tex. 595, 32 S. W. 876); otherwise, there would be no end to the number of attacks he might make if the court continued to sustain similar exceptions. We answer the question certified in the affirmative."

J. B. Scarborough, for appellant. Richard L. Munroe, for appellee.

COLLARD, J. (after stating the facts). From the foregoing it is evident that appellant's assignments of error cannot be sustained. It was not error to admit in evidence the record and judgment in cause No. 5,249; nor in admitting the judgment and proceedings to set aside that judgment; nor was it error to hold that the judgment of July 10, 1896, was res adjudicata of the rights of Jinks McGhee. The original petition in cause No. 5,249 was not had on general demurrer. We therefore conclude that the judgment in this cause must be affirmed, and it is so ordered. Affirmed.

WHITMIRE et al. v. STATE ex rel.  
VAUGHAN et al.<sup>1</sup>

(Court of Civil Appeals of Texas. June 18, 1898.)

SCHOOL DISTRICTS — DESIGNATION — CHANGES IN DISTRICTS — CONSENT OF VOTERS — COMMISSIONERS' COURTS — FINDINGS — CONCLUSIVENESS — CREATION OF NEW DISTRICTS — VALIDITY.

1. Sayles' Rev. Civ. St. arts. 3731, 3732, direct commissioners' courts to erect school districts, and designate same carefully, by giving the whole surveys and parts of surveys included, and the acreage thereof, respectively. A commissioners' court erecting districts failed to describe the acreage of the surveys, but delineated the districts on a map showing the names of the surveys. The map was adopted as a description of said districts, which were organized thereunder, and continued to be for 14 years. *Held*, that the departure from the statute was a mere irregularity, and did not invalidate the creation of the districts.

2. Under Acts 1884, Sp. Sess., pp. 43, 44, § 29 (Rev. St. 1895, art. 3938), providing that school districts "shall not be changed without the consent of a majority of the legal voters in all districts affected by such change," the erection of a new district out of a part of the old one, on a petition by voters thereof, does not presuppose a final judicial determination by the commissioners' court that the petitioning voters constitute a majority of the legal voters of the old district.

3. Under Acts 1884, Sp. Sess., pp. 43, 44, § 29 (Rev. St. 1895, art. 3938), providing that school districts "shall not be changed without consent of a majority of the legal voters in all districts affected by such change," an erection of a new district out of an old one on a petition of 38 voters thereof, not stating that they were a majority of such voters, or that a majority consented to the change, there being 132 legal voters therein, and without any inquiry or finding in the commissioners' court record that a majority consented, will be annulled.

Appeal from district court, Hill county; J. M. Hall, Judge.

Quo warranto on relation of J. W. Vaughan and others against Charley Whitmire and oth-

<sup>1</sup> Writ of error denied by supreme court.

ers. From a judgment for relators, the respondents appeal. Affirmed.

This is a quo warranto proceeding brought by the state, upon the relation of J. W. Vaughan, J. W. Beavers, and A. L. Peak, against appellants, Charley Whitmire, J. P. Orr, and J. B. Orenbaum, to test the organization of a certain school district, and the right of said last-named parties to hold the offices of trustees of said district. Plaintiffs alleged that they were the trustees of Ross school district, No. 5, in Hill county, sometimes designated also as "School District No. 91"; that the same was a legally constituted school district; that the commissioners' court of Hill county had attempted to cut off a part of this district, and form a new district; and that the defendants were attempting to act as the trustees of this new district, known as "District No. 80." It was charged that the action of the commissioners' court in creating a new district was void, for the reason that the court attempted to create the new district at a called session of the court, and for the further reason that the commissioners' court, in forming the new district, changed the old, without procuring the consent of the majority of the legal voters affected by the change. It was alleged that the voters of this new district had elected defendants as trustees, and that the said trustees had intruded themselves into the office, and were attempting to exercise its functions. The prayer was that defendants be enjoined from acting as trustees, and that upon hearing they be ousted from the said office. Upon application the court granted the writ in chambers. The defendants answered by exceptions, a general denial, and specially pleaded that the new district, No. 80, was legally constituted by the commissioners' court, and that they were the duly elected, qualified, and acting trustees of said district. Upon trial before the court, October 16, 1897, judgment was rendered in favor of plaintiffs. Defendants gave notice of appeal, and have duly perfected their appeal. The trial judge filed conclusions of fact and law, as follows:

"Conclusions of Fact. (1) I find that the commissioners' court of Hill county, Texas, on July 2, 1884, subsequent to their former action had on May 17th of the same year, divided Hill county, Texas, into school districts, conformably with the requirements of the act of the legislature of 1884 (Sayles' Rev. Civ. St. arts. 3731, 3732). (2) I find that the action of said commissioners' court in attempting to describe said school districts to some extent was irregular, in failing to give the acreage of whole surveys and approximate acreage of parts of surveys of each district; and I find that said commissioners' court of Hill county, Texas, ordered a delineation of said school districts upon a map furnished it, which gave the names of the surveys, but failed to state the number of acres in each survey, or parts of acres in

each survey, and that said map was adopted on July 2, 1884, by the commissioners' court of Hill county, Texas, as a description and delineation of Hill county school districts, including the district involved in this case. (3) I find as a matter of fact that the school district, the territory whereof is involved in this action, as originally designated by the commissioners' court of Hill county, Texas, was known as 'District No. 91,' or 'No. 5,' and was sometimes known as the 'Ross District,' and that each of said designations applied to the school district as delineated and identified on said map, and is the same as is designated as such by said order of July 2, 1884, of said commissioners' court of Hill county, Texas. (4) I further find as a fact that said school district No. 91, or No. 5, or said Ross school district, in its creation and designation into a school district by said commissioners' court on July 2, 1884, thereafter held public schools in said school district, and has continuously from that time to the present time elected and had acting for it trustees as provided by law, and that the plaintiff J. W. Vaughan and the other two plaintiffs suing on relationship herein are the duly elected and acting trustees for said original Ross district, or district No. 91, or No. 5, as the same is sometimes called and designated. (5) I find as a matter of fact that the commissioners' court on April 29, 1897, attempted to divide said school district known as the 'Ross District,' and sometimes called 'No. 91,' or 'No. 5,' as it had previously existed and was previously known, into two districts. (6) I find as a fact that at the time said commissioners' court of Hill county, Texas, attempted to change said school district by making two districts out of said original district, that there were 132 legal, qualified voters residing in said old original district. (7) I further find as a fact that said commissioners' court of Hill county, Texas, in changing said original district, and making said new district out of a part of the territory of the old one, did so without having the consent of but 38 of the legal voters of said original district, and therefore did not have the consent of a majority of the legal, qualified voters in said original district. (8) I find as a fact that the defendants were elected as trustees for the newly-created district, and are attempting to act in the capacity of trustees thereof.

"Conclusions of Law. (1) I find that because a majority of the qualified and legal voters of said original school district No. 91, or No. 5, and, as sometimes called, the 'Ross School District,' did not consent to a change of said district, it rendered the action of said commissioners' court of Hill county totally null and void. (2) I further find, as a conclusion of law, that the action of the commissioners' court of Hill county, Texas, in establishing said original school district, in accordance with their authority to divide said

county into school districts as required by the Acts of 1884, while doing so was in some respects irregular, still the same was but an irregularity, and such irregularity is one that the defendant trustees of the new district cannot take advantage of, this being a matter that could only be questioned by the state upon proper proceedings; and I find that to hold such irregularity to avoid the school district in question would affect every other school district in Hill county, Texas, and bring about confusion, and be a serious detriment to the public free school interests of Hill county, Texas. (3) I find, as a conclusion of law, that the action of the commissioners' court of Hill county, Texas, in April, 1897, was not a judicial act, but administrative, legislative, and ministerial in its character; and therefore the principle applicable to its action, judicially considered, of course, can have no application to the question involved in this action. (4) Furthermore, I find that, if it were conceded that the action of the commissioners' court was judicial, that its jurisdiction was not invoked, because of the want of the necessary two-thirds of the legal and qualified legal voters residing in said school district at the time it attempted to act, and therefore it was completely and wholly without jurisdiction in the premises to effect a change of said original district. (5) Hence, I hold, as a conclusion of law upon the whole case, that the defendants, as trustees for the new district, ought to be ousted from the functions of their office, and enjoined from further attempting to exercise the function of trustees of said newly-created district; and judgment is entered accordingly, with costs of suit against said defendant trustees."

The foregoing conclusions of fact are substantially correct, and we here adopt them.

McKinnon & Carlton, for appellants. Chas. F. Greenwood and Dyer & Dyer, for appellees.

FINLEY, C. J. (after stating the facts). 1. It is contended by appellants that there was no division of the county into the school districts in 1884; that there was such a total failure to comply with the statute by the commissioners' court that its action was void and wholly without effect. It is true that in dividing the county into school districts the statute was not complied with in all respects, but there was not such a departure from the statute as to render the action of the commissioners' court void. The most that can be said is that there were irregularities in the manner in which the court subdivided the county into school districts and described them. The court did, however, subdivide the county into such districts, described them

so that they could be readily ascertained, and such districts were organized and operated for about 14 years. Under these conditions, appellants cannot bring in question the regularity of the creation of such districts.

2. Appellants contend that the action of the commissioners' court in creating the new district out of the old district is conclusive that a majority of the legal, qualified voters of the old district consented to the change, and that the matter cannot be inquired into or questioned in this proceeding. It is insisted that the law confided the decision of that question to the commissioners' court exclusively and finally, having provided no method of reviewing its action. The act of the legislature under which the districts were created contained this provision: "Provided, that when districts are once established, they shall not be changed without the consent of a majority of the legal voters in all districts affected by such change." Acts 1884, Sp. Sess., pp. 43, 44, § 29. This same restriction upon changing established districts is embodied in our present statute (Rev. St. 1895, art. 3938). The cases of *State v. Goowin*, 69 Tex. 55, 5 S. W. 678, and *Ewing v. State*, 81 Tex. 172, 16 S. W. 872, are cited in support of the proposition contended for by appellants. We regard the statute passed upon in those cases as materially different from the one here involved. The statute considered in those cases required that satisfactory proof should be made before the county judge that the territory proposed to be incorporated had the number of inhabitants required by statute. The statute under consideration here does not provide that the court shall hear proof, and ascertain that a majority of the legal voters in the old district consent to the change, before the court shall make such change. It simply prohibits any change without the consent of a majority of the legal voters of the old districts. The order of the commissioners' court does not recite that the court made any inquiry as to this matter. The petition of the 38 persons, upon which the court acted, did not state that they were a majority of the legal voters of the old district, nor that a majority consented to such action. The cases of *Junction City School Incorporation v. Trustees of School Dist. No. 6*, 81 Tex. 148, 16 S. W. 742, and *Barrett v. Coleman* (Tex. Civ. App.) 35 S. W. 418, are more nearly in point upon the question presented than the cases relied upon by appellants. This is a direct attack upon the action of the commissioners' court, and as its action was clearly illegal and unauthorized, in that the old district was changed without the consent of a majority of the legal voters therein, we are of the opinion that such action was properly annulled by the decree of the district court of Hill county. Judgment affirmed.

**BACHELLER et al. v. BESANCON et al.**  
(Court of Civil Appeals of Texas. May 28, 1898.)

**PUBLIC LANDS—LOCATION CERTIFICATE—ASSIGNMENT—POWER OF ATTORNEY—ANCIENT INSTRUMENTS—IDENTITY—EVIDENCE.**

1. A location certificate was transferred before the patent issued by an indorsement that the holder did "hereby transfer, assign, and set over all the right, title, and interest which this scrip gives to [the assignor] to the land herein mentioned, to [the assignee] or his legal representatives, with full guaranty against all claims whatever." Afterwards the patent was issued to the assignor. *Held* that, on issuance of the patent, the legal title vested in the owner of the certificate.

2. A location certificate was transferred by indorsement by the brother of the owner under a power of attorney. The land was located and surveyed under it, and nine years afterwards it was returned by a subsequent transferee to the general land office. The attorney making the transfer lived with his brother, the owner of the certificate; and plaintiffs, the sons of the latter, never heard of the certificate until 40 years afterwards, when both their parents and their uncle were dead. During this time neither the assignor nor his family made any claim to the certificate or the land. The certificate showed a regular chain of transfers down to defendant. *Held* that, as the certificate would be admissible in evidence as an ancient instrument, the validity of the power of attorney to make the transfer would be presumed.

3. In support of an issue as to the identity of defendant, who claimed to be the person named in a location certificate, he testified as to the fact of the transfer and delivery of the certificate to him, and as to his whereabouts since that time. *Held*, that evidence of collateral matters, not bearing on the question of his identity, but merely tending to impeach his testimony, was inadmissible.

4. In support of an issue as to the identity of defendant, who claimed to be the person named in a location certificate, he testified that he had purchased the certificate in Texas, about a certain year. *Held*, that a copy of an order granting to him other land in Texas several years before that time, which recites that he had been a resident of Texas since a certain time, was inadmissible to show the date when he came to Texas.

5. A plea of stale demand cannot be maintained against one asserting a legal, and not merely an equitable, title.

Appeal from district court, Dallas county; W. J. J. Smith, Judge.

The heirs of L. A. Besancon sued in trespass to try title, Batcheller, as occupant, and Haynes and A. Benham and G. W. Benham, as claiming 640 acres of land in Dallas county, Tex., alleging title in fee. Haynes and A. Benham disclaimed. G. W. Benham pleaded not guilty, and by cross action set up title in fee, and made Scott and Turney parties. Batcheller, Scott, and Turney united in their defense, and pleaded not guilty, limitations of three, five, and ten years, and laches of both plaintiffs and G. W. Benham. The cause was tried by the court, and judgment rendered for plaintiffs. Batcheller, Scott, and Turney appeal. G. W. Benham also separately appeals. Reversed as

to plaintiffs, and also as to parties to the cross action, and the cause remanded for trial on the cross action.

The trial judge filed the following conclusions of fact and law:

Conclusions of fact: "(1) The land in controversy was patented by the state of Texas to L. A. Besancon; and it was admitted in open court by all the defendants that the testimony offered by plaintiffs established the facts—First, that they, the said plaintiffs, were the sole heirs at law of L. A. Besancon; and, second, that their ancestor was the L. A. Besancon named in the patent as grantee; and upon such admission, as well as the evidence introduced, I so find. (2) That the patent was issued by virtue of the location of a certificate, No. 151, issued by the republic of Texas to Thomas Toby, as the agent of said republic, dated December 20, 1836, for 640 acres of land. (3) I further find that said certificate was, by an indorsement thereon, duly and formally made and witnessed as provided in the face of said certificate for the transfer of the same, transferred by Thomas Toby to L. A. Besancon, on February 1, 1837. (4) I find an indorsement on said certificate in the following language, namely: 'Natchitoches, La., Aug. 21st, 1837. For value received, I, Edward R. Besancon, attorney in fact for L. A. Besancon, of Natchez, state of Mississippi, hereby transfer, assign, and set over all the right, title, and interest which this scrip gives to the said L. A. Besancon to the land herein mentioned, to Ephriam Terry, of the town and parish of Natchitoches, state of Louisiana, or his legal representatives, with full guaranty against all claims whatever. [Signed] Edward R. Besancon, Atty. in Fact for L. A. Besancon. Witnessed by B. P. Despallier, A. Rawlson.' That there also appears on said certificate as introduced in evidence a transfer from Ephriam Terry to James Lansing, of date the 14th day of April, 1838. That there also appears on said certificate a transfer thereof, of date the 16th day of April, 1839, from James Lansing to G. W. Benham, which transfer was witnessed by Richard Matson and Diadama Matson. (5) I find that there is no evidence in the case showing any act of ownership of the said certificate or scrip by any of the assignees thereof, other than the fact that it was subsequently located on the land in controversy, a survey thereof made by the properly constituted authorities, and field notes thereof returned to the general land office, and the recitals in said field notes, where said field notes and the certificate remained until the issuance of the patent. (6) I further find that none of the parties defendant in this suit ever exercised any acts of ownership over the land in controversy, as claiming under any assignment of said certificate from or under L. A. Besancon. (7) I find that the original certificate, with the indorsement thereon, came from the proper

<sup>1</sup> Writ of error denied by supreme court.

custodian,—the general land office of the state of Texas,—freed from suspicion, and that by reason of the age of the transfer indorsed on said certificate signed by Edward R. Besancon, as attorney in fact for L. A. Besancon, that I have a right to presume, and, as a matter of fact, do presume, and so find, that Edward R. Besancon was duly empowered by L. A. Besancon, the then owner of said certificate, to make such transfer. This finding is based solely upon such presumption, there being no other proof that such or any power of attorney was ever given by L. A. Besancon to E. R. Besancon. (8) I find from the evidence in this case that the defendant G. W. Benham is not the G. W. Benham to whom the above-mentioned certificate was assigned and transferred by James Lansing; that he has no interest, and never had any interest or title, in and to said certificate, or the land in controversy. (9) I find that the defendants W. W. Batcheller, N. G. Turney, and S. B. Scott, each and all of them, have wholly failed by the testimony in this case to establish any right or title in and to the land in controversy; that the said defendants have not in any manner connected themselves with whatever outstanding equitable title there may be against plaintiffs' title under this patent. (10) That the claim of title by defendant Batcheller, joined by warrantors, Turney and Scott, under the deed from Calloway Patrick, is inoperative as title to said land; that the claim of said defendants under their title from Press Fletcher, and the said Press Fletcher's conveyance from the tax collector of Dallas county, and all the other evidence offered in connection with said tax sale, constitutes no title. (11) I further find that the said defendants Batcheller, Turney, and Scott have not sustained either one of their pleas of limitations and possession set up in defense to this suit. (12) I find from the evidence, and upon an inspection of the original, that the body of the transfer from James Lansing to G. W. Benham is in the handwriting of James Lansing. (13) I find that all the transfers indorsed on the original certificate are genuine, and upon such conclusion, and in the absence of any other evidence on the matter, I conclude that the original certificate passed, by manual delivery, to the assignee, at the date of each respective indorsement. (14) I further find that the name of G. W. Benham was on the original field notes returned to the general land office."

Conclusions of law: "By reason of the presumption here found as a conclusion of fact, that Edward R. Besancon had authority from L. A. Besancon to make the transfer and conveyance indorsed on the original certificate, and by reason of the conclusion that the subsequent transfers on said certificate are regular and valid, I conclude that the said certificate and the title thereto passed into G. W. Benham, but that the legal title originally residing in the state passed by the is-

suance of the patent into L. A. Besancon and his heirs, the plaintiffs in this case. (2) That there is an outstanding equitable title in G. W. Benham, which, if G. W. Benham were a party to this suit, under proper pleadings, would be superior to the legal title conveyed by said patent; but, as hereinbefore determined in the conclusions of fact, none of the defendants have established any privity or connection with said outstanding equitable title; and it is the opinion of the court that the legal title vested by said patent in the plaintiffs, as the heirs of the grantee L. A. Besancon, should prevail; and judgment is therefore rendered that plaintiffs should recover the land in controversy."

J. D. Thomas, W. N. Coombs, J. R. Haynes, and Cockrell & Muse, for appellants. K. R. Craig and C. Von Carlowitz, for appellees.

FINLEY, C. J. (after stating the facts as above). The appellants challenge the correctness of the conclusions and judgment of the trial court, and assert that the court erred in holding that the legal title to the land was in the heirs of L. A. Besancon, it being shown that L. A. Besancon transferred the certificate prior to the issuance of the patent to him, as assignee of Thomas Toby, agent. The court held that the interest of L. A. Besancon in the certificate passed by the assignment to Terry, and that, on the subsequent issuance of the patent to him as assignee, the superior equitable title to the land vested in the owner of the certificate, but that the legal title remained in the heirs of Besancon, and, as none of the defendants had connected themselves with the equitable title, the heirs of Besancon should recover upon their legal title. The transfer of the certificate is in this language: "For value received, I, Edward R. Besancon, attorney in fact for L. A. Besancon, of Natchez, state of Mississippi, hereby transfer, assign, and set over all the right, title, and interest which this scrip gives to the said L. A. Besancon to the land herein mentioned, to Ephriam Terry, of the town and parish of Natchitoches, state of Louisiana, or his legal representatives, with full guaranty against all claims whatever." This conveyance manifests the intention to convey the land, and, under our decisions, it is clear that upon the issuance of the patent to L. A. Besancon, as assignee, the legal title to the land located by virtue of the certificate vested in the owner of the certificate. The owner of the certificate did not acquire a mere equitable title to the land, but the full title,—legal and equitable. *Borroum v. Culmell* (Tex. Sup.) 87 S. W. 318; *Baldwin v. Root* (Tex. Sup.) 40 S. W. 8. It follows that the plaintiffs' proof of title failed, and they were not entitled to recover the land in controversy, unless some of appellees' contentions—which we now notice—should prevail.

Appellees assert, first, that there was no

proof of the existence of a power of attorney from L. A. Besancon to Edward R. Besancon necessary to the authority to convey the certificate, and no such state of facts as would justify the conclusion that the power to convey existed. The evidence in relation to this matter is as follows: The transfer of the certificate was made August 21, 1837,—63 years prior to the date of the trial. The transfer was written upon the original certificate, and on its face it declared that Edward R. Besancon was attorney in fact for L. A. Besancon. The land was located and surveyed under it, and it was returned to the general land office in 1846, and it came from the proper custody,—the general land office. Edward R. was a brother of L. A. Besancon, and died at the house of the latter, 11 years after the date of the transfer. L. A. Besancon died in 1853; his wife lived until 1889; and their sons, O. and C. W. Besancon, never heard of the certificate until 1896, when informed of it by their agent, R. F. Hendricks, who applied for a patent to the land in the name of L. A. Besancon, as assignee of George W. Benham. There is no evidence that the Besancons made any claim to the certificate or land from the year 1837 to 1896. A regular chain of transfers of the certificate from Thomas Toby, agent, down to George W. Benham, including the transfer from Besancon to Terry, was shown; and it was shown that James Lansing, when he transferred the certificate to George W. Benham, in 1839, delivered the certificate to Benham, and that Benham delivered the certificate to John Dodd, to be located and returned to the general land office in 1846. The certificate and transfers thereon were admissible as ancient instruments, and, upon the facts stated, the court was fully authorized in reaching the conclusion that the power to make the transfer, in the case of the transfer from Besancon to Terry, existed. In *Johnson v. Timmons*, 50 Tex. 534, it is said: "It is a well-established principle that, in most cases where an instrument would be admissible in evidence as an ancient deed without proof of its execution, the power under which it purports to have been executed will be presumed,"—citing *Watrous' Heirs v. McGrew*, 16 Tex. 513; *Dailey v. Starr*, 26 Tex. 562; *Hooper v. Hall*, 35 Tex. 82; *Veramendi v. Hutchins*, 48 Tex. 531.

It is further urged by appellees that the title which vested in the owner of the certificate upon the issuance of the patent to L. A. Besancon, assignee of Thomas Toby, agent, was created by estoppel, and that it must be shown that the estoppel operated in favor of the party asserting benefits under it. This is not a defense of estoppel, and the rules applicable to such a defense cannot be applied here. As has been heretofore said, upon the issuance of the patent the legal title vested in the owner of the certificate; and, it matters not how the title arose, if the plaintiffs did not own the title they should not recover.

1 Eng. Ruling Cas. 495-497; *Welch v. Dutton*, 79 Ill. 465. These observations conclude the claims of the plaintiffs. They are not entitled to recover the land in controversy.

The contest next arises between the appellant George W. Benham, a defendant in the court below, upon his cross bill, setting up title in himself, and seeking a recovery against the plaintiffs and his co-defendants. The court below found that the appellant George W. Benham was not the George W. Benham to whom the certificate was transferred. The testimony of appellant Benham upon that point was disbelieved and disregarded by the court. Appellant Benham contends that the court admitted and considered improper evidence, which affected the decision upon the issue of his identity. The bills of exception Nos. 2 and 7 present the evidence objected to, and claimed to be inadmissible and hurtful, and we here give one of the bills which sufficiently discloses the evidence objected to: "Be it remembered that on the trial of the above-entitled cause the plaintiffs offered to prove by the witnesses Collins and Petty the following facts, to wit: By said Collins, that he knew Richard Matson, Jr., and James Matson, sons of Richard Matson, since 1840 or 1841, at which time their father was dead, and from that time on he saw them frequently for nine or ten years, and that, so far as he knew, they never did leave Texas to go to school. And by said Petty plaintiffs offered to prove that he knew Richard Matson in his lifetime, and also his said sons, and was frequently at the home of Richard Matson to carry corn to the mill, and that he knew said sons after the death of their father, Richard Matson (about 1839), for many years, and that, so far as he knew, said sons, Richard and James Matson, never left Texas to go to school; that they had but little education, and that they never went out of Texas to go to school; that Richard Matson was stabbed to death by Asa Mitchell about the fall of 1839; that he saw him lying under his wagon bleeding and dying. And also offered to prove by Mose Matson that Richard Matson was killed in August, 1839, and that he saw him killed. This evidence was offered by plaintiffs on the question of the identity of George W. Benham, and as affecting his credibility and the weight to be given his testimony; he having previously testified that he came to Texas about 1838 or 1839, and went to the home of Richard Matson, where he remained three or four years, and that while there he bought of James Lansing the certificate by virtue of which the land in controversy was located, and same was transferred to him by James Lansing's writing the transfer therefor and signing same, which transfer was witnessed by Richard Matson and Diadama Matson, and that when he, the said Benham, returned to Missouri, he took with him James and Richard Matson, sons of said Richard, and put them to school, their father, Richard

Matson, sending them, and paying all their expenses, and furnishing horses for their conveyance. Such was the state of the record when plaintiffs offered to prove the foregoing facts by the witnesses above named. Defendant Benham objected to the introduction of all of the said testimony, for the reason that the facts sought to be proved were irrelevant and immaterial, and were collateral to any material fact actually in issue, and because it was not competent to contradict or impeach said Benham as to said irrelevant and immaterial matters, except by his own cross-examination; and because no question had directly been asked said Benham as to the time, manner, place, or circumstances of the death of said Richard Matson (which is a fact). The said objections were each and all by the court overruled. Said witnesses were severally permitted to testify as above set forth, and the court heard and considered all of said testimony (with other testimony) in coming to the conclusion that said defendant and witness Benham was not the Benham to whom said certificate was transferred by James Lansing. To all of which rulings and action of the court the defendant Benham, by his counsel, duly excepted, and here now tenders this bill of exceptions, and the same is allowed and ordered filed as a part of the record herein."

The name of appellant Benham is the same as that of the transferee of the certificate, and, without proof to the contrary, identity in person should be presumed. *Yarbrough v. Johnson* (Tex. Civ. App.) 34 S. W. 310. Appellant Benham testified positively that he was the person to whom the certificate was transferred,—the George W. Benham named in the transfer. Opposed to this there was an effort made to show that appellant was not the Benham to whom the certificate was transferred. This seems to have been treated as the main contested issue of fact involved on the trial, and the court certifies that he considered this evidence on this issue. The evidence was not pertinent to the issue of identity, but tended to impeach the witness whose testimony was relied upon to establish the identity. It seems to be well established that a witness cannot be impeached by showing that he has testified falsely upon collateral matters. When he is cross-examined on collateral matters, the party cross-examining the witness is concluded by his answers, and cannot introduce other witnesses to contradict him as to such matters. 1 Greenl. Ev. §§ 448, 449; *Moore v. Moore*, 73 Tex. 388, 11 S. W. 396; *Railway Co. v. Phillips* (Tex. Sup.) 42 S. W. 852; *Gillett, Ind. & Col. Ev.* §§ 51, 50. It is manifest that the consideration of this evidence was injurious to appellant Benham, and its admission and consideration by the court were error.

On the trial this instrument was introduced in evidence: "No. 293, Geo. W. Benham. John Dodd and George Layne, sworn, proved him to have been a resident citizen of Texas

since 1st March, 1839, a single man. Ordered, that a certificate issue to said Benham for three hundred and twenty acres of land. December 11, 1839,"—which instrument was by O. A. Seward, clerk of the county court of Washington county, certified to be a true copy of order granting to George W. Benham 320 acres of land, as appears from the record of land commissioner of Washington county, Tex., which certificate was dated October 18, 1897. Defendant Benham objected to the admission of said document in evidence, because irrelevant and immaterial, and because same was incompetent as evidence of the collateral facts therein recited, same being offered by plaintiffs to prove date George W. Benham came to Texas. The court overruled the objections, and admitted said instrument in evidence, to which ruling defendant Benham excepted. The pertinency of this evidence is not manifest. It does not tend to show that appellant Benham was not in Texas at the date of the transfer of the certificate, and there is no other respect, that we perceive, in which it could be considered material.

The plea of stale demand urged by Benham's co-defendants against him cannot be maintained, the title which he asserts being a legal title, and not merely an equitable title. *Clark v. Adams*, 80 Tex. 674, 16 S. W. 552.

We find no other points presented which we deem it necessary to discuss. We approve and adopt the conclusions of fact of the trial judge in so far as they show the chain of title, through the certificate, transfers, and patent, including the transfer from L. A. Besancon to Ephriam Terry, and hold that these facts show that plaintiffs have no title to the land. As to plaintiffs appellees the judgment is reversed, and here rendered that they take nothing by their suit. As to the other parties the judgment is reversed, and the cause remanded for trial of the issue of title on the cross bill of appellant George W. Benham.

#### THOMPSON v. BRAZILE.

(Supreme Court of Arkansas. Oct. 1, 1898.)  
DEMURRER—WAIVER—COVENANT OF WARRANTY—BREACH.

1. A demurrer is waived by filing an answer and a cross complaint after it has been overruled.
2. Where the grantee is in possession, a covenant of warranty is not broken until there is an eviction.

Appeal from circuit court, Jackson county; Richard H. Powell, Judge.

Ejectment by Joseph Walker against Ida C. Brazile, who impleaded W. J. Thompson by cross complaint. The issue raised by the cross complaint was transferred to the equity docket, and judgment rendered for cross complainant against her co-defendant, and he appeals. Reversed.



The facts in this case are as follows: The appellee, Ida Brazile, purchased from R. W. Martin and W. J. Thompson a certain 80-acre tract of land lying in Jackson county, and took possession of the same under a deed from them. Afterwards one Joseph Walker brought an action of ejectment against appellee, Mrs. Brazile, to recover possession of said land, claiming title under a tax deed made in pursuance of a sale for nonpayment of taxes. For defense to said action, appellee set up, among other things, the fact that she had purchased the land from Martin and Thompson, that Martin had since died, and asked that Thompson be made a party defendant. Thompson was made a defendant, and afterwards Mrs. Brazile filed a cross complaint against him, alleging the execution of the deed from R. W. Martin and W. J. Thompson to her, and that the said grantor covenanted in said deed that they "would forever warrant and defend the title to said land against all lawful claims whatever except against the heirs of W. W. Brazile, deceased." She further alleged that, if there had been any forfeiture of the land for nonpayment of taxes, the forfeiture occurred long prior to the execution of the deed aforesaid; wherefore she prayed that Thompson be required to answer and defend the original suit, and that, if plaintiff prevailed in said suit, she have judgment against Thompson for \$400, the amount paid for said land, and for other relief. The appellant, Thompson, appeared, and moved to set aside the order making him a party defendant. He also demurred to the cross complaint filed against him by Mrs. Brazile. The motion and demurrer were both overruled. Thompson afterwards filed an answer and cross complaint, alleging that the covenant of warranty in the deed was the result of a mistake in the execution of the deed, and praying that the cause be transferred to the equity docket, and that the deed be reformed. The issues arising in the original action between Walker and the defendants, Brazile and Thompson, were tried by the circuit court, and judgment rendered in favor of Walker for the possession of the land. Afterwards the cause as to remaining issues between Brazile and Thompson was transferred to the equity docket. Upon the hearing, the court refused to reform the deed, found that there was a breach of the covenant of warranty in the deed, and gave judgment against Thompson for the sum of \$400 for breach of said warranty, and for costs, from which judgment Thompson appealed.

Sam W. Williams and E. Bradshaw, for appellant. Phillips & Campbell and M. M. Stuckey, for appellee.

RIDDICK, J. (after stating the facts). This litigation was commenced by an action of ejectment brought by one Walker against the

appellee, Ida Brazile, to recover from her a tract of land of which she held possession. Mrs. Brazile had purchased the land from appellant, W. J. Thompson, and one R. W. Martin, who had since died. She procured an order making Thompson a party defendant with her, and then filed a cross complaint against him, praying that he be compelled to defend the action of ejectment, and that, in the event the plaintiff recovered judgment against her for the land, she have a judgment against Thompson on the covenant of warranty contained in his deed. It is not clear that she could properly have her rights against Thompson, arising on covenants in his deed, adjudicated in the action of ejectment brought by Walker against her. The two matters were not sufficiently connected. *Hughey v. Bratton*, 48 Ark. 167, 2 S. W. 698; *Trappall v. Hill*, 31 Ark. 345. But Thompson did not stand on the demurrer filed by him to said counterclaim. After the same was overruled, he filed an answer and a cross complaint, and, by so doing, he waived his demurrer; but it was still necessary that the cross complaint of Mrs. Brazile should state a cause of action, and that the facts in proof should warrant a judgment against Thompson. *Manufacturing Co. v. Bommer*, 64 Ark. 510, 43 S. W. 504; *Fordyce v. Merrill*, 49 Ark. 277, 5 S. W. 329; *Chapline v. Robertson*, 44 Ark. 202.

Now, the cross complaint alleged that the deed from Thompson to Mrs. Brazile contained a covenant of warranty, but it did not allege an eviction. On the contrary, both the pleadings and the evidence showed that Mrs. Brazile, at the time this cross complaint was filed, was still in possession of the land, and that there had been no eviction, and consequently no breach of the covenant of warranty. Neither the facts alleged nor those established by the evidence warranted a judgment against Thompson. *Dillahunt v. Railway Co.*, 59 Ark. 629, 27 S. W. 1002, and 28 S. W. 657; 3 Washb. Real Prop. p. 506. It is true that counsel for appellee say that the deed in question contained a covenant of seisin as well as one of warranty, and contend that this covenant was broken as soon as the deed was executed; but no such question was presented in the circuit court. The cross complaint against Thompson sets up only a covenant of warranty. The decree of the court recites that there was a covenant of warranty and a breach thereof, and is founded upon such supposed breach. As neither the pleadings nor the evidence support this finding, the judgment against Thompson on the cross complaint of Mrs. Brazile is reversed, and the action against him is dismissed, but without prejudice to a future action.

BATTLE, J., absent.

## PRAIRIE COUNTY v. FINK.

Supreme Court of Arkansas. Oct. 1, 1898.)

## RAILROADS—CROSSING HIGHWAY.

Sand. & H. Dig. § 6263, providing that, "where any railroad corporation has constructed or shall hereafter construct a railroad across any public road," it shall construct the crossings in a certain manner, does not apply where a county highway is afterwards laid out across the railroad.

Appeal from circuit court, Prairie county; James S. Thomas, Judge.

An order of the county court refusing damages to Rudolph Fink, as receiver, caused by the laying out of a highway, was set aside, and damages awarded, by the circuit court, from which judgment Prairie county appealed. Affirmed.

E. R. Screeton and 26 other citizens of Prairie county filed a petition asking the county court of Prairie county to open up a new road from the town of Hazen, in said county, to a point on the Devall Bluff and Hazen road, which petition in every way complied with the requirement of the statutes. Said petitioners filed the bond and proof of publication required, and the court appointed three viewers to view out said road. Said viewers were notified by the clerk of their appointment, took the oath as required by law, and, after viewing said road, reported that the same should be established. Said new road, as established by said viewers, crossed the Little Rock & Memphis Railroad, of which appellee, Rudolph Fink, is receiver. Rudolph Fink, as receiver, at his own request was made a party to the record, and filed a petition showing that it would cost him, as said receiver, the sum of \$81.06 to build the crossing and approaches and put up a signboard at said crossing, and asked the court to allow him damages for that amount. The viewers did not find that appellee would be damaged by the opening of said road. The court approved the report of the viewers, and the said new road was opened and established according to the recommendations of said viewers. Appellee appealed from the order of the county court refusing to allow him the damage asked, to the circuit court. In the circuit court, appellant demurred to the petition of appellee asking for said damages, and the court overruled the demurrer, and allowed the damages asked, to which ruling of the court the appellant, Prairie county, at the time excepted, and appealed to this court.

F. E. Brown and E. B. Kimworthy, Atty. Gen., for appellant. Rose, Hemingway & Rose, for appellee.

HUGHES, J. (after stating the facts). Does the statute make the railroad liable? Section 6263, Sand. & H. Dig., governs this case, and is as follows: "Sec. 6263. Wherever any railroad corporation has constructed or shall hereafter construct a railroad across any public road or highway of this state, now estab-

lished or hereafter to be established, such railroad corporation shall be required to so construct such railroad crossing, or so alter the road bed of such public road or highway that the approaches to the railroad bed, on either side, shall be made and kept at no greater elevation or depression than one perpendicular foot for every five feet of horizontal distance, such elevation or depression being caused by reason of the construction of said railroad: provided, wherever there may be a cut of sufficient depth in the road bed of any railroad at the crossing of any public road or highway, such railroad may be crossed by a good and safe bridge, to be maintained in good repair by the railroad company or corporation owning or operating such railroad." It seems clear to us that the statute makes the railroad liable where the railroad crosses the county road, and not where the county road crosses the railroad. This is the unambiguous language of the statute. The legislature probably might make the railroad liable in such a case. We do not find that it has done so. The judgment is affirmed.

BATTLE, J., absent.

## ANDERSON et al. v. THOMAS et al.

(Court of Appeals of Indian Territory. Oct. 1, 1896.)

## APPEAL—REVIEW—FORCEFUL ENTRY AND DETAINMENT—EVIDENCE.

1. It is too late to assign error for the first time in the court of appeals.

2. In an action of unlawful detainer, evidence that plaintiff had conveyed an interest in land to which he makes no claim is irrelevant.

Appeal from the United States court for the Southern district of the Indian Territory; before Justice C. B. Kilgore, February 3, 1897.

Action by Charley Thomas and G. M. Wileman against G. G. Anderson and J. H. Johnson. There was a judgment for plaintiffs, and defendants appeal. Affirmed.

On the 21st day of August, 1896, the plaintiffs, Charley Thomas and G. M. Wileman, commenced an action of unlawful detainer against the defendants, G. G. Anderson and J. H. Johnson, by filing their complaint, and causing summons to be issued thereon. On the same day a writ of possession was issued, and the same was duly executed, and plaintiffs were put into possession of the premises. On September 9, 1896, plaintiffs filed their amended complaint, alleging that the plaintiff Charley Thomas leased to the defendant Anderson a certain tract of land for the term of two years, and that the lease to the same had expired; that the plaintiff Thomas leased to the plaintiff Wileman about 300 acres of this land off of the western side of the tract; that the defendant Anderson fenced off about 100 acres of the said 300 acres on the east side of the said tract; that the de-

fendant Johnson came into possession of the said 100 acres of land as agent or subtenant of the defendant Anderson; that said land was in the possession of defendants at the commencement of the suit; that the plaintiffs were the owners of the said 100 acres of land, and were entitled to the immediate possession of the same; that plaintiffs had given defendants lawful notice to quit and deliver up to them the possession of said premises, but the defendants failed and refused to do so, but unlawfully detain the same from them. To this is added a prayer for writ of possession, for judgment for possession of the premises, and other equitable relief. Separate answers were filed by defendants, in which the allegations in the complaint were denied generally, and especially denying that the land and the premises described in the complaint were the same that they rented from the plaintiff Thomas, or any part of the same. On February 1, 1897, defendants filed their demurrer to plaintiffs' complaint. On the same day defendants filed their motion to strike out of the complaint the name of the party plaintiff Wileman. On the 3d day of February, 1897, the cause was submitted to a jury, and on the following day the jury rendered a verdict in favor of plaintiffs. Thereupon the trial court rendered judgment in favor of plaintiffs against defendants for the possession of the premises in controversy and all costs. On the 4th day of February, 1897, defendants filed their motion for a new trial, which was overruled by the court, to which ruling defendants excepted. On the 8th day of February, 1897, defendants filed their motion for appeal, and the same was allowed by the court.

A. C. Cruce and J. W. Cherryhomes, for appellants. F. E. Riddle and E. M. Payne, for appellees.

SPRINGER, C. J. (after stating the facts). Counsel for appellants submit four assignments of error in this case. The first and second assignments are on account of overruling the demurrer to the complaint and the motion to strike out the name of the plaintiff Wileman. This court will not pass upon these assignments of error, for the reason that no exceptions were taken at the time the court passed on the demurrer and motion, and it is too late to assign such errors for the first time in this court.

The third assignment is as follows: "(3) The court erred in refusing to allow defendants to prove that the plaintiff Thomas had conveyed all his right, title, and interest in and to the Jim Hughes lease." In the certificate of the trial judge to the bill of exceptions in this case is the following statement in reference to the proposed testimony: "On the trial of the case the defendant undertook

to prove that the plaintiff Thomas had conveyed all his right and title to and interest in the Jim Hughes lease to some lawyers in Paris. Objection was made to this testimony because it was no portion of the land in controversy, and the court sustained the objection." Counsel for appellants, replying to this statement by the trial judge, contend that it was error to exclude the evidence on that ground; that the effect of the ruling was to take away from the jury the sole issue in the case, and decide it by the court. But the testimony was immaterial upon any theory of the defense, for, if the jury should find that the land in controversy was a part of the Ben Hughes lease, it would be no defense to have shown that the plaintiff had disposed of this interest in the Jim Hughes lease; and if the jury should have found that the land in controversy was a part of the Jim Hughes lease, such defense would have been sufficient, for the plaintiff laid no claim to any part of the land in the Jim Hughes lease. The burden of proof was on defendant to establish, by a preponderance of the evidence, that fact; and, if established, his defense was complete. It would have been wholly immaterial whether the plaintiff had sold his interest in the Jim Hughes land or not, for he laid no claim to it. It was not error to overrule the motion for a new trial, as no reversible error is found in the record of the proceedings of the court. The judgment of the court is affirmed.

CLAYTON and TOWNSEND, JJ., concur.

WAITE et al. v. GULF, C. & S. F. R. CO.  
(Court of Appeals of Indian Territory. Oct. 1, 1898.)

#### APPEAL—BRIEFS—DISMISSAL.

Where no briefs are filed by appellant as required by rule 10 of the court of appeals, the appeal will be dismissed.

Appeal from the United States court for the Southern district of the Indian Territory; before Justice O. B. Kilgore, December 6, 1895.

Action between Fred I. Waite and others and the Gulf, Colorado & Santa Fé Railroad Company. From the judgment below, Fred I. Waite and others appeal. Dismissed.

C. L. Herbert and Yancey Lewis, for appellants. P. L. Soper, for appellee.

CLAYTON, J. This case was submitted to this court for decision on the 5th day of January, 1898, upon briefs to be filed within 30 days from that date. No briefs having been filed in the case by either of the parties to the suit, the appeal is hereby dismissed for a failure on the part of the appellants to comply with rule 10 of this court.

**COX v. SWOFFORD BROS. DRY-GOODS CO.**

Court of Appeals of Indian Territory. Oct. 1, 1898.)

**PLEADING—ANSWER—SUFFICIENCY—SURPLUSAGE—CONCLUSIONS—ASSIGNMENTS FOR CREDITORS—PARTNERSHIP.**

1. Under Mansf. Dig. § 5033, requiring an answer to contain a denial of each controverted allegation, and a statement of new matter constituting a defense, a plea that property claimed under an assignment from an individual is partnership property, and hence did not pass by the assignment, need not state whether the partnership agreement is in writing, that being a matter of evidence.

2. An allegation that an assignment for the benefit of creditors was fraudulent and void, and conveyed no title, states a mere conclusion, and is insufficient.

3. An answer to an interplea, alleging that property claimed by the interpleader as assignee of one of the defendants for the benefit of creditors was partnership property, and that the assignment gives interpleader no right to it, states a good defense, and a further allegation that the assignment was fraudulent and void may be disregarded as surplusage.

4. A partner in absolute control of the business has no right to assign the partnership property for the benefit of creditors of the concern.

Appeal from the United States court for the Central district of the Indian Territory; before Justice Yancey Lewis, October 10, 1896.

Attachment by the Swofford Bros. Dry-Goods Company against J. W. Stalcup and another, as co-partners. W. A. Cox interpleaded, claiming part of the property as assignee of defendant Stalcup for the benefit of creditors. There was a judgment for plaintiff, and interpleader appeals. Affirmed.

On December 20, 1895, the appellee, the plaintiff below, filed its complaint against Daniels & Stalcup, as co-partners, alleging that the defendants were indebted to plaintiff in the sum of \$301.36, upon open account, and that the same was due and unpaid, and also secured on attachment. On April 22, 1896, John W. Stalcup, one of defendants, filed his answer, denying that a co-partnership existed between himself and Daniels when the suit was instituted, and denying that they have sold their property with intent to cheat, hinder, or delay their creditors, and alleging that before the suit was instituted he had purchased the interest of Daniels in the business; that on November 29, 1895, he made an assignment to W. A. Cox, the appellant, for the benefit of creditors, of all property except \$400, exempt by law. And on the same day W. A. Cox filed his interplea, and said he was entitled to immediate possession of the property attached, by virtue of a deed of assignment made by J. W. Stalcup, one of defendants, to him, for the benefit of his creditors, of all property except \$400, which he claims as exempt, and asks judgment for the property or its proceeds. On July 2, 1896, plaintiff filed an answer to the interplea, and denied that Cox

is entitled to possession of the property; denied that any part of said property is exempt, because the property was the partnership property of Daniels & Stalcup; alleged the assignment was fraudulent and void; and alleged that interpleader had wholly failed to comply with the law. On the same day the case was tried, and verdict for interpleader. On July 6, 1896, plaintiff moved for a new trial, which motion on July 7, 1896, was sustained by the court; and on September 30, 1896, the case was again tried, and a verdict was returned for the plaintiff against Cox, the interpleader. Cox made a motion for a new trial, which was overruled by the court, and judgment rendered upon the verdict, and Cox appealed to this court.

Wilkinson & Wilkinson, for appellant. N. B. Maxey and J. P. Clayton, for appellee.

TOWNSEND, J. (after stating the facts). The appellant has filed eight specifications of error. The first error assigned is the overruling of the motion of appellant (the defendant below) to require the appellee (the plaintiff below) to make its answer to the interplea of appellant more specific. Under section 5033, Mansf. Dig., it is provided what the answer shall contain: "Second. A denial of each allegation of the complaint controverted by the defendant, or of any knowledge or information thereof, sufficient to form a belief. Third. A statement of any new matter constituting a defense, counterclaim or set-off, in ordinary and concise language without repetition. Fourth. The defendant may set forth in his answer as many grounds of defense, counterclaim and set-off, whether legal or equitable, as he shall have. Each shall be distinctly stated in a separate paragraph, and numbered. The several defenses must refer to the causes of action which they are intended to answer in a manner by which they may be intelligibly distinguished." The motion of appellant which was overruled by the court is as follows: "First. To state whether the contract of partnership which is alleged to have existed between the said Daniels & Stalcup was or was not in writing, and, if in writing, to file the said contract as an exhibit in the said answer. Second. To state what fraud, or who was guilty of fraud, in the execution of the assignment referred to in this case." The allegation in the interplea by appellant is as follows: "That he is entitled to the immediate possession of the property attached in this action, by virtue of a deed of assignment made to him by the defendant J. W. Stalcup on the 29th day of November, 1895, for the benefit of his creditors, save and except \$400 worth of said property, which was claimed as exempt to him, under the law, from sale on execution or attachment or other process, on debt by contract, as a married man and the head of a family; that said assignment was made in good faith; and that the said assignee has done and is

doing all and singular the things required of him by law, and is administering the said assignment to the best advantage of all parties interested in the same." The answer of appellee to which the motion of appellant was directed, and to the overruling of which error is assigned, is as follows: "That it denies that interpleader is entitled to the possession of the attached property in this cause by virtue of a deed of assignment executed by one of the defendants, J. W. Stalcup, on the — day of December, 1895, and plaintiff denies that said interpleader has any right to said property whatever. Plaintiff, further answering, denies that any part of said property is exempt to said defendant Stalcup, because plaintiff says said property was and is the partnership property of James Daniels and J. W. Stalcup, and no part of it exempt. Plaintiff further states that said pretended assignment is fraudulent and void, and conveyed no title to said interpleader; and plaintiff denies that said interpleader has done all things required of him as assignee, but, on the contrary, alleges that said interpleader wholly failed to comply with the law." We do not think it was necessary for the plaintiff to allege in his answer to the interplea whether the partnership agreement between James Daniels and J. W. Stalcup was in writing or not. That was a matter of evidence, and evidence should not be pleaded. *Bliss*, Code Pl. (3d Ed.) §§ 140, 206. The second part of the motion, which went to the following allegation, "Plaintiff further states that said pretended assignment is fraudulent and void, and conveyed no title to said interpleader," should have been sustained. Fraud is a conclusion of law. The facts which constitute the fraud must be stated. *Id.* § 211; *Catlin v. Horne*, 34 Ark. 160. If the other allegations in the answer did not constitute a good defense, and the above allegation, properly pleaded, was necessary to present a material issue to the appellant's interplea, this case should be reversed; but I think the allegation may be treated as surplusage, and be disregarded. The other allegations stated in the answer constitute a defense, without this. *Bliss*, Code Pl. (3d Ed.) § 216.

The second and third assignments of error, in our opinion, are not well taken. The statements rebutted the presumption that Daniels and Stalcup were not full partners as contended by appellant, and were competent as to the credibility of Stalcup, and their admission was wholly within the discretion of the court.

The fifth assignment of error, that "a partner in absolute control of a business may make an assignment for the benefit of the creditors of the concern," is not, in our opinion, a safe rule. *Burrill* (Assignments, §§ 47-53, inclusive) reviews the decisions in extenso; and, as a result of the examination of all the leading cases, he says the law is unsettled, but says: "On the whole, while the

law remains thus unsettled on this point [power of one partner to make an assignment], it may be laid down as the only safe, practical rule, that in making assignments of partnership property, particularly to trustees, all the partners—special as well as general, dormant as well as active—should be consulted; and the assignment should either be the joint act of all, or should be made by the express authority or with the consent or concurrence of those who do not actually execute it, or subject to ratification on their part." *Id.* (6th Ed.) § 53. In *Corbett v. Cannon* (Kan. Sup.) 45 Pac. 80, it was held that the partner not joining had expressly ratified; and in *Matthews v. Smelser* (Tex. Civ. App.) 28 S. W. 872, that the partner not joining, and who had possession of the property assigned, surrendered the same to the assignee, thus assenting to it. These cases are cited by appellant, but evidently do not support his proposition.

The fourth, sixth, seventh, and eighth assignments of error all refer to the question of ratification of the deed of assignment, or to the refusal of the court to submit to the jury certain instructions upon the theory of the case entertained by the appellant. The controlling questions in the case were undoubtedly whether Daniels and Stalcup were partners when the deed of assignment was executed by Stalcup alone, and whether Daniels ratified or concurred in the same prior to the time the attachment writ was placed in the hands of the marshal. These questions were fully submitted to the jury by the court in his instructions, as will be seen by an examination of the charge of the court, and the jury found against the interpleader, and for the plaintiff. This is conclusive of the case. We think that the judgment of the court below was correct, and it is therefore affirmed.

SPRINGER, C. J., and CLAYTON, J., concur.

#### Ex parte TIGER.

(Court of Appeals of Indian Territory. Oct. 1, 1898.)

CREEK NATION—COURTS—POWERS—CONSTITUTIONAL LAW—INDICTMENT—SIGNATURE—GRAND JURY.

1. The word "indict," in Const. Creek Nation, art. 4, § 4, requiring the prosecuting attorney to indict all offenders against the laws of the district, does not have the common-law meaning, necessitating the finding of an indictment through a grand jury.

2. The failure of a prosecuting attorney to sign an indictment, in prosecuting an offender under Const. Creek Nation, art. 4, § 4, requiring him to indict all offenders, is an informality curable by verdict, in the absence of objection on the trial.

3. United States courts cannot, by habeas corpus or other process, interfere with the control of the courts of the Creek Nation over the arrest, presentment, trial, and punishment of the people of such nation.

Appeal from the United States court for the Northern district of the Indian Territory; before Justice William M. Springer, February 4, 1898.

Habeas corpus on the petition of William Tiger. From a judgment refusing to grant petitioner's prayer, he appeals. Affirmed.

Petitioner filed his petition for habeas corpus, showing that he had been tried by the authorities of the Creek Nation for the murder of one S. McIntosh, and that he had been convicted and sentenced to be shot, and alleged, among other things, as a reason why the prayer of his petition should be granted, that he had been tried without being indicted by a grand jury, contrary to section 4 of article 4, of the constitution of the Creek Nation. Writ granted. On trial, the evidence showed that he was not indicted by a grand jury, and that there is no such thing as a grand jury known to the Creek laws. It also shows that the so-called indictment or writing on which he was tried was not signed. Article 4, § 4, of the constitution of the Creek Nation, reads as follows: "The prosecuting attorney shall be appointed by the principal chief, by and with the consent of the national council. It shall be his duty to indict and prosecute all offenders against the laws of his district." A. P. McKellop testified that an indictment was prepared by the prosecuting attorney. He was asked by the court who signed an indictment, and his answer was, "The prosecuting attorney." He was then asked if there was any signature to the indictment on which petitioner was tried, and he said there was not. He also stated that there was no law in the Creek Nation requiring the prosecuting attorney to sign an indictment. He also stated that it was not customary for prosecuting attorneys to sign indictments. The court refused to grant the prayer of petitioner. On the same day petitioner filed a motion for a new trial, which was overruled. He had his exceptions noted, prayed an appeal, presented his bill of exceptions and had the same signed, filed, and made a part of the record of the case. The specifications of error are as follows: (1) In not holding that article 4, § 4, of the Creek constitution, required the presentation of an indictment by a grand jury against him before he could lawfully be tried for the crime of murder. (2) In not holding that the trial of petitioner by the Creek Nation, without an indictment having been first presented against him by a grand jury, was void. (3) In not holding that, even if the Creek constitution did not require the presentation of an indictment by a grand jury, the so-called indictment on which the petitioner was tried was void, because it was not signed by the prosecuting attorney.

De Roos Bailey, W. T. Fears, and S. S. Fears, for petitioner. Stuart, Lewis & Gordon, for respondent.

47 S.W.—20

CLAYTON, J. The first two specifications of error may be considered together. They are to the effect that the petitioner was put upon his trial on a charge of murder without an indictment having been presented against him by a grand jury. There is no such thing as a grand jury known to the constitution or laws of the Creek Nation. A grand jury has never been impaneled by the tribal courts of that nation. Article 4, § 4, of the constitution of the Creek Nation, however, provides that it shall be the duty of the prosecuting attorney to indict and prosecute all offenders against the laws of his district. It is contended by the counsel for the petitioner that the word "indict," as here used in the Creek constitution, must be given its common-law signification, and, as at common law no indictment could be found or presented except through the interposition of a grand jury, that the Creek prosecuting attorney could not indict except through the interposition of a grand jury. If the Creek Nation derived its system of jurisprudence through the common law, there would be much plausibility in this reasoning. But they are strangers to the common law. They derive their jurisprudence from an entirely different source, and they are as unfamiliar with common-law terms and definitions as they are with Sanskrit or Hebrew. With them, "to indict" is to file a written accusation charging a person with crime; and, when they ingrafted in the constitution that it should be the duty of the prosecuting attorney to indict and prosecute all offenders against their laws, they simply meant that he himself should write out and file this written accusation, and upon the charge which he should so prepare and file he should prosecute. As an evidence of this, they have ever since the adoption of this constitution pursued this course, and neither their constitutional conventions nor legislatures have provided any other method for presenting to the courts offenders against their laws.

The fact that the information filed by the prosecuting attorney of the Creek Nation was not signed by him does not affect the verdict, or the judgment of the court rendered upon it. At most, it was but a mere informality, which, not having been objected to in the Creek courts before trial, was cured by verdict. But, whether it was or not, the Creek courts were alone competent to pass upon any errors or informalities either in the indictment or in the proceedings; and the United States courts cannot, by habeas corpus or other process, interfere with their absolute control over the arrests, presentment, trial, and punishment of their own people, as the law then stood. The case of *Talton v. Mayes*, 163 U. S. 376, 16 Sup. Ct. 984, is conclusive of this case. The supreme court of the United States in that case decides: (1) The crime of murder, committed by one Cherokee Indian upon the person of another within the jurisdiction of the

Cherokee Nation, is not an offense against the United States, but an offense against the local laws of the Cherokee Nation; (2) the provision as to a grand jury in the fifth amendment to the federal constitution has no application to criminal procedure in the courts of the Cherokee Nation, whose powers of local self-government were enjoyed before the constitution was made; (3) the finding of an indictment by a grand jury of less than 13 does not violate the due-process clause of the constitution; (4) the question of the repeal of one statute of the Cherokee Nation by another, and as to what is the existing law of that nation as to the constitution of a grand jury, are solely for the courts of that nation to decide, without any right of review in federal courts by habeas corpus proceedings. Let the judgment of the court below be affirmed.

TOWNSEND, J., concurs.

### BOHART v. HULL.

(Court of Appeals of Indian Territory. Oct. 1, 1898.)

LOST RECORDS—RESTORATION—EVIDENCE—JUDICIAL NOTICE—COURTS OF INDIAN TERRITORY—PRACTICE.

1. Act Cong. March 1, 1889, § 6, providing that the practice, pleading, and forms of proceeding in civil cases shall conform to those existing in like cases in the courts of record of Arkansas, does not put in force Mansf. Dig. §§ 5347-5357, which point out the method of restoring lost or destroyed records.

2. Under Mansf. Dig. § 5356, providing that nothing in sections 5347-5357, relating to the restoring of lost or destroyed records, shall prevent any such records to be restored by any other legal method, secondary evidence is admissible to establish the contents of a redelivery bond destroyed by the burning of a court house.

3. Rev. St. U. S. §§ 905, 906, providing for the authentication of records of "other courts," do not apply to the records of the same court in different places in the same district, which court will take judicial cognizance of its proceedings throughout the district.

Appeal from the United States court for the Southern district of the Indian Territory; before Justice C. B. Kilgore, March 25, 1897.

Action by William Hull against J. C. Bohart. There was a judgment for plaintiff, and defendant appeals. Affirmed.

This is an appeal from a judgment rendered in the United States court for the Southern district of the Indian Territory, at Purcell, in said district, against the appellant, J. C. Bohart, in favor of William Hull, appellee. Plaintiff, hereinafter known as appellee, alleges in his complaint that his cause of action is upon a redelivery bond alleged to have been signed by appellant, J. C. Bohart, and others. He also alleges in his complaint that said bond, and all the papers in the action in which it was given, were destroyed by fire on the 19th day of April, 1895, at Ardmore, Ind. T., but he did not attach a

copy of the bond to his complaint. Bond was dated November 27, 1893. The appellant filed his motion to make the complaint more definite and certain by attaching a copy of the bond, and stating the date of signing it. The court overruled said motion, to which the defendant excepted. The appellant, J. C. Bohart, then filed his demurrer to the complaint, which the court overruled, and the defendant excepted. The appellant then filed his answer. The cause was then tried before a jury, and a verdict rendered in favor of the plaintiff, William Hull, and against the defendant, J. C. Bohart, for the sum of \$631.44 and interest, from which judgment appellant, J. C. Bohart, appealed to this court.

Chas. M. Fechheimer, M. M. Beavers, and J. W. Cherryhomes, for appellant. J. F. Sharp, for appellee.

SPRINGER, C. J. (after stating the facts). The appellant assigns but two errors to which attention is required.

The first assignment of error is on account of overruling the motion to make the complaint more definite and certain. The demurrer to the complaint was properly overruled, in view of the court's opinion as to the motion to make the complaint more definite and certain. The suit was on a redelivery bond, which was destroyed by a fire which burned up the court house at Ardmore, April 19, 1895. Counsel for appellant contend that the court should have required appellee to file a copy of the bond sued on. He could not do this on account of the destruction of the instrument by fire. But it was further contended that it was the duty of appellee to institute proceedings for restoring the records of the court as provided in sections 5347 to 5357 of Mansfield's Digest. These sections were not put in force by the act of May 2, 1890, but appellant insists that they were put in force by the act of March 1, 1889, § 6. The proviso to the last-named act is to the effect "that the practice, pleading and forms of proceeding in civil cases shall conform, as near as may be, to the practice, pleadings and forms of proceeding existing at the time in like cases in the courts of record of the state of Arkansas." While this provision put in force in the Indian Territory the action of ejectment, as decided by this court in the case of Wilson v. Owens, 38 S. W. 976, we are of the opinion that it did not put in force in the territory sections 5347 to 5357 of Mansfield's Digest, for the reason that the sections mentioned do not relate to "the practice, pleading and forms of proceeding in civil actions," but they point out a method by which lost or destroyed records may be restored. But, if these sections were in force in the Indian Territory, they would not prevent the courts from proving lost records by the other well-known methods. The proviso to section 5356 is to the effect that nothing in the sections indicated shall be so construed as to prevent

any of the lost or destroyed records therein provided for to be reinstated and established by any other mode known or recognized by existing law. Secondary evidence is admissible to establish the contents of documents which have been lost or destroyed. Steph. Dig. Ev. p. 136. It was admitted in the case at bar that the bond sued on was destroyed by the Ardmore fire, which destroyed the court house.

The third assignment of error is as follows: "That the court erred in admitting in evidence on behalf of plaintiff a copy of the marshal's docket of another court, showing indorsements on original writ, over the objection of defendant, while the witness E. C. Carter was on the witness stand, which said copy of the docket was not certified or authenticated as provided by law." The marshal of the court at Ardmore is the marshal of the court at Purcell. There is but one court, and that is held at different places in the same district. The court when held at one place will take judicial cognizance of the proceedings of the court wherever held in the district. The jurisdiction of the court is the same at all places of holding court. *Graham v. Stone* (Ind. T.) 37 S. W. 837. The authentication of records, as provided for in sections 905 and 906 of the Revised Statutes of the United States, only applies to the records of "other courts." The sections do not apply to the records of the United States courts in the Indian Territory, when used in the judicial district at other places of holding court in the same district. The case at bar was begun at Ardmore, and afterwards transferred for trial to Purcell. The record does not set forth the evidence in the case. Failing to do so, this court will assume that the evidence submitted to the jury was sufficient to support the verdict. *Hall v. Needles* (Ind. T.) 38 S. W. 671. There is no reversible error in the record. The judgment of the court below is affirmed.

CLAYTON and TOWNSEND, JJ., concur.

# TURNER HARDWARE CO. v. REYNOLDS et al.

(Court of Appeals of Indian Territory. Oct. 1, 1898.)

## ASSIGNMENTS FOR CREDITORS — WHAT ARE — FRAUDULENT CONVEYANCES—PREFERENCES.

1. Giving a chattel mortgage to certain creditors on the debtor's entire property in payment of their claims, under an agreement that they shall sell it, and prorate the proceeds, is not an assignment for the benefit of creditors.
2. An insolvent debtor may transfer his property to creditors in payment of their claims where no more than is sufficient for that purpose is given.

Appeal from the United States court for the Central district of the Indian Territory; before Justice Yancy Lewis, October 7, 1898.

Attachment by the Turner Hardware Com-

pany against C. G. Morgan & Co. Reynolds, Davis & Co. and another interpleaded, and from a judgment for interpleaders plaintiff appeals. Affirmed.

This case was tried to the court on the issues made upon the interplea of appellees and the answer of the appellant. On August 13, 1895, G. C. Morgan & Co., doing business at Calvin, in the Choctaw Nation, executed and delivered to appellees their conveyance in the form of a mortgage, on their stock of merchandise, which purports to secure a note for \$1,437.25, due the following day. Immediate possession was taken of the property, and, on the following day, appellees, by their agent, commenced selling. C. G. Morgan & Co. were insolvent, and all of their property was included in the mortgage. The agents of the appellees, who, for them, conducted these transactions, testified in effect that the mortgage was intended to be an absolute bill of sale; that it was the understanding at the time of the execution of the mortgage that the appellees, Reynolds, Davis & Co., and D. M. Halley, were to take the goods in payment of their claims, sell them, and prorate the proceeds. The property, at a fair price, was not sufficient to fully satisfy their claims. On the 11th day of September, 1895, the appellant brought this suit against C. G. Morgan & Co., and attached so much of the aforesaid property as had not been sold, upon the ground that the conveyance was an assignment for the benefit of creditors, and, not being in conformity to the law of assignments, was void. The appellees filed their interplea, claiming the property under the instrument described. The court found in favor of the appellees. It is admitted that the instrument on its face is a mortgage; hence it is not here set out.

H. O. Shepard, for appellant. Hale & Fannin and Stuart, Lewis & Gordon, for appellees.

CLAYTON, J. (after stating the facts). The only question in the case to be decided is, did the transaction had between C. G. Morgan & Co. and the interpleaders constitute an assignment for the benefit of creditors? It being admitted that the instrument, on its face, was a mortgage, unless the parol evidence showed the transaction to be otherwise, it must be sustained. The only witnesses produced at the trial on this question were F. M. Pope, the agent of Reynolds, Davis & Co., and James Elliott, the agent of D. M. Halley, the interpleaders, both of whom testified in substance that the transaction was an absolute sale; that the property was taken in satisfaction of the debt; that this was all they were to get on their accounts. And this testimony is in harmony with the fact of their having taken immediate possession, and, after conditions broken, proceeded to sell, otherwise than directed by the mortgage. It is true that this attacks the mortgage, and has the effect of showing the real transaction dif-



ferent from that shown by the instrument, but it would not show an assignment for the benefit of creditors. If true, it would simply change the instrument from a mortgage to a bill of sale; or, in other words, it would be the appropriation of the property to pay the debts, and not an appropriation of the property to raise a fund to pay the debts, through the instrumentality of a trustee. The appellant, before being entitled to recover, must not only show that the instrument was not intended to have been a mortgage, but that it was intended to have been an assignment for the benefit of creditors, or that, on other grounds, the transaction was fraudulent as to other creditors. The law does not consider it fraud on creditors for a person, although he may be insolvent, to pay his debts by appropriating property for that purpose, if the debt be just, and no more property be appropriated than is sufficient for that purpose; and it makes no difference that it takes all the debtor's possessions, and thereby has the effect of preferring the particular creditors. Burrill, Assignm. p. 166, § 125. In this case, if we take the instrument on its face, it is a mortgage. If we adopt the parol proof, it is simply an appropriation of the debtor's property to the payment of his debts. In either case it is not an assignment for the benefit of creditors, nor is the transaction condemned by law as being fraudulent as to creditors. Let the judgment of the court below be affirmed.

SPRINGER, C. J., and CLAYTON, J., concur.

#### WALSH et al. v. TYLER et al.

(Court of Appeals of Indian Territory. Oct. 1, 1898.)

#### APPEAL AND ERROR—ATTACHMENT—INTERVENTION—REFERENCE—WAIVER OF JURY—OBJECTIONS AND EXCEPTIONS.

1. In an action for goods sold, aided by attachment, a third person filed an interplea, claiming the attached property by virtue of a conveyance by defendants to him, prior to the attachment. Defendants answered, admitting their indebtedness to plaintiffs, but tendering an issue as to the validity of the attachment, whereupon the cause was referred, over defendants' objection, to a master in chancery, as a commissioner, by whom defendants' conveyance to interpleader was held void as against creditors, to which finding defendants excepted, on the ground that the issues raised by the complaint and the suing out of the attachment had been referred, when Mansf. Dig. § 358, authorized such reference only in case of the claim of an interpleader to the attached property. Plaintiffs thereupon answered the interplea, and, at the request of defendants, the matter of the attachment was resubmitted to the master, who again held such conveyance void. *Held*, that defendants' request for such resubmission to the master was, in effect, a waiver of their exceptions to the first order of reference.

2. Where the issues of fact raised by the suing out of an attachment were submitted to a master in chancery, at the request of defend-

ants, it was not error to refuse a trial by jury on such issues, after the master had filed his report, as any right which defendants may have had to such trial by jury was, in effect, waived by them.

3. Where an interpleader made no objection to a reference of the cause to a master in chancery, he thereby waived his right to a trial by jury on the issues raised by his interplea and the answer thereto.

4. An interpleader, in order to avail himself of the objection that the master in chancery to whom the cause was referred reported on his claim to the attached property, must except at the time to the order of reference.

Appeal from the United States court for the Southern district of the Indian Territory; before Justice C. B. Kilgore, March 18, 1897.

Action by Tyler & Simpson against Walsh & Anderson, in which Glave Goddard filed an interplea, claiming certain property which had been attached by plaintiffs. From a judgment in favor of plaintiffs, defendants and interpleader appeal. Affirmed.

On the 4th day of December, 1896, Tyler & Simpson filed in the office of the clerk of the United States court for the Southern district of the Indian Territory, at Pauls Valley, a complaint at law against Walsh & Anderson, alleging indebtedness to the amount of \$594.75 for goods, wares, and merchandise sold and delivered to them, and at the same time filed affidavit and bond for writ of attachment. Summons and order of attachment were issued thereon, and served the same day, and a stock of goods was levied upon under the writ of attachment. On the 14th day of December, 1896, the return day of the summons and order of attachment, Glave Goddard filed an interplea in this cause, claiming all the property taken into custody by the marshal, by virtue of a conveyance to him by Walsh & Anderson, of the date of November 30, 1896. On the 15th day of December following, Walsh & Anderson filed their joint answer, admitting the indebtedness to plaintiffs, as alleged in their complaint, but alleging that the attachment was wrongfully sued out; and they filed an affidavit controverting the grounds of attachment. On the same day an order of reference was made, sending the cause to the master in chancery, with instructions to hear the same, December 19th following. To this order of reference, defendants, Walsh & Anderson, duly excepted, but the interpleader took no exceptions to the reference. On the 23d day of December, 1896, the master filed his report, holding the conveyance to Goddard void as against creditors. This report of the master has been lost, and does not appear in the record. On the same day, the defendants filed exceptions to the report of the master. Afterwards, on the same day, plaintiffs filed an answer to the interplea of Glave Goddard. On the 24th day of December, 1896, at the request of defendants, Walsh & Anderson, the court re-referred the matter of the attachment to the same master in chancery, to take further testimony, and report

his findings. No exceptions were taken to this re-reference. On the 11th day of March, 1897, the master filed his second report, again holding the deed void as to creditors. On the 12th day of March, 1897, the defendants and the interpleader filed their separate exceptions to the report of the master in chancery. On the 16th day of March, 1897, this cause was called for trial in its regular order on the docket, and a trial by a jury was demanded, by both defendants and interpleader, which was refused. The cause was then heard by the court on exceptions to the master's report. The master's report was sustained, and judgment against the defendants upon the attachment and debt was rendered. In the same judgment the court decreed that the interpleader take nothing by reason of his interplea in this cause. On the 17th day of March, 1897, the defendants and the interpleader filed their motion, requesting the court to reduce to writing his finding upon the law and the facts. On the 18th day of March, 1897, defendants and interpleader filed their motion for a new trial, which was overruled by the court, whereupon an appeal was prayed for and granted.

J. P. Woods, L. C. Andrews, J. T. Blanton, and Nicholas Wolfe, for appellants. Weaver & Weaver and Johnson, Cruce & Cruce, for appellees.

SPRINGER, C. J. (after stating the facts). The first error assigned in this case is as follows: "The court erred in ordering and directing, over defendants' objection, that the issue raised by plaintiffs' complaint and affidavit for attachment, and the answer and affidavit of defendants controverting the grounds of attachment, be referred to the master in chancery." The reference in this case was made, as stated by the trial judge in his certificate to the bill of exceptions, to the master in chancery, as a commissioner. The only statutory authority for such a reference is found in section 358 of Mansfield's Digest, which is as follows: "Sec. 358. The court may hear the proof, or may order a reference to a commissioner, or may empanel a jury to inquire into the facts. If it is found that the claimant has a title to, a lien on or any interest in such property, the court shall make such order as may be necessary to protect his rights. The costs of this proceeding shall be paid by either party at the discretion of the court." By reading the context of this statutory provision, it will be seen that the reference authorized is in case of the claim of an interpleader to the attached property. The error assigned is on account of the reference to a commissioner of the issues raised by the complaint, and the suing out of the attachment. The order of reference was that "this cause be, and the same is hereby," etc., "with instructions to hear the same, Saturday, December 19th." To this order of reference, the defendants,

Walsh & Anderson, duly excepted; but the interpleader, Glave Goddard, took no exception thereto. The master or commissioner heard the case, reported the evidence taken by him to the court, and his findings as to the law and the facts. The findings were against the contentions of both the defendants and the interpleader. They filed exceptions, which the court at the time of the trial overruled. On the 24th day of December, one day after the master filed his first report, there was another reference to the master, in these words: "That the matter of attachment in this cause heretofore referred to the master in chancery be, and the same is hereby, resubmitted to the said master in chancery, and he is required to take further testimony, and report his findings on the attachment in this cause." The trial judge, in his certificate to the bill of exceptions, states that this reference was made at the request of the defendants, Walsh & Anderson. The interpleader took no exceptions to this reference. The defendants admitted in their joint answer their indebtedness as alleged in the complaint. The only issue which their answer made was upon the attachment. The second order of reference, which was made at the request of defendants, was for the purpose of taking further proof, and reporting upon the matter of the attachment. This request for a resubmission to the master was, in effect, a waiver of the exceptions taken by defendants to the first order of reference. If they relied upon their exceptions, they should have stood upon them. But they virtually abandoned them by asking for a re-reference. The interpleader took no exceptions to either reference.

The second assignment of error submitted by appellants (the defendants and interpleader below) is as follows: "Because the court erred in refusing the defendants a trial by a jury on the issues raised by the pleadings on the attachment proceedings herein." This court expresses no opinion at this time upon the question as to whether the issues of fact raised by the suing out of an attachment must be tried by a jury, when such trial is not waived, and when a timely demand is made therefor. In the case at bar, the defendants, by requesting a resubmission of the attachment issue to a master in chancery, and the interpleader, by failing to except to the submission or resubmission to such master, in effect waived their right to have the attachment issue tried by a jury, if any such right existed. When such reference is made, without objection or at the instance of the parties, the trial of the case or the issue is submitted to the master and to the court, upon exceptions to the master's report properly filed. And, when such report is adverse to the party agreeing to the submission, it is too late for such party to demand a jury to retry the case on the issue of fact submitted. The court below did not err in this case

in refusing a trial by jury upon the issues of fact raised by the attachment, for the reason that such trial was in effect waived.

The third assignment of error in this case is as follows: "Because the court erred in refusing the interpleader a trial by a jury on the issues raised by the interplea and the plaintiffs' answer thereto." Issues of fact raised by an interplea, if denied by any of the parties to the case, must be tried by a jury, when timely demand is made therefor, and the right to such trial by jury is not waived. But the interpleader in the case at bar took no exceptions to the reference of the case to a master. By acquiescing in such reference at the time, he waived his right to a trial by jury. The reference of the cause to the master took with it the interplea and the answer thereto, and the issues of fact raised therein. After the master had reported adversely, it was then too late to demand that the issues of fact be submitted to a jury. Exceptions must be taken at the time the ruling or order is made, and preserved in the bill of exceptions, and renewed in the motion for new trial, in order to entitle the exceptors to the benefits thereof. *Thomp. Trials*, §§ 2802, 2803, et seq., and authorities therein cited.

The fourth assignment of error in this case is as follows: "Because the court erred in refusing the interpleader and defendants separate trials on the issues raised by the attachment and the issues raised by the interplea." In the record it appears that the separate trial demanded by the interpleader was "by the jury." The interpleader would have been entitled to a separate trial by a jury if he had not waived his right thereto, as was done by failing to except to the order referring the case to a master in chancery.

The fifth assignment of error is as follows: "Because the court erred in construing the report of the master in chancery to be upon the issue raised by the interplea filed herein." The reference to the master was of the cause. This carried the whole case to the master, and the interpleader should then have excepted to such reference if he desired to save his objection. The master reported upon the interpleader's claim to the attached property. That report is not found in the record, but exceptions to it were presented and overruled by the trial court.

This court regrets to be compelled to call the attention of the attorneys on both sides of the case to conduct which is reprehensible. In the appellants' brief, in the statement of the case, is the following allegation: "On the 15th day of December following, Walsh and Anderson filed their joint answer, denying the indebtedness to plaintiffs," etc. By reference to the record it will be seen that the answer admitted the indebtedness to the plaintiffs, thereby taking that issue out of the

case. This error was, doubtless, unintentionally made, but counsel's statement was calculated to mislead the court by making a false statement. Such blunders are unpardonable. The attorneys for the appellees agreed with the attorneys for the appellants that they might have 30 days' additional time in which to file their record in the case in the court of appeals. The appellants availed themselves of this additional time, and consequently the record was not filed within the time required by law. The court of appeals alone can extend the time for filing the record. *Mansf. Dig.* § 1271. There was no motion made by appellees to dismiss the appeal; but in their brief counsel for appellees state: "It is true that an agreement was filed giving the appellants thirty days' additional time in which to file the record with the court of appeals; but we submit to the court that the filing of this record with the court of appeals within the time allowed by the lower court is a jurisdictional question, and has to be filed within the time allowed in order to give the court of appeals jurisdiction of the case, and could not be waived or agreed to by the attorneys in the case." Counsel then quote section 1271 of *Mansfield's Digest*, and conclude as follows: "From this statute the court will see that this court, as before stated, has no jurisdiction of any record unless filed within the time allowed by the court granting the appeal, which in this case was the lower court, unless further time is asked of the appellate court, which may be given, if sufficient cause is shown. This being a jurisdictional question, we take it that it cannot be done in any other way; and any agreement made by the attorneys could not give the court jurisdiction; and, appellants not having complied with the statute in filing their record, we take it that it is imperative upon the court to dismiss this appeal, regardless of what the facts at issue may be." After counsel for appellees had agreed with the counsel for appellants to extend the time for filing the record in this case, it ill becomes them to ask this court to take advantage of the error to which they had consented by making their agreement with the opposing counsel. No motion having been made to dismiss the appeal, or counter motion to permit the filing of the record after the expiration of the time, this court will regard the agreement which appears in the record as a good cause shown for extending the time for filing the record in this case; and it is accordingly ordered that the time for filing the record in this case be extended so as to embrace the actual date of filing. It appearing to this court that there is no reversible error in the record, the judgment of the court below is affirmed.

CLAYTON and TOWNSEND, JJ., concur.

**PURCELL MILL & ELEVATOR CO. v.  
KIRKLAND.**

(Court of Appeals of Indian Territory. Oct. 1,  
1898.)

**PLEADING—AMENDMENT—CONTINUANCE—DISCRETION—APPEAL—EVIDENCE—ASSIGNMENTS OF ERROR—SUFFICIENCY—TRIAL—INSTRUCTIONS—INJURIES TO SERVANT—NEGLIGENCE—DEFECTIVE APPLIANCES—WIRE ROPES—EXCESSIVE DAMAGES.**

1. An amended complaint for personal injuries, alleging that plaintiff was injured while doing a single job for defendant instead of while being in defendant's general employment, as alleged in the original petition, does not change the cause of action.

2. An amended complaint for personal injuries filed eight days before trial, alleging that plaintiff was injured while employed to do a single job instead of while being in defendant's general employment, as alleged in the original petition, could not work such surprise as would make the court's refusal of a continuance an abuse of discretion.

3. A trial court's finding that a party who made a motion for continuance, because certain depositions were burned, was lacking diligence in procuring other depositions, is conclusive on appeal, if there is any evidence to sustain it.

4. A refusal to grant a continuance is not reversible error, unless the court has abused its discretion.

5. An assignment that the court erred in admitting testimony over defendant's objection is too general to be considered.

6. A refusal of an instruction is proper, where the instructions given fully cover the subject to which the requested instruction is directed.

7. A verdict on conflicting evidence will not be disturbed on appeal.

8. An employé, before using a wire rope, the breaking of which caused the injury sued for, informed his employer that it was a little rusty, and the employer replied that it was all right, when the employé suggested that a new rope be gotten, whereupon the employer said, "That might do," followed by the statement that the rope had been insured for five years. *Held*, that the employer had made no promise to supply a new rope.

9. The fact that an employé used a defective appliance, after he had suspected or believed that his employer intended to supply a new one, does not relieve the employer from liability for injury resulting from such use, though he would not have been liable if he had in fact made a promise to supply the new appliance.

10. An employé about to ascend a smokestack by means of a wire rope that had been exposed to the weather for a year informed his employer that the rope was rusty. The employer took no steps to examine the rope, or to test its strength by the use of weights, but assured the employé that it was all right. While the employé was using the rope it broke, and he was injured. *Held*, that the employer was guilty of negligence.

11. A wire rope used in ascending a smokestack 60 feet high is such an appliance as requires one employing others to use it to see to it personally that it is strong and safe, and is kept in such condition.

12. An employé about to use a wire rope in ascending a smokestack 60 feet high found it rusted near an escape valve for steam, and he repaired it. He found it rusty in other places on the outside, but, when he pried apart the outer wires, the inner wires appeared bright and sound. He informed his employer that the rope was a little rusty, and his employer answered him that it was all right. When he used the rope it broke, and he was injured.

The break was occasioned by rust on inside wires at a place where the outside wires were sound. *Held*, that the employé was not guilty of contributory negligence.

13. A verdict of \$12,500 for personal injuries to an employé 52 years of age, and unable to earn full wages, is excessive, though he was seriously injured, but the verdict will be affirmed on a remittitur of \$7,500.

Appeal from the United States court for the Southern district of the Indian Territory; before Justice C. B. Kilgore, May 6, 1896.

Action by George W. Kirkland against the Purcell Mill & Elevator Company. From a judgment for plaintiff, defendant appeals. Affirmed on condition of remittitur.

This was an action brought by the plaintiff below, appellee here, to recover the sum of \$25,000 damages for personal injuries sustained by him while in the employ of the defendant below, appellant here; which injuries, it is alleged, were caused by the negligence of the defendant because of the failure to provide for him proper implements, machinery, etc., with which to perform his work. We do not deem it necessary to set out the pleadings. They contain the usual averments and denials found in this class of cases, and which, in this jurisdiction at least, have been reduced almost to a formula. The facts of the case, as shown by the proof admitted in evidence at the trial, are that the plaintiff was employed by the defendant to paint a smokestack attached to its mills, for the sum of \$10; that this smokestack was from 50 to 60 feet high; that there was attached to it, suspended from the top, a wire rope used for the purpose, when necessary, of carrying persons from the bottom to the top. It had been there for about one year, but was only used occasionally. This fact was known to the plaintiff. There was proof to show that the defendant was to furnish the plaintiff with all necessary implements, etc., but was not to erect any scaffolding or to arrange any of the appliances for ascending or descending during the progress of the work. The windlass and other things necessary for the work, including the rope, were about the mill, subject to be used by plaintiff. Previously he had been around the mill, had done some work there, and was somewhat familiar with the surroundings. He was a carpenter. On the day of the accident plaintiff and his son-in-law, John H. Graham, went to the mill for the purpose of doing the job, and told Mr. Trudgeon, who was defendant's manager, and had charge of the mill, that he was ready to paint the stack. He was told by Mr. Trudgeon, who was at his office, to go down to the mill, and get whatever he wanted necessary for the work. He did so, and while fastening the rope to the windlass he discovered that a part of it, which had been lying near the exhaust pipe of the engine, was defective, caused by the escape of steam. This part he cut off. In his testimony he says: "I cut off a whole lot of it." They then examined the balance

of the rope, "clear around, from one end to the other"; and although they found some slightly rusted places on it, and a place where it was slightly cut from some cause, he came to the conclusion, he says, that it was "pretty sound,—a pretty good rope." Still, he says, he had some doubt about it, and asked Graham, his son-in-law, his opinion. Graham responded that he would not go up there on any rope. He (Kirkland) then went to the office to see Trudgeon, the manager, for the purpose, he says, of getting his opinion. As the conversation which took place at this time is very important in this case, we will state it in the plaintiff's own language: "I told him I had come down to have him see about the rope. He says, 'What rope.' I told him the rope at the top of the smokestack. 'Well,' he says, 'what about that rope?' I told him I just wanted his opinion about it,—that is all; it was a little rusty. He says, 'Was it rusted in two anywheres?' and I told him, 'No, it was not rusted in two anywheres.' I told him I found a few strands of wire that was broken, and a few that the wire was cut,—a strand looked like it had been cut on something, but it seemed to be good. He said that was a funny idea. I told him I didn't know that it was, or something to that amount. He said that the rope was all right. He told me that it would not rust. I cut off the lower end of it, and threw it away. He said it was galvanized steel wire; it would not rust. I spoke to him about getting a new rope. I said: 'Mr. Trudgeon, why not get a new rope, and put it there. How long would it take?' He says, 'It would not take a great while to get a new one.' I says, 'Why not get one, then?' He says, 'That might do.' Well, I was about leaving, and started out. He told me that rope was insured for five years. While we was talking with regards to it he seemed to think I must be afraid of it, or something of the kind, so I got to believe I was suspicious myself. That was about all the conversation there was about it." This was about noon, and he concluded not to take the ascension until after dinner. Immediately after dinner they came back, and he made the ascension safely. Then he went to the blacksmith shop to get a hook repaired, came back, and made another ascension. Immediately afterwards, while making the third ascension,—this time with the additional weight of some rope and a block and tackle, which he took up with him, the block and tackle weighing 75 pounds, and the rope not being weighed, but being about 100 feet long,—when about half way up, the rope broke, and he fell upon the roof of the engine house, a distance of some 30 or 40 feet, receiving very severe injuries. The rope was afterwards examined, and it was found that at the place where it broke all of the wires, except five or six strands on the outside, were rusted off. Those on the outside had the same appearance of the rest of the rope.

No defects could be seen, nor were they discovered on the examination made by plaintiff and Graham before the accident, when they used a knife to pry open the strands in a number of places, but always found the wires bright and sound on the inside.

A motion was filed to strike from the files the second amended complaint, upon the ground that it was "wholly at variance with the other complaints previously filed in the case"; "that in the first petition, as first amended, plaintiff declared on a contract of general employment, and that the relation of master and servant existed between the plaintiff and the defendant, and that he was injured in the course of his employment as servant of the defendant," etc.; "and in the second amended complaint plaintiff declares upon a separate and independent contract that he was to paint a certain smokestack for the sum of ten dollars," etc. This motion was overruled, and exceptions duly saved. Thereupon a second motion was filed, to strike out the said inconsistent part of the second amended complaint, which was overruled, and exceptions saved. Defendant then filed a demurrer to the second amended complaint, setting up the same ground as that passed upon in the motion. This demurrer was overruled by the court, and exceptions saved. Thereupon a motion for continuance was filed, setting up that the said change in the pleading worked a surprise to it, which was overruled, and exceptions saved. When the case was called for trial, and after the plaintiff had announced himself ready, the defendant stated that it was not ready, and it was then agreed, in open court, that its counsel might state verbally the grounds upon which he relied for a continuance, and after the trial reduce them to writing in the shape of a motion for continuance, and file the paper in the case. The grounds were stated, and the court overruled the motion, which was duly excepted to. The motion, as afterwards filed, set up the fact that there had been two depositions taken of parties who were present at the time the rope was examined by the plaintiff and Graham. That at several places the strands of said wire rope were rusted entirely off. That after plaintiff had come back from seeing Trudgeon he told them that he (Trudgeon) had said that "it is funny that the wire rope is rusted; it can't rust; it is guarantied for five years." They then tested the rope by hanging a weight as heavy as three men to it. Afterwards they examined it further, before it was used by them. The witness then told plaintiff that he had seen such ropes used in Oregon in the mines with half the strands rusted, and that this rope would sustain a weight five times more than they would want to carry by it. That these depositions were lost, but counsel for defendant were not aware of it until the case was called for trial. That if the fact of their loss had been known to them they would have procured others to

have been taken. That, upon inquiry since, counsel had learned that they had not been seen by any one since the Ardmore fire. That the testimony was material, etc. This paper was sworn to by J. W. Hocker, Esq., one of the defendant's counsel in the case. Mr. R. N. Coffee, one of the counsel for plaintiff, filed a controverting affidavit against the motion for continuance, in which he stated that, at the time Mr. Hocker made his verbal motion, he admitted that the depositions of the witnesses had been destroyed in the Ardmore fire, in April, 1886, more than one year before, and that that fact was known to counsel for defendant; that one of the witnesses lived within the jurisdiction of the court, and could have been reached by subpoena; that facts alleged in the motion as having been testified to by these witnesses was different from those as stated in the depositions. Judge Kilgore, who presided at the trial, in a note over his signature, embodied in the bill of exceptions, sustains the recollection of Mr. Coffee as to the fact that defendant's counsel were aware of the fact that the papers had been burned more than a year before at the Ardmore fire, and that no effort had been made to retake or substitute them. There were no exceptions saved to the charge of the court.

Among the instructions asked for by the defendant was the following: "You are instructed that by the term 'contributory negligence' is meant the want of ordinary or reasonable care upon the part of the person injured, which occurred with the negligence of the defendant in causing the injury." This instruction was refused, and exception saved. Verdict for plaintiff for \$12,500. Motion for new trial filed, overruled, and exception saved. Judgment for plaintiff for amount of verdict. Appeal prayed for and granted.

Hocker & Woods and Stuart, Gordon & Hailey, for appellant. R. N. Coffee, Furman & Herbert, and Jesse H. Hill, for appellee.

CLAYTON, J. (after stating the facts). In this jurisdiction the statute governing appeals does not require that any assignments of error shall be filed. It does provide, however, that a motion for new trial must be filed, and passed on by the court below, and be brought up to this court by the bill of exceptions, and, when so brought up, it answers the purpose of an assignment of errors. In this case the motion for new trial is as follows: "The defendant moves for a new trial, because—First. The verdict is not sustained by the evidence. Second. The verdict is contrary to law. Third. The court erred in overruling the demurrer to plaintiff's second amended complaint. Fourth. The court erred in overruling defendant's motion to strike plaintiff's second amended complaint from the files, because of the variance between that complaint and the former complaint. Fifth. The court erred in overrul-

ing defendant's motion for continuance, after plaintiff's cause of action had been changed by the filing of the second amended complaint. Sixth. The court erred in overruling defendant's motion to strike out the inconsistent paragraphs in plaintiff's said amended complaint. Seventh. The court erred in overruling defendant's motion for a continuance after the plaintiff had announced ready for trial, and defendant had discovered the loss of depositions taken in the case. Eighth. The court erred in admitting testimony over the objection of defendant, as shown by the bill of exceptions. Ninth. The court erred in refusing instruction No. 6, asked by the defendant. Tenth. Because said verdict is excessive, and shows prejudice on the part of the jury."

We will leave the first, second, and tenth of the errors above assigned to be last considered, and dispose of the others in the order stated in the motion for a new trial; and, inasmuch as the demurrer mentioned in the third assignment attacked the second amended complaint on the same grounds as the motion mentioned in the fourth and fifth, and the motion for continuance in the sixth, assignments, we will consider them together.

It is argued that, because the second amended complaint alleged that the plaintiff's employment was special,—that he was to perform a single job,—and whereas the first amended complaint alleged that his employment was general (thus invoking the law of master and servant), this constitutes such a variance from the preceding pleading as the law will not permit by amendment. While the law of pleading will not allow an amendment which has the effect of changing the cause of action from that stated in the original complaint, we know of no law, nor has any been cited, which prohibits a change, in the amended complaint, of the statement of facts relating to the same cause of action. Indeed, this is often the very object of the amendment, and, under our statute, is allowed even during the trial, if it does not work a surprise, and then it would only be a ground for continuance; and as this amendment was filed eight days before the trial, as shown by the record, and in this particular only changed the preceding amended complaint as to the facts stated therein, to wit, that the plaintiff, instead of having been a general employé around the mill, as first stated, was only employed to do specially the labor necessary to the performance of a single job, we cannot agree with the learned counsel that this is prohibited by the law, or that it would work such a surprise as would entitle them to a continuance, which, if not allowed, would constitute an abuse of the discretion allowed the court in passing on motions for continuance.

The seventh assignment is that the court erred in overruling defendant's second motion for continuance, which set up the loss of the depositions of his witnesses theretofore

filed in the case. It must be conceded that, if the facts which the motion shows the witnesses had testified to in the depositions were true, they were material. But the affidavit of Mr. Coffee denies that the depositions contained the statements claimed by the motion; but, conceding that they were as stated, was there any diligence shown by defendant in procuring this testimony after knowledge of the loss of the depositions? If the written motion, which, by agreement, was written and filed after the trial, contains the real motion as verbally made, there might be some grounds for the claim that diligence was shown. Even then, when it is remembered that, a year before, they had been destroyed by fire in the burning of the court house, and that their loss had not been discovered until the day the case was called for trial, it seems to us a remarkable degree of diligence is not shown. But, be this as it may, the affidavit of Mr. Coffee, supported by the recollection of the trial judge, is to the effect that counsel, in the real motion for a continuance, admitted that they had therefore been advised of the loss of the depositions, and that one of the parties was then living within the jurisdiction of the court, and could be reached by subpoena. It is not for us to determine which version of the matter is correct. The court in whose presence the verbal motion was made has passed upon it, and it is conclusive as far as this court is concerned. The court found that diligence had not been used, and there was evidence to support its findings, and therefore the refusal to grant the continuance was not an abuse of its discretion. A motion for continuance is in the sound discretion of the court, and, unless that discretion has been abused, a refusal to grant the motion is not reversible error. *Burriss v. Wise*, 2 Ark. 33; *Stillwell v. Badgett*, 22 Ark. 164; *McDonald v. Smith*, 21 Ark. 460; *Harsh v. Hanauer*, 15 Ark. 252; *Hunter v. Gaines*, 19 Ark. 92; *Rector v. Gaines*, Id. 70; *Ware v. Kelly*, 22 Ark. 441. Under the circumstances of this case, we cannot see that the discretion resting in the court to grant or overrule the motion for a continuance was abused.

The eighth assignment does not point out what testimony was objected to, and therefore is too general to be considered. It points to nothing, and is too indefinite. *Edmonds v. State*, 34 Ark. 720. This assignment is not urged by counsel.

The ninth assignment is that the court erred in refusing to give instruction No. 6 asked for by the defendant. The general instructions of the court fully and fairly defined "contributory negligence" as applied to this case. The seventh and ninth instructions of the court, as given, are as follows: "(7) The duty was on the plaintiff to exercise ordinary care and diligence in his efforts to discover defects in the wire rope, and, if he failed to exercise such ordinary care and diligence, he thereby contributed, by his own negligence, to

the injury which he sustained, and he would not be entitled to recover." "(9) When the plaintiff undertook the work of painting the smokestack by virtue of the contract, he subjected himself to the ordinary peril incident to such services; and, if he undertook the work with notice and knowledge of the danger, he is deemed to have accepted the services and the danger too." We find no error in refusing the instruction asked for.

The first assignment is that "the verdict is not sustained by the evidence." The rule governing this court upon this question is that the court will not reverse the decision of the court below, refusing a new trial, when the only ground presented is the mere weight of evidence, unless there is a total want of evidence upon some point absolutely necessary to a recovery, or unless the verdict is clearly and palpably contrary to the weight of evidence. When there is a conflict of evidence, the jury being the exclusive judges of facts, their verdict will not be disturbed. *Drennen v. Brown*, 10 Ark. 138; *Sparks v. Beaver*, 11 Ark. 630; *Bank v. Wooddy*, 10 Ark. 638; *Gatlin v. Wilcox*, 28 Ark. 309; *Oliver v. State*, 34 Ark. 632.

It is claimed by the plaintiff that the conversation had between him and Mr. Trudgeon, the manager of defendant's mill, just before the accident, amounted to a promise to repair on the part of the defendant, and that, relying on the promise, the plaintiff had the right to continue the work with the defective rope. But it must be remembered that the work was but a mere job that would take but a day or two to complete; and, if the language could be construed to amount to a promise, it was not a promise to simply repair, but to supply an entirely new rope. If the understanding was that a new rope was to be supplied, then this was a condemnation of the old one, which would relieve the defendant from any further inspection of it, because it was no longer to be used. And this must have been understood by the one as well as the other; and if, under these circumstances, the plaintiff, without giving the defendant time to make his promise good, and without any further instructions from him, notwithstanding the understanding, should see fit to take the chances and use the old one, it would clearly be at his own risk. Under such circumstances, the defendant would be without fault, and this would be the end of the case.

But did the aforesaid conversation amount to a promise to repair or to supply a new rope? We think not. The conversation commenced by plaintiff telling Mr. Trudgeon that he came to see him about the rope,—to get his opinion of it; that it was a little rusty,—not rusted in two anywhere, but that a few strands of wire had been broken and a few were cut; looked as if they had been cut on something, but it seemed to be good. Mr. Trudgeon replied that that was a funny idea. The plaintiff responded that he did

not know that it was, or something to that amount. Mr. Trudgeon then said: "The rope is all right; that it would not rust; that it was galvanized steel wire; it would not rust." Plaintiff then suggested that a new rope be gotten, and asked how long it would take to get one, to which Mr. Trudgeon replied, "Not a great while." The plaintiff then said, "Why not get one?" The reply was, "That might do," and as the plaintiff turned to leave he was told that the rope had been insured for five years. And this was the whole conversation. We fail to find any element of a promise in it. The whole purpose of Mr. Trudgeon seems to have been to impress on the mind of the plaintiff the impossibility of the rope being defective on account of rust. He made light of the suggestion that it was defective; said it was a funny idea; "that the rope was all right"; "that it was made of galvanized steel wire, and would not rust." When a new one was suggested, he said, "That might do," but it had been insured for five years, and both knew that it had been in use but one. The plaintiff himself had said to him that, notwithstanding the few defects, he found that the rope seemed to be good. The argument made by Mr. Trudgeon seems to have satisfied the mind of the plaintiff, and to have dispelled all of his misgivings; for he says that he went back from the office where the conversation was had, to the smokestack, and concluded to make the ascension.

"Mere suspicions and surmises or belief that the defects will be remedied do not take the place of a promise to remedy them. There must be something emanating from the employer to induce a belief that the defects will be remedied." 1 Bailey, Mast. Liab. 3078. The after-conduct of the plaintiff is conclusive that he did not believe a new rope was to be supplied.

Taking the view that the language used did not amount to a promise, either express or implied, we are called upon to determine whether the evidence of defendant's negligence in not providing a rope sufficient for the purpose, and in not properly inspecting the one used, was sufficient; and, if so, was there any evidence of contributory negligence on the part of the plaintiff? and, if so, was it so clearly and palpably against the weight of the evidence on this point as to show that the court committed error in refusing to grant the motion for a new trial? So far as the defendant is concerned, we think it obvious that he had not performed his full duty. The wire rope had been suspended from the smokestack, subjected to the influences of the weather for one year. It may have been insured for five, but he had been informed by the plaintiff that it had been examined, and that there were defective places in it, and, notwithstanding his own views were that a galvanized steel rope would not rust, he had been informed that this particular one did. In the case of *Railway Co.*

*v. Harper*, 44 Ark. 528, the court say "that, if the company omitted any test of soundness of the boiler that ought to have been made, it was guilty of negligence, and it was not for the court to take the case from the jury." In this case the ordinary and simple test of applying the additional weight had not been made; but, instead of inspecting it himself or having it done, he satisfied himself by arguing away the fears of the man who was to perform the perilous duty of making the ascension. Had he made the inspection, and applied the common test in such cases of suspending to the rope a weight many times heavier than that to be used in the work, the defect would probably have been found. He cannot relieve himself of responsibility upon the ground that the defect was latent, and that an inspection such as should have been made would not have discovered it. The probabilities all are that it would, and, not having applied the test, he will not now, after the accident and a verdict of the jury against him, be allowed to say that it would not. The rope held the plaintiff, who had made two ascensions on it, but when the additional weight of the rope and tackle was added it broke. A latent defect may excuse the employé for not having discovered it by the use of such ordinary care as the law requires on his part, but they are the very kind of defects which the employer is required to find if, by proper inspection and by the use of such care and diligence as the law requires of him, they can be found; and he can only escape responsibility on this ground when it is shown that a proper inspection would not have discovered them. And in this case this question was fairly submitted to the jury by the charge of the court in its eighth instruction, which is as follows: "If you should conclude from the evidence that the Mill & Elevator Company contracted with the plaintiff to furnish safe and reliable appliances for the work, and that it did furnish the appliances, and was ignorant of the defects in the same, and could not by reasonable diligence ascertain the defects, then the defendant would not be liable." We think there was evidence supporting the verdict on this point, and therefore cannot interfere with it.

Was the plaintiff guilty of contributory negligence? He testified that he was not familiar with wire ropes; and we do not think that a rope of this description, used as this was, was an appliance of such simple construction and of such common use as that the common employé, not in the habit of using it, shall be considered as capable of knowing and understanding its mechanism, and of observing and discovering defects that may exist in it, as to take it out of the rule of a master's personal duty. In the case of *Telander v. Sunlin*, 44 Fed. 564, a rope connected with a tackle block was held to be such an appliance as came within the rule of a master's personal duty. In *Lund v. Hersey*,



41 Fed. 202, a rope which a foreman selected from a quantity on hand for use in hauling a barge from the water was held to be within the term "appliances." See, also, *Baker v. Railroad Co.*, 95 Pa. St. 211. Of course, much will depend on the purposes for which it is used. If it constitutes a part of a structure, as of machinery, which is most vital to the safety of the workman, then, however simple its construction, the personal duty of the master to make it strong and safe, and keep it so, is obvious. The very purpose for which this rope was used made it an "appliance," within the rule.

The proof shows that the defect in the rope at the place where it broke consisted of the inside wires having been destroyed by rust. The outside strands were bright, and had all of the appearance of soundness. The plaintiff, and those who were with him, had made a pretty thorough examination of it, but had failed to discover this defect. They found one place where a part of the rope had been lying near the escape valve of the engine that was so badly rusted that they cut it off and threw it away. They found other places where some rust appeared on the outside, but, upon full examination, decided that this did not materially lessen its strength. With their knives they opened the strands in places, and always found the inside bright and sound. The evidence does not show, however, that they attached any weights to it to test its strength in that way. But still they discovered enough to excite the fears of the plaintiff. He became at least suspicious of its soundness. What was his duty, under these circumstances? It may be said that he should have applied the other tests. But it must be remembered that the actual defect was latent, and the test, as far as made, showed no great defects, and that he did not choose to take the risk without informing his employer of the condition of the appliances. But he had two other courses open to him,—he might quit the work, or he might report the condition of the appliances to his employer. The actual defect not being obvious, the plaintiff chose the latter course. It became then the duty of the employer to inspect the appliances, and learn its condition himself. Or, if he preferred to rely on his own judgment or knowledge, he might have taken upon himself the responsibility of assuring the employé of its soundness and sufficiency; in which latter case, under the circumstances of this case, the employé might proceed with the work; and if he did so relying on the assurances which he had received, and was afterwards injured because of these defects, the fault was the employer's, and the employé would be guilty of no negligence,—he would have done his full duty under the law. *Bailey, Mast. Liab.* 898 et seq.; 3 Elliott, R. R. 2072, 2073.

The questions as to whether the language used by the defendant, as above set out, was such an assurance, and as to whether the

plaintiff really relied upon it when he proceeded with the work, were both fairly submitted to the jury by the fifth instruction of the court, which is as follows: "If, on the other hand, you should conclude from the testimony that the Mill & Elevator Co. bound itself to furnish the machinery and appliances necessary to enable the plaintiff to carry on the work on a swinging scaffold, and that they did furnish such necessary appliances and represented them to be safe and sound, and that they could be safely used in the work, and that the plaintiff relied upon the representations of the defendant upon this subject, and was unable to discover such defects as would make them unsafe, it would be your duty to find for the plaintiff." We cannot say, as against the verdict of the jury that it was the duty of the plaintiff, under the circumstances, to have made further examination before proceeding with the work or in doing so he did it at his own peril. He had gone far enough to discover that there were no apparent defects that were serious except at the place where the rope was exposed to the constant dampness caused by the escaping steam, and he had removed that. The actual defect was not visible. The rope had been insured for five years, and had been used but one. He had been told by his employer that it was all right, and that the material of which it was made was galvanized steel, not subject to rust. Aside from the place where the steam had caused it to rust, which had been removed, the defects were slight and immaterial. The inside, wherever it had been examined, was bright and sound. He had taken the precaution of submitting the matter to his employer, who virtually adopted his inspection, and deemed it sufficient. These facts were all before the jury, and their verdict is conclusive on us.

But, while the plaintiff was seriously injured, taking into consideration his age,—he was 52 years old,—and his necessary inability to earn full wages, and all of the circumstances of the case, we think the verdict of the jury excessive. If the plaintiff will remit the amount of \$7,500 within 15 days from this date, allowing the judgment to stand for the sum of \$5,000, let the judgment be affirmed; otherwise let it be reversed and remanded.

SPRINGER, C. J., and TOWNSEND, J., concur.

#### SPARKS et al. v. CHILDERS.

(Court of Appeals of Indian Territory. Oct. 1, 1898.)

BILLS AND NOTES — PRINCIPAL AND SURETY — REMEDIES OF SURETY — LIMITATIONS — TRIAL — EQUITY AND LAW DOCKETS.

1. A surety who pays a note may sue the maker at law on an implied promise to indemnify him, or in equity on the note, as being subrogated to the rights of the payee.

2. Where an action of equitable cognizance is

brought as an action at law, and neither party applies to have it transferred to the equity docket, plaintiff is entitled to a trial of the issues involved, under Mansf. Dig. §§ 4925, 4928, providing that an error as to the kind of proceedings shall not cause an abatement or dismissal, but merely a transfer to the proper docket, and authorizing defendant to apply for such a transfer.

3. Where a suit is brought in the wrong forum, and neither party moves for a transfer, the court is not bound to transfer it on its own motion.

4. Under Mansf. Dig. § 4483, permitting actions on written obligations to be brought within five years, an action on a note by a surety who has paid it against the maker may be brought within five years, since the surety is subrogated to the rights of the payee.

5. Where the cause of action is not barred by limitations, evidence of a new promise, offered solely to take it out of the statute, is immaterial and its reception is harmless error.

Appeal from the United States court for the Southern district of the Indian Territory; before Justice C. B. Kilgore, September 10, 1895.

Action by J. W. Childers against N. R. Sparks and another. There was a judgment for plaintiff, and defendants appeal. Affirmed.

This is a suit commenced on the 17th day of April, 1895, in the United States court for the Southern district of the Indian Territory, at Chickasha. The complaint states the cause of action, as follows: "In the United States Court in the Indian Territory, Southern Judicial Division. J. W. Childers vs. N. R. Sparks and J. L. Sparks. Action at Law. J. W. Childers, hereinafter styled 'plaintiff,' complaining of N. R. Sparks and J. L. Sparks, hereinafter styled 'defendants,' respectfully represents that plaintiff is a citizen of the United States, residing in Texas, and that the defendants are both citizens of the United States, residing in the Indian Territory, and in this judicial district, and nearer to the town of Chickasha than any other point in said district at which a United States court is located; that heretofore, to wit, on the 27th day of July, 1885, plaintiff and defendants executed a note whereby they, or either of them, bound themselves to pay on October 1, 1885, \$334.16 to the order of Gainesville National Bank, Gainesville, Texas, on October 1, 1885, with interest at the rate of 12% per annum after maturity until paid, with 10% additional as attorney's fees in case of nonpayment at maturity; that N. R. Sparks and J. L. Sparks were principals in said note, and that plaintiff signed the same as an accommodation surety for their benefit; that upon the maturity of said note defendants failed to pay the same; plaintiff, being thereunto compelled by such failure, paid the same to the Gainesville National Bank, the owner of said note, with the interest and attorney's fees thereon; that said bank thereupon, by its cashier, indorsed said note, without recourse, to plaintiff, whereby the plaintiff became the legal owner and holder of said note, and defendants became liable to pay plaintiff the amount of said note, ac-

cording to its legal tenor; that, though often demanded, defendants, and both of them, have failed and refused to pay said note, or any part thereof. Wherefore plaintiff prays that they be summoned to answer herein, and that upon final trial he have judgment for the amount of said note, with interest, costs, and attorney's fees."

The note, with its indorsements, which is an exhibit to the complaint, is as follows:

"Gainesville, Tex., July 27th, 1885. On the 1st of October, 1885, after date, we, or either of us, promise to pay to the order of Gainesville National Bank three hundred & thirty-four and 16/100 dollars, at the Gainesville National Bank, Gainesville, Texas, for value received, with interest at the rate of twelve per cent. per annum after maturity until paid. In case of nonpayment of the above note at maturity, — hereby authorize any licensed attorney at law to appear for me in court, and to accept service, waive process, and confess judgment in favor of the legal holder of said note against — for the amount of said note and interest, with ten per cent. attorney's fees additional. [Signed] N. R. Sparks. J. L. Sparks. J. W. Childers.

"Post office.

"\$334.16."

Indorsed: "Pay to J. W. Childers, without recourse on me. C. C. Heming, Cashier."

The defendants filed a demurrer to the complaint, which is as follows: "Now come the defendants, N. R. and J. L. Sparks, and for demurrer to plaintiff's complaint filed herein, and say that the same is insufficient to entitle plaintiff to the relief prayed for, because it appears upon the face of said complaint that plaintiff's cause of action, if he ever had any, against these defendants, is long since barred by the statute of limitations. And of this the defendants pray the judgment of the court." Upon hearing, the demurrer was overruled by the court; and, the defendant N. R. Sparks declining to answer further, judgment was rendered against him in favor of plaintiff for the sum of \$600. The defendant J. L. Sparks filed an answer, in which he alleged that he was not a principal in the note, but a co-surety with plaintiff, and that he was liable to the plaintiff, if at all, only for one-half of the amount paid by plaintiff. The plaintiff filed a reply to the answer, which is as follows: "Now comes the plaintiff, J. W. Childers, and in reply to the answer of the defendant J. L. Sparks, wherein he attempts to plead the statute of limitations against the cause of action sued on herein, he says that, if said action was ever barred, that the said defendant J. L. Sparks on the 22d day of August, 1895, in writing, admitted and confessed his liability on the note herein sued on, whereby and by reason whereof the statute of limitations was waived, and did not commence to run in said defendant's favor until August 22, 1895. All of which plaintiff is ready to verify, and prays judgment as prayed for in

his complaint." The writing relied upon to take the case out of the statute of limitations, and which was introduced in evidence over the defendant's objection, is as follows: "Chickasha, I. T., Aug. 22, 1895. Mess. Herbert & Lewis, Ardmore, I. T.—Dear Sirs: You have filed a suit against N. R. and J. L. Sparks, in favor of Mr. Childers, which he had to pay off, and which I was only a security with him. I would of written to you sooner, but I have been trying to get N. R. Sparks to do something with it; but he cannot pay anything now, nor neither can I do anything now. I can't pay the whole thing off, as I was only a security with Childers. If the case was put off this term, I might be able to fix it up soon next year, rather than have a judgment. I am not able to pay it, but I want to settle it on the best terms. Yours, truly, [Signed] J. L. Sparks." A jury was waived, and all matters of law and fact submitted to the court, which, upon a trial of the issues, rendered judgment in favor of the plaintiff against J. L. Sparks for the sum of \$300 and costs of suit. A motion for new trial was filed in due time and overruled, and from the judgment thus rendered the defendants have prosecuted their appeal to this court.

Ledbetter & Bledsoe, for appellants. C. L. Herbert and Yancey Lewis, for appellee.

CLAYTON, J. (after stating the facts). The record in this case presents but two questions for the consideration of this court: First, was this action, as set up in the complaint, barred by the statute of limitations? and, second, if it were, was the letter of J. L. Sparks, introduced in evidence, sufficient to take it out of the statute, as to him.

The statute of limitations began to run in the Indian Territory on May 2, 1890, and this suit was commenced on April 17, 1895; being more than three, and less than five, years between the time when the statute began to run and the bringing of the suit. Section 4478, *Manuf. Dig.*, provides that "all actions founded upon any contract or liability, express or implied, not in writing, must be commenced within three years after the cause of action shall accrue, and not afterward." Section 4483 provides that "actions on promissory notes, and other instruments in writing not under seal, shall be commenced within five years after the cause of action shall accrue, and not afterward." The contention of the defendants is that their liability is not founded upon the promissory note on which the suit is brought, but upon an implied promise upon the part of N. R. Sparks, the maker of the note, to reimburse his surety, Childers, for the amount paid by him in satisfaction of the note, and upon an implied promise of J. L. Sparks, as co-surety with Childers, to contribute one half of the amount paid by Childers in satisfaction of the note; that this implied promise is barred by

limitations within three years after the cause of action accrued; and that, inasmuch as this suit was not brought within that period, the plaintiff, Childers, is not entitled to judgment. The contention of the plaintiff is that this suit is upon the promissory note, and not barred until the expiration of five years from the time the cause of action accrued, and, as this action was brought within that period, he is entitled to recover. The general rule is that a surety who has paid the debt of his principal cannot maintain an action at law upon the original obligation, but that his only ground for relief is upon an implied promise of indemnity or reimbursement on the part of the principal. *Wood, Liquidations*, 320-322; *Brandt, Sur.* 313, 434; *Harrah v. Jacobs (Iowa)* 39 N. W. 187. The last case cited is directly in point. The plaintiff, who had signed the note as surety for the defendant, claimed that he had purchased the note, and was the owner of it. In an action upon the note the defendant demurred, and the supreme court of Iowa, discussing the question, said: "The demurrer was to the effect that the plaintiff cannot maintain an action on the note, because it was paid and discharged, and that, having paid and discharged the note as surety, the right to recover of the defendant the money paid is barred by the statute of limitations. It is very clear that, if plaintiff can recover at all, it must be upon the note. No action can be maintained in the usual form of an action by a surety against his principal for money paid in discharge of the note, because more than five years elapsed between the time of the payment and the commencement of the suit. It will be observed that the relation of principal and surety does not appear from the instrument itself. If the relation exists, it must be established by parol evidence. The right of action would therefore be founded upon an unwritten contract, and under our statute would be barred in five years. *Lamb v. Withrow*, 31 Iowa, 164. The plaintiff insists that his transactions with the corporation amounted to a purchase of the note, and not a payment. The same theory was claimed in the case of *Lamb v. Withrow*, supra; *Bones v. Aiken*, 35 Iowa, 534; and *Johnsten v. Belden*, 49 Iowa, 301. It is true that in all the cited cases the obligation had been reduced to judgment, but the principle involved is the same. It is that a joint maker of a note, who is in fact surety, is not entitled to recover, by purchasing a note, or a judgment rendered upon it, either upon the note or judgment. It makes no difference whether he calls the transaction a purchase or a payment. His action is one for indemnity for the money paid. It is not an action upon a written contract, and is barred in five years. Such appears to be the rule in the cases above cited." The right of contribution does not spring from contract, but rests on general principles and natural justice; and when one has discharged a debt or obligation which

was a common charge, for the benefit of all, he has a right to call upon his debtors for contribution. *Durbin v. Kuney* (Or.) 23 Pac. 661. *Bushnell v. Bushnell* (Wis.) 46 N. W. 412, was an action brought by a surety against his co-surety for contribution. The supreme court of Wisconsin held that the cause of action arose upon an implied promise of indemnity, and that it was barred by the statute of limitations which governs actions upon instruments not in writing. The supreme court further held: "But there is an error in giving interest on the last payment exceeding 7 per cent. Interest at 10 per cent. was given, doubtless, because the note drew interest at that rate; but the recovery is upon an implied contract for money paid to the defendant's use, and not upon the note, nor upon the guardian's bond. The rate of interest on the amount of recovery should be the legal rate, and no more." In Arkansas the rule is well established that a surety who pays the debt of his principal must, at law, rely upon an implied promise of indemnity or reimbursement. Where a surety on a note takes it up after it is due, and cancels it by giving his own note, which is accepted by the creditors, this is equivalent to the payment of the first note, and will support a count for money laid out and expended." *Neale v. Newland*, 4 Ark. 506; *Jordan v. Adams*, 7 Ark. 348; *Snider v. Gratehouse*, 16 Ark. 92. Texas (and the note in suit is a Texas contract, having been executed and made payable in that state), by a long line of decisions, holds the same opinion. *Holliman v. Rogers*, 6 Tex. 91; *Hammond v. Myers*, 30 Tex. 375; *Jackson v. Murray* (Tex. Sup.) 14 S. W. 235; *Faires v. Cockerell*, 88 Tex. 428, 31 S. W. 190, 639; *Tabor v. Cockerell* (Tex. App.) 16 S. W. 786. While the right of the surety to sue his principal or a co-surety is, at law, based upon an implied promise, by which fiction courts of law, with their inflexible procedure, are enabled to give the surety, who has paid, relief, courts of equity give more ample relief by subrogating the surety who has paid to all of the rights of the creditor, and authorizing him to proceed upon the original obligation, as well as collateral securities, against the principal or co-surety. "The courts of all of the American states, with a very few exceptions, have extended the remedy of subrogation. They enable the surety to enforce the bond, contract, or judgment immediately against the principal, although the surety was himself directly liable. In other words, by the English doctrine the surety becomes equitable assignee only of collateral securities; by the American doctrine, he becomes equitable assignee not only of collateral securities, but of the principal obligation." 3 Pom. Eq. Jur. § 1419, note 1, and cases cited. "This is a doctrine of the court of chancery, and cannot usually be enforced in a court of law." *Brandt*, Sur. 434. It would appear, therefore, that in this case the plaintiff, a surety,

having paid off the debt, had a legal right to bring his action either at law upon an implied promise of his principal to indemnify him, or in equity on the note, as being subrogated to all of the rights of the payee; and, if his action is to be considered as at law, the three-years statute of limitation prevails, but, if in equity, the five-year statute controls. The plaintiff elected to bring his action at law, and no motion was made by the plaintiff or the defendants to transfer it to the equity side of the docket. In this jurisdiction the distinction between actions at law and in equity is preserved by the Code. The statute (*Mansfield's Digest*) is as follows:

"Sec. 4914. The forms of all actions and suits heretofore existing are abolished.

"Sec. 4915. There shall be but one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be called a civil action.

"Sec. 4916. In such action the party complaining shall be known as the plaintiff, and the adverse party as the defendant.

"Sec. 4917. The proceedings in a civil action may be of two kinds: First. At law. Second. In equity.

"Sec. 4918. The plaintiff may prosecute his action by equitable proceedings in all cases where courts of chancery, before the adoption of this Code, had jurisdiction, and must so proceed in all cases where such jurisdiction was exclusive.

"Sec. 4919. In all other cases the plaintiff must prosecute his action by proceedings at law."

If, however, the plaintiff erroneously brings his action upon either side of the docket, the statute provides that the suit shall not abate or be dismissed because of that, but, on proper motion, shall be transferred to the proper docket, and, if the motion shall not be made by either the plaintiff or the defendant, the error is waived. The statute is as follows:

"Sec. 4925. An error of the plaintiff as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings by an amendment in the pleadings and a transfer of the action to the proper docket.

"Sec. 4926. The error mentioned in the last section may be corrected by the plaintiff without motion at any time before the defendant has answered, or afterward, on motion in court.

"Sec. 4927. Such error is waived by failure to move for its correction at the time and in the manner prescribed in this chapter, and all errors in the decisions of the court on any of the motions named in this chapter are waived unless excepted to at the time, which may be done by the clerk noting at the end of such decision words of the following import: 'To which decision the plaintiff (or defendant) excepts.'

"Sec. 4928. The defendant shall be entitled

to have the correction made in the following cases: First. When the action has been commenced by equitable proceedings the defendant, by motion made at the time of filing his answer, may have them changed into proceedings at law when it appears that, by the provisions of section 4919, the plaintiff should have adopted proceedings at law, unless his answer presents an equitable defense. Second. When the action has been commenced by proceedings at law, the defendant, by motion made at or before the time of filing his answer, may have them changed into equitable proceedings when it appears that, by the provisions of section 4918, the plaintiff should have adopted proceedings in equity."

The question here is, in case the action is erroneously brought on the wrong side of the docket, and no motion is made by either of the parties to the suit to transfer, what is it that is waived? In such a case must the court proceed at the trial in accordance with the principles of the forum, at law or in equity, as the case may be, or must it try the case in accordance with the principles involved, as set up in the pleadings? By a careful reading of the statute, it seems to us quite clear that in such a case the court should pursue the latter course; that is, try the case in accordance with the principles involved, as set up in the pleadings. The language of the statute is: "An error of the plaintiff as to the kind of proceeding adopted shall not cause the abatement or dismissal of the action," etc. "The error mentioned may be corrected," etc. "Such error is waived," etc.; that is, the error of bringing the suit on the wrong side of the docket. But, if such error is not objected to, the suit is not to be dismissed. It remains on the docket, to be tried in the forum where brought. And how can it be tried there, if all of the evidence offered and the principles raised by the pleadings must be excluded because not applicable to the forum? A plaintiff, mistaking the kind of proceedings to be adopted, brings a purely equitable action in a court of law. The defendant files an answer, simply denying the facts. Neither party moves to transfer. What is to be done with the case? It cannot be abated or dismissed, for the statute forbids it. It simply remains on the docket to be tried. And how can it be tried, unless the court of law in which it is pending enforces the equitable rights of the parties? There are no other issues before it. If it is to be tried as at law, why not dismiss in the first instance, for the result would be the same? But, by a failure to move to transfer, something has been waived. It is not the right to have the case tried. The trial must proceed at all events. That is the very object of the statute. It cannot be tried in equity, because it is pending in a court of law, without motion to transfer. The court trying it cannot try the issues of law, because there are no issues of law to be tried. The only thing to try is the equi-

table rights of the parties, and they must be determined in the court of law; and therefore that error which is waived under the statute, by a failure to move to transfer, is not the issue as made by the pleadings, but only the forum in which those issues are to be tried. It may be said that the court, by virtue of its inherent powers over its proceedings, may, on its own motion, transfer such cases. This is unquestionably true. But without a motion the court is not bound to do so, and a failure upon the part of the court to so transfer the case without a motion for that purpose is not error for reversal. *Railroad Co. v. Perry*, 37 Ark. 164. As to the course which the courts should pursue in cases where the plaintiff has adopted the wrong proceedings, and no motion to correct the error has been made, the decisions of the supreme court of Arkansas, passing upon this statute, are not consistent. In *Organ v. Railroad Co.*, 51 Ark. 235, 11 S. W. 96, all of the Arkansas cases on this subject are reviewed; and that court finally settled down, as being more in harmony with the spirit and letter of the Code of Procedure in civil cases, to the rule that if an error in the kind of proceedings adopted be committed, and no motion to correct the error be made, it should not be dismissed on that account, but the issues in the action should be tried according to the principles involved. The court in that case say: "The Code abolished all forms of actions, and provided that there shall be but one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be called a civil action, and that the proceedings in a civil action may be of two kinds: First, at law; and, second, in equity; that the plaintiff may prosecute his action by equitable proceedings in all cases where courts of chancery, before the adoption of the Code, had jurisdiction, and must so proceed in all cases where such jurisdiction was exclusive; and that in all other cases the plaintiff must prosecute his action by proceedings at law. It further provides: 'An error of the plaintiff as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a change in the proper proceedings by an amendment in the pleadings, and a transfer of the action to the proper docket.' Such error may be corrected at the instance of either party, but is waived by a failure to move for its correction. *Mansf. Dig.* §§ 4914-4928. In this case the action was dismissed because, in the opinion of the court, the remedy of the plaintiff was at law. If legal and equitable remedies were required to be administered in separate forms of action, this ruling would be correct. But under the Code there is but one form of action for all kinds of civil remedies. All that the plaintiff is required to do in the statement of his cause of action is to state in his complaint facts to show that he is entitled to the relief demand-

ed. and it is the duty of the court to treat his complaint as valid, without stopping to speculate upon the name to be given to his action. If he states facts which entitle him to relief, either legal or equitable, it is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action. If an error in the kind of proceedings adopted be committed, it should not be dismissed on that account, but the issue in the action should be tried according to the principles involved, and the relief he is entitled to should be granted without regard to such error." Citing *Trulock v. Taylor*, 28 Ark. 54. From an inspection of the complaint in this case, it is evident that the plaintiff brought his suit on the theory that by paying off the note, and taking an indorsement of it to himself, he could sue in a court of law, as an indorsee of the note. But, as heretofore shown, he being a surety, the law regards all such transactions as a payment of the obligation, and not an indorsement or purchase of it; leaving the only remedy at law to a suit on the implied promise to indemnify, which in this case was barred by the statute of limitations. But nevertheless the complaint sets up the facts from which the court was informed that notwithstanding the action at law was barred, and the plaintiff in that forum left remediless, there was still left an adequate and complete remedy in equity. Upon the facts of the case as stated in the complaint, the court had but to apply the equitable doctrine of subrogation to bring the case within its equity jurisdiction. It was shown by the complaint that the plaintiff and defendants had executed their promissory note, that the plaintiff signed only as a surety, that the defendants failed to pay the note at its maturity, that the plaintiff paid it off, and that his remedy at law on the implied promise of the defendants to indemnify him was barred by the statute of limitations, and the suit was brought on the note. This clearly states an equitable ground for relief. Had a motion been made, either by the plaintiff or the defendants, to transfer the case to the equity side of the docket, it would have been the duty of the court to have sustained it. No motion having been made to that effect, the right to have the case tried in a court of equity was waived, and the court did not err in applying the principles of equity involved in the case in the trial at law. Applying these principles, the plaintiff, being subrogated to the rights of the payee of the note, had the right, in equity, to sue upon it; and, the note not having been barred by the statute of limitations, the court did not err in overruling the demurrer raising that question.

The second assignment of error is to the effect that the court erred in admitting in evidence the letter of the defendant J. L. Sparks, heretofore set out. Inasmuch as this letter was introduced in evidence for the sole purpose of proving a new promise on the

part of the defendant J. L. Sparks in case the court should find that the original obligation was barred by the statute of limitations, and having found on that branch of the case that the original obligation was not barred, we cannot see that it would be either profitable or desirable that we should pass upon that question. Upon the question of the statute of limitation, where the debt is not barred, a new promise is immaterial, and therefore whether the particular language set up as the new promise be sufficient or not is also immaterial; and the introduction in evidence of that which is claimed to be the new promise, whether sufficient or not, being immaterial, as tending to prove none of the issues, is technical error, but not reversible error, because it does not tend to prejudice the defendant's cause. Finding no error in the proceedings of the court below, the judgment is affirmed.

SPRINGER, C. J., and CLAYTON, J., concur.

# LEXINGTON & CARTER COUNTY MIN. CO. v. STEPHENS' ADM'R.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 15, 1898.)

MASTER AND SERVANT—DEATH BY WRONGFUL ACT—PLEADING—SERVANT'S KNOWLEDGE OF DANGER.

1. A mining company is liable for the death of its servant resulting from its failure to use proper care to prevent the accumulation of poisonous or noxious gases.

2. In actions under the constitution and statutes to recover damages for death by the negligent or wrongful act of defendant, it is not necessary for plaintiff to allege or prove that the decedent, though defendant's servant, was not aware of the danger or risk, that being matter of defense; the rule applying in cases of injuries to servants not resulting in death having no application.

Appeal from circuit court, Carter county.

"To be officially reported."

Action by W. M. Stephens' administrator against Lexington & Carter County Mining Company to recover damages by death of plaintiff's intestate. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

E. B. Wilhoit and Richards, Baskin & Ronald, for appellant. Jas. Andrew Scott, R. O. Burns, and Frank Prater, for appellee.

GUFFY, J. This action was instituted by W. H. Stephens, administrator of W. M. Stephens, against the appellant, seeking to recover \$30,000 for the death of said decedent. It is substantially alleged in the petition that on the — day of October, 1894, the decedent, while engaged, under the employment of the appellant as a hand digging coal, where he had a right to be, upon and in the mine of appellant, and at its special

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

instance and request, which rendered it necessary for him to be there in defendant's mine, and while actually engaged in digging coal for defendant company, was overcome by foul air and noxious gases, thereby dying from the effects of said poisonous air; that decedent's death was caused solely by the negligence of said appellant, its agents and servants, which dangerous condition of said place where decedent lost his life was known, or by the exercise of ordinary care ought to or could have been known, by appellant, but was not known by decedent, and could not have been known to him by the exercise of ordinary care, in time to have prevented his death; that, in the mine where decedent worked and was killed, the defendant had for weeks before allowed bad air to accumulate at the place where decedent worked, and to become and remain without ventilation, so as to make same unsafe and dangerous, all of which was known to defendant, or could have been known to it by the exercise of ordinary care and diligence, in time to have prevented the death of decedent, but was unknown to the decedent, and could not have been known to him, in time to have saved his life; that decedent's death was caused by the negligence of the appellant in permitting its said mine to become out of repair, and not ventilated, and by retaining in its employment incompetent agents and servants. The first paragraph of defendant's answer is a traverse of all the averments as to negligence upon its part. The second paragraph of the answer in substance charges that decedent's death was the result of his own actions in returning to the place where he was at work too soon after blasting, and that he had been warned that it was dangerous to return before the smoke had properly cleared away, and charges that his death was due to his own act of carelessness or negligence, or from heart failure or other organic disease, aided by the inhalation of said powder smoke. One or the other is true, but it does not know which. The plaintiff, in an amended petition, set out more specifically and clearly the negligence of the defendant. After the issues were fully made up, a trial resulted in a verdict and judgment in favor of the plaintiff for \$5,000; and, appellant's motion for a new trial having been overruled, it prosecutes this appeal.

The grounds relied on for a new trial are as follows: (1) The court erred to defendant's prejudice in admitting and permitting incompetent, irrelevant, and misleading evidence to go to the jury; and in permitting the evidence of the plaintiff, W. H. Stephens, Cora Stephens, and A. T. Henderson, to go to the jury. (2) The court erred in admitting and permitting the evidence of numerous witnesses giving opinions as experts, and regarding condition of defendant's coal entries and mines, which was and is incompetent, irrelevant, and misleading. (3) The court erred in refusing and overruling defendant's motion, at the close of all the evidence offered

by plaintiff, to direct the jury to find for the defendant, to which defendant excepted at the time. (4) The court erred to the prejudice of the defendant in giving to the jury, over defendant's objections, instructions Nos. 1 and 2, and in refusing to give, on defendant's motion, instructions Nos. 1, 2, 3, and 4 to the jury. (5) The court erred in overruling defendant's motion, at the close of all the testimony in the action, to instruct the jury to find for the defendant upon the whole case. (6) Because the court erred to the substantial rights of the defendant in permitting plaintiff's attorney, in closing the argument to the jury, to arraign, criticize, and denounce instruction No. 4, given by the court to the jury over defendant's objection, and in refusing to exclude that portion of said counsel's language and argument from the jury, or direct the jury that in their retirement they should consider all the instructions submitted to them as a whole. (7) The verdict of the jury is not authorized or upheld by the evidence, and is against the weight of the evidence, and was the result of passion or prejudice. (8) The verdict of the jury is against the law and the evidence.

We are inclined to the opinion that some of the testimony admitted both for plaintiff and defendant was incompetent; but we are, however, of the opinion that such testimony did not prejudice the substantial rights of either party. It therefore results that the first ground relied on in the motion for a new trial is not well taken; and the same may be said as to the second ground relied on.

The third ground relied on is error of the court in overruling defendant's motion to direct the jury to find for the defendant. It seems clear to us that there was evidence conducing to show that the death of decedent was the result of poisonous or noxious air or gases, which had accumulated in that part of the mine in which he was at work.

The fourth ground is error of the court as to instructions. It seems to us that the instructions given were quite as favorable to the appellant as it was entitled to; and we are further of the opinion that no error to the prejudice of the appellant was committed in refusing the instructions asked by it.

The sixth ground complains of the remarks of the plaintiff's attorney. It, however, seems to us, that, in view of the ruling of the court as to the remarks complained of, no injury resulted to the appellant in respect thereto. It may be, however, remarked, that circuit courts should be prompt and firm in compelling attorneys to pursue the proper line of argument in addressing the jury, and especially so in closing the case.

As to the seventh ground relied on, we think there was sufficient evidence to support the verdict of the jury, and nothing to indicate that the verdict was the result of passion or prejudice. Therefore the verdict of the jury is not, in our opinion, against the law and evidence. It may be conceded that

the evidence introduced is somewhat conflicting; but it was the peculiar province of the jury to weigh and determine as to the weight of the evidence, and to ascertain the truth of the matter. It seems clear to us that there was proof conducing to show that appellant did not use the care to prevent the accumulation of poisonous or noxious gases which, both at common law and under the statute, it was required to do.

It is, however, insisted for appellant, that there was no proof introduced conducing to show that the decedent was not aware of the danger, or that he could not have ascertained the danger by the use of ordinary care and diligence; and it is insisted that, in the absence of such proof, the verdict of the jury was unauthorized; and we are referred to *Bogenschutz v. Smith*, 84 Ky. 342, 1 S. W. 578, as well as other authorities, in support of this contention. It may be said that, in all cases where a servant is suing an employer to recover for injuries sustained by reason of the negligence of the employer, it is incumbent upon the plaintiff to aver and show that he was not aware of the danger, and that he could not with ordinary diligence have known of the danger or risk that he was incurring in time to have prevented the injury. But it must also be remembered that a recovery in such cases is authorized by the common law, and that at common law no recovery can be had for injuries resulting in the immediate death of the person injured. The right to recover in case of death is authorized by the constitution and statutes enacted by the legislatures, which give an absolute right to recover where death ensues from the negligence or wrongful act of the defendant; and it will be observed that the statute makes no reference to the knowledge or contributory negligence of the decedent; and, while it may be true that the administrator or heir would not be allowed to recover in a case where the decedent had knowledge of the danger or risk he was about to incur, yet such negligence is matter of defense, and, to be made available, must be pleaded and proved by the defendant. Any other construction of the law would, in effect, make it a dead letter, for the reason that, the injured party being dead, it would be impossible to prove that he was not aware of the danger, or that he could not with reasonable diligence have ascertained the danger. We have carefully examined this record, and perceive no error in it prejudicial to the substantial rights of the appellant. Judgment affirmed.

#### RICE et al. v. TOLBERT.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 11, 1898.)

ATTACHMENT—FRAUDULENT INTENT TO DELAY CREDITORS.

Defendant, after promising payment of plaintiffs' debt on various occasions, informed

plaintiffs that he had four hogsheads of tobacco, which he would ship to their tobacco warehouse. Plaintiffs thereafter discovered the four hogsheads in a wareroom, consigned to another warehouse than that of plaintiffs, and sued out an attachment on the ground that defendant was about to dispose of his property with the fraudulent intent to cheat, hinder, and delay his creditors. *Held*, that the facts authorized the attachment.

Appeal from circuit court, Owen county.

"Not to be officially reported."

Action by Rice & Givens against F. M. Tolbert on a promissory note. Judgment discharging attachment, and plaintiffs appeal. Reversed.

E. E. Settle, for appellants. Lindsay & Ball, for appellee.

DU RELLE, J. It appears that appellee, Tolbert, was indebted to appellants on a note for the sum of \$403.25, which note appellants' agent, Harding, was instructed to collect. After promising payment on various occasions, or that arrangements would be made for the payment of the note, Tolbert informed Harding that he had about four hogsheads of tobacco, which he was prizing, and that he would ship them to appellants' tobacco warehouse, in Louisville, Ky. Harding discovered the four hogsheads in a wareroom in Owenton, marked with Tolbert's name, and consigned to another tobacco warehouse in Louisville than that of appellants. Upon this discovery, suit was immediately brought, and an attachment sued out; the ground of attachment being that Tolbert was about to sell, convey, and otherwise dispose of his property with the fraudulent intent to cheat, hinder, and delay his creditors, with the further ground that he had not sufficient property in the state subject to execution to satisfy appellants' claim, and that the collection thereof would be endangered by the delay arising in obtaining judgment and return of "No property found." To the suit upon the note Tolbert interposed a set-off of some \$40, which was allowed, and judgment rendered against him for the remainder. Subsequently, upon trial of the attachment, the facts above recited appeared; and it further appeared that Tolbert was living with his wife and two children upon a tract of about 100 acres of land in Owen county, valued at from \$25 to \$30 per acre, and that he had no other personal property subject to execution than the tobacco. But it appeared that Tolbert was the owner of a tract of some 300 acres in Jackson county, which he had taken in a real-estate trade at a valuation of \$350, and which he estimated to be worth \$500. At the time the attachment was sued out there appeared of record a mortgage for \$2,306 upon the Owen county tract. This mortgage, however, according to the testimony, had been reduced to about \$900 of actual indebtedness at the date of the attachment, and some three months later was

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.



released in full, but at the time of the release was immediately again mortgaged for some \$1,400 to one Violet. The trial court discharged the attachment, and, upon the showing made, we think, acted correctly, as to the ground that Tolbert had not sufficient property in the state subject to execution to pay plaintiffs' claim; but, as to the other ground, we think appellants made out their case. The postponement from time to time of the date at which payment of their note was to be made, taken in connection with the proposed shipment to the other warehouse of the tobacco which had been agreed to be shipped to appellants' house, and which was the only personalty of Tolbert subject to execution, seem to us to sufficiently indicate a design to dispose of this property with the fraudulent intent to hinder or delay his creditors. For the reason given the judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

JOHNSON et al. v. KAUFMAN et al.  
(Court of Appeals of Kentucky. Oct. 12, 1898.)

**ATTACHMENT—DEFENDANT'S CONCEALMENT OF HIMSELF SO AS TO AVOID SERVICE OF PROCESS.**

1. To authorize an attachment under Civil Code, § 194, subsec. 5, on the ground that defendant "so conceals himself that summons cannot be served upon him," it is not necessary for plaintiff to first have a summons issued, and make the attempt to serve it, but the truth of the averment may be shown as any other fact may be.

2. Defendant, as the deputy sheriff approached his home, went towards the back of the premises, and one of the plaintiffs, who was then leaving defendant's residence, stated to the officer that defendant was not at home, doing so, as he says, because he did not wish to have defendant sued. The officer, upon inquiry at a barn near by, was told by a servant that defendant was "off somewhere." Held not sufficient to authorize an attachment on the ground that defendant so conceals himself that summons cannot be served on him.

Appeal from circuit court, Caldwell county.  
"To be officially reported."

Actions by Kaufman & Goldnamer and others against B. B. Johnson and others. Judgments sustaining attachments, and defendants appeal. Reversed.

Wm. Marble and James & James, for appellants. Hodge & Gates, for appellees.

HAZEL IGG, J. The ground relied on in some five different petitions against appellant Johnson to sustain attachments against his property is that he "so conceals himself that summons cannot be served upon him." Civ. Code, § 194, subsec. 5. Upon a trial of this issue, the actions being consolidated in the lower court, the attachments were sustained. At the outset we are met with the contention on the part of appellant that such

ground is not assertable in an original petition, but can be set up only after a summons is issued, and the attempt made to serve it is defeated by concealment denounced by the statute. It is true, as contended by counsel, that the averments of the affidavits in these cases made in the petition in support of this ground of attachment must be true when the affidavit is made, but the truth of the averment may be shown as any other fact may be. Instead of the rule being, as counsel contends, that the summons must first issue, and an attempt made to serve it, it is clear that if it be true that the debtor so conceals himself that a summons cannot be served on him it is wholly useless to have the attempt made to serve it. Shinn, *Attachm.* § 89. We are far from being convinced, however, that the plaintiffs (appellees here) succeeded in establishing the ground relied on. Their whole case rests substantially on the testimony of one of their number, Pettit, who visited Johnson's house in the morning of the day on which the attachments were sued out. He testifies that while he was in the house with Johnson and his family, and while discussing the probability of one Ratliff suing Johnson, he saw, and he supposes Johnson saw, Deputy Sheriff Jones turn into Johnson's place from the main road; that about this time he arose to leave and did leave Johnson's house, Johnson leaving at the same time, going towards the back of the premises; that he met Jones as the latter was coming in, who asked him if Johnson was at home; that he told him he was not. Jones did not go into the house to inquire for Johnson, but went off to a barn near by, and was told by a negro man that Johnson and one Kevill were off together somewhere. He made no further search or inquiry. This was 10 days before the last suing day for the approaching term of court. On the next day Johnson came to the county seat, distant from his home only one and one-half miles, and made an assignment for the benefit of all of his creditors. Had Pettit's statement to Deputy Sheriff Jones, to the effect that Johnson was not at home, been made at the instance of Johnson, or with his approval, this would have been strong, and perhaps sufficient, evidence that he was concealing himself from the officer. But this statement was made voluntarily by Pettit, who was himself one of Johnson's creditors, because, as he says, he did not want Johnson sued. Nevertheless he at once brings his own suit, and avers that Johnson is concealing himself to avoid service of summons, using, it now appears, his own misleading and unauthorized statement to convict Johnson of such concealment. There is some further proof of Johnson's not being found by Pettit later on in the day, but Johnson himself explains his whereabouts all the time in a perfectly consistent and satisfactory manner, and is corroborated

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ed by other witnesses. There would seem to be no reason whatever to doubt that the officer would have found Johnson had he inquired for him at the house at the time of his visit there. The attachments ought to have been discharged, and the funds of the estate distributed under the deed of assignment; wherefore the judgment is reversed for proceedings consistent herewith.

**COOKE v. FIDELITY TRUST & SAFETY-VAULT CO. FIDELITY TRUST & SAFETY-VAULT CO. v. BURNETT. COOKE v. COOKE et al.**

(Court of Appeals of Kentucky. Oct. 8, 1898.)

**WILLS—ELECTION BY WIDOW—ESTOPPEL TO CLAIM COMMUNITY PROPERTY—HUSBAND'S RIGHT TO PROCEEDS OF LAND IN ANOTHER STATE—DEFEAT OF WIFE'S INTEREST BY ADVANCES TO CHILDREN—ALLOWANCE TO GUARDIAN AD LITEM.**

1. A widow who has elected to take under the husband's will is estopped to claim an interest in lands in Texas devised to others, though they are, under the laws of that state, the common property of husband and wife.

2. The proceeds of community property in Texas, sold by the husband, residing in Kentucky, vested in him under the then existing statute of Kentucky, his interest therein being fixed by the law of his domicile, and not by the law of Texas; he having the right of disposal under the Texas law.

3. Reasonable advances by the husband to his children during the existence of the marriage relation will not be disturbed at the instance of the wife, though they may diminish her marital interest in the husband's estate.

4. It is error to require the plaintiff in the principal action to pay the allowance to a guardian ad litem, where the services were rendered by him under his appointment on a cross petition.

Appeals from circuit court, Jefferson county.

"To be officially reported."

Action by the Fidelity Trust & Safety-Vault Company, executor of George E. Cooke, for settlement of testator's estate. Judgment dismissing counterclaim and cross petition of Mary C. Cooke, and she appeals; the plaintiff also prosecuting an appeal from order of allowance to guardian ad litem. Modified.

William S. Pryor and Simrall, Bodley & Doolan, for appellant Mary C. Cooke. Helm & Bruce, for appellee Fidelity Trust & Safety-Vault Co. T. L. Burnett, Lane & Burnett, and C. B. Seymour, for Louisville Trust Co. T. L. Burnett, in pro. per.

**BURNAM, J.** Dr. George E. Cooke died a citizen and resident of Louisville in December, 1893. He left a large estate, which he disposed of by last will and testament, which was probated and admitted to record, and by the terms of the will he appointed the Fidelity Trust & Safety-Vault Company executor thereof. By the third paragraph of his will he

devised to his wife certain real estate in the city of Louisville (which was specifically described in the will) for life, and also one-third of his personal estate left after paying his debts. He also states in this connection that he had previously given to his wife a house and lot in the city of Louisville. He then makes the following declaration of his purpose and intention in making these provisions for her: "This devise to my wife is in lieu of all other interests in my estate of every character and description, and is believed by me to be fair and just to her, as all of the real estate described is first-class, improved property, on which the rents are promptly paid and collected, and which, in my judgment, and from a thorough knowledge of my property, I believe will give her less trouble than any other she could get from my estate; and the said property hereby devised, exclusive of that which I have given her during my life, is, in my judgment, fully equal in value to one-third of the total value of my real estate, wherever situated." His executor brought this suit for a settlement of his estate, making the widow, Mary C. Cooke, his two sons and their wives, and certain creditors parties defendant. The widow made her answer a cross petition, and sought to have the time extended in which to determine whether she would renounce the provision made for her by the will, and also sought to recover one-half of the proceeds of the sale of certain lands which had been purchased by her husband in Texas during coverture, the title to which had been taken in his name, and which had been subsequently sold by him, and the proceeds of sale collected, and held by him at the time of his death. And she alleged that her husband, during his lifetime, had conveyed by deed to his two sons, H. B. and J. E. Cooke, 10,240 acres of this land, as trustees for the benefit of their wives and children, one-half of which she claims under the law of the state of Texas to have been her property; her case against appellees resolving itself into five branches. She seeks to recover: First, a half interest in a lot of these lands which stood in the name of Dr. Cooke at the time of his death; second, a half interest in the lands which have been conveyed by Dr. Cooke in his lifetime to his sons, Brent and Esten Cooke, as trustees for their wives and children, and which had never been sold, either by Dr. Cooke while living or by his sons after his death; third, one-half of the proceeds of certain portions of land conveyed to Brent and Esten Cooke, which were sold by their father, and conveyed by them at his instance, and which were represented in part by notes amounting to about \$3,750, which were on hand at the death of George E. Cooke, payable to Brent and Esten Cooke, and which he directed should be given to them; fourth, one-half of the proceeds of the portion of these lands which had been transferred to Brent and Esten Cooke, as trustees, which

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was sold by them, and the proceeds collected, after the death of their father; fifth, a portion of the lands which was conveyed to Brent and Esten Cooke, which was sold by their father, and conveyed by them, at his instance, and the whole of the purchase money collected by their father.

This claim of the widow is based upon articles 4641 and 4642 of Paschal's Digest of the Laws of Texas. Article 4641 provides: "All property, both real and personal, of the husband, owned and claimed by him before marriage, and that acquired afterwards by gift, devise or descent, as also the increase of all lands or slaves so acquired, shall be his separate property (same as to the wife); provided, that during the marriage the husband shall have the sole management of all such property." And article 4642 provides: "All property acquired by either husband or wife during marriage, except that which is acquired in the manner specified in the second section of this act [which is article 4641, supra], shall be deemed the common property of the husband and wife, and during marriage may be disposed of by the husband only. He shall be liable for the debts of the husband and the debts of the wife contracted during marriage for necessities, and upon the dissolution of the marriage by death the remainder of such common property shall go to the survivor if the deceased have no child or children, but if the deceased have a child or children the survivor shall be entitled to one-half the said property, and the other half shall pass to the child or children of the deceased." The chancellor extended for 11 months the time for her to make her election whether she would renounce the provision of the will, to enable her to accurately inform herself of the nature, character, and value of her husband's real estate, and after such extension had been given her to become acquainted with her rights to the estate, she elected to accept the provision made in the will for her benefit. The chancellor then held that this election ended all her claim against the decedent's estate, and sustained the demurrer of the executor to her counterclaim. She continued, however, to prosecute her cross petition against H. B. and J. E. Cooke, as trustees, seeking a recovery of one-half the Texas lands conveyed to them by decedent, and to be reimbursed for one-half the proceeds of such of those lands as had been disposed of; and upon final hearing of this branch of the case the chancellor dismissed her cross petition on this branch also, and appellant brings her appeal to this court, and asks a reversal of both judgments.

Her claim is based upon the idea that these Texas lands were community property, and that, as soon as her husband acquired title to them, she became vested with the fee-simple title to one-half thereof; and that the gift by him to his two sons of 10,240 acres of these lands, in trust for their

wives and children,—so far as she was concerned,—was fraudulent, and was made with the fraudulent intent to deprive her of her legal interest therein, and that the grantees knew of such fraudulent purpose on the part of her husband. The proof in the record shows that Dr. Cooke and his wife were citizens of, and resided in, the state of Kentucky, and never had their domicile anywhere else; and the question, as we understand it, is, can appellant claim under the will of her deceased husband, and at the same time assert claim to other portions of his estate? There can be no doubt that testator intended that the provision made for his wife in the third paragraph of his will should be in full of all interests in his estate "of every character and description," and this court must give effect to this plain purpose of the testator. It has been often decided by this court that a widow is not entitled to dower in addition to the devise made to her in the will, unless it affirmatively appears from the will that the testator so intended (see *Huhlein v. Huhlein*, 87 Ky. 247, 8 S. W. 260), and that, when the devisee under a will accepts property of the testator devised to him, he thereby relinquishes the right to property of his own which the testator has undertaken to devise to another (see *McQuerry v. Gilliland*, 89 Ky. 434, 12 S. W. 1037). If a devisee accepts a devise of testator's property to him, he is estopped to claim the property of his own which the testator has, by the same instrument, devised to another. See *Brossenne v. Schmitt*, 91 Ky. 465, 16 S. W. 135. In the case at bar the cross plaintiff, having elected to take under the will of her deceased husband, is estopped from asserting claim to property conveyed by him at any time in his life, whether it be located in Texas or elsewhere. The claim asserted in this action by the cross plaintiff is a provision of the law of Texas for widows, and grows out of and is incident to the marriage relation, and is in reality a provision analogous to the dower of the common law; and when the husband, out of his own estate, and by his own will, makes a provision for his wife in lieu of what the law gives and secures to her, and she accepts the provision thus made, she then and there estops herself from afterwards asserting any of her marital rights in his estate, or from contesting any disposition he may have made thereof in his lifetime. By appellant's election to claim under her husband's will, she cuts herself off, not only from claiming against her husband's estate, but also from claiming against those who claim through or under him as legatees or grantees. Under the Texas statute Dr. Cooke had the right, at any time during his life, without the consent of his wife, to sell and convey by deed any or all the Texas lands, and such conveyance would have invested the purchaser with perfect title to lands situated in Texas, free from all

the marital rights of the cross plaintiff therein; and the purchase price of such sale, either in money or notes, or both, by reason of the domicile of decedent in Kentucky, and the laws governing therein, would have become the absolute property of decedent, as the law of the domicile of the husband fixes the extent of the wife's interest in his personal estate, and of the husband's rights in the personal estate of his wife, as the statute then was (see *Cox v. Coleman*, 13 B. Mon. 452, and *Townes v. Durbin*, 3 Metc. [Ky.] 356); and his disposal of the Texas lands disposed of any claim the appellant might have had thereto.

If appellant had renounced the provision made for her by the will of her husband, and the proof had shown that the husband, with the express purpose to defeat the marital interest of his wife in his estate, had the title to his property taken in the names of his children, or other persons, with the fraudulent intent to deprive her of dower, then she could have maintained her action for her interest in such property; but the right of a father to make advances to his children during the existence of the marriage relation, if they are reasonable, will not be disturbed by a chancellor at the instance of the wife, notwithstanding they may diminish in amount the marital interest in her husband's estate. This doctrine has been thoroughly considered by this court in *Manlikee's Adm'r v. Beard*, 2 S. W. 545, and in the more recent case of *Patterson v. Patterson*, 24 S. W. 880. In the latter case a father, worth about \$100,000, had given one of his sons about \$20,000. He purchased and paid for realty worth almost \$20,000, and conveyed it to his son. His wife sued for divorce. He seems to have had no affection for her, and, no doubt, made her life miserable. The court in that case says: "Nothing was done by him to contribute to her happiness, but his entire conduct indicated an aversion to her that amounted to hatred;" yet this court refused to set aside such conveyance. In this case the provisions made by Dr. Cooke for his sons and their families by the trust deeds of May 1, 1889, considering the extent of his estate, was not an excessive provision for his children; and there is no evidence in the record of any fraudulent purpose on the part of decedent to deprive appellant of her interest in his estate in making them. The cross petition against the grantee in these deeds was, therefore, properly dismissed.

Another question is presented by the appeal prosecuted by the executor from the judgment of the circuit court making an allowance of \$250 to T. L. Burnett, as guardian ad litem of the infant children, and charging this allowance to the executor, and ordering him to pay it. The facts, as we gather them from the record, are substantially as follows: When the original petition was filed, the infant children of Brent Cooke were not made defendants, and when Mrs. Cooke, the widow, filed her answer, she made it not only a counterclaim

against plaintiff, but also a cross petition against Brent and Esten Cooke, both individually and as trustees for their wives and children under the deed of trust which had been executed to them by Dr. Cooke in his lifetime; and by an amendment filed October 17, 1894, she made the wives and children of Brent and Esten Cooke defendants to her cross petition, and asked that a guardian ad litem be appointed for the infant defendants on this cross petition. On this cross petition of Mrs. Cooke against Brent and Esten Cooke and their infant children T. L. Burnett was appointed guardian ad litem for the infant defendants, and as such guardian ad litem filed, on October 15, 1895, answers for the two sets of children, praying that their interests be protected; and on October 24, 1895, he filed an amended answer, in which he alleged that George E. Cooke, during his lifetime, had conveyed certain properties to Brent and Esten Cooke, respectively, in trust for their wives and children, and that subsequently large portions of this property had been sold and conveyed, and that Dr. Cooke had received the proceeds of the sale, for which he failed to account. At that time Burnett was only the guardian ad litem on the cross petition of Mrs. Mary C. Cooke, the widow. Subsequently the plaintiff filed an amended petition, November 4, 1895, in which he made these defendants for the first time defendants to the original action. But in the meantime, before this amendment was filed, Brent and Esten Cooke had been respectively appointed statutory guardians for their infant children, and the amendment stated this fact, and made the two guardians parties to the action, and the statutory guardians of the children filed answers for them, in which they alleged, in substance, what had been previously alleged by the guardian ad litem on the cross petition of Mrs. Cooke. These answers were filed November 9, 1895. Several months later—in March, 1896—the case was submitted on the cross petition of Mrs. Cooke against Brent and Esten Cooke, their wives and children, and on the 28th day of March, 1896, the case was decided by the chancellor and the cross petition dismissed. In his opinion the chancellor goes on to say: "There is a fact in this case, however, that calls for the interference of the chancellor by the deeds of May 1, 1889, by which Dr. Cooke conveyed 5,020 acres of land to each of his sons, Brent and Esten Cooke, in trust for their wives and children, with power of sale given, the proceeds to be reinvested in real estate with like trust. The wives and children were then made defendants, and T. L. Burnett was appointed guardian ad litem to protect the infants' property rights. Thereupon the fathers were appointed guardians of their respective children, thereby dispensing with the services of the guardian ad litem. And, it appearing from the depositions of the trustees, taken by the guardian ad litem before his retirement from the case, that the trustees had sold \$12,000 worth of these trust lands, and turned the

money over to Dr. Cooke, or directed him to collect it without surety, and that these facts were first pleaded by the guardian ad litem on October 24, 1895, and afterwards by the guardian ad litem two weeks later, on November 9, 1895, and as it does not appear who was surety upon the bonds of the statutory guardians, it is perfectly apparent that the individual interests of the fathers and the interests of their wards are directly antagonistic. And under the authority of *Walker v. Smyser's Ex'rs*, 80 Ky. 633, the court is of the opinion that under the circumstances of the case the interests of the children should be represented by a guardian ad litem. And the court has not only the right, but it is its duty, to appoint a guardian ad litem for them whenever the interests of the statutory guardian are opposed to the interests of his ward; and in accordance therewith T. L. Burnett is appointed guardian ad litem for the purpose of preparing and prosecuting their claim against the estate of George E. Cooke, deceased." Acting under this appointment, the guardian ad litem, on April 4, 1896, filed answers, repeating the charges made in the answer which he filed as guardian ad litem on the cross petition of Mrs. Cooke. Subsequently the two statutory guardians tendered their resignations as trustees, which were accepted, and the Louisville Trust Company was appointed trustee for each of them under the two deeds of trust on April 14, 1896, and immediately thereafter filed its answer and counterclaim as trustee under each of the deeds for the benefit of the wives and children of Brent and Esten Cooke, making the allegations which had previously been made in the answers of the guardian ad litem. These answers were filed for the trust company by the guardian ad litem as one of its counsel. The question whether there is a good cause of action in favor of the infant defendants set up by the guardian ad litem in his cross petition against the plaintiff is not a question now before this court. Nor have we properly before us the question as to the authority of a guardian ad litem to prosecute such a claim, in view of the fact that the infants are represented in the record by a trustee, whose duty it is to protect their interests. Neither can we consider what allowance should properly be made to him for services in such proceeding. These questions must await the determination of the litigation in progress in the lower court. On this appeal we have only the question of the allowance to the guardian ad litem growing out of the services rendered by him under his appointment on the cross petition of Mrs. Cooke, as whatever services he has rendered were as guardian ad litem under his original appointment; and for that service the original plaintiff in this action is not responsible. But appellee Burnett is entitled to a reasonable allowance for such services as he has properly rendered as guardian ad litem, to be taxed as costs against Mrs. Cooke on the dismissal of her cross petition. For the reasons indicated in this opinion, both judg-

ments appealed from are affirmed, so far as appellant is concerned; but, in so far as appellee Burnett is allowed a fee of \$250 as guardian ad litem, to be paid by plaintiff, the judgment is reversed, and the cause remanded for proceedings consistent herewith.

### JONES v. COMMONWEALTH.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 8, 1898.)

**LOCAL OPTION ELECTION—MAJORITY REQUIRED—INDICTMENT—JOINDER OF OFFENSES—REPEAL OF STATUTE—EFFECT ON PREVIOUS OFFENSES.**

1. Act March 26, 1886, to prohibit the sale of liquors in Hart county, which provides that it is not to take effect until approved by a majority of the votes cast at an election to be held at the next regular November election, became operative by receiving a majority of the votes cast on that question, though not a majority of all votes cast at that time.

2. An indictment alleging that defendant sold spirituous, vinous, and malt liquors charges only a single offense.

3. It was a question for the jury whether certain bitters sold by defendant were spirituous liquors.

4. Under Ky. St. § 465, providing that no new law shall be construed to repeal a former law, as to any penalty incurred thereunder, except that, if any penalty be mitigated by the new law, the mitigated penalty may be imposed by any judgment pronounced after the new law takes effect, a judgment pronounced before the new law took effect cannot be reversed so that the mitigated penalty may be applied.

Appeal from circuit court, Hart county.

"To be officially reported."

A. L. Jones was convicted of selling spirituous, vinous, and malt liquors, and appeals. Affirmed.

Cradock, Conyers & Edwards, for appellant. W. S. Taylor, for the Commonwealth.

PAYNTER, J. This prosecution is under an act approved March 26, 1886, to prohibit the sale of spirituous, vinous, and malt liquors in Hart county. The act was not to take effect or be in force until it was ratified and approved by a majority of the votes cast at an election to be held at the regular election on the first Tuesday in November, 1886. The election was held on the day named in the act, as shown by the certificate which was made; and the returns of the officers of the election, who were required by law to compare the polls and certify the result, show that a majority of the votes cast on the question as to whether the act should go in force were for it. The appellant sought to impeach that certificate by offering to prove that at the regular November election in 1886 such number of votes were cast for candidates at that election, which showed that the votes cast to put the act in force were not a majority of those voting at the election,—not the election on the question as to whether the act

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

should go in force, but at an election held for the purpose of electing certain officers. There was no effort made to show that a majority of those voting upon the question as to whether the act should go in force did not vote therefor. The language of the act (Acts 1885-86, p. 1061) clearly shows that a majority of those who might vote at the election held at the regular election in November, 1886, could ratify and put in force the act. The third section of the act provides that a majority of votes cast at the election provided for should put the act in force. The fourth section of the act provides that an "election shall be held" at the November election, 1886. While the election to take the sense of the voters on the question as to whether the act should be put in force was required to be held on the same day that the regular election was held, still the language of sections 3 and 4 refers to an election separate and distinct from the regular election. We are therefore of the opinion that the evidence which the plaintiff offered was incompetent, and that a majority of those who voted upon the question could ratify and put in force the act.

The indictment charges that the defendant sold spirituous, vinous, and malt liquors in Hart county, etc. It is contended that it charges three offenses, because it charges that the appellant sold spirituous, vinous, and malt liquors. It is also claimed that they are three offenses that cannot be united, because of the provisions of sections 126 and 127 of the Criminal Code of Practice. Without going into a discussion of the question as to whether or not, as an original question, this court should have given an interpretation to the sections of the Code, as insisted by counsel for appellant, it is sufficient to say that this court in hundreds of cases has treated and regarded as valid indictments charging defendants with having sold spirituous, vinous, and malt liquors. The court therefore regards the question raised by counsel as settled adversely to his contention.

We think the testimony introduced by the commonwealth was sufficient to allow the case to go to the jury, to determine whether or not the so-called "bitters" were spirituous liquors.

It is contended that under the act approved March 15, 1898 (Acts 1898, p. 85), prohibiting the sale, barter, or loan of intoxicating beverages in any county, city, town, district, or precinct in which the sale, etc., of spirituous, vinous, and malt liquors is or shall be prohibited in accordance with the local option law, the penalty for its violation is fixed at the sum of not less than \$20 nor more than \$100 for each offense, and that, if any penalty should be imposed, it should be the one denounced therein. The offense was committed and the indictment returned before the passage of the law in question, and the case was tried on April 15th, one month after the act was approved. There was no emergency clause in the act, and it did not take effect

until after the trial and conviction in the court below.

It is claimed that, by reason of the fact that the penalty fixed in this act is less than that of the local act, that section of the local act denouncing the penalty is repealed, and as the act approved March 15, 1898, is in force, the court must take notice of that fact, and that the appellant, if fined at all, should have imposed on him the penalty fixed in the repealing statute. If the offense for which the appellant was indicted was the same as the one for which the act of 1898, *supra*, denounces a penalty, and the terms of which mitigated the penalty which was imposed by the law in force at the time the offense was committed, still the appellant is not entitled to have imposed the penalty named in the new law. Section 465 of the Kentucky Statutes reads as follows: "No new law shall be construed to repeal a former law, as to any offense committed against the former law, nor as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever, to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings. If any penalty, forfeiture or punishment be mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect." This section has been construed in the cases of *Com. v. Duff*, 87 Ky. 586, 9 S. W. 816; *Com. v. Sherman*, 85 Ky. 686, 4 S. W. 790; *Waddell v. Com.*, 84 Ky. 276, 1 S. W. 480. The section expressly declares that a new law shall not be construed to repeal a former law, as to any offense committed against the former law, etc.; but it provides that, if a penalty be mitigated by any provision of a new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect. This latter provision of the statute only applies to a judgment pronounced in the trial court after the new law takes effect. The judgment in this case was pronounced before the new law took effect; hence the defendant would not be entitled, in any event, to have the penalty as mitigated imposed. The judgment is affirmed.

#### DOUGLAS v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 8, 1898.)

##### STATUTES—REPEAL OF LOCAL LAW.

Act March 26, 1886, to prohibit the sale of liquors in Hart county, repealed that part of the act of 1873 imposing a less penalty for selling liquors in a town within the county than is imposed by the act applying to the entire county.

Appeal from circuit court, Hart county.  
"Not to be officially reported."

Louis Douglas was convicted of the offense of selling liquor, and appeals. Affirmed.

S. M. Payton, for appellant. W. S. Taylor, for the Commonwealth.

PAYNTER, J. This prosecution is under the same act under which the indictment was found in the case of *Jones v. Com.*, 47 S. W. 328, in which the court this day delivered an opinion. The principal questions raised in this case have been considered in that opinion, and it is unnecessary to discuss them here. The act of 1886 became operative in the entire county of Hart, and, of course, in the territory embraced in the corporate limits of the town of Caverna (now Horse Cave), and revealed that part of the act of 1873 which imposed a less penalty for selling liquors in the town than is imposed by the act applying to the entire county. The judgment is affirmed.

#### LEXINGTON HYDRAULIC & MANUFACTURING CO. v. PRESTON et al.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 5, 1898.)  
TRUSTS—CONDEMNATION OF TRUST LANDS—RESERVATION BY TRUSTEE OF RIGHT OF FISHERY.

P. being trustee under a will creating a life estate in land in his wife, remainder to her heirs, and being entitled to the rents and profits during coverture, with the right of curtesy in the event he survived his wife, made a contract with a corporation agreeing that it might by condemnation proceedings acquire 30 acres of the land for a reservoir at a certain price, reserving "the right to himself and his assigns" to stock the reservoir with fish, and to have the exclusive right of fishing therein, not designating himself as trustee. It was also agreed that additional lands might be had if needed. Subsequently the corporation made a contract for additional lands, without condemnation, P. and wife, "for themselves, their heirs and assigns," reserving all rights of fishery. *Held*, that P. did not act as trustee in making the first contract, and that the reservation therein was for his individual benefit, and not for the benefit of his cestuis que trustent or heirs.

Appeal from circuit court, Fayette county.  
"Not to be officially reported."

Action by Margaret W. Preston and others against the Lexington Hydraulic & Manufacturing Company, asking that plaintiffs be adjudged to have the exclusive right of fishery in defendant's reservoir. Judgment for plaintiffs, and defendant appeals. Reversed.

Breckenridge & Shelby, for appellant. Sam M. Wilson, I. R. Morton, Wm. Lindsay, and Humphrey & Davie, for appellees.

WHITE, J. The appellant, Lexington Hydraulic & Manufacturing Company, was chartered by the legislature in 1882. The purpose of its incorporation was to enable

it to put into operation a system of waterworks for the city of Lexington. The charter grants powers for the acquisition of necessary real estate by purchase or condemnation for the sole purposes contemplated by the act. This includes, as of necessity, lands for a reservoir, as well as for engine houses and pumping stations. To secure this land for a reservoir, appellant, in 1884, made a contract with William Preston, who was trustee under the will of Robert Wickliffe, by which it was agreed that appellant might by condemnation proceedings (that being necessary on account of the trust) acquire the right to 30 acres, more or less, at the price of \$125 per acre, and that, if other lands were needed thereafter, such additional lands, not exceeding 39 acres in all, might be obtained adjoining the first tract. This land was to be used to make a reservoir for the water supply. The contract contains this stipulation: "And the said Wm. Preston reserves the right to himself and his assigns to cut, gather, and store ice from the said reservoirs and waters, and to haul the same from the said waters to the road, and to the ice houses, and also reserves the right to stock the said reservoirs and waters with fish, and to have and retain the exclusive right of fishery therein; provided, however, that said privilege shall not unreasonably interfere with the operation of said waterworks." In pursuance to this contract, appellant instituted condemnation proceedings by which about 35 acres were taken. The land taken being a valley, the reservoir was built by erecting a dam at the lower end. Subsequently, appellant, desiring other lands, made an additional contract with William Preston and wife, by which appellant was given the right to overflow certain additional lands of the same tract. This second contract provides: "The said William Preston and Margaret W. Preston, for themselves, their heirs and assigns, reserve all rights of fishery, and to collect and gather ice, with free access to the margin of the water, and such other rights herein or hereto as were reserved to them in the lands heretofore conveyed by the proceedings for that purpose had; intending hereby that the right, title, and easement of the said company in and to the premises hereby referred shall be the same in all respects as acquired by it in and to the parcel so already condemned; provided, however, that the circumjacent lands shall not be so used as to foul the waters of the reservoir or water supply of Lexington, or pollute the same, or alter its wholesomeness." Upon an agreed state of facts, it is shown that, at the time of and before the condemnation proceedings were had, there was no dam or reservoir or fish or permanent body of water on appellees' land. There was a small stream that ran through the land, and the tenants of William Preston were in the habit, in the winter, of building dams, and accumulating

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

sufficient water to gather ice, the water being let out in the spring. After the condemnation, the company took possession, and fenced the land in, and constructed a reservoir covering the greater part of the land; and this reservoir constitutes the water supply of the city of Lexington. After the construction of the reservoir, some gentlemen, associated under the name of Eilerslie Fishing Club, at the instance of and under an arrangement with William Preston, and with the consent of appellant,—who, however, was ignorant of the arrangement with Preston,—stocked the reservoir with fish. There was never any controversy between appellant and William Preston as to the latter's privilege of fishing in the reservoir, but it always denied that he had any right to confer the privilege on others to fish. The fishing club for a time paid rent to both Preston and appellant for the privilege of fishing in the reservoir, but afterwards to appellant alone, it claiming alone the right to authorize persons to fish therein. The appellant denies that appellees have any right either in themselves or to permit others to fish in the reservoir, but does admit the exclusive right of appellees to fish in the waters which overflowed from the reservoir onto and over the land on the northeast side of the turnpike, being the land embraced in the second agreement. This action was brought by appellees seeking a judgment that they had the right to fish in the reservoir, as well as the exclusive right to rent that privilege to others, all of which was denied by the appellant. The chancellor, on the agreed state of facts and pleadings, granted the relief sought by appellees, and from that judgment this appeal is taken.

We are of the opinion that by the condemnation proceedings, taken in connection with the contract made by appellant with the trustee, William Preston, there is no right of fishery in appellees in the 35 acres condemned. By the condemnation, the use in perpetuity of the whole of this land was taken, and the full value of the land paid therefor. The use to which this land was to be put was in its very nature exclusive, and, but for the contract with William Preston, no person would have had any right or interest in the land condemned save appellant, except, perhaps, the bare possibility of reverter.

It is argued that the condemnation was not of the fee, but a less estate. A use in perpetuity may not be technically a fee, but it approaches it very closely. The bare possibility of a reverter when the use is discontinued is, indeed, a very slender right, when the use is to erect a reservoir for public waterworks. If appellees own the fee title to the land condemned, from that estate or right alone they have no rights in the land so long as the user continues. By the preliminary contract made by appellant with William Preston, who was the trustee under

the will of Robert Wickliffe, it is claimed that Preston acted as trustee, and any reservation to him was a reservation to the owners of the land. The agreed facts show that William Preston was the husband of Margaret W. Preston, and, while he was appointed trustee under the will, he was also the husband of the life tenant, and, by the will, was to have the right of tenant by the curtesy in case he survived the wife. So, he was entitled to the rents and profits during coverture, and, in case of survivor, he had curtesy. While, as trustee, William Preston could confer no rights on appellant, in his own right and for himself he could, by contract, surrender such rights, present and contingent, as he had; and we are of opinion that in the contract he did not act as trustee, and the reservation was not to the trustee, but to him personally, and could not descend to his heirs. If William Preston could make a contract as trustee that was binding on the cestui que trust, why the condemnation proceedings?

Counsel contends that, by the execution of the second contract, the terms of the reservation in the first contract were extended to the heirs, or reserved to the land. This second contract was made two years after the first, and is entirely dissimilar; does not provide for condemnation at all, but fixes the damages and the annual rental, and provides for a reservation. It will be noticed that this second contract was made with William Preston and Margaret W. Preston, his wife. We are of opinion that this second contract in no way modified the first one, but left the land condemned theretofore as though the second had not been made. The first contract is plain and unambiguous, and was made by William Preston alone and for himself, and bound no one of appellees with the appellant; and, if there was a mistake in its provisions or conditions, there appears here no suggestion of it, and, so far as we are informed, no effort made to have it corrected; and there is no complaint that appellant paid less than the full value of the land condemned. If appellees have been paid the full value of the land, they cannot complain if they are not permitted to exercise acts of ownership over it. Judgment is reversed, and cause remanded, with directions to dismiss the petition.

#### AULICK v. REED.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 8, 1898.)

JUDGMENT—FAILURE TO SUBMIT CAUSE—PREFERENCE BY INSOLVENT DEBTOR—PLEADING.

1. It is error, after setting aside an order of submission, and allowing answer to be filed, to render judgment without resubmitting the cause.

2. An answer denying merely that a mortgage attacked as a preference "was made in

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.



contemplation of insolvency, or with the design to prefer one or more creditors," is not good.

3. Where the recitals of a mortgage attacked as a preference do not show that the debt secured was created simultaneously with the mortgage, if defendant wishes to rely on the exception to the statute he must aver that the mortgage was executed in good faith to secure such a debt.

Appeal from circuit court, Bracken county.  
"To be officially reported."

Action by J. T. Reed against A. F. Aulick and another to set aside a mortgage as made with a design to prefer the mortgagee. Judgment for plaintiff, and defendant Aulick appeals. Reversed.

Leslie T. Appelgate, for appellant. H. P. Willis, for appellee.

HAZELRIGG, J. Appellee, Reed, seeks to set aside a mortgage executed by his debtor, Teegarten, to appellant, Aulick, on the ground that it was made in contemplation of insolvency, and with the design to prefer one or more creditors, to the exclusion in whole or in part of appellee and other creditors. The mortgage is exhibited with the petition, and recites that in consideration of \$2,000 the mortgagor conveys certain lands to Aulick, and, further, that "the grantor, Teegarten, has this day executed to the grantee a note for two thousand dollars, due one year thereafter." Whether any money was furnished the mortgagor simultaneously with the execution of the instrument is not made to appear in the writing, and its recitations are entirely consistent with the fact, if it be a fact, that the debt thus secured was a pre-existing debt. At the appearance term of the court, no answers being in, the cause, on motion of the plaintiff by his attorney, "was ordered to be submitted as to the defendant Aulick." On the succeeding day, July 14, 1896, on motion of Aulick's attorney, "the orders submitting the cause as to him were set aside"; and thereupon "the defendant Aulick, by his attorney, produced and filed his answer." On the succeeding day, July 15th, on motion of the plaintiff's attorney it was "ordered that this cause be submitted as to the defendant F. M. Teegarten." Ignoring the answer of Aulick, and without further submission of the case, after the order of submission as to him had been set aside, the court, on July 17th, proceeded to set aside the mortgage and direct a sale of the land to pay the debt of Teegarten. It is insisted for appellee that this course was proper, because the answer of Aulick was evasive, and insufficient in law to support a defense. But it seems to us, irrespective of that question,—and we shall consider it presently,—the defendant Aulick, under the practice prevailing in this state, having appeared, and without objection filed his answer, after getting an order submitting the case as to him set aside, was entitled to some notice that the case was to be taken by the court on submission. There was nei-

ther a motion to resubmit, nor a submission in fact; and under our practice it would seem clear that the defendant was taken unawares, and has not had his day in court.

As to the answer, we regard it insufficient. Its sole averments consist in a denial that the mortgage to Aulick "was made in contemplation of insolvency, or with the design to prefer one or more creditors." It seems to us that the plaintiff having by his pleadings presented a state of case which, under the sweeping terms of the statute, operated as a transfer and assignment of all the property and effects of the debtor for the benefit of all his creditors, it was incumbent on the mortgagee, in order to avail himself of the exceptions provided for in the statute, to aver that his mortgage was "executed in good faith to secure a debt or liability created simultaneously with such mortgage." He is not supposed to know whether the mortgagor made the conveyance in contemplation of insolvency, but he does know whether his debt thus attempted to be secured was a pre-existing one, or was created in good faith to secure a debt created when the instrument was executed. It is true, he denies in the answer that the mortgage was executed with the design to prefer. Still, as matter of fact, it may have been a preference, so far as any facts are stated showing the contrary. But, for reasons given, the judgment is reversed for proceedings consistent herewith.

STEWART v. COMMONWEALTH, to Use  
of MARRIOTT et al.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 12, 1898.)

SUBROGATION—SURETIES OF PUBLIC OFFICER—  
OFFICIAL ACTS.

The sureties of a circuit court clerk, who have been compelled to answer to the commonwealth for money which it has paid on fraudulent witness certificates issued by a deputy clerk, cannot be subrogated to the rights of the commonwealth against the person to whom they were paid, as he would have a right of action against the sureties for any loss sustained by him through the acts of the deputy in issuing the certificates, and selling them to him with forged indorsements thereon, all of the acts of the deputy in the transaction being official acts.

Appeal from circuit court, Hardin county.

"To be officially reported."

Action by commonwealth of Kentucky, to use of W. H. Marriott and others, against John M. Stewart. Judgment for plaintiffs, and defendant appeals. Reversed.

Jas. C. Poston and W. S. Pryor, for appellant. Helm & Bruce, for appellees.

PAYNTER, J. While Charles Moore was deputy of C. M. Fraize, clerk of the Hardin circuit court, he issued a large number of fraudulent witness certificates, which pur-

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

ported to be for the attendance of witnesses in commonwealth cases, which had been pending in the court, but were then off of the docket. The persons named in the certificates seem not to have been fictitious, but in actual existence. Moore sold certificates amounting to something over \$1,700 to the appellant, Stewart, who collected them from the commonwealth. W. H. Marriott, etc., were sureties on the official bond of Fraize; and, upon discovering the fraud, the commonwealth instituted an action on the clerk's bond, and recovered judgment against the sureties for some thirty odd hundred dollars, which embraced the amount of certificates which Moore had sold to the appellant, Stewart. The sureties by this action seek to recover from Stewart the amount which he received on the fraudulent certificates.

It is claimed that the commonwealth had a cause of action against Stewart, and therefore the sureties who were compelled to pay the commonwealth the amount which it had received are entitled to be subrogated to the rights which existed in favor of the commonwealth to have recovered judgment against Stewart. This claim is based upon the theory that the loss resulting from Moore's fraudulent acts should have fallen upon Stewart, and not upon the sureties. If the loss should have fallen upon the sureties, and not upon Stewart, of course it does not follow that, because the commonwealth might have recovered against Stewart the sums which he collected on the fraudulent certificates, the sureties of the official bond, who have reimbursed the commonwealth, can recover against Stewart. If one sustained loss by reason of the failure of the clerk, or one acting for him as deputy, to discharge the duties of the office faithfully, a cause of action existed in favor of such one.

It is contended by counsel for appellees that the acts of Moore in issuing the certificates were official in character, but his acts indorsing names of persons named in the certificates, and selling them to Stewart, were not official acts, and therefore the sureties were not liable therefor on the bond which they signed. In the action against the sureties, the lower court and this court must necessarily have taken the view that they were liable for such acts, or for the acts which resulted in the commonwealth being defrauded. In fact, they seek to recover in this case because they were liable on the bond therefor, and were compelled to pay the commonwealth the loss which it sustained by reason of the acts of Moore. This action is based upon the theory that the sureties were liable on the clerk's official bond for the acts of Moore that resulted in the loss to the commonwealth; that their liability had been fixed by a judgment of the court; and that they had discharged it. Suppose the deputy clerk had conspired with the parties named in the witness certificates

to defraud the commonwealth or such persons to whom they might sell them; that, as part of and to carry out the fraudulent design, he was to issue the certificates, and the parties named therein were to sell them. Would it be seriously contended that the commonwealth or any person injured by such acts could not recover on the clerk's bond the damages sustained thereby? Moore conceived the fraudulent purpose of defrauding the commonwealth or some person, and he did not think it best to call any one to his aid; so he issued the fraudulent certificates, and indorsed the names of the payees on them. The quality of the act could not be changed so far as the sureties were concerned, whether the indorsement was made on the back of the certificates by Moore or by a co-conspirator.

We cannot understand why the fact that Moore added forgery to his offense of issuing as deputy clerk the fraudulent certificates would release the sureties from liability. It was part of Moore's fraudulent design to both issue and indorse the certificates which culminated in producing the loss which is the subject of this controversy. It was unfaithfulness to his trust that caused the injury. In this transaction the acts of Moore cannot be disassociated so as to designate some as official and others as individual. Suppose Moore had presented the fraudulent certificates to the commonwealth, and received the money on them, certainly Fraize and his sureties would have been liable to the commonwealth for money thus collected. Instead of collecting them of the commonwealth, he sold them to Stewart; and, if he had been refused payment by the commonwealth, he would have sustained the same loss which the commonwealth sustained by paying them, and by the same acts of Moore. The sureties in the clerk's official bond would have been liable to Stewart in the latter state of case as they would have been to the commonwealth in the former. The judgment is reversed for proceedings consistent with this opinion.

#### VAUGHN v. FOSTER.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 12, 1898.)

##### BOUNDARIES—CHANGE OF BED OF STREAM.

1. The meanders of a creek called for in a deed must be followed, and not the courses and distances, where they conflict.

2. The law of accretion does not apply where a boundary stream shifts from one channel to another, but the line remains where it was at the time of the conveyance.

Appeal from circuit court; Greene county. "Not to be officially reported."

Action by M. A. Vaughn against James H. Foster to quiet title. Judgment for defendant, and plaintiff appeals. Reversed.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Thos. H. Hines, Wm. H. Holt, and J. D. Wilson, for appellant. Garnett & Garnett, for appellee.

**BURNAM, J.** This action was instituted by appellant against appellee to quiet his title to a small strip of land lying between the old and the new bed of a creek that runs between the tract of land owned by appellant, which lies on the south side thereof, and a tract belonging to appellee, on the north side. This strip is called by some of the witnesses a "sandbar," by others "a towhead," but generally it is spoken of as an island. The proceeding is under the statute of 1854, which provides: "Hereafter it shall, and may be lawful for any person holding the title and possession of land to institute and prosecute suits, by petition in equity, in the circuit court of the county where the lands or some part thereof may lie, against any other person setting up a claim thereto; and if the plaintiff be able to establish his title to said land the defendant shall be by the court ordered and decreed to release his claim thereto." Laws 1853-54, p. 149. Appellee answered, denying both the title and possession by plaintiff, and asserts that he holds the legal title thereto, and is in possession of the strip of land in question. The proof in the record (which is voluminous) conduces to show that the parties to the litigation have a common source of title, both claiming under Belfield Henry, as remote vendees, whose lands were sold after his death in 1853; that one Marshall purchased the tract of 42½ acres now owned by appellant, and one Wilson purchased the tract of 141 acres now owned by appellee; that a survey dividing the lands of appellant and appellee was made prior to the sale, and deeds made pursuant to this survey to the purchasers thereof. In describing the division line between the two tracts of land now owned, respectively, by appellant and appellee, after reciting the courses and distances, both deeds called to "start from a point on the south bank of Pitman's creek, and runs up said creek as it meanders, and binding thereon." It also discloses the fact that the several courses and distances called for in the deeds do not correspond with the meanders of the stream as it ran at the time the heirs of Henry parted with title, but that the line called for by the courses and distances recited in the deeds is considerably south of the south bank of either the old or new bed of the creek, which divides them. The proof conclusively establishes that the south bank of the creek is now considerably south of where it was in 1853, and that the creek has gradually since that time left its old bed, and taken a new channel, further south, cutting off from the land of appellant the strip in question. This is shown by the testimony of numerous witnesses, and by the physical fact that the county road, which

originally ran along the edge of the south bank, has been three times changed on account of the change in the bed of the stream. This change has been gradual, and going on for many years, until now the new bed has become the main channel in ordinary stages of water; but when the creek rises as much as 10 or 12 inches above its usual low-water mark it still flows through the old channel, and the south bank of the old channel as it existed in 1853 is still clearly discernible on the north side of the strip of land in dispute. There is no contention that appellee has ever had this strip of land inclosed by a fence. He claims to own it because, as he alleges, the courses and distances of his deed cover it, and on the additional ground that it belongs to him as made earth, under the law of accretion; while appellant contends that the meanders of Pitman's creek as it ran in 1853 must be followed, and not the courses and distances, when they do not correspond with each other. As to the contention that it is included within the courses and distances of appellee's deed, it is a well-settled rule of law that in conflicts of the character of that in this case the actual boundary, whether natural or artificial, must control, regardless of the calls for courses and distances in the survey. See *Bruce v. Taylor*, 2 J. J. Marsh. 160. And in *Degman v. Elliott* (Ky.) 8 S. W. 10, where a stream had gradually changed its bed, the court held that the line was to be established where it ran at the time of the conveyance, and said: "As to title by possession. We see nothing in this case to make it an exception to the well-settled rule of law that the proprietors and occupants of two adjacent tracts of land are considered as being, respectively, in the actual possession up to the boundary line, and that neither can acquire a possessory title beyond such line without actual inclosure, coupled with adverse claim for 15 years. The occasional cutting of timber is not such continued occupancy as will bar recovery. \* \* \* The rule that applies when one side or the other of a watercourse has gained by gradual washing away of the opposite bank, has no application at all where the stream itself has shifted from one bed or channel to another, leaving the intervening land comparatively undisturbed. In the latter case, whether the change has been made gradually or suddenly, by an unusual flood, there is neither a gain of soil to the one nor the other owner, nor a change of the boundary line between them." And the same doctrine was announced by the supreme court of the United States in the case of *Indiana v. Kentucky*, 136 U. S. 479, 10 Sup. Ct. 1051, in which the court held that, "if a boundary river between states forms a new distinct channel, the dominion and jurisdiction of the several states are not affected. The original line, when established, controls the ownership." This is also the doctrine of the elementary writers. See *Gould, Waters* (2d Ed.) § 159.

There can be no question, from the testimony in this case, that the strip in contest originally belonged to the tract of land of appellant, and was south of the south bank of the old bed of the creek at the time it was sold by the heirs of Henry, and the law of accretion has no application here. Appellant has not been divested of title by adverse possession, and is entitled to be quieted in the possession thereof. For the reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

### WOOLEY'S EX'RS et al. v. GREEN-WADE'S HEIRS.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 7, 1898.)

APPEAL AND ERROR—WEIGHT GIVEN CHANCELLOR'S FINDING—ADVERSE POSSESSION.

1. While the chancellor's findings of fact will be given some weight on appeal, they do not stand as the verdict of a properly instructed jury.

2. The chancellor's finding that defendants have title to land by adverse possession will not be disturbed, being fully sustained by the evidence.

Appeal from circuit court, Menifee county. "Not to be officially reported."

Action by Thomas Greenwade's administrator to settle his intestate's estate. Answer and cross petition by S. H. Wooley's executors and others against Thomas Greenwade's heirs, claiming certain lands. Judgment for defendants in cross petition, and S. H. Wooley's executors and others appeal. Affirmed.

R. Gudgeon & Son, for appellants. Wood & Day, for appellees.

WHITE, J. In an action to settle the estate of Thomas Greenwade, it appeared that certain lands were sold to Russell and others by the heirs of Greenwade for a considerable sum, and by agreement of all the heirs the purchase money was to be paid to the administrator to discharge the debts due by Thomas Greenwade; and, upon the administrator seeking to compel the payment of the purchase money, the purchasers, Russell and others, presented the defense of a total failure of title of a part of the land purchased, alleging that title was in appellants here, and asked that they be made parties. This the court did, and appellants come in by answer and cross petition against appellees, and claim certain lands described by the full patent boundary, and allege their entire want of information as to what lands were claimed by appellees. Appellees, by answer to cross petition, specifically set out the lands claimed by them as being 302½ acres out of a tract of 312½ acres, describing it; 43½ acres out of a tract of 771¼ acres, describing it; 7½ acres out of an 885-acre tract, describing it; 334 acres out of a tract of 1,000 acres patented to Bascom; 283½ acres out

of a 394-acre tract patented to James Sudduth; and 358 acres out of a 500-acre tract patented to Swearengen, it being conceded that appellees were the owners of 142 acres of the 500-acre tract; all these interferences being shown by plat in the record. Appellees' answer to this cross petition claimed all the above tracts of land by adverse possession of 7, 15, and 30 years. This adverse possession was denied. Upon this issue of adverse possession proof was taken, and the case was tried by the chancellor, who adjudged that appellees had title by possession of the 302½ acres out of the 312½-acre tract, 334 acres out of the 1,000-acre tract, and all of the 500-acre Swearengen patent, and that appellants were entitled to the 283½ acres of the 394-acre tract patented to Sudduth, and to the 43½ acres of the 771¼-acre tract patented to R. Wickliffe, and that on that issue each party should pay their own costs. From so much of the judgment as adjudges to appellees the land, this appeal is taken.

The question presented on this appeal is purely one of fact,—adverse possession by appellees, their ancestor, and those under whom he claimed. On this issue a great deal of testimony was taken, and many witnesses examined. It is contended by counsel for appellees that the finding of the chancellor in this action is entitled to the weight of a properly instructed jury. In this, counsel is mistaken. This court has said that, where the evidence stood evenly balanced, this court would give the opinion of the chancellor some weight, but it has never held that a judgment or finding of a chancellor stood as a verdict of a properly instructed jury. Where an action at law is submitted to the court without a jury, his finding of fact stands as the verdict of the jury that was waived, but in suits in equity this rule does not apply. We are of opinion that the chancellor did not err in his judgment rendered. The proof fully sustains the contention of adverse possession as to all the land adjudged to appellees. Any other judgment, in our opinion, would have been against the decided weight of the proof. Finding no error, the judgment is affirmed.

### ADAMS v. ADAMS.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 8, 1898.)

WILLS—DEVISE TO DAUGHTER AND CHILDREN.

A devise to testator's daughter "and her children in their exclusive right" creates a life estate in the daughter, remainder to the children in fee.

Appeal from circuit court, Todd county.

"Not to be officially reported."

Action by R. N. Adams against M. J. Adams for divorce. Judgment fixing defendant's interest in certain real estate under her father's will, and plaintiff appeals. Affirmed.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Forgy & Petrie, for appellant. Ben T. Perkins, for appellee.

**HAZELRIGG, J.** In this proceeding for a divorce by the wife it became necessary to construe the will of her father, B. F. Grady, and determine the extent of the estate she took thereunder in his realty. She was the only child, and at the time the will was made was married to appellant, Adams, and had only two children, daughters of tender years. After providing for the payment of \$500 to one of his grandchildren, which was to be loaned out until she attained her majority, the testator, in the third clause of his will, provides as follows: "It is my will and desire that all the balance of my estate, both real, personal, and mixed, I give and bequeath to my daughter, Martha Jane Adams, and her children, in their exclusive right." The court held that the wife took a life estate in the whole for life, and the children the remainder in fee. The appellant contends that the wife took, jointly with her children, in fee,—one-third each; and on the death of one of the children its interest descended equally to the father and the mother. We think the intention of the testator was to give the whole estate to his daughter for life, and at her death to her children. This seems to be the trend of the modern decisions on the use of the words here involved. If a joint estate is given, the quantity of interest each takes will remain uncertain, and shift on the birth of each after-born child, for confessedly in such case the devise opens up for the benefit of all the children whether in existence at the time the will speaks or not. It is hardly to be supposed the testator intended to create such an estate. Moreover, the father had in mind a restriction of his bounty to his daughter and her children "exclusively," a result more nearly accomplished by the construction adopted than by an immediate division of the estate. *Mefford v. Dougherty*, 89 Ky. 58, 11 S. W. 716; *Mitchell v. Simpson*, 88 Ky. 125, 10 S. W. 372; *McIlvain v. Porter* (Ky.) 7 S. W. 309. It is also noticeable that, while the father makes provision for the profitable use of the special bequest of \$500 made to one of the grandchildren, he makes no such use of the balance, and more valuable part, of the devise to these infants; and this he would hardly have omitted to do if an immediate division of his estate were contemplated. Judgment affirmed.

**TODD et al. v. LANCASTER.<sup>1</sup>**

(Court of Appeals of Kentucky. Oct. 6, 1898.)

**TRANSITORY ACTIONS—ACTION AGAINST NONRESIDENT FOR RESCISSION OF LAND CONTRACT.**

Where lands in Kentucky have been exchanged for lands in another state, the Ken-

tucky court where the lands are situated has jurisdiction of an action against the nonresident for rescission of the contract; the general rule that such actions are transitory not applying to actions against nonresidents.

Appeal from circuit court, Daviess county. "To be officially reported."

Action by N. M. Lancaster against C. C. Todd and others for rescission of contract. Judgment for plaintiff, and defendants appeal. Affirmed.

W. Foster Hayes and Reuben A. Miller, for appellants. Walker & Slack, for appellee.

**HAZELRIGG, J.** It is well settled that suits for rescission or for specific performance of agreements respecting land are transitory, and not local. *Kendrick v. Wheatley*, 3 Dana, 34; *Bullitt v. Land Co.* (Ky.) 36 S. W. 16. But this rule is not applicable to suits against nonresidents. In such cases the courts where the land is situated have jurisdiction to rescind the contract for fraud or other reason, or enforce its specific execution. This is a rule of necessity. *Dicken v. King*, 3 J. J. Marsh. 592; *Berryman v. Mullins*, 8 B. Mon. 152; *Newm. Pl. & Prac.* 38. The purpose of the present action is to rescind a contract involving a swap of lands; those of appellee being in Kentucky, and those of appellants being in Florida. The chancellor decreed a rescission. We have seen that the Kentucky court where the appellee's land was situated had jurisdiction, and, the remaining questions—the existence of fraud, want of title, and misrepresentation of material facts inducing the trade—being questions of fact, we do not feel inclined to disturb the chancellor's finding; and especially so as it appears that the appellant Todd has not performed a material part of the contract, by paying off a mortgage on the Kentucky land, for the payment of which appellee was personally bound. Judgment affirmed.

**DONNELLY, Tax Collector, v. CARPENTER et al.<sup>1</sup>**

(Court of Appeals of Kentucky. Oct. 11, 1898.)

**TAXATION—ROAD TAX—CHANGE OF BOUNDARY OF TAXING DISTRICT.**

Under Act May 13, 1890, providing for the building of turnpike roads in Kenton county, and for the levy of a tax on the lands outside certain cities and towns to pay therefor and to keep the same in repair, lands which at the time of the passage of the act were not in any town, but have since been included in one of the towns named, are not subject to the tax for repairs.

Appeal from circuit court, Kenton county. "Not to be officially reported."

Action by O. J. Carpenter and others against George E. Donnelly, tax collector, to enjoin the collection of taxes. Judgment for plaintiffs, and defendant appeals. Affirmed.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

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Robert C. Simmons, for appellant. O'Hara & Rouse, for appellees.

GUFFY, J. The object of this action is to perpetually enjoin the appellant from collecting from the appellees certain taxes to be used for the repair of public roads and bridges in Kenton county, Ky., for the year 1897. It is alleged that the fiscal court of Kenton county made an order whereby they assumed to and have levied a tax on the property of appellees of 15 cents ad valorem on each \$100 in value thereof, as assessed by the county assessor, to be collected by the sheriff, according to the value of said estate and property in and for said county of Kenton at the last legal period for so doing, but limiting said levy to the territory of said county outside of the cities of Covington and Ludlow, and the towns of West Covington and Central Covington, as those cities and towns were bounded at the date of the passage of the act of May 13, 1890, providing for the building of turnpike roads in said territory, and keeping the same in repair; the fund arising from said levy to be used for the repair of public roads and bridges in said county, and to be known as the "Road and Bridge Fund." It is also alleged that the estate and property of each of the appellees is situated within the limits of said town of Central Covington, and was so situated at the time when, by law, the said assessor of said county by law was authorized to assess the property and estate of said county for state and county purposes; and they aver that said fiscal court had no authority to make a binding levy upon their said estate and property, to be collected in the said year 1897, to be held and used as a road and bridge fund for the repair of public roads and bridges in said county outside of said town of Central Covington. They further aver that the said sheriff is about to enter upon the collection of said taxes from the appellees, and will, unless restrained, proceed to collect the same, and they pray for all orders and judgments, etc.

Appellees obtained an order enjoining said sheriff from collecting said tax until further orders of court. Appellant's demurrer to the petition having been overruled, he filed his answer, which reads as follows: "Defendant, George E. Donnelly, as special collector of Kenton county, states that the general assembly of the commonwealth of Kentucky passed an act approved May 13, 1890, entitled 'An act to authorize the building of turnpike roads in Kenton county, Kentucky, and providing for the payment of same,' wherein provision was made for the building of turnpike roads in Kenton county, for the payment of the cost thereof, and for keeping same in repair. Said act was submitted to the legal voters of that part of Kenton county then situated outside of the cities and towns of Covington, West Covington, Central Covington, and Ludlow, at a special elec-

tion held in all respects in accordance with the provisions of said act, on the — day of —, 1890, which day was fixed by the county commissioners of Kenton county; and at said election a majority of those voting declared themselves in favor of, and voted for, said act. By said act it was provided that one-half of the cost of construction of the roads built under same should be paid for by the county at large, then outside of said town, and that one-half of said cost should be paid by the owners of the taxable property located within certain prescribed limits of the line of such roads, same being designated as road districts, and that the cost of maintaining and repairing said roads should be borne by the taxable property situated within said respective road districts under the supervision of the three road commissioners acting in each of said road districts. Thereafter, in conformity with the provisions and terms of said act, numerous turnpike roads were built in the said county of Kenton within the taxing district created by said act, all of which said roads are still in existence, are used as public roads, and each and all of same require annual expenditures for repairs, and in one of said districts, to wit, the Latonia turnpike road district, the property of plaintiffs was situated. Thereafter the general assembly, by general law entitled 'An act relating to roads and passways,' passed and approved June 23, 1893, in effect dispensed with the services of three commissioners in each of the numerous turnpike road districts in said county in which turnpikes had been constructed, and provided for the maintaining of public roads by general tax, under the control of the fiscal courts of the several counties of the state by taxation of a rate not to exceed 25 cents on the \$100 valuation, and by the imposition of a per capita tax, which act, from and after the time the same went into effect, has been carried out by the board of commissioners, and, since said board has been succeeded by the fiscal court, by said court; and, pursuant thereto, an annual ad valorem tax, not exceeding 25 cents on the \$100 valuation, has been levied and assessed on all the property situated outside said towns, as same were constituted at the time of the going into effect of said turnpike law of 1890, including said levy of 15 cents on the \$100 valuation for the year 1897 complained of herein, for the purpose of maintaining and repairing said roads and the bridges thereof built under said law of 1890; and the plaintiffs were thereby relieved of their obligation to pay district repair taxes in the Latonia turnpike road district, and accepted the benefits and provisions of said general law by voluntarily paying the taxes levied thereunder, up to and including the year 1897. For convenience, and to better regulate the distribution of said money and provide for the proper application and effective use of same, the board of commissioners for said county at that time having charge of the fiscal affairs

thereof divided that part of Kenton county then located outside of said cities and towns of Covington, Central Covington, West Covington, and Ludlow into 11 road districts, included in one of which districts was the property of plaintiffs. At the time said act of May 13, 1890, was passed and approved and went into effect, and at the time the election provided thereunder was held, and at the time the various turnpikes provided thereunder were built, at the time of the passage of the act of June 23, 1893, and the districting of the county thereunder, the property of the plaintiffs referred to in the petition was located within the portion of Kenton county outside of the cities and towns of Covington, West Covington, Central Covington, and Ludlow; but thereafter, to wit, February 14, 1894, plaintiffs' said property, together with the property of many others, was at the instance and request of plaintiffs and the other property owners, by ordinance on that day passed by the board of trustees of Central Covington, annexed to said town. Defendant states that the assessed valuation of the taxable property so annexed to the town of Central Covington by said ordinance of February 14, 1894, was at the time of the passage of said act of May 13, 1890, and at the time of the building of said turnpike roads, about \$500,000; and the assessed valuation of the other property in that part of Kenton county outside the cities and towns of Covington, West Covington, Central Covington, and Ludlow was at said times about \$7,000,000; that the relative value of that portion of Kenton county so annexed to Central Covington has increased since said dates. Defendant states that no part of any of the turnpikes built under said law of May 13, 1890, is kept up or maintained or repaired in any way by the town of Central Covington, but that said roads are kept up and maintained wholly by the tax levied as hereinbefore indicated on the property, including that of plaintiffs, located in said taxing district as created by said act of May 13, 1890. Defendant further states that the town of Central Covington is now a sixth-class town; that it existed prior to the adoption of the present constitution, by virtue of an act of the general assembly approved May 5, 1880, which act contained an exemption in favor of the citizens of said town from working any county road outside the limits of said town, but did not exempt them or their property from county levy. And defendant states that plaintiffs and the other inhabitants of the territory, on February 14, 1894, annexed to said town, are not now required to work any county road either in or out of said town as now constituted; but that the other inhabitants of Kenton county, to wit, those living outside said cities and towns of Covington, Central Covington, West Covington, and Ludlow, as now constituted, are required by the fiscal court of said county to work the public roads in said county; and, in addition, the property

owners living outside said cities and towns as now constituted are required to pay the ad valorem tax now contested by plaintiffs. Since the annexation of plaintiffs' property to Central Covington, said town has built and paved additional streets and public ways in and through the territory so annexed, and maintains and repairs same; and plaintiffs and the other residents and property owners of said annexed territory have acquired other advantages and privileges and rights not theretofore possessed by them, including lights and police protection and water privileges, for which added rights and privileges said town of Central Covington taxes the property of plaintiffs, but not for repairing and maintaining any of the roads built under said act of May 13, 1890. Defendant says that plaintiffs reside in, and their said property is situated in, the magisterial district of one of the members of the fiscal court, which court levies and assesses the taxes herein complained of. Defendant says that, if the property of plaintiffs and others within said annexed territory is relieved from the payment of said annual repair tax, the burden of maintaining said roads will be placed upon the remaining property owners in said taxing district, as created by said act of May 13, 1890, and thereby said taxes will become unjust, unequal, and oppressive as to them, and that plaintiffs, who enjoy equally with said other landowners the advantages derived from the construction of said roads, will be relieved from their just proportion of the common burden of keeping said roads in repair; that thereby the constitutional requirement of uniformity in the levy and collection of taxes will be violated. Defendant prays that the restraining order herein be set aside, that the injunction prayed for be refused, that the petition be dismissed, and for costs, and complete relief." Appellees filed a demurrer to said answer, which was sustained by the court, with leave to amend; and, appellant failing to amend, the court rendered judgment perpetually enjoining the appellant from collecting said tax, by seizure or otherwise of any of the property of said appellees within the boundary of Central Covington, levied by order of the fiscal court of Kenton county, and known as the "Road and Bridge Fund"; and from that judgment this appeal is prosecuted.

It is the contention of appellant that inasmuch as appellees were not within the boundary of Central Covington at the time of the passage of the act of May 13, 1890, they and their property still remain liable for the tax in question, although they have been included within the boundary of Central Covington, and now reside there, and their property is now situated in Central Covington. It is the contention of appellees that inasmuch as the property situated within Central Covington was exempt by law from the payment of this special road and bridge tax at the time of the passage of the act of May 13, 1890,

the act must be now construed to exempt all the property now situated in Central Covington, as its boundary now exists. It appears from the briefs on file, as well as from the petition, that the fiscal court of Kenton county has construed the general road law as to some extent repealing or modifying the act of May 13, 1890, and has sought to impose a special tax upon the property outside of the several towns as bounded at the time of the passage of the act of May 13, 1890, to be used as a special road and bridge fund for the purpose of keeping in repair the turnpikes and roads erected under and by virtue of the act of 1890. It may be readily conceded that if bonds had been issued, as is claimed was done, to pay for the building of the turnpikes under the act of 1890, the property of appellees could not escape its proportion of that burden by becoming a part of Central Covington after the creation of the bonded debt, and it is said that the circuit court has so adjudged; but the question presented for decision is whether such property holders are bound to pay this special tax levied from year to year to keep the roads and bridges in repair. It seems to us that, when the boundaries of Central Covington were so extended as to include appellees and their property, they then became, so far as the future was concerned, liable for only such tax as the residue of the citizens and property of Central Covington were bound to pay. It results, therefore, that the court did not err in perpetuating the injunction. Judgment affirmed.

#### GUNN et al. v. STRONG.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 8, 1898.)

**BILLS AND NOTES—REASSIGNMENT OF NOTE PENDING ACTION—PROSECUTION OF APPEAL ON PARTIAL TRANSCRIPT.**

1. Where the assignee of a note pending an action by him thereon reassigned the note to the original assignor, in whose favor judgment was rendered, the court cannot say, on a partial transcript, that any payment had been made or judgment rendered which precluded the original plaintiff from reassigning the note.

2. It was sufficient for the original assignor, upon the reassignment of the note to him, to allege in his petition, in the nature of a supplemental pleading, that he had, by reassignment pending the action, become the owner of the unpaid balance of the note.

Appeal from circuit court, Breathitt county.

"Not to be officially reported."

Action by J. W. Cardwell against R. T. Gunn & Co. on two promissory notes. Petition filed by Thomas Strong, alleging the assignment of the notes to him pending the action. Judgment in his favor, and defendants appeal. Affirmed.

J. J. C. Bach for appellants. Marcum & Cope, for appellee.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

LEWIS, J. Appellants have not filed the entire record in this case, but it may be inferred from that part of the transcript before us that appellee held two promissory notes against appellants, on which J. W. Cardwell brought suit; that, while the action was pending, Cardwell reassigned the notes, there being a balance of each uncollected; and that appellee, on his petition, was made a party to the action, and, in his pleading, asked judgment for such balances, together with a balance alleged to be due him on settlement of accounts. The action was subsequently referred to a commissioner, who, upon proof offered by appellee, reported the amounts claimed by him to be due; and thereupon the court rendered judgment according to that report.

Counsel now contends that a plea in abatement filed by appellants, and also their demurrer to the pleading of appellee, should have been sustained. As the entire record of this case has not been filed, we cannot say that any payment was made to Cardwell, or judgment rendered in his favor, which extinguished the debt sued on, or precluded him from reassigning, or appellee from legally acquiring, title to the balance of the notes alleged to be unpaid, and right to become a party to this action and recover judgment thereon. For the same reason, we cannot say that a cause of action on the notes may not have been fully and completely stated in the original petition filed by Cardwell; and, if so, it was not necessary for appellee to state more in his pleading, which was in the nature of a supplemental, not an original, pleading, than that he had pending the action become, by reassignment, the owner of the unpaid balance of the notes. Judgment affirmed.

#### PORTWOOD v. COMMONWEALTH.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 12, 1898.)

**CRIMINAL LAW—ADMISSIONS AS EVIDENCE—INSTRUCTION AS TO INSANITY.**

1. Admissions made by accused to a newspaper correspondent a few hours after he was put in jail, upon the suggestion of the correspondent that he had a statement of the other side, and that accused had better make a statement, are admissible in evidence, not being made under constraint.

2. On a plea of insanity, defendant is not entitled to an instruction telling the jury that in order to convict they must believe, "to the exclusion of a reasonable doubt," that he was of sound mind.

Appeal from circuit court, Fayette county. "To be officially reported."

G. A. Portwood was convicted of murder, and appeals. Affirmed.

George Denny, for appellant. W. S. Taylor, for the Commonwealth.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.



LEWIS, J. The uncontradicted evidence in this case shows that the accused, without previous warning, entered in the daytime the saloon of the deceased, who was sitting quietly at a table, and abruptly said to him, "Dick Perkins, I came here to kill you, and God damn you, I am going to do it;" and notwithstanding the deceased rose from the table, protesting in the following language, "My God, man, don't shoot me," the accused then and there shot him, and pursued him outside of the house, on the street, where he fired two more shots into his body, causing his death. No instruction was given, nor was there evidence to authorize an instruction, upon the hypothesis of either manslaughter or self-defense. For the purpose of showing a motive for the deed, the commonwealth was permitted by the court to prove a statement made by the accused, a few hours after he had been put in jail, to a newspaper correspondent, which was brought about and is substantially as follows: Cromwell, the newspaper man, told the accused that he had a statement of the other side, and that he had better make a statement, whereupon the accused said that he had killed him, and was glad of it; that he had disgraced and ruined his life; that he had intended to kill both Perkins and Haley, but found Haley had died suddenly some days before; that Perkins had been the cause of his being arrested several years before, and fined in the police court, and sent to the workhouse, and Policeman Haley, who had arrested him, had clubbed him in making the arrest; and that his arrest and confinement in the workhouse had been the cause of his wife separating from him, and had disgraced him. As that statement appears to have been made voluntarily, and without the influence or constraint of either threats or promise of any reward or benefit, we think the objection to the testimony was properly overruled. It was proved by another witness that about two years before the homicide the accused referred with a great deal of feeling to the treatment he had received at the hands of Policeman Haley and the deceased, and stated his determination to get even with them.

The principal ground of defense on the trial below was insanity, and the principal reason now urged for a reversal of the judgment is that the lower court failed to fully and properly instruct the jury on the subject of insanity. The instructions necessary to quote are as follows: "(1) If the jury believe from the evidence, beyond a reasonable doubt, that the defendant, G. A. Portwood, in Fayette county, Kentucky, and before the time the indictment herein was found, on the 14th day of April, 1898, willfully and with malice aforethought shot and killed Richard Perkins, by shooting said Perkins with a pistol loaded with powder and leaden balls, the jury should find the defendant guilty of murder, unless the jury believe from the evidence that at the time of such shooting, if

there was such, the defendant was of unsound mind, in which event the jury should find the defendant not guilty. (2) If at the time defendant shot Richard Perkins, if he did shoot him, the defendant did not have mental capacity sufficient to enable him to know and understand that it was wrong to shoot said Perkins, the defendant was of unsound mind, or if at the time the defendant shot Richard Perkins, if he did shoot him, the defendant was prompted to do such shooting by an impulse, resulting from a diseased mind, of such violence that it overcame the will of the defendant, and constrained him to shoot said Perkins when he did not wish to do so, the defendant was of unsound mind. If, however, at the time the defendant shot Richard Perkins, if he did shoot him, the defendant had mental capacity sufficient to enable him to know right from wrong, and if he had will power sufficient to enable him to choose between shooting and refraining from shooting said Perkins, the defendant was of sound mind. Or if the defendant at the time he shot Richard Perkins, if he did shoot him, had mental capacity to enable him to know right from wrong, and if his mind was free from disease, then no impulse to shoot said Perkins, no matter how violent, and no matter how completely it dominated the will of defendant, was unsoundness of mind." The error which it is contended the court committed was the failure to instruct the jury that before they could convict they must believe, to the exclusion of a reasonable doubt, that the accused was at the time he committed the act of sound mind. What counsel contends for in this case involves the radical change of a rule of evidence long and well settled by this court. In view, however, of the severe penalty,—that of death,—we would not hesitate to change that rule, if convinced of the propriety and wisdom of doing so. But this court has heretofore, more than once, after thorough consideration and discussion, settled the question, we now think correctly. In *Graham v. Com.*, 16 B. Mon. 587, where the question was thoroughly considered, and authorities examined, the following language was used: "This principle of requiring clear and satisfactory evidence in support of the defense of insanity thus appears to be recognized and adopted in England and this country, and not to have been regarded as conflicting with the principle which deems every man innocent until the contrary is shown beyond a rational doubt. It is based upon the legal and obviously necessary presumption of sanity, and in our opinion it is a safe rule, founded in reason and good policy, sanctioned by experience and authority, and should not be departed from." That case was followed and approved in *Brown v. Com.*, 14 Bush, 398, and the doctrine thus settled has not been since questioned. Numerous witnesses—most of them, however, relatives—testify to acts and language at various times indicating temporary

aberration of mind of the accused. Two attempts by him to commit suicide are proved, and there is evidence tending to show that insanity is hereditary in the family; his father having been confined for several years, and died, in a lunatic asylum. On the other hand, testimony of witnesses for the commonwealth tends to show that his violent acts and extravagant language resulted from the intemperate use of intoxicating liquors, to which he had been addicted for some time. The evidence in this case shows that he was very much incensed against the deceased and the policeman, and that he for two or three years harbored malice, and that the killing was certainly not the result of a casual or accidental meeting, or of a sudden or unpremeditated impulse. In our opinion there was evidence sufficient to authorize the jury to find that the accused was not insane at the time of the killing. Judgment affirmed.

#### FRYER v. DICKEN.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 15, 1898.)

##### ATTORNEY AND CLIENT—COMPENSATION FOR SERVICES.

Where a mortgage for \$3,300, attached as a preference, was held to operate as an assignment for creditors, but the mortgagee's claim was adjudged to be a preferred one, an attorney's fee of \$450 for services rendered to the mortgagee in defending that suit, and in drawing the deed and other papers pursuant to a title bond executed by the mortgagee for certain lands sold by him, and for collecting \$1,600 of a \$2,000 installment of purchase money, was ample compensation for the attorney's services.

Appeal from circuit court, Pendleton county.

"Not to be officially reported."

Action by John H. Fryer against N. B. Dicken to recover an unpaid balance of attorney's fees. Judgment for defendant, and plaintiff appeals. Affirmed.

John H. Barker, for appellant. W. J. Perrin, for appellee.

DURELLE, J. Appellant instituted suit against appellee, Dicken, for an unpaid balance of fees amounting to \$1,000, alleged to be due him upon a quantum meruit for services rendered in the defense of a suit, for drawing the necessary deed and other papers in pursuance of a title bond given by appellee for certain lands sold by him, and for collecting without suit the first installment due thereon. The suit in which the services were rendered was brought by creditors of one Drake, attacking as preferential a mortgage to Dicken to secure the payment of some \$3,300 held by Drake as Dicken's guardian. Appellant throughout this record seems to consider his defense of that suit as having been successful in establishing the mortgage; but the judgment

in that case, which was read upon the hearing of this case, shows that the mortgage was held to operate as an assignment, but that Dicken's claim was adjudged to be a preferred one. The other services consisted, so far as this record discloses, in preparing a deed and the lien notes in pursuance of a title bond given by appellee, who himself effected the sale, and in collecting \$1,600 of a \$2,000 installment of the purchase money, being the first installment due. Appellant collected \$50 from a debtor of Dicken, giving him an order upon Dicken therefor, and deducted \$400 from the \$1,600 collected by him. The suit was brought in equity, asserting a lien for \$550 upon certain funds of Dicken in the hands of the master commissioner. Subsequently the issue of the value of appellant's services was transferred to the ordinary docket, but, by agreement, retransferred to equity. The trial court, upon the evidence heard, adjudged that the money already collected by appellant was ample compensation for the services rendered, and in his finding we concur. Judgment affirmed.

#### LOUISVILLE RY. CO. v. STAMMERS.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 12, 1898.)

##### STREET RAILROADS—COLLISION WITH BUGGY ON TRACK.

Instructions entitling plaintiff to recover against defendant street-railroad company for injuries resulting from a collision of defendant's car with his buggy, if the motorman failed to give notice of the approach of the car from plaintiff's rear, and use ordinary care to avoid a collision, and requiring plaintiff to use ordinary care, and to give the right of way to the car, fairly presented the law; plaintiff not being entitled to recover thereunder if he was not driving on the track, but suffered his horse, just before the collision, to start across the track in front of the car.

Appeal from circuit court, Jefferson county.

"Not to be officially reported."

Action by Charles Stammers against the Louisville Railway Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

Kohn, Baird & Spindle, for appellant. O'Neal & Pryor and Phelps & Thum, for appellee.

HAZELRIGG, J. Appellee was driving in a top buggy along Bank street in Louisville about 11 o'clock at night, when he was run upon from the rear by appellant's electric car; his buggy being knocked off the track, and he himself considerably bruised and cut. His suit for damages resulted in a judgment for \$500. The proof conduces to show that appellee was driving along the track, the wheels of his buggy straddling it, and that no alarm was given of the car's approach and proximity to him until too late for him to get off, or for the car to be stop-

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ped. Under the instructions, the plaintiff was entitled to recover if the motorman failed to give notice of his approach, and use ordinary care to avoid collision, but, if the injury resulted from the appellee's own negligence, no recovery could be had. The appellee was also to use ordinary care, and give the right of way to the car on its approach; and, if he failed to use ordinary care to avoid collision, he was precluded from recovery. If, as contended by appellant, the appellee was not driving on the track, but, just before the collision occurred, suffered his horse to start across the track in front of the moving car, he could not recover, under these instructions. We think the law of the case was fairly submitted to the jury, and judgment is affirmed.

#### LOUISVILLE & N. R. CO. v. FOARD.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 7, 1898.)

**MASTER AND SERVANT—EXCLUSION OF PLAINTIFF'S WIFE AND CHILDREN FROM COURT ROOM—EVIDENCE AS TO NEGLIGENCE OF PHYSICIAN EMPLOYED BY RAILROAD COMPANY—FELLOW SERVANTS—LIABILITY FOR GROSS NEGLIGENCE.**

1. A petition alleging that plaintiff, while riding on the pilot of an engine in discharge of his duty as brakeman, and at the suggestion of the fireman in charge of the engine, was thrown on the track by the sudden and negligent checking of the train, and that then the air-brakes were suddenly released, and the engine moved over him, injuring him, states a cause of action.

2. It was not error to refuse to exclude from the court room, during the trial, the wife and children of plaintiff suing to recover damages for personal injuries.

3. It is error to permit plaintiff to prove the neglect or maltreatment of a physician employed by defendant railroad company to treat his injuries for which he sues to recover damages, there being no charge that defendant was negligent in the selection of a physician.

4. It was error to instruct the jury to find for plaintiff in an action to recover damages for injuries received by him in discharge of his duty as brakeman, if his "co-agents, servants, and employés" could have avoided his injury by the observance of "ordinary diligence and care," defendant railroad company being liable to plaintiff only for the gross negligence of the servants in charge of the engine.

5. An instruction improperly authorizing a recovery for ordinary negligence is not cured by an instruction authorizing a recovery only for gross negligence.

6. In an action to recover damages for personal injuries, no instruction as to willful neglect should be given.

Appeal from circuit court, Christian county.  
"To be officially reported."

B. D. Warfield and Joe McCarroll, for appellant. John Feland & Son and W. G. Bulitt, for appellee.

**WHITE, J.** The appellee, Robert B. Foard, brought this action in the Christian circuit court against appellant for damages for personal injuries suffered by appellee by being run over by an engine on appellant's road.

The petition alleges that appellee was in the employ of appellant as a brakeman on a freight train, and while so employed, in the discharge of his duties as brakeman, it became necessary for him to throw a switch to permit his train to go upon a side track at Sebree, Ky.; that at the time of the accident the engineer of the engine was not on the engine, but that the fireman had charge of, and was operating, the engine; that, at the suggestion of the fireman, the appellee climbed over the engine from the cab to the pilot, and stood on the pilot, and rode down near to the switch, when, as he alleges, suddenly and without warning, and negligently, the air brakes were put on the train, which caused a sudden check of the train, so much so that he was thrown forward and off the engine, and onto the track in front of the engine; that then the air brakes were suddenly released, and the engine moved forward, and over and upon him, injuring his foot and leg, necessitating amputation. Appellant, by answer, denied the negligence complained of, or at all, and pleaded contributory negligence of appellee. The contributory negligence was denied by reply, and, issue thus being joined, trial was had, which resulted in a verdict and judgment for appellee for \$9,000 in damages. Appellant's reasons and motion for new trial having been overruled, it appeals.

The reasons assigned by appellant in its motion for a new trial are: Error of the court in overruling a demurrer to the petition; in refusing to give instructions asked by appellee; in giving instructions to the jury; in refusing to exclude the wife and children from the court room during the trial; in admitting improper evidence; and that the verdict is excessive, and flagrantly against the evidence, and contrary to law. To the action of the court on all the matters assigned as error in the reasons for new trial proper exceptions appear in the record.

Counsel for appellant do not argue the action of the court in overruling the demurrer to the petition, and that might be considered as waived. However, we are of opinion that the demurrer was properly overruled. The petition states a cause of action.

Appellant's counsel urges upon this court that the action of the lower court in refusing to exclude from the court room the wife and children of appellee is error, and that for this error a reversal is asked. In our opinion, this was not error. We know of no law that would authorize a court to exclude any spectator from the court room during the trial except for some cause, or, in certain cases, small children, as provided by law. Every citizen, whether accused of an offense or engaged in a civil action, is entitled to a public trial of his case. Witnesses may be excluded for a well-known reason, and small children may by statute be excluded in certain cases, on account of the effect on their morals, but there is no law that authorizes a court to exclude the friends or family of any

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litigant from the court room, except it be to preserve order or to avoid serious danger reasonably apprehended. It is not pretended that the wife and children in any way disturbed the court or were guilty of any misconduct, nor was any legal reason assigned why they should be excluded.

It is insisted that the court erred in permitting appellee to prove by himself that the attending physician and surgeon, who was furnished by the appellant to treat his injuries, was negligent in his treatment of the wounds, and that he was rough in his treatment of him, witness going into detail, and that by reason of this bad treatment his leg had to be amputated the third time. We are of opinion that the admission of this testimony was improper. The appellant was in no way responsible for the acts of the physician, or for his neglect of the appellee, unless it be shown that appellant was careless and negligent in his selection and that he was incompetent. In the employment by a railroad company of its surgeons to attend the persons injured by its trains, the relation of master and servant and principal and agent does not exist; and if the railroad company is careful, and selects suitable surgeons, it is not responsible for their neglect or malpractice. There is no pretense that appellant was careless or negligent in the selection of this physician and surgeon, or that he was in any way incompetent. The court should not have permitted appellee to prove the misconduct, neglect, or maltreatment of the physician. In support of this doctrine, see *Quinn v. Railroad Co.*, 94 Tenn. 718, 30 S. W. 1036; *Railway Co. v. Artist*, 9 C. C. A. 14, 60 Fed. 365; *Laubheim v. Steamship Co.*, 107 N. Y. 228, 13 N. E. 781; *McDonald v. Hospital*, 120 Mass. 432.

Appellant complains of the action of the court in permitting appellee to prove by witness Robinson that the train that ran over appellee could have been stopped before it ran onto appellee, without the necessary showing that he was versed in handling an engine or was otherwise qualified as an expert. This witness was asked, on a hypothetical case, if in his opinion a train could be stopped within a certain distance. His answer is: "Well, yes; it looks to me like it might, while I am no railroad man, but I understand they can stop a train in a shorter distance than that." We are of opinion that this was improper. This witness expressly stated that he was no railroad man, but he understood (how or from what source he does not say) that it could be stopped in a shorter distance. As this was a material issue in the case, it was such error as will require a reversal. The opinion of a witness on any question could only be proven on a showing that the witness was, by reason of knowledge or experience in that line of business, capable of giving an opinion on that question. Witness here not only fails to show himself to be qualified, but he affirma-

tively shows himself not qualified, and gives his information on the subject derived from others. The evil of the answer admitted is more than the answer itself shows, on account of the form of the question. The question reads: "Now, professor, you are a man of a good deal of experience and good education, and you say that your measurements are right. Now, I want to ask you if it is your opinion whether or not a train going at the speed of from four to five miles an hour, with a train of five cars, all empty but one, it could have been stopped within a space of fifteen feet."

We are of opinion that the court did not err in refusing to give instruction A, asked for by appellant, it being peremptory to find for appellant. We are of opinion that there was sufficient evidence to authorize the court to submit the case to the jury.

Appellant also asked and the court refused to give instruction B. This, in our opinion, was not error.

Instruction C, asked for by appellant and refused by the court, was, in force and effect, given by the court in other instructions, and the refusal to give instruction C was not error.

Instruction 3, given by the court, and to which objection was made, and an exception reserved, reads: "The court instructs the jury that, even if they should believe that plaintiff contributed to his injury by his own neglect, yet, if his co-agents, servants, and employes could have avoided plaintiff's injury and damage by the observance of ordinary diligence and care, defendant would be liable, and the jury should so find." We are of opinion that this instruction should not have been given. It permits a recovery for ordinary negligence of appellant's servants, and this is not the law. This error was not corrected by the court in a subsequent instruction, in saying to the jury that in no event could they find for the plaintiff unless they believed from the evidence that the engineer acted with gross and willful neglect of duty, whereby plaintiff was injured.

As the case will be reversed for another trial, we think it proper to say that, from all the instructions there should be eliminated any reference to willful negligence. Willful negligence existed only by reason of the statute, and applied, as has been repeatedly held, only to cases where death ensued; and that section of the statute was repealed, and section 6, Ky. St., enacted, in which there is no mention of willful negligence. It only refers to ordinary and gross negligence and willful act.

In view of another trial, we refrain from a further discussion of the case, or as to the amount of damages awarded by the jury on this trial. For the errors indicated the judgment is reversed, and cause remanded, with directions to set aside the verdict and judgment, and award a new trial, and for other proceedings consistent herewith.

OHIO VAL. RY.'S RECEIVER v. LANDER  
et al.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 7, 1898.)<sup>2</sup>  
**CONSTITUTIONAL LAW—DISCRIMINATION AGAINST  
 COLORED RACE—SEPARATE COACH LAW—CON-  
 STRUCTION OF STATUTE SO AS TO UPHOLD IT.**

1. Though not authorized or required by statute to do so, railroad companies may make reasonable regulations for the separation of white and colored passengers.

2. Act 1892, known as the "Separate Coach Law," requiring railroad companies to assign white and colored passengers to separate coaches, is not in violation of the 14th amendment to the constitution of the United States.

3. If the statute be a regulation of interstate commerce, if applied to interstate passengers, which is not conceded, it will be construed as intended to apply only to transportation within the state.

Appeal from circuit court, Christian county.  
 "To be officially reported."

Action by Robert N. Lander and Fannie E. Lander against John McLeod, receiver of the Ohio Valley Railway, to recover damages. Verdict and judgment for plaintiffs, and defendant appeals. Reversed.

Fairleigh & Straus and Hunter Wood, for appellant. John Feland & Son, for appellees.

GUFFY, J. This action was instituted by the plaintiffs, Robert N. Lander and Fannie E. Lander, his wife, against John McLeod, receiver of the Ohio Valley Railway. It is alleged in the petition that the plaintiffs are husband and wife, and citizens of Hopkinsville, Ky., and that they are colored people, and citizens of the United States. It is further alleged: That said railway was in the possession and under the control of said McLeod, as receiver aforesaid; and that said McLeod, through his agents, etc., has been and is operating it as a common carrier; and said railway extends from the city of Evansville, Ind., through the cities of Henderson and Princeton, to Hopkinsville, Ky., and is an interstate carrier of passengers and freight between said points, and is so operated by McLeod, receiver. That on or about the 24th of July, 1895, the plaintiffs purchased from the agent of said McLeod a first-class passenger ticket for the female plaintiff, entitling her to ride on said railway and connecting line from Hopkinsville, by way of Princeton, to Mayfield, Ky., in any first-class coach of any passenger train running between said points; and, with said ticket in her possession, she boarded the regular passenger train of defendant, which was then about to leave said station, and entered what is usually called the "ladies' coach," and took a seat therein which was not at the time occupied or claimed by any other person; and while thus seated, and waiting for the train to start, the conductor thereof in charge of said train came to her, and without demanding of her her ticket, or making

any explanation of his conduct, required her to give up her seat, and leave said coach, and occupy a seat in the front coach, usually called the "smoker," in a small compartment in front thereof, or get off of the train. That it was very warm weather, and the compartment to which she was thus assigned was small and ill ventilated, and that it was unclean, and equipped and fitted with accommodations greatly inferior to the ladies' coach from which she was thus ordered by said conductor, and was occupied by colored passengers of all classes, sexes, and conditions, and persons were allowed to smoke and indulge in other practices without restraint therein, offensive to ladies and children, and which was not permitted in said ladies' coach. That she refused to give up her said seat, and asserted her right as holder of a first-class ticket to remain where she was. That said conductor went into another coach or part of said train, and came back with two or three other men, who were also agents of defendant, and, upon her persisting in retaining her seat, said conductor took hold of her by the arms, and shoved her up from it, and was proceeding by force of arms to remove her from said coach, and plaintiff, in order to avoid a physical struggle with said employes and prevent a breach of the peace, yielded, under protest, to the commands of said conductor, and consented to go into said car rather than give up her trip by being removed from the train, and she was thus compelled to occupy a seat in said car until said train reached Princeton, the end of her journey on that road. That after she had gone into said compartment the conductor demanded of her her ticket, which she gave up to him. That plaintiff Fannie E. Lander is a lady of good character and reputation, and that she was not at the time interrupting, or in any way disturbing or interfering with, anybody, and, by this violent and illegal conduct of the conductor and other employes of the defendant, these plaintiffs have been damaged in the sum of \$10,000, for which they prayed judgment. The defendant filed a demurrer to said petition.

The answer of the defendant is as follows: The defendant, for answer to the petition herein, denies that while plaintiff Fannie E. Lander was seated in one of its passenger cars, and waiting for the train to start, the conductor in charge of this defendant's car came to her, and without demanding her ticket, or making any explanation to her of his conduct, required that she should give up her seat and leave said coach or occupy a seat in the front coach usually called the "smoker," or in a small compartment in the front part thereof, or to get off of the train. He denies that the compartment to which the plaintiff was invited to take a seat was small or ill ventilated, or that it was unclean or unfitted or equipped with accommodations greatly or at all inferior to those of the coach in which plaintiff was seated at the

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

<sup>2</sup> For further opinions, see 47 S. W. 882.

time she was requested to go into another coach, or that said compartment was occupied by persons who were unfit to be in said compartment, or indulged in any practice or practices, without restraint therein, offensive to ladies and children, which were not permitted in the coach which plaintiff was invited to leave. He denies that, when plaintiff was requested to leave the coach that she was in, she refused to give up her said seat or to leave said coach, or that she asserted any right, as the holder of a first-class ticket, to remain where she was when said conductor requested her to leave said coach; and he denies that said conductor went into another coach or a part of the said train, or came back into the coach where plaintiff was with two or three other men, or any other men, who were agents or not agents of this defendant, and that, upon her persisting and retaining said seat, the said conductor took hold of her by the arms, or shoved her up from the seat, or was proceeding by force of arms to remove her from said coach, or that plaintiff, in order to avoid a physical struggle with said conductor or persons, or to prevent a breach of the peace, yielded under protest to the commands of the said conductor, or consented under protest to go into said compartment in order to avoid being removed from said train, or to avoid giving up her said trip, or that she was thus compelled or forced to occupy a seat in said compartment until said train reached Princeton, the end of defendant's road. He denies that by reason of any illegal or violent conduct by the conductor in charge of said train, or any other employé upon said train, the plaintiff was greatly or at all damaged in the sum of \$10,000, or any other sum. The defendant, for further answer, says that the plaintiff bought a ticket at Hopkinsville, Ky., to Mayfield, Ky., and started to board one of defendant's trains at Hopkinsville, Ky.; and, when she made an effort to board said train, the brakeman in charge of said train, and under the employment of this defendant, was standing at the steps of the coach, where it was his duty to stand, and there informed the plaintiff before she got into any coach to go into the colored coach, the apartment set apart for colored people, as required by the laws of this state. The plaintiff refused to do this, and went to the white coach. The conductor thereupon went into the white coach, and politely informed the plaintiff of the law of this state providing for separate coaches for colored and white passengers, and politely requested her to obey the law, and to go into the compartment provided for colored people, and took the plaintiff's basket or baggage and carried it into the colored compartment for her, and requested her to go into said car. The plaintiff, without being forced in any way and without any force being used upon her in any way, consented to go into said coach, and did go into said coach. The conductor did not take hold of the plaintiff,

and did not force her from her seat, by any violence whatever, but, after explaining to her about the law and the requirements of the law, the plaintiff voluntarily, in company with her husband, left the white coach, and went into the coach provided for the colored people. No insulting language was used by the conductor or any other employé of the train to the plaintiff, and she was not in any way mistreated or offended by any misconduct upon the part of the conductor of said train, or any other employé connected with the operation of said train. The defendant further states that the compartment provided on said train for the colored passengers was in every way as comfortable, as clean, and as free from offensive misconduct on the part of the passengers as the coach provided for first-class white passengers. Said coach was well ventilated, and was as well provided and equipped in every respect for the comfort of colored passengers as the coach in which the plaintiff was at the time she was invited to go into the colored compartment. No smoking was allowed in said compartment, and no disorderly conduct or offensive or disorderly characters were permitted to ride in said coach, but the same was as well conducted in every respect and as well policed in every respect as the coach which plaintiff was invited to leave. The defendant says that these separate coaches are provided by virtue of a law passed by the Kentucky legislature, and that he has obeyed said law, and requires all of his agents in the operation of his road to obey it, and it is the duty of every passenger, white or black, to obey it, and nothing was done on this occasion except to request the plaintiff to obey the law, which she did, and she was not compelled to do so by any violence used by the conductor or any other agent towards her. Having fully answered, defendant prays to be dismissed and for his costs herein expended.

The reply is a traverse of the affirmative matters of the answer, and the affirmative averments of the reply were, by agreement, controverted of record.

A jury trial resulted in a verdict and judgment in favor of plaintiffs for \$125, and, appellant's motion for a new trial having been overruled, he prosecutes this appeal. The grounds relied on for a new trial are: (1) Because the court erred in giving instruction No. 1, asked for by plaintiff; (2) because the court erred in refusing to give instructions Nos. 2, 3, and 4, asked by appellant; (3) because the verdict is contrary to the law and the evidence.

The instruction given by the court is as follows: "The court instructs the jury that, under the law and the evidence in this case, the plaintiff had the right to take a seat where she did in the ladies' coach, and that any attempt on the part of the defendant, his agents or employés, in charge of the train, to make her move into and take a seat in another coach was a violation of law and of

her rights; and, if she was required by any conductor or any agent or servant of the defendant so to remove, the jury must find for plaintiffs the damages they have sustained; and in so finding they are not confined to actual damages, but may take into consideration the humiliation and injury to the feelings of the plaintiff, and the nature and condition of the compartment which she was required to occupy, and find in any sum not exceeding the amount claimed in the petition."

The defendant asked the three following instructions, which were refused by the court:

"(1) If the jury believe from the evidence that the plaintiff got into the ladies' coach in defendant's car at Hopkinsville, Ky., and was invited, in a polite and courteous way, by the conductor of said car, to leave the same, and go into the compartment prepared for colored passengers; and they believe from the evidence, further, that said compartment prepared for colored passengers was substantially as comfortable in all of its appointments as the car from which she was invited to leave; and they further believe from the evidence that the conductor was not guilty of any misconduct towards the plaintiff, and used no more force than was necessary to compel a compliance with his request,—then the law is for the defendant, and the jury should so find.

"(2) The court instructs the jury that it was the duty of the defendant to provide separate coaches for colored and white passengers, and it was the duty of the defendant, through its agents, officers, or employes, to compel colored passengers and white passengers to occupy the respective compartments prepared for them, and it was the duty of the plaintiff to obey this regulation of the company; and if the jury believe from the evidence that the defendant was in good faith at the time enforcing the regulation, and using no more force than was necessary to compel the plaintiff to conform to this regulation, then the law is for the defendant, and they should so find.

"(3) The court instructs the jury that, in the event they should find for plaintiff, they can only find compensatory damages; that is, such damages as would actually compensate her for any injury done to her, including any mental anguish or mortification to her feelings resulting by reason of the conduct of defendant's agents and employes in compelling her to leave the ladies' coach and go into the colored compartment."

It will be readily conceded that it was the duty of the appellant to furnish the appellee a seat in a coach as good and comfortable as the others used or set apart for the accommodation of first-class white passengers, and also that appellant would not be justifiable in using unnecessary force in requiring plaintiff to occupy the coach set apart for colored passengers; and, while there is some conflict in the proof in this respect, the

chief, if not the sole, question discussed in the briefs on file is the constitutionality or validity of an act of the legislature of 1892 commonly called "The Separate Coach Bill." It is, however, suggested by appellant that, in the absence of any statutory enactment, the appellant company had the right to adopt and enforce rules and regulations requiring colored persons and white persons to occupy separate coaches.

The supreme court of North Carolina in *Britton v. Railway Co.*, 88 N. C. 542, used the following language: "Equally well settled does it seem to be, both upon principle and authority, that among those reasonable regulations which they have a right to adopt is the one of classifying their passengers, and assigning them to separate, though not unequal, accommodations. This right, as regards the separation of the white and colored races in public places, has been expressly and fully recognized in many of the courts, both state and national [quoting *Railroad Co. v. Miles*, 55 Pa. St. 209; *Day v. Owen*, 5 Mich. 520; *Hall v. De Cuir*, 95 U. S. 485]. In some of the cases it is said to be not barely a right appertaining to the carrier, but a positive duty, whenever its exercise may be necessary in order to prevent contacts or collisions arising from natural or well-known antipathies, such as are likely to lead to disturbances from promiscuous intermingling."

The supreme court of Illinois in *Railway Co. v. Williams*, 55 Ill. 187, said: "It is the undoubted right of railroad companies to make all reasonable rules and regulations for the safety and comfort of passengers traveling on their line of road. It is not only their right, but their duty, to make such rules and regulations. It is alike the interest of the companies and the public that such rules should be established and enforced, and ample authority is conferred by law on the agents and servants of the companies to enforce all reasonable regulations made for the safety and convenience of passengers."

In discussing the question under consideration, the supreme court of Tennessee in *Railroad Co. v. Wells*, 85 Tenn. 615, 4 S. W. 5, said: "We know of no rule that requires railroad companies to yield to the disposition of passengers to arbitrarily determine as to the coach in which they take passage."

The case of *Day v. Owen*, reported in 5 Mich. 525, was an action to recover damages against a defendant because of his refusal to allow Day, a colored man, to take cabin passage in defendant's boat from Detroit to Toledo. One of the defenses interposed was that, by the regulations and established course of the business of the steamboat men, colored persons were not received as cabin passengers, and were not allowed to use the cabin as such passengers, and said regulation and course of business was averred to be reasonable. The court in that case said:

The refusal to allow plaintiff the privilege of the cabin, on his tendering cabin fare, was nothing more or less than denying him certain accommodations while being transported, from which he was excluded by the rules and regulations of the boat. The rules and regulations must be reasonable, and, to be so, they should have for their object the accommodation of the passengers. \* \* \* As the duty of carriers is imposed by law for the convenience of the community at large, and not of individuals, except so far as they are a component part of the community, the law would defeat its own object if it required the carrier, for the accommodation of particular individuals, to accommodate the community at large."

The same principle is announced in *Railroad Co. v. Miles*, 55 Pa. St. 209. To the same effect is the decision of *Com. v. Power*, 7 Metc. (Mass.) 596.

In *Murphy v. Railroad Co.*, 23 Fed. 637, Judge Key in his charge to the jury said: "Again, I believe that, where the races are numerous, a railroad may set apart certain cars to be occupied by white people, and certain other cars to be occupied by colored people, so as to avoid complaint and friction; but, if the railroad charge the same fare to each race, it must furnish, substantially, like and equal accommodations." It, however, appears in the case supra that the railroad did not furnish equal accommodations, and the colored man was allowed to recover.

In the United States district court of Maryland, in the case of *McGuinn v. Forbes*, 87 Fed. 639, the syllabus of the decision reads as follows: "Plaintiff, an educated colored clergyman, the holder of a first-class ticket on defendant's steamboat, when the supper bell rang, seated himself at the table; and on the captain requesting him to move to another table, because the other passengers had complained of his presence, he refused. The captain then had another table fixed up for the other passengers, and plaintiff was left alone, his supper being furnished him. Held, that there was no discrimination against plaintiff on which to base a libel for damages against the owner of the boat."

It was said in the case of *Houck v. Railway Co.*, in the United States circuit court for Texas, reported in 38 Fed. 226, in substance, that a railway company, in the management of its complicated interests, may be authorized in law, on showing a proper or sufficient state of facts, to establish in the opinion of the court the reasonableness of the rule, in setting apart one or more of its cars for the use exclusively of colored passengers, and a like number, more or less, as the services may require, for the use exclusively of white passengers; but, whenever the company enforces such rule, the company is charged with the duty of furnishing to colored people, who pay first-class fare, cars to ride in that are as safe and comfortable in their

conditions and appointments as the cars furnished to white passengers who pay first-class fare.

It will be seen from the authorities cited that the appellant was authorized to establish a rule requiring white passengers and colored passengers to occupy separate coaches; and whether the law relied on by appellant is constitutional or not, yet if it did adopt the requirements of the law as a rule, and the rule was reasonable, all passengers were legally bound to abide by the rule; and it may be safely assumed that such a rule, in this state, is a reasonable rule, and is not unjust either to the white or colored people.

The important question presented for decision is whether or not the Kentucky statute requiring separate coaches or compartments for white and colored passengers is in violation of the constitution of the United States or of this state. The statute in question is embraced in sections 796-801, inclusive, of the Kentucky Statutes. The assumption by some colored persons, and by some of the white race, to the effect that the statute implies or assumes that the colored race is an inferior race, is not well founded. It is well known that a large portion of the white race is opposed to being required to occupy the same seat, or to travel in the same coaches that are occupied by the colored race, and it is wholly immaterial whether the colored race shares the same feeling in that regard towards the white race or not, but the presumption is that many of them likewise prefer to occupy seats in coaches not occupied by white persons. But, whether this be true or not, it is manifestly better for the colored race to be separated from the white race than to be placed in the same coach with white persons, with the result that the same would be offensive to the white race; for, if this be true, it would reasonably cause disturbances, which would be alike disagreeable and injurious to both races. It seems to us that the law complained of is more necessary for the comfort, convenience, and protection of the colored race than of the white race; and it is to be regretted that the law has not been accepted by both races as designed and intended for the mutual benefit, convenience, and protection of both races. So far as we are advised, the constitutionality of the statute in question has not been directly passed on by this court, but its validity has been recognized in several decisions of this court.

In the case of *Quinn v. Railroad Co.*, 32 S. W. 742, the court had under consideration the claim of appellant, who was a colored lady, for damages against the appellee, based upon the allegation that the appellee permitted a white person to go in and remain in the car assigned to colored passengers, and which was occupied by her, and while such person was permitted to remain there he used obscene and profane language, thus humiliating and injuring appellant. This court held



that she had a cause of action, and reversed the judgment of the lower court on account of error of instructions, the instructions not being sufficiently explicit as to the right of the party to recover. In *Louisville & N. R. Co. v. Com.* (Ky.) 37 S. W. 79, the court again recognized the validity of the law; and to the same effect is the case of *Bailey v. Railroad Co.* (Ky.) 44 S. W. 105. It seems clear, therefore, that this court has heretofore regarded the statute as valid; and, upon due deliberation, we are of the opinion now that the statute in question is not in conflict with the constitution of the United States, nor with the constitution of this state, and we are not aware of any decision of the supreme court of the United States that holds the statute in question to be invalid.

The statute of Mississippi of March 2, 1888, required all railroads carrying passengers in that state to provide equal and separate accommodations to the white and colored races. It also provided that all railroad companies that shall refuse or neglect, within 60 days after the approval of the act, to comply with the requirements, should be deemed guilty of a misdemeanor, and upon conviction fined not more than \$500. The *Louisville, New Orleans & Texas Railway Company* was indicted and fined in the court of Mississippi for failure to comply with the law in question, and, the judgment of the lower court having been affirmed by the supreme court of Mississippi, appellant appealed to the supreme court of the United States, which court affirmed the judgment of the Mississippi court. In discussing the question, the court said (*Louisville, N. O. & T. Ry. Co. v. Mississippi*, 133 U. S. 587, 10 Sup. Ct. 348): "So far as the first section is concerned (and it is with that alone we have to do), its provisions are fully complied with when to trains within the state is attached a separate car for colored passengers. This may cause an extra expense to the railroad company; but not more so than state statutes requiring certain accommodations at depots, compelling trains to stop at crossings of other railroads, and a multitude of other matters confessedly within the power of the state. No question arises, under this section, as to the power of the state to separate in different compartments interstate passengers, or to affect, in any manner, the privileges and rights of such passengers. All that we can consider is whether the state has the power to require that railroad trains within her limits shall have separate accommodations for the two races. That, affecting only commerce within the state, is no invasion of the powers given to congress by the commerce clause. In the case of *Wabash, St. L. & P. Ry. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4, Mr. Justice Miller, speaking for the court, said: 'If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begin and end within the state, disconnected from a continuous transportation through or

into other states, there does not seem to be any difficulty in holding it to be valid. For instance, a contract might be made to carry goods for a certain price from Cairo to Chicago or from Chicago to Alton. The charge for these might be within the competency of the Illinois legislature to regulate. The reason for this is that both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the state, and is not commerce among the states, or interstate commerce, but is exclusively commerce within the state. So far therefore, as this class of transportation, as an element of commerce, is affected by the statute under consideration, it is not subject to the constitutional provision concerning commerce among the states. It has often been held in this court, and there can be no doubt about it, that there is a commerce wholly within the state, which is not subject to the constitutional provision; and the distinction between commerce among the states and the other class of commerce between the citizens of a single state and conducted within its limits exclusively is one which has been fully recognized in this court although it may not be always easy, when the lines of these classes approach each other, to distinguish between the one and the other [quoting *The Daniel Ball*, 10 Wall. 557; *Hall v. De Cuir*, 95 U. S. 485; *Telegraph Co. v. Texas*, 105 U. S. 460]. The statute in this case, as settled by the supreme court of the state of Mississippi, affects only such commerce within the state, and comes, therefore, within the principles thus laid down. It comes also within the opinion of this court in the case of *Stone v. Trust Co.*, 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191."

It will be seen that the appellee in the case at bar purchased a ticket from Hopkinsville to Mayfield, the entire trip being within the state of Kentucky; and, moreover, it appears that she would leave the appellant's road at Princeton, Ky., and there board another train for Mayfield, her destination. It, therefore, seems clear to us that the decision of the supreme court, *supra*, is conclusive of the constitutionality of the act in question, so far as appellees in this case are concerned. It is true that the appellant railroad extends to Evansville, in the state of Indiana, but that fact can in no wise render the statute in question invalid as to the duty of the railroad to respect and enforce the statute in question.

We have also been referred to the case of *Plessey v. Ferguson*, decided by the supreme court of the United States, May, 1896, reported in 163 U. S. 537, 16 Sup. Ct. 1138. We quote as follows from the opinion of the court in that case: "This case turns upon the constitutionality of an act of the general assembly of the state of Louisiana passed in 1890, providing for separate railway carriages for the white and colored races. Acts 1890, No. 111, p. 152. The first section of the

statute enacts 'that all railway companies carrying passengers in their coaches in this state, shall provide equal but separate accommodations for the white and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations: provided, that this section shall not be construed to apply to street railroads. No person or persons shall be admitted to occupy seats in coaches, other than the ones assigned to them on account of the race they belong to.' By the second section it was enacted 'that the officers of such passenger trains shall have power and are hereby required to assign each passenger to the coach or compartment used for the race to which such passenger belongs; any passenger insisting on going into a coach or compartment to which by race he does not belong, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison; and should any passenger refuse to occupy the coach or compartment to which he or she is assigned by the officer of such railway, said officer shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railway company which he represents shall be liable for damages in any of the courts of this state.' The third section provides penalties for the refusal or neglect of the officers, directors, conductors, and employes of railway companies to comply with the act, with a proviso that 'nothing in this act shall be construed as applying to nurses attending children of the other race.' The fourth section is immaterial. The information filed in the criminal district court charged, in substance, that Plessy, being a passenger between two stations within the state of Louisiana, was assigned by officers of the company to the coach used for the race to which he belonged, but he insisted upon going into a coach used by the race to which he did not belong. Neither in the information nor plea was his particular race or color averred. The petition for the writ of prohibition averred that petitioner was seven-eighths Caucasian and one-eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every right, privilege, and immunity secured to citizens of the United States of the white race; and that, upon such theory, he took possession of a vacant seat in a coach where passengers of the white race were accommodated, and was ordered by the conductor to vacate said coach, and take a seat in another, assigned to persons of the colored race; and, having refused to comply with such demand, he was forcibly ejected, with the aid of a police officer, and imprisoned in the parish jail to answer a charge of having violated the above act. The constitutionality of this act is attacked upon the ground that it con-

flicts both with the thirteenth amendment of the constitution, abolishing slavery, and the fourteenth amendment, which prohibits certain restrictive legislation on the part of the states. That it does not conflict with the thirteenth amendment, which abolished slavery and involuntary servitude except as a punishment for crime, is too clear for argument. \* \* \* By the fourteenth amendment, all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are made citizens of the United States and of the state wherein they reside; and the states are forbidden from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or shall deprive any person of life, liberty, or property without due process of law, or deny to any person within their jurisdiction the equal protection of the laws. The proper construction of this amendment was first called to the attention of this court in *Slaughterhouse Cases*, 16 Wall. 36, which involved, however, not a question of race, but one of exclusive privileges. The case did not call for any expression of opinion as to the exact rights it was intended to secure to the colored race, but it was said, generally, that its main purpose was to establish the citizenship of the negro; to give definitions of citizenship of the United States and of the states; and to protect from the hostile legislation of the states the privileges and immunities of citizens of the United States, as distinguished from those of citizens of the states. The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power, even by courts of states where the political rights of the colored race have been longest and most earnestly enforced. \* \* \* It is claimed by the plaintiff in error that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is property, in the same sense that a right of action or of inheritance is property. Conceding this to be so, for the purposes of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property. If he be a white man, and assigned to a colored

coach, he may have his action for damages against the company for being deprived of his so-called 'property.' Upon the other hand, if he be a colored man, and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man. In this connection, it is also suggested by the learned counsel for the plaintiff in error that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color. The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class.

\* \* \* So far, then, as a conflict with the fourteenth amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes, or even requires, the separation of the two races in public conveyances is unreasonable, or more obnoxious to the fourteenth amendment than the acts of congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures. We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in

this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, mutual appreciation of each other's merits, and a voluntary consent of individuals.

It was said by the court of appeals of New York in *People v. Gallagher*, 93 N. Y. 448: 'This end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon which they are designed to operate. While the government, therefore, has secured each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed the functions respecting social advancement with which it is endowed.' Legislation powerless to eradicate racial instincts or abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. One race cannot be inferior to the other socially, the constitution of the United States cannot put them upon the same plane. It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different states, some holding that any visible admixture of black blood stamps the person as belonging to the colored race (*State v. Chavers*, 50 N. C. 11); others that it depends upon the preponderance of blood (*Gray v. State*, 4 Ohio, 354; *Monroe v. Collins*, 17 Ohio St. 663); and still others that the preponderance of white blood must only be in the proportion of three-fourths (*People v. Dean*, 14 Mich. 406; *Jones v. Com.*, 80 Va. 538). But these are questions to be determined under the laws of each state, and are not properly put in issue in this case. Under the allegations of his petition, it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race. The judgment of the court below is therefore affirmed."

It seems to us that the foregoing decision conclusively settles that it was the duty of the appellant to assign to the appellee a coach separate from a coach set apart for white persons. It may be true that the railroad under consideration in the case supra commenced and ended in the state of Louisiana, but we do not think that the court was at all governed in its conclusion by that fact.

It is insisted for appellee that the act under consideration undertakes to regulate the

control as to interstate passengers, and that that portion of the statute is invalid, as being in conflict with the interstate commerce clause of the United States constitution, and that the act is inseparable, and therefore it must all be held invalid. We do not think that such contention is tenable. It seems to us that such contention is in conflict with the decision, hereinbefore referred to, of the supreme court of the United States in the case of *Louisville, N. O. & T. Ry. Co. v. Mississippi*, 133 U. S. 587, 10 Sup. Ct. 348, and also in conflict with the well-settled rules of construction. If it were conceded (which is not) that the statute is invalid as to interstate passengers, the proper construction to be given it would then be that the legislature did not so intend it, but only intended it to apply to transportation within the state, and therefore it should be held valid as to such passengers. It seems to us that a passenger taking passage in this state, and railroad companies receiving passengers in this state, are bound to obey the law in respect to this matter, so long as they remain within the jurisdiction of the state.

It results from the foregoing that the court erred in giving instruction No. 1, and also erred in refusing the instructions asked for by appellant. Judgment appealed from is therefore reversed, and cause remanded for a new trial, upon principles consistent with this opinion.

MISSOURI, K. & T. RY. CO. v. WHITE.  
Court of Appeals of Indian Territory. Oct. 1, 1898.)

**PARTIES—AMENDMENT.**

Amendment may be allowed in title of action commenced by W. and B., the only parties in interest, changing it to "W., to the use and for the benefit of B."

Appeal from the United States court for the Central district of the Indian Territory; before Justice Yancey Lewis, March 13, 1896.

Action by Barbara White, for the use of R. P. Bowles, against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

This is an action for damages commenced before a United States commissioner for the Central district of the Indian Territory by R. P. Bowles and Barbara White against the Missouri, Kansas & Texas Railway Company, the appellant and defendant below. Judgment was rendered against the defendant, and an appeal was taken to the United States court for the Central district of the Indian Territory. The action was brought to recover damages for the killing of five head of cattle by the defendant, at different dates, extending from the spring of 1893 to August, 1894; the plaintiffs alleging, in each instance, that the killing was done through the carelessness and negligence of the defendant's agents and employes, and not through the

fault of the plaintiffs. The defendant denies by its answer in each instance that it killed and destroyed the animal alleged through the carelessness and negligence of its agents and employes; denies that it damaged the plaintiffs in any sense whatever; and denies that the animals were of the value alleged; and alleges that the animals were not the property of the plaintiffs. The case was tried in the district court before Hon. Yancey Lewis and a jury, March 13, 1896. It appeared from the evidence of the plaintiff R. P. Bowles that he had attached these cattle as the property of Mr. White; that Mrs. Barbara A. White interpleaded in that suit, claiming the cattle as her own property; and while that case was pending the plaintiff Bowles and the plaintiff Barbara A. White entered into a contract, dated August 21, 1894, which is as follows, to wit: "Aug. 21st, 1894. It is hereby agreed that all the cattle levied on by the constable in the case of R. P. Bowles vs. Wm. White, and claimed by me as interpleader in said case, which has been appealed to the U. S. court at South McAlester, and for which cattle this interpleader obtained a judgment in the commissioners' court at Atoka, be, and the same are hereby, transferred to the said R. P. Bowles, together with all claims against the Missouri, Kansas & Texas Ry. Co., a corporation, for damages in killing and injuring any or all of said cattle, and I hereby release to the said R. P. Bowles all my right, title, and interest in and to each and all of said cattle and claims, and authorize said R. P. Bowles to use my name in any and all accounts and claims for the collection of any and all cattle killed by the said R. R. Co., and to use my name in any and all actions that may be necessary in the collection thereof. B. A. White." The defendant excepted to the introduction of this contract. Plaintiff moved to amend by changing the names of plaintiffs from "R. P. Bowles and Barbara A. White" to "Barbara A. White, to the Use and for the Benefit of R. P. Bowles, Plaintiff," which motion was allowed by the court, and to which ruling defendant excepted.

The court instructed the jury as follows, to wit: "The railway company is not liable for any injuries resulting to stock of the plaintiff or of anybody else through not having fenced its track. There is no obligation in law in the Indian Territory imposing a duty upon a railway company to fence its tracks. It is not liable because it killed the stock. It is only liable if it killed the stock through the negligence of its employes operating its engines and trains. (The negligence for which it would be liable is the failure of its engineers or employes operating its engines and trains to exercise reasonable care to discover animals upon the track, and to avoid striking them after they had discovered them.) Reasonable care is the care which a prudent person would use with like agencies and under like circumstances. If you believe

from the evidence that the defendant's employes operating its engines were ~~guilty~~ of a lack of reasonable care in endeavoring to discover animals upon its track, and to avoid striking them, and by reason of said lack of care injury was inflicted upon the animals whose value is sued for, or upon any of them, and that such injury would not have occurred but for the failure on the part of defendant's engineers or employes operating its engines to exercise reasonable care to discover the animals upon the track and to avoid striking them, then you should find for the plaintiff as to such animals as to which you find that defendant's employes were negligent, under these instructions, if any. If you find that defendant's engine and train did actually kill any or all of the stock, but that as to any or all there was not a failure upon the part of its employes operating its engines to exercise reasonable care,—that is, the care which a reasonably prudent man, with like agency and under like circumstances, would exercise to discover animals upon the track and to avoid striking them, or inflicting injuries upon them,—the defendant would not be liable, and as to such animals, where you find that there was not a failure to exercise such care, your verdict should be for the defendant. The court instructs you that it does not necessarily follow that when an engineer discovers an animal upon the track, that he is negligent if he does not stop his train. Regard must be had for his own safety, and for the safety of his fellow employes; and if a reasonably prudent man, under the circumstances in which the engineer may be shown to have been by the evidence, when the animal was discovered, would not have checked the train in the exercise of reasonable prudence and caution, then he would not be guilty of negligence, and the company would not be liable in that case. If, however, in the exercise of such care, after the discovery of the animal, having due regard to his own safety and the safety of his fellow employes, he could have stopped the train or slackened its speed, or avoided striking the animal, and the evidence showed that he failed to exercise reasonable care in that particular, resulting in the injury to the animal, then the defendant would be liable for such injury. The degree of care to be exercised is to be determined by the exigencies of the particular situation, having regard not only to the killing or avoiding injury to the animal, but also to the safety of the engineer and his fellow employes. If, in the exercise of ordinary care, he could have stopped or slackened his speed, or avoided the injury, as I have told you, and he failed to do so, it would be negligence for which the company would be liable. If he could not do these things, having regard to the safety of himself and his fellow employes, in would not be negligence. Of this matter you are the judges, under the evidence. The burden is upon the plaintiff to show negligence upon the part of the company's employes op-

erating its engines, and, if he has failed to show a failure upon the part of the company's employes to exercise ordinary care as thus defined to you, then your verdict will be for the defendant. If it is shown that such failure to exercise that degree of care resulted in injury to the stock in question, or any of it, then your verdict will be for the plaintiff. If you find for the plaintiff, you must find a reasonable market value for the animals killed for whose killing you find the defendant liable because of the negligence of its employes, under the instructions that I have given you. You will find in favor of the party in whose behalf, in your judgment, is the preponderance of the evidence submitted to you." The jury returned a verdict for plaintiff for \$100. Defendant moved for a new trial, which motion was overruled by the court, to which defendant excepted, and judgment was entered upon the verdict; whereupon defendant appealed to this court.

Clifford L. Jackson, for appellant. Geo. A. Pate and R. L. Williams, for appellee.

TOWNSEND, J. (after stating the facts). The appellant has filed 25 specifications of error, but in the brief of his argument he limits his specifications to five different heads:

First, that the district court should have directed the jury to return a verdict for the defendant upon the whole case, as well as to each of the animals mentioned in the complaint. Under this head, counsel for appellant first discusses the question of negligence on the part of appellant, and evidently satisfies himself that no negligence was proven, notwithstanding the verdict of the jury. And, second, counsel says: "Outside of the question of negligence in this case, there are other reasons why a verdict in favor of appellant should have been directed by the district court. This suit was originally brought by R. P. Bowles and Barbara White as joint plaintiffs, claiming a joint interest in each of the five head of cattle, and a joint cause of action against the railway company for wrongfully killing each head thereof. Whilst plaintiffs were introducing their evidence in the trial of the case, the following proceedings were had: R. P. Bowles, one of the plaintiffs, being on the stand as a witness in his own behalf, testified as follows, to wit: 'These cattle belonged to the parties to this suit—Mrs. White and myself—by virtue of an agreement that we had. I had attached the cattle as the property of Mr. White, and she had interpleaded for them, and in the meantime I was under bond for the cattle. We effected a compromise, and she transferred her interest to me, with the privilege to collect from the railroad company any amount that might be due for the killing of the cattle. I have a transfer to that effect. Q. Is that the contract [indicating]? A. Yes, sir.' Plaintiff then offers said contract in evidence. Whereupon the defendant, by its counsel, ob-

jects to the introduction of this contract as evidence in this case, for the reason that said contract does not prove, or tend to prove, that R. P. Bowles and Barbara White have a joint cause of action against the Missouri, Kansas & Texas Railway Company, but the same shows that the said Barbara White sold to the said R. P. Bowles certain cattle, and assigned to him certain rights of action, which she, the said Barbara White, claimed against said Missouri, Kansas & Texas Railway Company. Whereupon plaintiff offers to amend his complaint in this case by changing the parties plaintiff from 'R. P. Bowles and Barbara White, Plaintiffs,' to 'Barbara White, to the Use and for the Benefit of R. P. Bowles, Plaintiff,' to which proposed amendment defendant, by its counsel, objects on the grounds: First, that the amendment would cause a complete change of the parties plaintiff; second, because it would substitute an entirely new cause of action than that originally sued upon,—which objection to such amendment the court overrules, and permits the amendment to be made, which is at once and in open court done; to which action of the court in so overruling the defendant's objection to such amendment the defendant, by its counsel, then and there, at the time, duly excepts and still excepts. Defendant then renews its above objection to the introduction of the said contract in evidence, which objection is by the court overruled, to which action of the court in so overruling defendant's objection defendant, by its counsel, then and there at the time duly excepted and still excepts. Thereupon the plaintiff read said contract to the jury,"—the said contract being the one heretofore referred to and set out in the statement of facts in this case.

"Every action must be prosecuted in the name of the real party in interest, except as provided in sections 4935, 4936, 4938." *Mansf. Dig. § 4933*. "Where the assignment of a thing in action is not authorized by statute the assignor must be a party, as plaintiff or defendant." *Id. § 4934*. Section 4935 relates to transferring or assigning the right of plaintiff during the pendency of the action, which was not done in the case at bar. The authorities cited, and apparently relied upon by appellant, relate to cases where changes were made from a representative to an individual capacity, or vice versa, and, as it seems to us, are not in point, as applied to the facts of this case. There is certainly no new cause of action set up, and the record shows that Bowles was an interested party by the assignment of Mrs. White, and the record shows Bowles to have been in possession of the cattle at the time they were killed. "One who is in the possession of goods may maintain trespass against a mere wrongdoer, without showing his rights to them,

possession alone being sufficient for the purpose of the action, with respect to every one except the owner." 6 *Wait, Act. & Def.* p. 98. The appellant would not have been prejudiced by the parties remaining as they were, and neither was appellant prejudiced by the amendment, for the real parties in interest remained the same. "The allowance or refusal of amendment, whether the action of the court is contrary to law or merely an abuse of discretion, will not constitute reversible error, if the party complaining is not prejudiced thereby." 1 *Enc. Pl. & Prac.* p. 533, and authorities cited in footnote 2. Bowles and Mrs. White were the only parties in interest, and the defendant could have suffered no injury by plaintiffs remaining as they were, and the change to "Barbara White, to the Use and for the Benefit of R. P. Bowles," could not prejudice the defendant, and was undoubtedly done by the court in the furtherance of justice, and this court will not interfere in the exercise of such a discretion unless it has been grossly abused. *Ford v. Ward*, 26 Ark. 360. The court below, by virtue of the statute, had express authority to make the amendment. The issues were unchanged, and there was no change of the real parties in interest. See *Mansf. Dig. § 5080*:

"Sec. 5080. The court may, at any time, in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved."

The foregoing disposes of the second specification in the brief of argument.

The third, fourth, and fifth specifications apply to the charge of the court, the introduction of evidence, and the ruling on motion for new trial. An examination of the charge of the court shows the same to be very full and explicit, as to the proof of negligence being shown to the satisfaction of the jury, and substantially complies with the request of defendant in his specifications of error Nos. 14, 16, and 19. We think the general charge of the court is without error, and properly submitted the issues to the jury. "The verdict of a jury will not be disturbed in the supreme court, where the finding of the facts has been submitted to them under proper instructions of the court." *Railway Co. v. White*, 48 Ark. 495, 4 S. W. 52. We think the judgment of the court below was correct, and it is hereby affirmed.

SPRINGER, C. J., and CLAYTON, J., concur.

**WALKER v. WANTLAND**, Clerk of Court.  
(Court of Appeals of Indian Territory. Oct. 1, 1898.)

**CERTIORARI.**

The court of appeals for the Indian Territory having only the same jurisdiction as is given the supreme court of Arkansas by Mansf. Dig. § 1263, providing that "in aid of its appellate and supervisory jurisdiction it shall have power to issue writs of \* \* \* certiorari," it cannot issue such writ, to take the place of an appeal or writ of error, to set aside a judgment for want of service.

Original petition by T. C. Walker for writ of certiorari to L. C. Wantland, clerk of the United States court for the Southern district of the Indian Territory, sitting at Purcell. Denied.

This is an original action, brought in the United States court of appeals for the Indian Territory, by petition filed in this court, praying for a writ of certiorari to quash an alleged void judgment entered against plaintiff in the United States court for the Southern district of the Indian Territory, sitting at Purcell. The judgment complained of was obtained under section 3957, Mansf. Dig., and the chapter entitled "Summary Judgments." Plaintiff claims that he had no notice of such proceedings whatsoever, and that the said judgment is absolutely void, and that the records of the inferior court should be purged. The service was made by leaving a copy of the motion with a son of petitioner, over 16 years of age, at his place of residence. The petition for the writ of certiorari sets forth in detail and at length the proceedings of the court below, and all the facts upon which petitioner relies, and concludes as follows: "Wherefore, by reason of the facts aforesaid, and your petitioner having no other remedy adequate in the premises, he prays this honorable court that a writ of certiorari be issued herein, directed to the clerk of the United States court for the Southern district of the Indian Territory, sitting at Purcell, commanding him to forthwith certify to this honorable court a true copy of the record of all the proceedings in said cause, and that this court inquire into all the proceedings herein, and the jurisdiction of said United States court for the Southern district of the Indian Territory, sitting at Purcell, over the person of your petitioner, and on final determination quash the proceedings and judgment aforesaid." The clerk issued the writ on the order of one of the judges of the court of appeals, and the entire record of the court below is now before this court.

J. W. Hocker and Zol Woods, for petitioner.  
B. D. Davidson and Dorset Carter, for respondent.

**SPRINGER, C. J.** (after stating the facts). The counsel for respondent in this case have filed a brief, in which they argue the case on its merits. No objection is urged to the form

of the action. They concede by their brief that the case is properly before this court. But this court cannot assume a jurisdiction not conferred upon it by law, even by consent of the parties in interest. The jurisdiction of this court is the same as that conferred upon the supreme court of Arkansas, and is contained in section 1263 of Mansfield's Digest. See section 11 of act of congress approved March 1, 1895 (Rich. Dig. p. 138). Section 1263 of Mansfield's Digest is as follows: "The supreme court, except in cases otherwise provided by the constitution, shall have appellate jurisdiction only; which shall be co-extensive with the state, under such restrictions as may from time to time be prescribed by law. It shall have a general superintending control over all inferior courts of law and equity; and, in aid of its appellate and supervisory jurisdiction, it shall have power to issue writs of error, and supersedeas, certiorari, habeas corpus, prohibition, mandamus, and quo warranto, and other remedial writs; and to hear and determine the same. Its judges shall be conservators of the peace throughout the state, and shall severally have power to issue any of the aforesaid writs." A careful reading of this section will clearly establish the conclusion that this court has no authority to issue writs of certiorari, except "in aid of its appellate and supervisory jurisdiction." In the case of *U. S. v. Judges of United States Court of Appeals of Indian Territory*, the circuit court of appeals for the Eighth circuit held that that court had no power to issue a writ of mandamus in any case which was not pending in its court, and in which it had not already acquired jurisdiction by other appropriate proceedings. 29 C. C. A. 78, 85 Fed. 177. The court further held in that case that a writ of mandamus may not be made to perform the office of an appeal, or writ of error to review the action of a court in the lawful exercise of its jurisdiction, nor may it be invoked to direct such a court or officer to reverse a decision of a judicial question which has already been rendered. The authority of this court to issue writs of certiorari is conferred by the same provisions of law that confer authority to issue writs of mandamus. The power conferred upon this court of appeals is similar to the power conferred upon the circuit courts of appeals, in so far as the issue of remedial writs is concerned. It is a power to be exercised only in aid of its appellate and supervisory jurisdiction. The petition in this case for a writ of certiorari is invoked to perform the office of an appeal or writ of error to review the action of the court below in the lawful exercise of its jurisdiction, and for the purpose of reversing a decision which has already been rendered in the case. The writ cannot be invoked for that purpose. The prayer of the petitioner is therefore denied, and the petition is dismissed.

**CLAYTON and TOWNSEND, JJ.**, concur.

## WHITE v. WHITE.

(Court of Appeals of Indian Territory. Oct. 1, 1898.)

## DIVORCE—NONRESIDENTS.

The provision of Acts Cong. May 2, 1890, § 30, and March 1, 1895, § 7, that "all civil suits shall be brought in the division or district in which \* \* \* defendants reside, or may be found," does not apply to actions against a nonresident, or prevent a divorce suit against a nonresident; section 31 of the former act extending over and putting in force in the Indian Territory Mansf. Dig. c. 52, entitled "Divorce," and chapter 119, entitled "Pleadings and Practice"; section 2558 of the former providing that the proceeding shall be in the county where complainant resides, and that the process may be directed in the first instance to any county in the state where defendant then resides; and sections 4989 and 4990 of the latter chapter authorizing constructive service by publication of a warning order on nonresident defendants; and section 5195 of the same chapter distinctly recognizing that judgment in divorce proceedings may be entered where constructive service was had on a nonresident defendant.

Appeal from the United States court for the Northern district of the Indian Territory; before Justice John R. Thomas, October 26, 1897.

Action by Henry N. White against Sallie J. White. Demurrer to complaint was sustained, and plaintiff appeals. Reversed.

On July 31, 1897, this action was commenced by the plaintiff below (appellant here) against the defendant below (the appellee here) for divorce, by filing complaint, and in which he alleges that he is a citizen of the United States, and a resident of the Northern judicial district of the Indian Territory, and has been such resident for more than one year last past; that defendant is a nonresident of the Indian Territory; that he and defendant were lawfully married in December, 1893, in Sevier county, state of Tennessee, and lived together until August, 1894, "when defendant willfully abandoned his bed and board, and refused to live with him longer"; that he moved to the Indian Territory, and sent for his wife to come to him, but she positively refused to do so; that defendant has continued to reside away from plaintiff since August, 1894; that the cause of divorce occurred within five years last past, and that the ground for divorce is a legal ground for divorce in the state of Tennessee. W. H. Tibbills was appointed attorney for the nonresident defendant by the clerk of the court of the Northern district. On October 22, 1897, defendant, by attorney, filed a demurrer to plaintiff's complaint, and assigned the following grounds: (1) That said complaint does not disclose the style of the court in which the action is brought; (2) that the court has no jurisdiction of the person of the defendant, or the subject of the action named in said complaint; (3) the complaint does not state facts sufficient to constitute a cause of action. Plaintiff filed proof of publication of warning order on October 26,

1897, and on the same day the cause came on to be heard upon the demurrer of defendant, and the same is sustained by the court "for want of jurisdiction," and said complaint was dismissed. Plaintiff appealed to this court.

Davenport & Dugger, for appellant. W. H. Tibbills, for appellee.

TOWNSEND, J. (after stating the facts). The appellant has filed one assignment of error, as follows: "The court erred in sustaining the demurrer of defendant on the ground that under the law as it now stands the court cannot obtain jurisdiction of the person of the defendant by warning orders or by publication proceedings, where the defendant is a nonresident of the Indian Territory." Under the act of congress approved May 2, 1890 (section 31), it is provided that certain general laws of the state of Arkansas, contained in Mansfield's Digest of the Statutes of Arkansas, "which are not locally inapplicable or in conflict with this act, or with any law of congress, relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory, until congress shall otherwise provide." Included among other general laws thus extended over and put in force in the Indian Territory by said act of congress, and specially mentioned in said section 31, is chapter 52 of said Mansfield's Digest, entitled "Divorce," and it is provided in said section 31 of said act of congress, designating said chapter 52, as follows: "And said court in the Indian Territory shall exercise the powers of the circuit court of Arkansas under this chapter." Also included in said section 31 of said act of congress is chapter 119 of Mansfield's Digest, entitled "Pleadings and Practice," which, by virtue of said act of congress, is "extended over and put in force in the Indian Territory." Hence the courts of the Indian Territory, by virtue of said act of congress, have jurisdiction of divorce with all the "powers of the circuit court of Arkansas," and the pleadings and practice of Arkansas is the law regulating the proceedings of said courts. Section 2558 of said chapter 52 provides as follows: "The proceedings shall be in the county where the complainant resides, and the process may be directed in the first instance to any county in the state where the defendant may then reside." Section 4989 and 4990 of chapter 119, provide as follows: Section 4989: "Where it appears by the affidavit of the plaintiff, filed in the clerk's office at or after the commencement of the action, that the defendant is: First, a foreign corporation, having no agent in this state; or, second, a nonresident of this state; or, third, has departed from this state, with intent to delay or defraud his creditors; or, fourth, has been absent from this state four months; or, fifth, has left the county of his residence to avoid the service of a summons; or, sixth, conceals



himself so that a summons can not be served upon him; or, where either of the last two mentioned facts is stated in the return by the proper officer of a summons against the defendant, the clerk shall make upon the complaint an order warning such defendant to appear in the action within thirty days from the time of making the order." Section 4990: "The court may make the warning order upon the requisite facts being satisfactorily shown by affidavit or other proof. Warning orders shall be published weekly for at least four weeks." It will thus be seen that constructive service may be had by the publication of a warning order on nonresident defendants. Under the head of "Judgment by Constructive Service" (section 5195 of said chapter 119) it is provided as follows: "Sec. 5195. Where a judgment has been rendered against a defendant or defendants constructively summoned, and who did not appear, such defendants, or any one or more of them, may, at any time within five years after the rendition of the judgment, appear in court and move to have the action re-tried; and, security for the costs being given, they shall be admitted to make defense; and thereupon the action shall be re-tried as to such defendants, as if there had been no judgment; and, upon the new trial, the court may confirm the former judgment, or may modify or set it aside, and may order the plaintiff to restore any money of such defendant paid to him under it or any property of the defendant obtained by the plaintiff under it and yet remaining in his possession, and pay to the defendant the value of any property which may have been taken under an attachment in the action, or under the judgment, and not restored. But the provisions of this section shall not apply to judgments granting a divorce except so far as relates to alimony." This is a distinct recognition by the statute that judgment in divorce proceedings can be entered, where constructive service was had on nonresident defendants. The attorney for appellee, in his argument, criticises the legislation of Arkansas for its limited extent "touching the question of service in divorce proceedings," and says that this question has never been presented to and construed by the supreme court of Arkansas. It may be suggested that possibly no lawyer among the able lawyers of Arkansas ever supposed that there was any question to present. The statute is explicit as to constructive service on nonresident defendants. The statute is explicit that the courts of the Indian Territory have jurisdiction of divorce proceedings and exercise the powers of the circuit courts of Arkansas, and the adoption of chapters 52 and 119 by act of congress gives them the force of acts of congress, so far as the courts of the Indian Territory are concerned. The quotation by the appellee from section 80 of the act of May 2, 1890, and section 7 of the act of March 1, 1895, providing "that all civil suits shall be brought in the division or

district in which the defendant or defendants reside, or may be found," in our judgment does not apply to actions and proceedings against nonresident defendants. This is the same law as declared by section 5007 of chapter 119 of Mansfield's Digest, providing where actions shall be brought, but it is regulating actions where persons are residents of the state of Arkansas; and by no rule of construction can the provisions of the same chapter be nullified where constructive service is provided for against nonresidents; and that chapter 119 of Mansfield's Digest, specially mentioned in section 31, is as much an act of congress as section 30 of the act of May 2, 1890, there can be no conceivable question or doubt. If so, no civil suit could be entertained by the courts of the Indian Territory against any defendant where constructive service is required, as provided for in sections 4989 and 4990 of Mansfield's Digest. This, in our view, would be a denial of justice. Justice Field, in *Pennoyer v. Neff*, 95 U. S. 714, quoted by appellee, says as follows: "To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by anything we have said, that a state may not authorize proceedings to determine the status of one of its citizens toward a nonresident, which would be binding within the state, though made without service of process or personal notice to the nonresident. The jurisdiction which every state possesses to determine the civil status and capacities of all of its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The state, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved." The argument of appellee as quoted is that "the state may" prescribe the conditions on which proceedings may be commenced and carried on. We think that the state of Arkansas has done so, and that the law regulating proceedings against nonresidents in Arkansas is the law that governs the courts in the Indian Territory. We are therefore of the opinion that the judgment of the lower court in sustaining the demurrer and dismissing the complaint should be reversed, with direction that the demurrer be overruled, and the cause remanded for further proceedings.

SPRINGER, C. J., and CLAYTON, J., concur.

#### WEBB v. STATE.

(Court of Criminal Appeals of Texas. Oct. 19, 1898.)

FORGERY—INDICTMENT—SUFFICIENCY—VARIANCE.

1. An allegation that a certain instrument bearing certain signatures was forged by ac-

cused sufficiently shows that the instrument purported to be the act of another than accused, as required by Pen. Code 1895, art. 530, though accused's name appeared as one of the signers.

2. An indictment for forging a note naming a bank as payee need not state whether the bank is incorporated.

3. An indictment set out what it alleged was the substantial parts of a forged note, signed by "J. N. Webb," and further alleged that the note could not be set out according to its tenor, as it was not in the possession of the grand jurors. The evidence showed a note signed by "N. Webb." *Held* to be a variance.

Appeal from district court, Erath county; J. S. Straghan, Judge.

J. N. Webb was convicted of forgery, and he appeals. Reversed.

McCain & Daniel, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of forgery, and his punishment assessed at confinement in the penitentiary for a term of  $2\frac{1}{2}$  years; hence this appeal.

Appellant made a motion in arrest of judgment, which involves the validity of the indictment, which was overruled by the court, and he assigns the same as error. The charging part of the indictment is as follows: "That J. N. Webb \* \* \* did then and there unlawfully and without lawful authority, and with the intent to injure and defraud, willfully and fraudulently make a false instrument in writing, which said instrument is substantially as follows: '\$82.80/100. Dec. 29th, 1896. On May the 29th, 1897, for value received, we or either of us promise to pay to the Dublin National Bank the sum of eighty-two & 80/100 dollars, at Dublin, Texas, with ten per cent, per annum interest from maturity. [Signed] J. N. Webb, J. R. Rucker, S. E. Drake.' The said note cannot be described better, nor set out by its tenor, for the reason that the same has been taken up and paid off by the defendant, and is now in his possession, or is lost and destroyed, and cannot be had by the grand jurors aforesaid." Appellant alleges—First, that the indictment charges no offense, because it failed to allege that said forged instrument was the act of another or others, as required in article 530 of the Penal Code of 1896; and, second, that the indictment alleged that said forged instrument was payable to the order of the Dublin National Bank, of Dublin, Tex., and nowhere alleges that said Dublin National Bank is a co-partnership, joint-stock company, or incorporated company.

While the statute requires, before the offense of forgery can be committed, it must purport to be the act of another, it is not necessary, in charging forgery, to set out the purport of an instrument, or by whom it purported to be signed. It is simply sufficient to set forth the instrument by its tenor. It is not claimed that the name "J. N. Webb," the defendant, was forged to the instrument;

but the forgery, as shown by the proof, consists in signing the names of J. R. Rucker and S. E. Drake to said instrument, following the name of Webb. We held that there was no necessity for the allegation that the instrument purported to be the act of another than the said J. N. Webb; that the signature to said instrument purported to be the act of another than the said Webb sufficiently appears by the allegation that the instrument bearing said signatures was forged by the said Webb,—not that he forged his own name thereto, but that he forged the names of one or both of the other parties thereto. See *Thurmond v. State*, 25 Tex. App. 366, 8 S. W. 473; *Wilson v. People*, 5 Parker, Cr. R. 178.

The other ground alleged in the motion in arrest of judgment is not well taken. It was not necessary here to allege the incorporation of the bank. It was not claimed that the bank executed or purported to execute the order. The instrument was merely drawn on a bank. See *Brown v. State* (Tex. Cr. App.) 43 S. W. 986; *Lucas v. State* (Tex. Cr. App.) 44 S. W. 825. This is not like the cases of *White v. State*, 24 Tex. App. 231, 5 S. W. 867, and *Nasets v. State* (Tex. Cr. App.) 32 S. W. 698.

Appellant, on the trial of the case, asked the court to give the following instruction to the jury, which the court refused, and he reserved his exception thereto, and assigns this action of the court as error: "You are charged that in this case the state has alleged that the instrument claimed to have been forged was signed, 'J. N. Webb, S. E. Drake, J. R. Rucker,' and that, before you can find the defendant guilty, you must find from the evidence that the instrument was so signed. Therefore you are charged that if you find from the evidence that said instrument was signed as alleged in the indictment, and you further find that the other allegations as set out in the indictment are true, you will convict the defendant. But if, from the evidence, you believe that said instrument was signed, 'S. E. Drake, J. R. Rucker, N. Webb,' then you are instructed that such would not sustain the allegations of the indictment; and you will, if you so find, acquit the defendant. You are further instructed that where the state, by indictment for forgery, sets out the forged instrument in substance, then the grand jurors are required to describe said forged instrument so as it can be reasonably identified." The charge asked was unquestionably predicated upon testimony adduced by appellant; that is, he produced an instrument in general terms similar to the one declared on by the state, and proved by a state's witness that said instrument was the one which was passed by appellant. This instrument, instead of containing the initials "J. N." in connection with the signature of Webb, contained the initial "N." only preceding the signature of Webb. It will be observed that the indictment does not propose

to set forth said forged instrument by its tenor; but the pleader excuses himself therefrom by an allegation that the note had been paid off by the defendant, and was then either in his possession, or had been lost or destroyed by him. It was competent to pursue this method in such case. See *Smith v. State*, 18 Tex. App. 399; *People v. Badgley*, 16 Wend. 53; 2 Bish. Cr. Proc. § 404; 8 Am. & Eng. Enc. Law, p. 514, and note. The authorities above cited appear to authorize a liberal construction in setting out the alleged lost instrument in substance.

The question accordingly presented for our consideration is whether the alleged forged instrument is substantially set out. While the pleader states in the indictment that the forged instrument cannot be set out according to its tenor, he does not proceed to set out what the instrument purported to be, but attempts to set it out substantially according to its terms, and, in so doing, he alleges that the first signature to said note is J. N. Webb. This, as we understand it, is tantamount to charging that one J. N. Webb signed the said instrument. Appellant, however, offered to prove that the instrument was not signed J. N. Webb at all, but signed N. Webb. Now, can it be said that J. N. Webb and N. Webb are one and the same person; in other words, is there a variance between the initials of the two names? Undoubtedly, if said instrument were set forth according to its tenor, there would be a variance under all of our decisions. It will be noted that the pleader does not allege any uncertainty as to the initials of Webb. If he had said that the paper was signed by one Webb, whose initials were not known, then another question would be presented, and there would be no variance. But here the distinct allegation is that the certain instrument declared on was signed by J. N. Webb. While the state proved this allegation, yet the defendant offered testimony that the note alleged to have been forged was not in fact signed "J. N. Webb," but "N. Webb." On this testimony appellant asked the court to charge on a variance. This, in our opinion, the court should have done; and, for the failure to do so, the judgment is reversed, and the cause remanded.

HURT, P. J., absent.

#### ROBERTS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 19, 1898.)

LARCENY—EVIDENCE—AFFIDAVITS—ADMISSIBILITY.

1. In a prosecution for the theft of a rooster, the admission of testimony to identify it that witness, at a cockfight in which the rooster was pitted, said to the bystanders, not knowing that accused was present, that, if the rooster belonged to a certain person alleged to be the owner, it would run after the first round

if it did not win, and that it whipped in the first fight, and ran in the second after the first round, is prejudicial error.

2. In a criminal case it is competent to establish a date by means of an affidavit.

3. In a criminal case, where an affidavit is used to establish a date, only the portion bearing on the date is admissible.

Appeal from Caldwell county court; George W. Kyser, Judge.

Jim Roberts was convicted of theft of a chicken, and he appeals. Reversed.

Hix & Baylor, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of theft of a chicken, and his punishment assessed at a fine of \$25 and three days' imprisonment in the county jail, and he prosecutes this appeal.

Appellant's second bill of exceptions is reserved to the admission of the following testimony, elicited from the state's witness Cris Burger, to wit: "That on the 19th of November, 1896, back of Grady's saloon, in Lockhart, Texas, when defendant's chicken had been pitted and was about to be fought against another game rooster, that he [Burger] remarked to the bystanders that if that was the George Adams rooster, and he did not win his fight in the first round, he would run; that the witness did not know that defendant was present and heard the remark; that the Jim Roberts rooster whipped his first fight, and in the second fight he ran after the first round." This testimony was clearly hearsay, and the only question is, was it of a character to prejudice the rights of appellant? We think it was. The material question in the case was as to the identity of the rooster found in the possession of the defendant in the rear of Grady's saloon, as being the rooster of the alleged owner, George Adams. There was much testimony on this point, both for the state and the defendant. It was, indeed, the turning point in the case; and we think the admission of the above testimony under the circumstances was calculated to be considered and weighed by the jury in determining the identity of said rooster. The witness Burger, by this hearsay testimony, was permitted to detail what he said to the bystanders with regard to said rooster, and how he was enabled to identify him; and the circumstances detailed by him were calculated to be regarded by the jury as strongly corroborative of his evidence of identification. It was not competent for him to state what he said to others, in the absence of the defendant, with regard to his identification of said rooster.

We believe it was competent for the state to introduce the affidavit of George Adams for the purpose of establishing a date, but only that portion of the affidavit should have been introduced.

The circumstance, as shown by the bill of exceptions, regarding the action of the judge in recalling the jury before they had separat-

ed, and sending them out again to reconsider their verdict, was not error. The court may not have been called upon to give the charge requested by appellant, as we do not believe the testimony sufficiently pointed to appellant's son as having stolen said rooster; but inasmuch as the court failed to give any charge affirmatively presenting appellant's defense, on another trial, if the evidence is the same, and the court should be requested, a charge should be given instructing the jury that, before they could convict the defendant, they must believe that he was present at the time, and participated in the fraudulent taking of said rooster, before they could convict him, and that if they believed he was not so present, but received the chicken after he was stolen, they would acquit him. We will not discuss the matter contained in the motion for a new trial predicated on newly-discovered testimony, as it is not necessary. For the error of the court in admitting the hearsay testimony heretofore discussed, the judgment of the lower court is reversed, and the cause remanded.

HURT, P. J., absent.

#### McELROY v. STATE.

(Court of Criminal Appeals of Texas. Oct. 19, 1898.)

##### ANIMALS—LOCAL OPTION STOCK LAW—ELECTIONS.

1. Act 25th Leg. p. 112, making it a misdemeanor to willfully permit stock to run at large in local option territory, is invalid as applied to counties which had previously adopted the local option stock law, it providing only a civil remedy for its violation.

2. Where the petition was to determine whether "hogs, sheep, and goats" should be prohibited from running at large, and the order of court directing the election was to determine whether "hogs, sheep, or goats" should be so prohibited, the election was void.

Appeal from Cherokee county court; S. B. Barron, Judge.

W. E. McElroy was convicted of unlawfully permitting hogs to run at large, and he appeals. Reversed.

J. A. Bulloch and Weeks & Fleager, for appellant. L. D. Guinn, Co. Atty., and Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted for unlawfully and willfully turning out, and causing to be turned out, on lands not his own, and for failing to keep up, certain hogs, and allowing them to trespass upon the lands of another, in Cherokee county, after the local option stock law had been put into operation in said county by a vote of the people of said county. The statute under which the law was put into operation authorized the party whose property was trespassed upon to impound the stock so trespassing. Such was the law when the people of said county voted it into existence.

This law went into effect on the 5th of April, 1897. By an act of the 25th legislature (page 112), which went into operation in August, 1897, it was made a misdemeanor to willfully permit said stock to run at large in such local option territory, punishable by a fine of not less than five nor more than fifty dollars. It is urged by appellant that, if the legislature had the authority to pass such law, it could not become operative in the territory where the law was then in existence; that the law as voted by the people was not punishable by fine, nor was it made a violation of the law for them to turn out their stock; that the only redress under such state of case was a civil remedy. Without going into the question, or the reasons for the decisions, further than as stated in former opinions of this court, we believe this position is sound. See *Dawson v. State*, 25 Tex. App. 670, 8 S. W. 820; *Robinson v. State*, 28 Tex. App. 52, 9 S. W. 61; *Lawhon v. State*, 26 Tex. App. 101, 9 S. W. 355.

It is further contended by appellant that the election was void because the order of the court directing the election was to determine whether "hogs, sheep, or goats" should be prohibited from running at large in said county, whereas the petition was to determine whether "hogs, sheep, and goats" should be prohibited from running at large in said county. But, as submitted and voted upon, it would seem that they voted in the alternative; and therefore it is impossible to determine whether they intended to prohibit the running at large of one or all kinds of said stock. It therefore appears that this point is well taken. The judgment is reversed, and the prosecution ordered dismissed.

HURT, P. J., absent.

#### GOODALL v. STATE.

(Court of Criminal Appeals of Texas. Oct. 19, 1898.)

##### HOMICIDE—MALICE—EVIDENCE—JURY.

1. The court may excuse a juror, though he does not make his excuse known on the call for excuses, but only when called for the purpose of being passed on by the parties; Code Cr. Proc. 1895, art. 657, not being mandatory with reference to the time of granting excuses.

2. It is no ground for challenge to a juror that defendant's counsel had been involved in litigation against him.

3. Defendant cannot show what happened in a difficulty between deceased and another an hour or two before the homicide, he not having known thereof, so that he could not have been influenced thereby.

4. Evidence that immediately after deceased was killed his mother was shouting and praying, if irrelevant, is not prejudicial.

5. It is not error to authorize the jury to consider, on the question of malice, the fact that defendant shot other parties immediately after he killed deceased.

Appeal from district court, Bosque county; J. M. Hall, Judge.

Rich Goodall was convicted of murder, and he appeals. Affirmed.

Lockett & Kimball, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 12 years; hence this appeal.

On the trial appellant objected to the method pursued by the court in the impanelment of the jury. It appears that the regular venire had been exhausted, and a special venire had been summoned. Their names were placed in a box at the request of appellant, and the list drawn therefrom. Those jurors who were present were tested as to their qualifications. Some, including McCurdy, were absent, but afterwards came in. In the meantime the names on the list had been called, and the name of Martin reached. When he was called for the purpose of being passed on by the parties, and after he had qualified, for the first time he stated as an excuse that he was sick, and not able to sit on the jury. He was excused by the court, over the objections of the appellant; the ground alleged being that the court called for excuses when the list of jurors were first tested as to their qualifications, and that Martin should have urged his excuse at that time, and that it was too late to urge it subsequently. Appellant further states that the name of McCurdy, who had come in, was then called. Appellant objected to this juror, because he claimed that said juror, for certain causes, had prejudice against appellant's counsel, and that he was generally opposed to crime; that appellant's challenges were then exhausted, and he was compelled to take said juror. We do not believe there is anything in this bill of exceptions. It was competent for the court to excuse the juror Martin, although he did not make his excuse known on the first call of the court for excuses, but only made it known when he was subsequently called for the purpose of being passed on by the parties. If it appeared to the court that he was then sick, and not able to serve on the jury, there was no impropriety in the court excusing him. We do not regard article 657, Code Cr. Proc. 1895, as mandatory with reference to the time when the court should grant excuses. Of course, it would be better to hear excuses when the jurors are first tested as to their qualifications; but the failure on the part of the court to do so, and the granting of an excuse subsequently, when the name of the juror is called to be passed on by the parties, will not be ground for reversal, unless it appears that some prejudice resulted to the appellant by the action of the court. Nor is there any error apparent in the action of the court with reference to the juror McCurdy. He was shown to be a qualified juror, and the fact that counsel for the defendant may have

been involved in litigation against him was not sufficient ground for challenge.

Appellant reserved two bills of exception to the action of the court in refusing to permit certain testimony as to the details of the difficulty between Lub Howard and Sim Goodall, which occurred the same night of the homicide, and about one hour before it happened. The first bill shows that the defendant asked the witness W. B. Goodall, on cross-examination, this question: "Did not some one tell you, just before the difficulty at the church, and while Sim and Lub Howard were quarreling, and while you were present and heard what was being said between them, that you saw Sim Goodall have a knife?" to which the witness answered, "Yes." Defendant then asked "where the witnesses Robert, Thad, and Sim were at that time," to which question the state's counsel objected, because the details of the fight could not be gone into. The object and purpose for the introduction of this testimony are not stated in this bill. The next bill is as follows: "The defendant offered to prove by the witnesses W. B. Goodall, Thad Goodall, Mrs. Howard, Lub Howard, and Will Lay that in the difficulty at the church which occurred between Lub Howard and Sim Goodall, about one hour before the homicide, and in which Lub Howard was seriously cut by said Sim Goodall, that W. B., Robert, Sim, and Thad Goodall were all present, and encouraged by words and acts Sim Goodall to cut said Howard, and that they had agreed in the afternoon of that day that they would raise a difficulty with said Howard about what he had said Sim was saying in regard to a certain picture looking deceitful, and that Sim Goodall borrowed a dirk knife of Will Lay." The objection to this testimony was on the ground that the same was irrelevant, which was sustained by the court, and the defendant excepted, but did not state the grounds of his exception. Appellant claims that this excluded testimony should have been admitted as shedding some light on the question of manslaughter. If the bills showed that appellant knew the circumstances attending the difficulty which occurred at the church, the contention might have some force, but the bills do not show that; nor, if we recur to the statement of facts (if we were permitted to do so), is it shown that he was cognizant of the circumstances attending said first difficulty, which occurred at least an hour or two prior to the homicide, and defendant was shown at the time not to be there, but, on the contrary, the evidence placed him at home, some miles from where it occurred. What happened in the first difficulty, what the parties did, and where they stood, in the absence of a showing that he knew the details of said difficulty, could not possibly have any influence upon or operate on his mind. Moreover, the first bill quoted above does not show what was expected to be proved by said witness W. B. Goodall. It

merely shows that defendant asked several witnesses a question as to where Robert, Thad, and Sim were at the time of the first difficulty. The second bill does not show that appellant expected to prove certain acts or words used by W. B., Sim, and Thad Goodall to encourage Sim Goodall in the first assault, but merely states a conclusion, to wit, that they were present, and encouraged by words and acts, etc. Appellant also objected to the state proving by the witness Scott that he was present at the difficulty, and, when it occurred, ran to the barn, some 100 yards distant, and immediately returned; that on his return Mrs. Goodall was shouting and praying. His objection to this testimony was because it was irrelevant, and was no part of the *res gestæ*. In point of time it certainly was a part of the *res gestæ* of the homicide; but, if it be conceded that the testimony was irrelevant, in our opinion, it could not operate to the prejudice of appellant. The bare fact that the mother of the deceased was shouting and praying immediately after her son was shot and killed would not be evidence of an inculpatory character against appellant, as no expression is shown to have been used by her affecting the question of the guilt or innocence of appellant. As stated above, this testimony immediately followed the shooting, and was as much a part of what happened there as the fact that the father of the deceased immediately crawled from where he was shot down to where the deceased, Robert, was, and turned him over, and attempted to revive him; or the fact that the mother of the deceased brought a pillow, and placed it under his head.

A number of exceptions were taken to the court's charge, and also to the refusal of the court to give the four special requested instructions asked by appellant. We have carefully examined the charge, and, in our opinion, it is an admirable presentation of the law of the case to the facts in evidence. The court charged on murder in the first and second degrees and on manslaughter, and gave a charge on self-defense. We regard the charge on manslaughter as full and complete as the facts of the case could possibly require. The jury were expressly told that they could consider all the facts in evidence which in any wise, in their opinion, might tend to reduce the homicide to manslaughter,—that is, all the surrounding facts, tending to excite passion under the circumstances of the case; and if, in their opinion, such facts and circumstances were calculated to excite a person of ordinary temper, and did excite passion in appellant's mind, that the same was adequate cause, and they could only find appellant guilty of manslaughter. The charge given by the court was comprehensive, and rendered the special charge asked by appellant on the subject unnecessary. The insistence of counsel that the court on this subject should have charged on imperfect self defense,—that is, that

appellant may have gone to W. B. Goodall's, not with a felonious intent, but merely with the intent to commit a battery,—was not called for by any evidence in this case. Nor, in our opinion, did the court err in his general charge on manslaughter by giving to the jury the substance of the statute to the effect that the provocation must be by the party slain, in order to reduce the homicide to the grade of manslaughter. All the facts and circumstances, as stated before, that might reduce the offense to manslaughter, were given to the jury. Appellant himself testified that the reason he shot deceased was on account of the part he took in the homicide; that was the provocation. But in the charge of the court the jury were not constrained to look alone to that, but were authorized to consider all the circumstances. We would observe, in this connection, that while the court gave a liberal charge on manslaughter, we fail to see any manslaughter in this case. There is no testimony that indicates, to our minds, any adequate cause. But, even conceding that there was, the court's charge on this subject was ample. There was no error in the court's charge on the use of a deadly weapon in the commission of the homicide. The charge is in the language of the statute, and there can be no question in this case that defendant intended by shooting deceased to take his life. The court's charge on provoking the difficulty was authorized by the testimony. If the court had stopped here, and not given an alternative charge to the effect that, if the jury believed that appellant went to the home of the deceased on a peaceful mission, and was there attacked by deceased and his father, he had a perfect right to defend himself, there might be error. But this alternative proposition was given by the court in his charge on self-defense, and adequately guarded appellant's rights. Nor was there any error in the court limiting appellant's right of self-defense solely to an attack being made or about to be made on him by the deceased and W. B. Goodall. Whatever self-defense there is in this case is predicated on the testimony of the appellant himself. He does not pretend that Thad or George Goodall was making an assault on him, or about to make an assault on him. On the contrary, he disavows this. He claims that he only fired three shots, and that he did the shooting solely because W. B. Goodall and Robert Goodall were making an attack on him; that, if he shot anybody else, it was purely accidental. None of the other testimony in the case suggested self-defense, and the court did not err in confining the right of the defendant to self-defense to the testimony in the case which in any measure raised this issue.

Appellant "further excepted to the charge of the court because it authorized the jury to consider the fact that the defendant shot other parties after he had killed Robert Goodall, for the purpose of showing malice." This

charge of the court, it occurs to us, was in favor of the defendant. We do not think it would have been error to have failed to charge the jury on this subject altogether, but certainly the limitation of this matter to appellant's intent in shooting others than Robert to its legitimate purpose, to wit, the intent with which he may have shot Robert, was a matter of which appellant cannot be heard to complain. As stated before, manslaughter and self-defense were barely suggested by the testimony. Upon both phases the court's charge was adequate, and appellant cannot complain. The evidence shows beyond any reasonable doubt that appellant was instigated to kill deceased, Robert Goodall, because he had heard previously on that night that in a difficulty which had occurred between Sim Goodall (the brother of Robert and the son of W. B. Goodall) and Lub Howard Sim Goodall had cut his brother-in-law, Lub Howard. This difficulty, which occurred on the same night, was at a church, some two or three miles from the defendant's residence. Defendant was informed of this difficulty about 11 o'clock that night, and after he had retired. It is not shown that he knew any of the details of said difficulty, but, on learning thereof, he immediately got up, saddled his horse, armed himself, and proceeded towards the church where the previous difficulty is said to have occurred. It was a bright moonlight night. On the way he met certain parties with Lub Howard in a wagon. He is not shown either to have made any inquiry as to how the difficulty occurred or the extent of the wounds. We gather that the wounds were not of a serious character. He merely inquired of Howard "if he was hurt much," to which he replied "that Sim had cut him; that he had got it in on him a little." He then inquired where Sim was. On being informed that he had gone to his father's, W. B. Goodall, he replied, "Good," and then rode off rapidly towards W. B. Goodall's. When he arrived there, W. B. Goodall, and his sons Robert, Thad, George, and his wife and Mrs. Fulger were all seated on the gallery. He stopped at the fence, and hailed them. The old man and his boys immediately came out, and the altercation brought on by defendant concerning the cause of the difficulty at the church immediately ensued. In a short time after defendant arrived there, Scott and Ladd, who were with the wagon conveying Lub to his home, also came, evidently actuated by an apprehension that appellant, in going to the house of W. B. Goodall, meant mischief. These parties attempted to stop the difficulty. One took hold of W. B. Goodall and the other of the defendant. The testimony shows that appellant, referring to the cause of the previous difficulty, used harsh and denunciatory language towards W. B. Goodall. This was resented by W. B. Goodall, and almost immediately defendant drew his pistol, and began firing at W. B. Goodall.

The second shot took effect in his head, and he fell to the ground. He then shot Robert Goodall down, and then shot at George, and missed him, and then shot at Thad, striking him in the back as he ran. None of the parties except the defendant were shown to have been armed at the time. Although appellant states in his evidence that he went there on a peaceful mission, and to put a stop to the difficulty, we are not surprised that the jury, under the evidence in this case, discredited all of such testimony. No doubt they thought it singular when defendant declared his purpose in going there, at 12 o'clock on that night, to stop a difficulty which had already come to an end, armed as he was, was most remarkable, and well calculated to challenge their credulity, especially when the circumstances attending the actual shooting show that he was the aggressor, and if he did not kill the whole Goodall family it was not his fault, for evidently he attempted to do that. We think that appellant not only has no right to complain of the verdict in this case, but that he should congratulate himself that the jury were exceedingly lenient in giving him murder in the second degree, with the small punishment of 12 years in the penitentiary. There being no errors in the record, the judgment is affirmed.

HURT, P. J., absent.

#### SWAN v. STATE.

(Court of Criminal Appeals of Texas. Oct. 19, 1898.)

##### MURDER—DEGREES—INSTRUCTIONS.

Defendant had repeatedly threatened to kill his father. One night he crept to his father's bed, and shot and killed him, while he was asleep, with a pistol that he had prepared, and then went to the neighbors, and stated that another did the shooting. Held not error to refuse to charge on murder in the second degree.

Appeal from district court, Bastrop county; Ed R. Sinks, Judge.

Elijah Swan was convicted of murder, and he appeals. Affirmed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of murder in the first degree, and his punishment assessed at death.

There are only two assignments of error in the record, both involving the same question, to wit, the refusal of the court to charge on murder in the second degree. We have examined the record very carefully, and do not find that the evidence required a charge on any grade of homicide less than murder in the first degree. The confessions of the defendant clearly show a case of assassination. Aside from the confessions, the evidence is purely circumstantial; but it points unmistakably to a deliberate and cold-blooded murder, which had been premeditated some time

before its commission. Deceased was the father of the appellant, and, because of his refusal to allow his son (defendant) to attend a party in the neighborhood on the night of the homicide, he carried out a plan to kill his father, which he had repeatedly threatened. On the night of the homicide, his stepmother was away from the premises, attending the funeral of her mother, and no one was left at home except the father and son. They were sleeping in separate rooms. Near midnight, defendant crept from his bed, procured a pistol, which he had prepared, went to the room in which his father was sleeping, and, without warning, shot him, then fled to a neighbor's, and, doubtless in pursuance of his preconceived plan, stated that some one else had come to the house and shot his father while they were asleep. This statement was not only shown by circumstantial evidence of the most cogent character to be false, but was also stamped as a falsehood by appellant's own subsequent confession. Under the evidence, there was nothing less than murder in the first degree, and the court did not err in refusing to give the requested charge. The judgment is affirmed.

HURT, P. J., absent.

### LONG v. STATE.

(Court of Criminal Appeals of Texas. Oct. 19, 1898.)

#### BURGLARY—EVIDENCE—ADMISSIBILITY—SIMILAR OFFENSES.

1. Evidence that shortly before the commission of the offense charged, of breaking into the wheat bin of a certain person, and bringing the wheat to a certain city for sale, defendant broke into bins of other persons in the neighborhood, and brought the wheat to the same city for sale, is inadmissible.

2. Evidence that defendant committed an offense similar to the one charged against him is not admissible merely on the ground that it would corroborate an accomplice.

Appeal from district court, Tarrant county; Irby Dunklin, Judge.

George Long was convicted of burglary, and he appeals. Reversed.

O. S. Lattimore, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of burglary, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

There is only one question in the case which requires notice, to wit, the admissibility of evidence of other burglaries committed about the same time and in the same neighborhood in which the burglary for which defendant was tried is claimed to have been committed. This evidence was admitted by the court over the objections of the appellant. The court, in his explanation to the bill, shows that same was admitted for the purpose of connecting

defendant with the commission of the offense charged, and he so instructed the jury, basing the admission of the testimony on the ground that the proof showed a system. Appellant, by his counsel, O. S. Lattimore, has filed an able brief, reviewing the authorities on the subject of the admission of this character of testimony; and he insists that, even where proof of other crimes is admitted, such testimony has been admitted solely for the purpose of shedding light on the intent with which the defendant may have committed the offense for which he is being tried; and he furthermore claims that this was the rule laid down in the *Hennessy Case*, 23 Tex. App. 340, 5 S. W. 215, and that expressions found in cases decided since that time, and purporting to follow it, carrying the rule beyond this, are dicta, or are not supported by the authorities, and not in consonance with correct legal principle.

The general rule on this subject is that evidence of collateral crimes is not admissible. This rule, however, is subject to exceptions; among them, evidence of contemporaneous crimes may be admitted, where such collateral offenses form part of the *res gestæ* of the offense charged, and serve to identify same or to connect defendant therewith. See *Whart. Cr. Ev. § 81*. And collateral crimes, though not contemporaneous, may be admitted in a proper case to show the intent with which the accused may have committed the act charged. And this was the rule laid down in the *Hennessy Case*, *supra*. And it has also been said that evidence of collateral offenses may be proven where such offenses form part of a system or part of the transaction in which the act under investigation is involved; and in such case the evidence may be used to connect or identify the accused with the transaction under investigation. We do not understand by this that the authorities mean that distinct offenses in no wise connected and not involved in the same transaction charged against the accused may be proven in order to connect him with said charge. Such was the rule laid down in what is known as the *Mollie McGuire Cases*. See *Carroll v. Com.*, 84 Pa. St. 107. Mr. Wharton, in his work on Evidence, says: "In order to prove purpose on defendant's part, system is relevant; and, in order to prove system, isolated crimes are admissible, from which system may be inferred. The reason for the rule in this and similar cases is that, when once a system is proven, each particular part of the system may be explained by the other parts which go to make up the whole." Section 32. "When the object is to show system, subsequent as well as prior offenses, when tending to establish identity or intent, can be put in evidence. The question is one of induction, and, the larger the number of consistent facts, the more complete the induction is. The time of the collateral inculpatory facts is immaterial, provided they be close enough together to indi-



cate that they are a part of a system." Section 38.

Under no rule of evidence with which we are familiar was the testimony in this case admissible. The system claimed by the state was to the effect that, a few days prior to the alleged offense, certain wheat in the neighborhood had been stolen out of a bin, and carried to Ft. Worth, by some one, and sold; and also that, a few days after the alleged theft, certain wheat in the same neighborhood was stolen from a bin, loaded on a wagon, carried to Ft. Worth, and sold. With the first offense, there is no testimony outside of the confessed accomplice tending to connect appellant with the same. With the latter offense, it may be conceded that there is testimony tending to connect defendant with said offense. The state insisted that these transactions formed part of a system, and were admissible as independent evidence tending to connect defendant with the offense charged, and so corroborate the accomplice. Now, we hold that because an offense has been committed by a defendant in the same manner that the offense charged may have been committed does not constitute this separate offense a part of a system. The fact that two distinct crimes may have been committed in the same way does not, in our opinion, constitute a system, as meant by the authorities treating of this subject. If these independent acts constituted a system, and if proof of such collateral offenses could be offered to connect a defendant with the offense charged, because such other offenses were likely perpetrated in the same way as the one for which he was being tried, then, in every case in which appellant was shown to have committed similar offenses, proof of such offenses could be made in order to identify or connect him with the case for which he was on trial. To illustrate: Suppose A. is on trial for the theft of a horse, and the proof should show that it was taken in a particular manner, but there was no proof identifying or connecting A. with the theft of said horse; then, in order to connect him with such offense, and to show that he was the guilty party, if the contention of the state be correct, if he had been convicted for the theft of other horses committed in a similar manner, proof of such collateral crimes could be introduced in evidence, as testimony tending to show that he was guilty of the offense charged against him. This we do not understand to be the rule; but this was exactly what was done in this case,—that is, proof of independent offenses was introduced by the state as testimony tending to connect defendant with the main offense, for the purpose of corroborating the accomplice's evidence. There was no proof outside of said collateral offenses that tended to connect defendant with the offense charged, or to corroborate the accomplice. The testimony being inadmissible, the accomplice could not be corroborated in this manner. We hold that

the court erred in admitting said evidence for any purpose, and because of its admission the judgment is reversed, and the cause remanded.

HURT, P. J., absent.

#### PERRYMAN v. STATE.

(Court of Criminal Appeals of Texas. Oct. 19, 1898.)

##### CRIMINAL LAW—APPEAL—NOTICE—DISMISSAL.

A motion to dismiss an appeal in a criminal case in the county court on the ground that the justice's transcript failed to show the giving of a notice of appeal, as required by Code Cr. Proc. 1895, art. 974, cannot be met by a request for time to present a mandamus to compel the justice to enter on his docket a notice of appeal.

Appeal from Wood county court; D. W. Crow, Judge.

William Perryman was convicted of using abusive language under circumstances calculated to provoke a breach of the peace, and he appeals. Affirmed.

M. D. Carlock, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted in the justice court of using violent and abusive language against Lizzie Brown, in her presence and hearing, under circumstances reasonably calculated to provoke a breach of the peace. On the tenth day after the adjournment of the justice court appellant entered into an appeal bond for his appearance before the county court. When the case was called in the county court, the county attorney made his motion to dismiss the appeal, because notice of appeal was not given and entered upon the docket of the justice court, as required by the statute. In opposition to this motion appellant filed an affidavit, signed by his counsel, to the effect that notice of appeal had been given in said justice court by the defendant in person, and that said notice was given within 10 days after the rendition of the judgment; and he filed Exhibit A to said affidavit, in the following language: "The State of Texas v. Wm. Perryman. Notice of Appeal. Filed November 22nd, 1897." This, however, was not filed by the justice. In fact, the justice refused to enter upon his docket any notice of appeal, and his reason for so doing was that said notice was not attempted to be given until after the adjournment of his court, which was November 15, 1897.

Appellant also moved the court to postpone the consideration of the motion to dismiss the appeal until he could present a mandamus to compel the justice of the peace to enter the notice of appeal. This was declined. The appeal was dismissed, and a bill of exceptions reserved to this ruling of the court. It is contended before this court that the county judge erred in dismissing

the appeal, and in not granting appellant a writ of mandamus pending the appeal in the county court to compel the justice of the peace to enter upon his docket a notice of appeal. In order to attach the jurisdiction of the county court to an appeal from the justice court, the notice of appeal must be given in open court, and entered upon the minutes or dockets of the justice court. See Code Cr. Proc. 1895, art. 974. The transcript shows that notice of appeal was not given during the term of the justice court, but was sought to be given subsequent to said adjournment, and the justice, under the circumstances, refused to make the entry. Appellant proposed to show these facts in the county court, in order to avoid the county attorney's motion to dismiss his appeal. This could not be done. A motion to dismiss an appeal in the county court cannot be met by a request for time to prepare a writ of mandamus. Without the notice of appeal in the transcript the county court had not obtained jurisdiction, and mandamus proceedings could not confer jurisdiction, of the appeal. If the facts justify the proceeding, the court upon a proper showing, and within proper time, might issue the writ of mandamus; but the fact that he did issue said writ would not be equivalent to a notice of appeal given in the justice court which would authorize the county court to entertain jurisdiction of the appeal, for, if so, the county court would have jurisdiction, not by virtue of the notice of appeal, but because of the issuance of the writ of mandamus. For a discussion of this question see *Truss v. State* (Tex. Cr. App.) 43 S. W. 92. As presented by the record, the action of the county court was correct, and the judgment is affirmed.

HURT, P. J., absent.

#### Ex parte WILLIAMS.

(Court of Criminal Appeals of Texas. Oct. 19, 1898.)

##### HABEAS CORPUS—APPEAL—RECORD.

An appeal in habeas corpus proceedings heard in vacation will be dismissed where the record is not certified by the judge.

Appeal from district court, Erath county; J. S. Straghan, Judge.

Habeas corpus by Harry Williams. Being remanded, he appeals. Dismissed.

Martin & George and J. B. Keith, for relator. W. J. Oxford, Nugent & Kearby, and Mann Trice, for the State.

DAVIDSON, J. Appellant was arrested charged with the murder of Austin King, and resorted to the writ of habeas corpus to secure bail. Upon the hearing of the case in vacation he was remanded to custody, without bond; hence this appeal.

Upon an examination of the record, we find that it is not certified by the judge, as required by the statute. For this reason we cannot entertain jurisdiction of this appeal. See *Ex parte Malone*, 35 Tex. Cr. R. 297, 31 S. W. 665, and 33 S. W. 360. There are several other cases following the *Malone Case*, but we deem it unnecessary to cite them. The appeal is accordingly dismissed.

HURT, P. J., absent.

#### Ex parte WICKSON.

(Court of Criminal Appeals of Texas. Oct. 19, 1898.)

##### HABEAS CORPUS—APPEAL—RECORD.

Where the record in a habeas corpus proceeding tried in vacation is not certified by the trial judge, as required by statute, the appeal will be dismissed.

Appeal from Milam county court; W. M. McGregor, Judge.

Application by Ben Wickson for a writ of habeas corpus. From an order remanding him to custody, he appeals. Appeal dismissed.

R. Lyles, for relator. Mann Trice, for the State.

DAVIDSON, J. Relator was convicted for a violation of a city ordinance, and resorted to the writ of habeas corpus for his discharge, upon the ground that the ordinance denounced the same act as the state law. Upon the hearing the relator was remanded to custody, and prosecutes this appeal.

Motion is made to dismiss the appeal because the record is not certified by the judge, as required by law. The cause was tried in vacation, and this is shown by the record. In this character of case the statute requires the trial judge to certify the record, which was not done in this case. The motion is therefore well taken, and the appeal is dismissed. See *Ex parte Malone*, 35 Tex. Cr. R. 297, 31 S. W. 665, and 33 S. W. 360; *Ex parte Williams* (just decided) *ubi supra*.

HURT, P. J., absent.

#### Ex parte ARTHUR.

(Court of Criminal Appeals of Texas. Oct. 19, 1898.)

##### ADMISSION TO BAIL.

One indicted for a capital felony, who proves that he has property of the value of \$500, is entitled to be admitted to such bail as would require his presence at his trial.

Appeal from district court, Midland county; W. R. Smith, Judge.

George P. Arthur, arrested on an indictment charging him with rape, obtained a writ of habeas corpus to secure bail, and from an

order remanding him to custody he appeals. Order for admission to bail.

Hawkins & Camp and F. G. Thurmond, for relator. Mann Trice, for the State.

DAVIDSON, J. Relator was arrested on an indictment charging him with rape. Upon his arrest he resorted to the writ of habeas corpus for the purpose of securing bail, and upon the hearing thereof was remanded to custody; hence this appeal.

On the trial the state introduced the indictment and the capias by virtue of which the relator was arrested. He introduced evidence as to the amount of property owned by him. There was no testimony before the court in regard to the offense, and the record comes before us in this condition. The court seems to have followed the case of *Ex parte Smith*, 23 Tex. App. 100, 5 S. W. 99. That case, however, has been subsequently overruled. See *Ex parte Newman* (Tex. Cr. App.) 41 S. W. 628. So we have the case before us with the simple showing that relator stands indicted with the crime of rape, a capital felony, together with the proof that he has property of the value of \$500. In this character of case, we would be required to fix such bail as would require the presence of the accused to stand his trial before the jury. We are of opinion that relator is entitled to bail as the case is presented, and therefore fix the same in the sum of \$5,000. Upon the relator giving bond in said amount, in the terms and under the conditions required by law, the officer holding him will release him from custody.

HURT, P. J., absent.

#### DENMAN v. STATE.

(Court of Criminal Appeals of Texas. Oct. 19, 1898.)

##### ROBBERY—ASSAULT—EVIDENCE.

Defendant and prosecutrix were picking berries, and he caught her by the arms, without saying anything, and refused to release his hold. After she forcibly released herself, he said he wanted some of her berries, and when he was being arrested attempted to run away. Held insufficient to warrant a conviction of assault with intent to commit robbery.

Appeal from district court, Anderson county; W. H. Gill, Judge.

Fayette Denman was convicted of an assault with intent to commit robbery, and he appeals. Reversed.

A. W. Gregg, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of an assault with intent to commit the crime of robbery, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

The only error assigned is the insufficiency

of the testimony to support the conviction. It is disclosed by the statement of facts that Mrs. N. E. Gunter and the defendant were gathering blackberries in the field of Dr. Link, about one mile north of Palestine. He passed Mrs. Gunter, and went to another place in the field to pick berries. As he passed she asked him how many berries he had, and he replied that he lacked about two quarts of having his bucket full. She picked on for a short while, and had reached a stump, around which the berries were thick, and was picking them, when the appellant (a negro boy) appeared suddenly before her, caught her by the left arm with both of his hands, and held and shook her, "but did not say one word." She began begging him not to hurt her, and "told him she had no money with her, but had some at home, and would give it to him the next time she saw him if he would not hurt her," and continued to so beg him, but he still held her. She further testified that she tried to get loose from defendant, and that he had hold of her for several minutes; that he then turned her left arm loose with his left hand, but still held her with his right hand, and reached his left hand towards her right arm, on which she had her bucket of berries, "as if to catch her by the right arm." She pushed his hand away, and at the same time jerked loose from him, and backed off 10 or 12 feet. Appellant then said he wanted some of her berries. This was the first and only remark he made during the whole transaction. Mrs. Gunter replied that she had a bucket of berries behind a clump of trees a short distance off, and would get it and give it to him. She went towards and after getting behind the trees ran away. Appellant did not pursue her. An officer testified that about 3 o'clock of the same evening he went to arrest appellant, who, when he saw him coming at a distance of about 150 yards, fled, pursued by the officer. After having chased him some 100 or 200 yards, appellant fell in a ditch, and was captured, and placed in jail. This statement embodies substantially the evidence in the case, and all the testimony which bears upon the intent or motive of appellant. He was a boy about 14 or 15 years of age. His flight from the officer may be as well attributed to the fact that he committed an assault as to any other motive. It does indicate, perhaps, fear of arrest and punishment for having taken hold of the assaulted female. So the only evidence, it occurs to us, in this record, bearing upon the question of the intent to rob, will be found in the statement by appellant, after Mrs. Gunter had backed off from him, that he wanted some of her berries. We do not believe that this testimony is sufficient to show that to be the reason of his assault upon Mrs. Gunter, when viewed in the light of all the testimony. That he committed an assault is fully shown, but that it was for the purpose of robbery we think is too doubtful to justify this conviction.

tion. The judgment is reversed, and the case remanded.

HURT, P. J., absent.

### BYBEE v. STATE.

Court of Criminal Appeals of Texas. Oct. 12, 1898.)

#### HOMICIDE—EVIDENCE—CHARACTER OF DECEASED.

Evidence of a witness that deceased had tried to attack witness a short time prior to the killing was inadmissible to show the character of deceased as a fighting person.

Appeal from district court, Fannin county; R. D. McClellan, Judge.

Jim Bybee was convicted of murder in the second degree, and he appeals. Affirmed.

J. H. G. Lee, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for the term of 18 years, and he prosecutes this appeal.

Appellant offered to prove, by the witness Jake Meyers, that, a short time prior to the homicide in question, he (Meyers) had a difficulty with the deceased, and that the deceased tried to get to him, but was held and prevented from doing so. This testimony was objected to on the part of the state on the ground that it was hearsay, and not pertinent to any issue in this case. Defendant insisted that it was pertinent and relevant, because it tended to show that deceased was of a violent temper and a dangerous character, and that said evidence would have shown that said deceased was not the innocent and inoffensive character that the state represented him to be, but, on the contrary, was of a reckless disposition, and ready and willing to engage in a difficulty. The testimony was excluded, and appellant reserved his bill of exceptions. It was not competent to prove the character of the deceased by this sort of testimony. Evidence of his general character as being peaceable and inoffensive, or a violent and dangerous man, was certainly admissible, but the proof offered was not of this character. The evidence was of another difficulty, that had no connection with the charge against the defendant, and it would not have been proper for the court to have allowed proof of said difficulty, especially of the particulars thereof.

The court committed no error in overruling appellant's motion for a continuance. Conceding that due diligence was used, we do not believe the absent testimony of John Gillemwater, if he would testify as stated, was material. We do not believe there was any self-defense in this case, as appellant was the aggressor from the beginning. He provoked and brought on the difficulty. The application does not show that said absent

witness saw the beginning of the difficulty, but first saw the parties when they were standing upon the ground. This was some time after the original assault by defendant on deceased, and the taking charge of his horse and leading it back towards the public square. Under the circumstances of this case, even if the witness would testify to what is stated, which is doubtful, it would not be material. Nor would the newly-discovered evidence of Mary or Mattie Ward be material to the defendant on the grounds above stated.

Appellant also complains that the court refused to give the special charge asked on self-defense. The court gave a charge on self-defense which was certainly all that appellant could ask. The charge asked was not the law of the case. As stated above, we do not believe the issue of self-defense was in the case. Appellant, by his own unlawful acts, provoked and brought on the difficulty, and the jury were exceedingly lenient when they rendered the verdict finding him guilty only of murder in the second degree, and assessing his punishment at 18 years in the penitentiary. There being no errors in the record, the judgment is affirmed.

### LESLIE v. STATE.

(Court of Criminal Appeals of Texas. Oct. 12, 1898.)

#### PASSING FORGED INSTRUMENT—INDICTMENT—CONTINUANCE—JURY—EVIDENCE.

1. It is sufficient to give defendant's name in an indictment as "L., alias S."

2. There is no repugnance in an indictment for passing a forged instrument because it, while alleging that the instrument purported by its tenor to be the act of P., set out the indorsement by S.; the making of the instrument, and not the indorsement, being the basis of the forgery.

3. One is served with a true copy of an indictment though it is perfectly plain, while the original shows a line or blotch across a figure.

4. Application for continuance for witnesses to prove an alibi is too general, where stating that they will testify that they saw defendant at a certain place on the evening in question, the time in the evening not being stated, the state having located him early in the evening, and it being possible that he could also have been at the other place late in the evening.

5. One may be convicted of passing a forged instrument, though it be not in his handwriting.

6. A panel is properly filled with talesmen, where all the regular jury except seven are trying another case and have been out considering it for a long time.

7. Testimony that defendant attempted to pass a forged instrument to witness is admissible to show the intent with which he shortly afterwards passed it.

8. Also to connect him with it, and to contradict him as to his whereabouts, he having stated that he was not at the place in question at that time.

Appeal from district court, Nolan county; W. R. Smith, Judge.

A. M. Leslie, alias A. B. Stovall, appeals from a conviction. Affirmed.

O. P. Woodruff, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of knowingly passing as true a forged instrument in writing, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

Appellant made a motion to quash the indictment on the ground that it failed to allege the name of the defendant or give an accurate description of him. The name of the defendant, as stated in the indictment, is "A. M. Leslie, alias A. B. Stovall," which means that he was known by both names, and is sufficient. The second ground of his motion to quash was, as appellant claims, that the first count of the indictment alleges that the instrument purported by its tenor to be the act of R. B. Pyron, when it was indorsed by A. B. Stovall, and was consequently the act of Stovall, and not of Pyron. The indictment need not have set out the indorsement. This was not the basis of the prosecution for forgery, but the making of the instrument itself, and there was no antagonism or repugnance in said count of the indictment. See *Labbaite v. State*, 6 Tex. App. 257; *May v. State*, 15 Tex. App. 430; *Hennessey v. State*, 23 Tex. App. 340, 5 S. W. 215; *De Alberts v. State*, 34 Tex. Cr. R. 508, 31 S. W. 391; *Perkins v. Com.*, 7 Grat. 651.

Appellant filed an application for the postponement of the cause in order that he might be served with a true copy of the indictment, claiming that the copy with which he was served varied from the indictment in the cause in the date. The copy with which he was served, in setting out the instrument, had the date 1897 plainly written in figures, whereas the original indictment shows a line or blotch across the figure "7." There is nothing in this contention.

Appellant also craved a continuance of the case on account of the absence of the following witnesses, to wit: J. L. Simpson, Charles Leslie, William Leslie, Rachel Leslie, and George Tyler. Appellant had process issued for all these witnesses, and the record shows due diligence to obtain them. The application shows that he expected to prove an alibi by Simpson and Tyler; and by Charles Leslie, Wm. Leslie, and Rachel Leslie he expected to prove that the instrument, or the indorsement on the back thereof, was not in the handwriting of the appellant. We have examined the application carefully, and as to the testimony of Simpson and Tyler the allegations are entirely too general. They do not state at what time of the evening of the 10th of December they saw the defendant. For aught that appears, it may be true that Simpson saw him at Roscoe on the evening of the 10th, and the state's testimony may be true that he was at Sweetwater, and passed the forged instrument about nightfall on that same evening. It is stated that Tyler saw him on his way to Sweetwater as he passed

his house, but the time of evening is not here stated. The fact that they may have seen him late that evening does not meet the state's case. The allegations should have been more pointed. As to the other witnesses, there is no allegation that they were acquainted with the handwriting of the defendant, but the general statement that they would prove that the instrument alleged to have been forged and passed by the defendant to William Wright was not in his handwriting. Appellant was convicted for passing the alleged forged instrument, and not for the forgery thereof; and, although it may not have been in his handwriting, the state's case was made out. We would further observe, with regard to the testimony of all these absent witnesses, that, in view of the overwhelming evidence on the part of the state that appellant was in Sweetwater late on the evening, about nightfall, of the 10th of December, 1897, and passed said instrument to William Wright, if said witnesses had been present, and testified as alleged, which is doubtful, their evidence would have had no weight with the jury.

Appellant also complains of the action of the court in not giving him a list of the regular jury for the week from which to draw a jury to try said case. The exception shows, as explained by the court, that all of the regular jury for the week were out trying another case, except seven; that said regular jury had been out for some 38 hours considering another case; and that, under such circumstances, the court had the panel filled with talesmen. It was entirely competent for the court to do this, and we do not understand the appellant to complain that the sheriff acted improperly in summoning said talesmen, or that any of the talesmen who were summoned by the sheriff and sat upon the case were not fair and impartial jurors.

It is insisted that the court should have instructed the jury with reference to the testimony of J. M. Foy, and that he should have limited the effect of this testimony to the particular purpose for which it was introduced, to wit, as to the intent with which appellant may have passed the forged instrument charged in the indictment. Foy testified that he saw appellant in Sweetwater late on the evening of the 10th of December, and that he attempted to pass the alleged forged instrument to him. This evidence was certainly legitimate for the purpose not only of showing the intent with which appellant may have subsequently passed the forged instrument to William Wright, if there was any question about that intent, but it was admissible for another purpose. This was the same instrument that he subsequently passed to Wright. Appellant denied any knowledge of said instrument, or any connection therewith, and he also denied being in the town of Sweetwater until after the time when Wright says he passed it to him. So this testimony was admissible for the purpose of identifying

appellant with said forged instrument, and for the purpose of showing that he was in Sweetwater before the time he admits that he was. This testimony was therefore pertinent to other issues in the case besides the question of intent, and the court would have had no right to deprive the state of its use for such other purposes. Besides, there was no danger that appellant might be convicted by the jury for attempting to pass as true said alleged forged instrument, because he was on trial for the passing of said instrument, and not for attempting to pass the same. See *Thornley v. State*, 36 Tex. Cr. R. 118, 34 S. W. 264. We have examined the record carefully, and, in our opinion, the evidence amply supports the finding of the jury. The judgment is affirmed.

### MORRISON v. STATE.

(Court of Criminal Appeals of Texas. Oct. 12, 1898.)

#### HOMICIDE—JUSTIFICATION—MANSLAUGHTER—INSTRUCTIONS.

1. Accused testified that he caught deceased and his wife in the act of adultery, and followed them for the purpose of beating his wife, when deceased attacked him, and the killing was done in self-defense. *Held*, that under Pen. Code 1897, art. 672, he was entitled to an instruction that homicide committed by a husband on one taken in the act of adultery with his wife is justifiable, although accused did not assign that as the reason for the killing.

2. Accused testified that he caught his wife and deceased in the act of adultery in the latter's room; that he waited near by, and when they came out followed them up, and on overtaking them the altercation took place which resulted in the killing. *Held*, that the killing occurred soon enough after the discovery to entitle accused to an instruction on manslaughter.

Appeal from district court, Bexar county; Robert B. Green, Judge.

Tip Morrison was convicted of murder in the second degree, and he appeals. Reversed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 20 years; hence this appeal.

In his motion for a new trial appellant excepted to the action of the court in failing to charge the law of justifiable homicide, and also because the court failed to charge the jury on the law of manslaughter; appellant's contention being that the evidence required a charge on both defensive theories. On an examination of the charge we find that the court charged for the state murder in the second degree, and the only defensive charge given was a charge on self-defense. There were only two witnesses to the facts attending the killing. One of these, to wit, John F. Rodriguez, was introduced by the

state, and the defendant testified on his own behalf. The testimony of the state's witness clearly established an unprovoked murder by lying in wait. This witness states: That he was in the vicinity of the Devine House, in San Antonio, near which the homicide was committed, on the night in question, for the purpose of grazing his mare. That while in that vicinity he saw the defendant come up, and crouch down on the street, near some bushes. Presently he saw the deceased and Jennie Morrison, the wife of the defendant, come along from the direction of the Devine House. As soon as they passed, the defendant ran across the street, and shot the deceased in the back, inflicting upon him a wound which caused his death. That defendant then ran off, and witness did not go to the body, but went back to his home. The defendant himself testified that he shot deceased. He states he had reason to believe that deceased was committing adultery with his wife; that on that particular night he was informed by one George Wright that his wife was to meet the deceased at the Devine House, where deceased was working as a domestic, and he went with Wright to the premises; that he saw his wife in the room of the deceased; deceased was then in another room, washing dishes; that he and Wright got under the house and under the room of the deceased; that after a while he heard deceased come in the room, and he heard deceased and his wife get on the bed in the room, and he states that he heard them copulate; that they remained there about an hour; that he heard them get up off of the bed, and that he and Wright then got off about 35 steps, and stood in the dark, near the privy, and that he saw deceased and his wife come out of the room together; that he and Wright went around another way, and intercepted the parties; that he came up behind them, and as he approached he said to his wife, "I have caught you," and she replied, "For God's sake, don't disgrace me on the street." Walker Richardson, the deceased, said, "He is nothing but a common Southern cur," and that he replied, "You are a son of a bitch." The deceased broke, to run on him, and that when he got pretty close he hit him with his six-shooter; that deceased wheeled out of the way, and he gave him a kick, and that when he got him down there he shot him; that deceased had a six-shooter at the time; that after he shot him deceased told him that he was dead, and not to shoot him any more; that he led him up to the corner, and that he and George Wright left him; that George Wright picked up the pistol. Appellant stated that it was his intention when he came up to the parties to give his wife a beating with the six-shooter, and leave her alone; that it was not his intention to kill deceased; that deceased took it up, and he had to kill him. If this statement of appellant is true,

then, evidently, deceased, Walker Richardson, and defendant's wife were guilty of adulterous intercourse in the room of the deceased on the Devine premises. The circumstance of their meeting and being there was such as to induce the reasonable belief on the part of the defendant that they were engaged in adulterous intercourse and the parties had not separated when defendant came up with them. If this was the motive that actuated appellant in the homicide, then, unquestionably, under article 672, Pen. Code 1897, he was justified in taking the life of the deceased. See *Price v. State*, 18 Tex. App. 474; *Massie v. State*, 30 Tex. App. 64, 16 S. W. 770. However, it is stated that appellant did not assign this as the motive for the homicide, and that, consequently, the court was not required to give this article in charge. Undoubtedly, if the defendant's testimony is to be believed, the attack by him on the deceased was superinduced by the conduct of the deceased towards his wife; and we do not believe the court was authorized to overlook this phase of the case, notwithstanding appellant himself assigned the killing to another cause, to wit, that he was about to attack his wife on said account, as she was to blame for going to the room of the deceased; and that he killed the deceased in self-defense, because he interfered between himself and his wife. There is no inconsistency between the cause assigned by appellant for the killing and the cause shown by the facts attending the killing. The jury may not have believed that deceased attacked appellant at all, or that he acted in self-defense; they may have discredited that part of the appellant's testimony; but they may have believed that appellant slew deceased because he had but recently caught him in the act of adultery with his wife, but, not being authorized under the instruction of the court to give him the benefit of that view of the case, they could not acquit him on that ground. In our opinion, that defense was clearly raised by the testimony, and appellant should have had the full benefit of a charge presenting that theory. Furthermore, the evidence, according to our view, raised the issue of manslaughter. This is not like the case of *Pitts v. State*, 29 Tex. App. 374, 16 S. W. 189, where there was clearly a prior meeting between the parties before the meeting at which the killing took place. True, in this case defendant was standing some 30 steps from the parties when they came out of the door from the room where they had evidently been copulating. He stood in the dark. As soon as they passed out, he immediately pursued them, and the moment he came up with them the altercation occurred in which the homicide was committed. There was here no two meetings, but on the first meeting defendant instantly pursued, until he came up to the deceased and his wife. But a few moments of time could

have elapsed between the exit of the parties from the house and the shooting. We do not believe the defendant, under the law, was required to fire upon the deceased as soon as he emerged from the door in order to avail himself of his defense under the theory of manslaughter. Certainly, under the rule laid down in *Eanes v. State*, 10 Tex. App. 421, if we consider that an interval of time had elapsed between the first meeting and the homicide, then a charge on manslaughter, in connection with cooling time, should have been given. As stated before, however, no charge on manslaughter was given, and defendant was entirely deprived of this theory of his defense presented by the facts of the case. It is difficult to conceive how the learned judge who tried the case should have withheld a charge on this subject, unless he entirely disregarded and discredited the testimony of the appellant. Unquestionably, the cause assigned by him was adequate cause, under our statute, and sufficient to engender passion, and the jury should have been afforded an opportunity to pass upon the truth of his evidence.

Appellant assigned as one of the grounds of his motion for a new trial that the jury received other testimony than that developed on the trial of the case, to wit, that one of the jurors stated in the jury room that a former jury which tried the case found defendant guilty, and assessed his punishment at 20 years in the penitentiary. Appellant stated in his affidavit that he was unable to procure an affidavit from any of the jurors as to the facts, because they were not willing to make one, and asked the court to summon the jurors who tried the case, and place them under oath, so that the defendant might have the benefit of their testimony. The state made a motion to strike out said affidavit and that part of the motion, because it was too general, and did not set up the facts. The court granted the motion, and struck out that part of the defendant's application for a new trial. Appellant then offered to show by one A. Cohen that he was one of the jurors who tried the case, and that, after the jury had retired to consider their verdict, some member of the jury stated that the defendant on a former trial had been convicted, and given 20 years in the penitentiary; that said statement about what defendant had received as punishment at a former trial influenced him in the verdict rendered on the last trial. 44 S. W. 511. The district attorney objected to this evidence on the ground that it should be presented by affidavit, and not stated orally: whereupon defendant's counsel stated that the witness was unwilling to make an affidavit, but that he would swear to the above facts upon the stand under oath; and the court, over the defendant's objections, refused to allow said witness to testify as aforesaid. It is not necessary to decide the questions involved in this matter, as the case

must be reversed on other grounds heretofore stated. We are inclined to the opinion, however, that the affidavit seeking to attack the verdict of the jury was too general. The practice of allowing jurors to impeach their verdicts is not countenanced in the courts of most of the other states of the Union. See 2 *Thomp. Trials*, § 2618, and authorities there cited. Our courts, however, have taken a contrary view, and we have gone to a considerable extent in authorizing jurors to impeach their verdicts. The attempted impeachment here, however, as far as the predicate was concerned, stated no facts, and, we think, was too general in its terms. It is not deemed necessary to discuss what effect the announcement in the jury room that appellant had previously been convicted, and his punishment assessed at 20 years in the penitentiary, may have had upon the jury. The mere statement of that fact in the jury room may not have operated to the prejudice of appellant. Before a case would be reversed on this ground, some prejudice must be shown. The bare statement that a former jury had tried the case, and rendered a certain verdict against defendant, would not ordinarily cause a reversal. For the failure of the court to charge the jury as above pointed out, the judgment is reversed, and the cause remanded.

#### AUSTIN v. STATE.

(Court of Criminal Appeals of Texas. Oct. 12, 1898.)

#### ASSAULT WITH INTENT TO MURDER—DEADLY WEAPONS—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

1. Where the testimony for the state, on a trial for an assault with intent to murder, showed that defendant was riding a gray horse, and for the defense that it was a dark-colored horse, or, according to some of the witnesses, a dark bay, there was no error in refusing to grant a new trial because of newly-discovered evidence that a person saw defendant at a certain place, 8 or 10 miles from where the assault was alleged to have been committed, riding a dark-colored horse, as such testimony was only cumulative, and not likely to produce a different result on another trial, in view of the fact that defendant was positively identified by witnesses for the state as the man by whom certain shots in controversy were fired.

2. Where the evidence, on a trial for an assault with intent to murder, disclosed that defendant went to the house of the person assaulted, called him to the fence, and, after some words, pulled his pistol, and fired three shots, one of which took effect, the evidence did not fail to show that the pistol was a deadly weapon.

Appeal from district court, Limestone county; L. B. Cobb, Judge.

John Austin was convicted of an assault with intent to murder, and he appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of an assault with intent to murder, and his

punishment assessed at a term of two years in the penitentiary; hence this appeal.

The action of the court refusing the continuance asked by appellant will not be reviewed, because a bill of exceptions was not reserved to such ruling. Nor was there error in refusing to grant a new trial on the ground of the alleged newly-discovered evidence of J. W. Campbell. The substance of this testimony is that Campbell saw the defendant at "Cotton Gin," about 8 or 10 miles distant from where the assault is alleged to have been committed, riding a dark-colored horse. The testimony on the trial for the state shows that he was riding a gray horse, or a grayish-colored horse; and for the defense that it was a dark-colored horse,—some of the witnesses say a dark bay. This was one of the issues upon the trial. Newly-discovered evidence, to be available as a ground of motion for a new trial, must not only be competent, but it must be of such a character as would likely produce a different result upon another trial. While the testimony of Campbell would have been competent, yet it was simply in line with the defensive theory, and is only cumulative. And, besides, he did not see the defendant riding this horse except at a point 8 or 10 miles from where the shooting occurred. Under this state of case, the corroboration, to say the least of it, would have been of a rather weak character. The witnesses for the state, in addition to showing the color of the horse to be gray, positively identify the defendant as the man who fired the three shots testified about by the witnesses. Therefore we say there was no error on the part of the court in refusing to grant the motion for a new trial for the testimony of Campbell.

Nor is there any merit in the contention that the evidence fails to show that the pistol used in making the assault was a deadly weapon, or one reasonably calculated to produce death. The evidence discloses the fact that the defendant went to the house of the assaulted party, and called him to the fence, and, after some words, pulled his pistol, and, as his victim retreated, fired three shots, one taking effect. We think it would be remarkable that under this character of evidence we should be asked to hold that a pistol thus used was not a deadly weapon. The judgment is affirmed.

#### HANLEY v. STATE.

(Court of Criminal Appeals of Texas. Oct. 12, 1898.)

#### ASSAULT WITH INTENT TO MURDER—SUFFICIENCY OF EVIDENCE.

A conviction of assault with intent to murder was supported by evidence that defendant was the aggressor; that the person assaulted demurred, and stated to defendant that he was not armed; that defendant then drew his pistol, placed it against the stomach of the other party, and snapped it, but it failed to discharge; that such assaulted party then grab-



bed the pistol, and a scuffle ensued; and that defendant finally succeeded in wrenching the pistol from his adversary, and began beating him with it on the head,—as the snapping of such pistol, under the circumstances, was sufficient to constitute such offense.

Appeal from district court, Bastrop county; Ed R. Sinks, Judge.

Tom Hanley was convicted of assault with intent to murder, and he appeals. Affirmed.

R. A. Brooks, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of assault with intent to murder, and his punishment assessed at a term of two years in the penitentiary. No errors are assigned, and, looking to the motion for a new trial urged in the court below, we find the first two grounds of said motion based upon the supposed illegal admission of testimony. There were no bills of exceptions reserved to the admission of said testimony, if, in fact, it was admitted. Therefore these grounds cannot be considered. It is further contended, as the third ground of said motion, that the verdict is contrary to the law and evidence. There is evidence for the state showing that appellant brought on the difficulty; that the assaulted party demurred, and stated to appellant, in answer to a question, that he was not armed. Appellant then drew his pistol, placing it against the stomach of the alleged assaulted party, snapped it, but it failed to discharge. The assaulted party then grabbed the pistol, and a scuffle ensued. Finally appellant succeeded in wrenching the pistol away from Brown, the assaulted party, and began beating him. The licks were of a very severe character, all being applied to the head of Brown. These facts are admitted by the defendant's evidence, except that with reference to snapping his pistol. If it be true, as testified for the state, that appellant did snap the pistol under the circumstances detailed in evidence, then the jury were justified in their verdict; and we suppose upon this testimony mainly the jury predicated their verdict, instead of reducing it to aggravated assault. Under the circumstances we would not feel justified in saying that the evidence was not sufficient to show a specific intent to kill. That he may have abandoned that idea, and afterwards, in the difficulty, used the pistol as bludgeon, would not change the matter. If he had the intent to kill at the time he snapped the pistol, the state's case was clearly made out. The judgment is affirmed.

#### GUTIEREZ v. STATE.

(Court of Criminal Appeals of Texas. Oct. 12, 1898.)

CRIMINAL LAW—PLACE OF PUNISHMENT—NEWLY-DISCOVERED EVIDENCE—RIGHT TO COUNSEL.

1. It is no ground for a new trial that the place of punishment of a person under 16 years of age, convicted of felony, was fixed as the

penitentiary, instead of the reformatory, when no proof of his age was introduced on the trial.

2. The court is not compelled of its own motion to appoint counsel to defend a person indicted for a felony.

Appeal from district court, Duval county A. L. McLane, Judge.

Hilario Gutierrez was convicted of maiming and he appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant and Rosalio Ruiz were jointly indicted and convicted of maiming one Garza. Appellant's motion for a new trial being overruled, he prosecutes this appeal.

The points relied upon for reversal are that the defendant is under the age of 16 years, and had not the assistance of counsel upon his trial. This was first brought to the attention of the trial court upon motion for a new trial. If appellant was under the age of 16 years as shown by the affidavit of himself and his father, this fact was well known to them before the trial, and cannot be regarded as newly-discovered evidence. This evidence was known to the defendant, and if he had desired the jury to pass upon the place of his punishment,—whether it should be in the reformatory or the penitentiary,—he should have introduced proof upon the trial, and not speculate upon the chances of acquittal, and subsequently raise it on a motion for a new trial. The court was not compelled to appoint counsel to defend appellant. The judgment is affirmed.

#### KEELING v. STATE.

(Court of Criminal Appeals of Texas. Oct. 12, 1898.)

ASSAULT—VARIANCE.

Under an indictment for aggravated assault, a conviction for simple assault may be had.

Appeal from Upshur county court; T. H. Briggs, Judge.

P. A. Keeling was convicted of assault, and he appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was charged with aggravated assault, and was convicted of simple assault. The record contains neither a statement of facts, bill of exceptions, nor motion for a new trial. The indictment and judgment are in good form, and under the indictment a conviction for simple assault could be had. As presented to us, the judgment should be affirmed, and it is so ordered.

#### WAGNER v. STATE.

(Court of Criminal Appeals of Texas. Oct. 12, 1898.)

BURGLARY—BREAKING.

When burglary is committed in the nighttime, the opening of a closed door is sufficient, without any actual breaking.

Appeal from district court, Bexar county; L. L. Martin, Judge.

W. J. Wagner was convicted of burglary, and he appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of burglary, and his punishment assessed at confinement in the penitentiary for a term of three years; hence this appeal.

In his motion for a new trial he criticises the charge, because the court instructed the jury that it was not necessary that there should be an act of breaking to constitute burglary in the nighttime, opening a closed door being sufficient; and that portion of the charge also which defines entry. There is no merit in either of these contentions. It is not necessary, where a burglarious entry is had at night, that there should be an actual breaking. The decisions in this state are uniform upon this question. In addition, the evidence shows without contradiction that there was an actual breaking; that the door of the house was closed, and securely fastened about sunset, and that some time between midnight and day said door was forcibly opened, and property taken from the house. The evidence shows conclusively that a burglary was committed, and it is overwhelming that defendant and his confederate, Garvin, committed the burglary. The judgment is affirmed.

### BRYANT v. STATE.

Court of Criminal Appeals of Texas. Oct. 12, 1898.)

CRIMINAL LAW—CONTINUANCE—ABSENCE OF WITNESSES—CUMULATIVE TESTIMONY—MANSLAUGHTER—CHARACTER OF DECEASED—ARGUMENT—SELF-DEFENSE—THREATS—INSTRUCTIONS.

1. It was not error to refuse a continuance for absence of witnesses, where process was not issued for them as soon as they were in default.

2. Where a witness was in court before the argument commenced, and no request was made to place him on the stand, the previous denial of a continuance on account of his previous absence cannot be urged.

3. The refusal of a continuance for absence of witnesses whose testimony was merely cumulative, and not controverted, is proper.

4. In a prosecution for manslaughter, it was not error to limit the number of witnesses to the character of the deceased, it appearing that 21 witnesses were introduced by defendant, and that the matter was not controverted by the state.

5. A new trial, on the ground of newly-discovered evidence, will not be granted, where the motion leaves the facts relied on in ambiguity.

6. It is not reversible error to limit the time for argument, where the time allowed was sufficient to present all the salient features of the case and the law applicable thereto.

7. Where the time for argument is limited, defendant cannot complain that his attorneys, of their own volition, split up the time, and so handicapped themselves.

8. On a prosecution for manslaughter, where the defense was self-defense, the court need

not charge on the presumption from the use of a weapon, where there was no evidence that deceased used a weapon in the assault made by him on defendant.

9. A charge that threats by deceased against the life of defendant are not a justification for the killing, unless at the time of the homicide the person killed, by some act, manifests an intention to execute the threats, taken in connection with a charge on self-defense covering all of the evidence relating to what passed between defendant and deceased previous to the homicide, including threats, was sufficient.

10. Although by Pen. Code 1896, art. 675, homicide is permitted when inflicted for the purpose of preventing maiming, disfiguring, etc., as well as murder, the court did not err in limiting self-defense to the prevention of murder, where there was no evidence that it was the specific purpose of deceased, in making the assault, to maim or disfigure defendant.

11. An instruction in accordance with Pen. Code 1896, art. 677, providing that homicide would be justified in the protection of the person from any other unlawful and violent attack besides an attack with intent to murder, disfigure, or maim, but that in such case all other means must be resorted to before homicide would be authorized, except retreating, which the person attacked was not bound to do, was proper, where the testimony showed that deceased was a powerful man, stronger physically than defendant, that he had previously assaulted and beaten defendant, and that in making the assault on defendant he used no weapons, but merely advanced towards him with his fists.

Appeal from district court, Limestone county; L. B. Cobb, Judge.

E. R. Bryant was convicted of manslaughter, and he appeals. Affirmed.

O. D. Cannon, E. Hall, Wm. Kennedy, Kimbell Bros. & Blackmon, and Walton & Hill, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of manslaughter, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

Appellant complains of the action of the court in overruling his motion for a continuance. The continuance was craved on account of the absence of the witnesses H. W. Patterson and Z. A. Stephens. The diligence used for these witnesses was not sufficient. They were certainly in default on the meeting of the court in January, 1898, and appellant should have had due process issued for them as soon as they were in default. If he was mistaken as to the service on the witness Patterson, it would not relieve him from the issuance of new process for said witness as soon as he was in default, and he was in default on the meeting of the court if he had been served, and, if he had not been served, it was certainly the duty of the appellant to have new process issued for him. Furthermore, as to this witness Patterson, it is shown that he was present at court before the argument commenced in the case, and came into court, and had his account approved while the argument was in progress. It was the duty of appellant then to ask to place him on the stand, but he did not do so.

By both of these witnesses, appellant states he expected to prove uncommunicated threats against his life. The statement as to the character of the threats to be proved by Stephens is exceedingly vague. He states that he expected to prove by Stephens that the threat was made some time before the killing. By Patterson appellant proposed to prove that on the 3d of October, 1893, about a month before the killing, he heard the deceased make threats against the defendant's life. The defendant proved a number of threats, both communicated and uncommunicated, by deceased against defendant, and these threats were merely cumulative, at the most. And, besides, it does not appear that the state attempted to controvert the proof of threats. Ordinarily a new trial will not be granted for merely cumulative testimony.

We do not believe the court committed any error, as shown by the bill of exceptions, in limiting the number of witnesses to the character of the deceased. Twenty-four witnesses were introduced by the defendant on this phase of the case, and the matter was not controverted by the state.

Appellant complains of the action of the district attorney in asking one of the witnesses for the defendant, on cross-examination, as to the character of the defendant for peace and quietude. On objection, the question was withdrawn. We cannot see any error in this. In this connection, however, appellant insists, in his motion for a new trial, that the question asked, in connection with the discussion in the jury room between the jurors as to the character of the defendant, was such as to authorize a reversal of this case. The affidavit on this point shows "that one of the jurors, Watson by name, before any vote was taken, made a long, strong argument before the jury in favor of finding the defendant guilty; that, in his argument, he (Watson) declared that the defendant was no better than the deceased; and, admitting that deceased was a bad man, still he claimed the same for the defendant." We know of no rule that inhibits the members of the jury from discussing the case,—that is, the evidence,—and a reversal can only be had on account of some misconduct of the jury, as in stating some fact or facts, not in evidence, calculated to prejudice the jury. The affidavit here fails to allege any fact stated by the juror. The general statement here is that, if deceased was a bad man, defendant was also. For aught we know, he may have adduced this conclusion from the evidence in the case, and, in the absence of a showing to the contrary, we must presume that he did so. Looking at the testimony, we are inclined to the opinion that he was warranted in drawing that conclusion. The proof showed that deceased was a bad man, and that defendant was his associate; that he was a gambler; that he had made threats against the life of the deceased; and the circumstances of the killing itself tend to strengthen

this view. See *House v. State*, 19 Tex. App. 227.

We do not think there is anything in the newly-discovered evidence of the witness Sowders. It is not material what kind of a knife appellant may have had in his pocket. We do not think that Haley's expression, when he pulled out the knife, and remarked to Sowders that "this is all he had when he was killed, and it was shut up in his pocket," would indicate that he meant that the knife he exhibited was the particular knife that deceased had. It might be susceptible of that construction, but a motion of this character should not leave a fact in ambiguity.

It is insisted by appellant that the court committed reversible error in limiting the argument in the case to two hours to a side. It is not shown how this injuriously affected the argument, except that Kimbell, one of the defendant's counsel, had only 15 minutes, and the concluding counsel, O. D. Cannon, only had 35 minutes, in which to discuss the case. So far as we are advised by the bill, there was no effort on the part of the court to require all of the defendant's counsel to speak in the case; and the fact that, of their own volition, four or five lawyers split up the time, and so handicapped themselves, if injurious to the defendant, is a matter of which he cannot complain. We think, under the facts of this case, that two hours was ample to present all of the salient features and the law applicable thereto.

Appellant makes an assault on that part of the court's charge relating to self-defense. We have carefully examined the charge, and do not think it is open to the criticism indulged in by counsel. There was no occasion to charge on the presumption from the use of a weapon; there being no evidence that deceased used a weapon in the assault made by him. The court gave appellant the full benefit of a charge on the appearance of danger, which was all he was entitled to in that connection. The charge on self-defense sufficiently covered all of the evidence relating to what had passed between the parties previous to the homicide, including threats; and the fact that the court gave a charge on threats in the following language, to wit: "Threats made by the deceased against the life of the defendant are not to be regarded as affording justification for the killing, unless at the time of the homicide the person killed, by some act then and there done, manifests an intention to execute the threats,"—was, in connection with the general charge on self-defense, sufficient.

Appellant insists that the court in the 21st paragraph of the charge erred in limiting self-defense to the prevention of murder; that is, that the court should have also included, as defensive matter, the right of appellant to act on an attack with intent to maim or disfigure him. We do not understand because the statute uses, in connection with killing to prevent murder, also maiming, disfiguring,

and castration, that in every case the court is required to charge these particular clauses of the statute. The charge is only required to cover such defensive matter as is presented by the testimony. Under the defendant's theory of the case, the assault was evidently made with intent to murder him. True, it might result in maiming or disfiguring him, but, unless it appears from the evidence that this was the specific purpose of deceased in making the assault, it would not become necessary to charge on this matter; nor is the position of appellant to the effect that this statute only has relation to third parties who may interfere, and not to the person assaulted, any more tenable.

Appellant further complains that the court gave a charge, under article 677 of the Penal Code of 1895, to the effect "that appellant would be justified in protecting himself against any other unlawful and violent attack besides an attack with intent to murder, disfigure, or maim, but that in such case all other means must be resorted to before the party would be authorized to take life, except retreating, which he was not bound to do." This is in accord with the provisions of said article, and unquestionably should be given in every case where there is testimony tending to show that the assault was of that character. In our opinion, there is a phase of the evidence here pertinently raising that defense. The testimony for the defendant shows that the deceased was a powerful man, larger and stronger physically than the defendant; and it is also shown that he had previously assaulted and beaten the defendant severely. It was also shown that the deceased, in making the assault on the defendant, did not present or use any weapon, but merely advanced towards him with his fists. Aside from the appearance of danger, which appellant's own testimony tends to establish, there was the manifestations of a violent assault,—that is, one less than an assault to murder, disfigure, or maim, as covered by article 675; and, according to our view, the court was required to give the charge he did, as authorized under article 677. In this connection, it is insisted that appellant had no other means to which he could have resorted besides retreating, and that the charge of the court, referring to other means as used in the statute, was hurtful to him. If there was no other means to which the party could resort, then, of course, the jury, under the charge, would not have required him to resort to other means; but if they believed he could have arrested the assault being made on him by deceased by other means, such as drawing and presenting his pistol and commanding the deceased to halt, then, obviously, the jury, under the charge of the court, would require him to resort to such other means. With reference to this charge on self-defense, we would further observe that it is not a fair method of criticism, as indulged in by appellant, to take up and discuss isolated portions of the charge,

when the charge, viewed as a whole, fairly covers every issue in the case. For instance, he complains that one portion of the charge did not authorize appellant to act, except his life was in danger, when another section of the charge instructed the jury that the defendant had a right to act, not only to protect his life, but to protect himself against serious bodily injury,—that is, the charge properly tells the jury in section 21 that the defendant had a right to slay deceased to prevent deceased from killing or murdering him, and also in section 22 that he had a right to kill deceased in the protection of his person against any unlawful and violent attack, etc., if such attack be for the purpose merely of beating, or any personal injury less than death, maiming, or disfiguring, etc.; and in section 23, in addition, the jury are told that defendant had a right to slay deceased if the attack on him produced a reasonable expectation of fear of death or serious bodily injury; and again, in section 25, appellant is authorized to act on the appearance of danger. So that, in our opinion, the charge adequately covers every phase of the case raised by the evidence on which appellant was entitled to have the jury instructed. Nor is there any antagonism or confusion in the charges given. They were clear and explicit, and we fail to see how the jury could have been misled thereby. The jury only found appellant guilty of manslaughter. Under the evidence in this case, they could well have found him guilty of a much graver offense. Appellant, it appears, had some trouble with the deceased the night before. On the morning of the day of the homicide, and prior thereto, he armed himself with a pistol. The state's testimony tends strongly to show that he made the first assault on deceased, and, when deceased advanced towards him, he had no weapon, but was merely using his hands and fists. Appellant's own testimony barely raises the issue of self-defense. Evidently the jury disregarded this testimony, as they had a right to do. They only gave him a verdict for manslaughter, with the least punishment affixed to that offense, and we fail to see any ground on which we are willing to disturb their verdict. The judgment is affirmed.

BELL et al. v. PRESTON et al. <sup>1</sup>

(Court of Civil Appeals of Texas. Oct. 22, 1898.)

BOUNDARIES—SURVEYS—CALLS—COURSE AND DISTANCE—MONUMENTS—EVIDENCE—FIELD NOTES—DECLARATIONS.

1. Where two adjoining surveys are made at the same time by one surveyor, for the same owner, they constitute one piece of work, and the field notes of one may be considered in determining the bounds of the other.

2. Where the calls for locations and distances of two adjoining surveys, made simultaneously by one person for the same owner, are conflicting, it is for the jury, in an action to determine

<sup>1</sup> For opinion on motion for rehearing, see 47 S. W. 753.

the boundary between them, to say which calls are mistaken.

3. The rule that marked trees and lines, when found on the ground and identified, control calls for courses and distances, has no application where the survey was not made on the ground, but was copied from other surveys.

4. A person's statements as to boundaries of lands, made when he had no interest therein, are inadmissible against him subsequent to his acquiring title.

Appeal from district court, Cooke county; D. E. Barrett, Judge.

Action by George A. Preston and others against R. V. Bell and others to recover possession of land. There was a judgment for plaintiffs, and defendants appeal. Reversed.

J. T. Adams and Stuart & Bell, for appellants. Davis & Garnett, for appellees.

STEPHENS, J. On March 1, 1855, two surveys in the name of Estevan Mora, one of 640 acres, and the other of 320 acres, were made in Warren's bend, in Cooke county, by a deputy surveyor of that county. The larger survey begins on Red river, where none of its calls can now be found, and runs "south, 3,804 varas, to the southeast corner of said [Elijah] Wright [survey]; thence west, 131 varas, to a mound in small prairie, from which a post oak marked 'W' bears north, 19° east, 19 varas; thence south, 185 varas, to a post; thence east, 1,081 varas, to a post, from which a red oak, 20 in. dia., bears south 231 varas, marked 'W'; thence north" to the river, and, with its meanders, to the beginning. This survey was patented September 12, 1850. The other Mora survey, which was patented October 19, 1857, begins, as described in its field notes, "at the southwest corner of Estevan Mora's survey of 640 acres, a rock mound, from which a post oak marked 'W A' bears north, 19° east, 17 varas; thence south, 900 varas, a post; thence east, 1,843½ varas, a post; thence north, 1,095 varas, the southeast corner of the W. H. White survey; thence west 702½ varas, the southwest corner of said White survey; thence south, 195 varas, the southeast corner of said Mora survey; thence west, 1,081 varas, to the place of beginning." As originally recorded in the surveyor's record, the field notes of this survey placed its beginning corner and the southwest corner of the larger survey 231 varas north of the "rock mound, from which a post oak marked 'W A' bears north, 19° east, 17 varas." But the call "thence south 231 varas" was, for some reason and at some time not disclosed, marked out on the record, and not carried into the patent.

Appellees, the admitted owners of the larger Mora survey, brought this suit against the appellants, the admitted owners of the smaller Mora survey, to recover all land north of an old marked line running east from the above corner, witnessed by the "W A" post-oak tree, which corner and line are both still found upon the ground. Appellants disclaimed as to the larger survey, but insisted that

the strip 231 varas wide just north of this line was a part of the smaller tract.

The court submitted the issue of boundary thus joined to the jury, as follows: "(2) In determining the location of surveys, marked trees and lines, when found upon the ground and identified, control calls for course or distance. (3) The two Mora surveys were made upon the same day and by the same surveyor, and the field notes of both of them should be looked to in determining the position of either of them upon the ground. The 320-acre Mora survey calls to begin at a point from which a post oak marked 'W A' bears north, 19 degrees east, 17 varas, which point is designated as the southwest corner of the 640-acre survey. Now, if this tree can be found on the ground and identified as the one mentioned in the field notes, this will indicate the true southwest corner of the E. Mora 640-acre survey, and the true northwest corner of the E. Mora 320-acre survey; and, if the defendants are in possession of any land north of a line running east from said tree, you will find for the plaintiffs; otherwise you will find for defendants."

Besides complaining of this charge, appellants assign error to the refusal of the sixth special charge requested by them, reading: "It is your duty, gentlemen of the jury, to determine what land was intended by the surveyor who surveyed the two E. Mora surveys to be covered by said E. Mora surveys, and in so determining you will look to all the facts and circumstances introduced in evidence before you; and unless you find and believe, after taking into consideration said facts and circumstances, that the preponderance of the evidence introduced herein shows the land in controversy was intended by said surveyor to be a part of the E. Mora 640-acre survey, you will find for the defendants."

In thus submitting the issue, the court made the latter part of the first call in the smaller Mora for its beginning corner control, not only the first part of the same call and its further calls for the W. H. White survey, but the calls of the larger Mora as well, and, in effect, took the case from the jury. Unless, then, that part of the call for the point (rock mound) "from which a post oak marked 'W A' bears north, 19° east, 17 varas," necessarily controls all other calls, appellants' assignments of error must be sustained.

Looking to the evidence, we find that the Elijah Wright and E. Mora locations were made upon substantially the same ground as that first covered by two surveys made in the name of B. W. Osborne, and afterwards abandoned. The Osborne surveys, however, had evidently been made upon the ground, and had well-defined boundaries, while the circumstances in evidence tended very strongly to rebut the presumption that the Mora surveys had been so made. The point marked by the "W A" tree, and mentioned in the

first call of the smaller Mora, and the marked line running east from this corner, were evidently the original southwest corner and south line, respectively, of the eastern Osborne survey. The evidence tended to show that this corner was 416 varas south of the south boundary of the Elijah Wright survey called for in the field notes of the larger Mora, the Wright covering substantially the same ground as the western Osborne. No such line as that called for as the south boundary of the larger Mora can be traced, and the evidence tended to show that no such line had ever been run or marked. There was some evidence tending to show that the south boundaries of the Wright and of the White surveys called for in the field notes of the Mora surveys could still be traced on the ground, though the preponderance of the evidence tended to show that the above "W A" corner, and the line running thence east, were the only monuments now capable of identification in the territory covered by the several surveys mentioned.

Appellants' first contention, that the field notes of the smaller Mora should not be considered in determining the bounds of the larger Mora, we overrule. As both surveys were made at the same time, by the same surveyor, and for the same owners, we think they should be treated as one piece of work. When so treated, in order to join them together, as was evidently intended by the surveyor who made them, there arises an apparent, if not an irreconcilable, conflict between the calls of the two surveys, and hence a conflict between the calls themselves of the smaller Mora; for the call in the larger Mora for distance south from the Wright, in order to make the southwest corner of the larger Mora and the northwest corner of the smaller Mora a common corner, must, at least according to the testimony relied on by appellants, be extended 231 varas. Unless, then, the call in the larger Mora for 185 varas be rejected as a mistake, and extended 231 varas, so as to make it read 416 varas (the further call, thence east "to a post from which a red oak, 20 in. dia., bears south 231 varas, marked 'W,' " being, in any view of the case, a mistake), the call of the smaller Mora, to begin "at the southwest corner of the Estevan Mora's survey of 640 acres," would be in conflict with the further call for "a rock mound from which a post oak marked 'W A' bears north, 19° east, 17 varas"; and, if the south call of the larger Mora be so extended, then appellants' evidence tended to show a conflict between the call last quoted and the further calls of the smaller Mora for the W. H. White survey.

As the trial was by jury, it should have been left to them to determine which, if any, of the material calls in question had been made by mistake, and hence to determine, from all the circumstances in evidence, where the surveyor who made the locations of the two Mora surveys intended the dividing line

between them should be. We conclude, therefore, that the court should not have selected and given controlling effect to the single call mentioned in the third paragraph of the charge quoted above. While it is the general rule, as stated in the second paragraph, that, "in determining the location of surveys, marked trees and lines, when found upon the ground and identified, control calls for course and distance," the rule is not one of invariable application, but, like all other general rules on the subject, is subject to qualification, and the facts of this case called for some such qualification as that contained in the sixth special charge quoted above. It is true the marked tree described in the court's charge, and called for in the field notes of the smaller Mora, could undoubtedly "be found on the ground and identified as the one mentioned" in said field notes, and the jury, under the evidence, could not have otherwise found; and had the evidence also conclusively shown, or the presumption obtained, that the surveyor, in making the Mora survey, went upon the ground and marked this tree, such tracing of his footsteps would doubtless have had controlling effect, and would have warranted the unqualified charge. But, as before seen, the circumstances in evidence tended to show that the survey had not been so made, but that it was office work, and that the surveyor intended to call for the lines and corners of surveys previously made, and in doing so made mistakes, as is usual in such cases. For the views of our supreme court upon what the court's charge should contain in this class of cases, see the opinion of Justice Brown in *Huff v. Crawford*, 89 Tex. 214, 34 S. W. 606. See, also, *Best v. Splawn*, 33 S. W. 1005, and *Ayers v. Beatty*, 24 S. W. 366, decided by this court.

Appellants also assign error to the admission in evidence over their objections of the testimony of the witnesses Locker, Kelly, and Pybas to prove that appellant R. V. Bell, before he acquired his interest in the Mora survey of 320 acres, had stated to each of said witnesses that the northwest corner of this survey was where the call for the "W A" tree indicated it to be. To sustain this ruling, counsel for appellees submit the following proposition, and that only: "The admissions that the defendant R. V. Bell made in reference to the 'W A' tree being the corner of the Mora 320-acre survey were admissible against him, and the fact that at the time he made the admissions he was disinterested, and under no temptation to exceed or fall short of the truth, adds to their weight, and furnishes additional reasons why they should be admitted." No authority is cited in support of this proposition, doubtless for the reason that none could be found. We know of none. This assignment, too, is consequently sustained. For the errors indicated the judgment is reversed, and the cause remanded for a new trial.

**VOLLMER v. SAN ANTONIO & G. S. RY.  
CO. et al.<sup>1</sup>**

(Court of Civil Appeals of Texas. June 1, 1898.)

**RAILROADS—RECEIVERS—CLAIMS.**

Confirmation of report of master on application for classification of a claim consisting of judgment obtained in action begun against a railroad before appointment of a receiver, that it is a lien on the railway and equipments in the hands of the receiver, and shall be paid as a claim of the sixth class (Rev. St. 1895, art. 1472), payable only out of the earnings of the railway in the hands of the receiver, does not preclude payment of the claim from the proceeds of the sale of the property on which it is adjudged a lien, if the earnings of the property coming into the receiver's hands are not sufficient to pay claims of the class.

Appeal from district court, Bexar county; R. B. Green, Judge.

Action by John Vollmer, administrator of Augusta Wenz, deceased, against the San Antonio & Gulf Shore Railway Company and another. From an order confirming the classification of plaintiff's claim, a receiver for the company having been appointed after commencement of the action, plaintiff appeals. Affirmed.

T. J. Newton, for appellant. Wm. Aubrey and Carlos Bee, for appellee.

**NEILL, J.** On November 5, 1894, John Vollmer, as administrator of the estate of Augusta Wenz, deceased, filed suit in the district court of Bexar county against the San Antonio & Gulf Shore Railway Company for damages alleged to be caused to the real property of appellant's intestate by reason of the construction and operation of appellee's line of railroad along Dawson street, in the city of San Antonio, in front of and on which the property of Augusta Wenz abutted. After the suit was filed, Henry Terrell was appointed receiver of the railway company, and was made a party defendant in the suit. Upon the trial of the case on the 5th day of June, 1896, the appellant recovered judgment against the San Antonio & Gulf Shore Railway Company in the sum of \$300 damages, with interest from date of judgment at the rate of 6 per cent. per annum, and all costs of suit. After the recovery of the judgment the appellant intervened in the suit wherein the receiver was appointed, and in his petition of intervention represented that he had recovered against the railway company the judgment before described, and he claimed that by reason of the construction, operation, and maintenance of its line of railway along the street upon which his intestate's property abutted, he was entitled to have said judgment classified as a first-class claim against the receiver, and entitled to have it paid as such. He prayed that his claim be referred to the master in chancery, and that upon his report judgment be rendered for

the amount thereof, and that it be classified as a first-class claim, and that the receiver be ordered to pay to him the amount due on the judgment. By virtue of an order of the court "that all claims of every kind outstanding or which may arise, whether prosecuted by intervention or otherwise, against the San Antonio & Gulf Shore Ry. Co. and the receiver thereof, be, and is hereby, referred to Frank H. Wash, Esq., master in chancery, heretofore appointed by the court, in order that said master, as he is herein empowered to do, may determine—First, the validity of all such claims; second, their several legal and equitable classification; and make due report of his action therein to the court,"—said judgment was referred to said master in chancery for classification; whereupon the master, upon hearing evidence and considering the claim, reported as follows: "I am of the opinion that the debt of said judgment is primarily and solely the debt of the railway company, and that intervenor [appellant] is entitled to judgment against said railway company for the sum of \$300 with interest at the rate of 6 per cent. per annum from the 5th day of June, 1896, until paid, and costs of suit; and that he is also entitled to an equitable and statutory lien on said railway and equipments in the hands of the receiver, and that such lien shall be declared foreclosed, and that said aforesaid claim shall be ordered to be paid as a claim of the sixth class, payable only out of the earnings of the railway in the hands of the receiver,"—to which classification intervenor excepted. Upon the 26th day of January, 1898, intervenor's exceptions to the report of the master in chancery were heard and considered by the court, whereupon it was ordered, adjudged, and decreed by said court that the report of the master in chancery upon said claim of John Vollmer, administrator, be confirmed. From the order of confirmation this appeal is prosecuted.

It appears from the record in this case by virtue of an order of the district court entered in the cause wherein the receiver of the railroad company was appointed that on the 7th day of July, 1896, all the effects, rights, franchises, cars, rolling stock, engines, ties, construction material, rights of way, lands, roadbed, track, equipments, chartered powers and privileges, and all other property of every nature and description belonging to said railway company were sold by the receiver for \$150,000 to third parties, and that the report of the receiver of said sale was upon the 28th day of November, 1896, duly confirmed by the district court. It thus appears that the sale of all the property of the railway company was made by the receiver after appellant applied to the court to have his claim classified, and that no amendment of said application was made setting up said sale or showing that the proceeds thereof were in the hands of the receiver. It must be held, therefore, that the application of

<sup>1</sup> Writ of error granted by supreme court.

appellant was to have his claim classified as provided by article 1472, Rev. St. 1895. Under this statute "all judgments recovered against the person or persons or corporations in suits brought before the appointment of a receiver in the action" are classed as sixth-class claims, and the order of the court confirming such classification of appellant's claim by the master in chancery is correct. We do not understand how this order of confirmation precludes the appellant from having his claim paid from the proceeds of the sale of the property of the railway company, upon which it was adjudged a lien, in the event the moneys coming into the hands of the receiver from the earnings of the property placed in his hands were not sufficient to pay claims of its class. In such event the claim should be paid from the proceeds of the sale of the property upon which it has been adjudged a lien in the same order that liens of like character are paid. There is no error in the judgment appealed from, and it is affirmed.

**MULBERGER v. MORGAN et al.**<sup>1</sup>  
(Court of Civil Appeals of Texas. Oct. 12, 1898.)

**NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASER—PRESUMPTION.**

1. A purchaser, before maturity, of negotiable instruments, though having "notice of facts sufficient to put a man of ordinary prudence on inquiry," is entitled to the protection of an innocent holder, if he had no direct knowledge or trustworthy information of the defense which the maker may have against the original payee.

2. One suing on a negotiable instrument under a written indorsement purporting to have been executed prior to maturity is presumed to have paid a valuable consideration, and taken without notice of defenses against the payee.

Appeal from district court, McLennan county; John G. Winter, Judge.

Action by H. Mulberger against W. W. Morgan and others. Judgment for defendants. Plaintiff appeals. Reversed.

D. A. Kelley, for appellant. Eugene Williams, for appellees.

**KEY, J.** This is the second appeal in this case. The nature of the suit is fully stated in the former opinion. 34 S. W. 148. H. Mulberger was the plaintiff, suing as assignee of the notes sued on, which are negotiable instruments, and purport to have been assigned to him before maturity. The defendants claimed that they were induced to execute the notes by certain false representations made by the original payee; and one of the principal questions in the case is whether or not Mulberger was an innocent purchaser of the notes, before maturity, for value, and without notice. The written indorsement transferring the notes to him purports to have been made before the notes fell due. The charge of the court, in effect, told the

jury that, if they found that the notes were procured by fraud on the part of the original payee, then, in order for Mulberger to claim protection as a bona fide holder, he must have acquired them without actual notice of the fraud, "and without notice of facts sufficient to put a man of ordinary prudence upon inquiry as to whether or not the notes were fraudulently obtained." The rule announced does not apply to negotiable instruments. If the purchaser of commercial paper has no direct knowledge or trustworthy information of the defense which the maker may have against the original payee, and acquires it before maturity, and for a valuable and sufficient consideration, he is entitled to protection as an innocent holder. Of course, if inadequacy of the consideration paid, or any other fact, shows that the purchase was not made in good faith, then the purchaser will not be protected. *Buchanan v. Wren* (Tex. Civ. App.) 30 S. W. 1077, 1082, 1083; *Hynes v. Winston* (Tex. Civ. App.) 40 S. W. 1025; *Wilson v. Denton*, 82 Tex. 535, 18 S. W. 620; *Turner v. Grobe* (Tex. Civ. App.) 44 S. W. 898; *Cromwell v. Sac Co.*, 96 U. S. 58; 1 Daniel, Neg. Inst. §§ 775, 776. There are expressions in the former opinion of this court in this case that tend to sustain the charge in this respect, but they were not necessary to a decision of the questions then under consideration; and the doctrine adhered to in this opinion has been heretofore announced by this court before and since the former decision of this case. *Buchanan v. Wren* and *Turner v. Grobe*, supra. We also agree with appellant that Mulberger, suing as an assignee, under a written indorsement purporting to have been executed prior to the maturity of the notes, is presumed to have paid a valuable consideration, and bought without notice of the failure of consideration set up by the defendants; and the burden rested upon the latter to show that Mulberger did not pay a valuable consideration for the notes, or, if he did, that he had notice of the defense interposed by the defendants. Rev. St. 1895, art. 314; *Newton v. Newton*, 77 Tex. 508, 14 S. W. 157; *Herman v. Gunter*, 83 Tex. 68, 18 S. W. 428; *Rische v. Bank*, 84 Tex. 413, 19 S. W. 610. The charge of the court was not in accord with our views on this subject. Assignments presenting other questions are overruled. For the reasons stated the judgment is reversed, and cause remanded. Reversed and remanded.

**CABANESS v. HOLLAND.**<sup>1</sup>  
(Court of Civil Appeals of Texas. Oct. 12, 1898.)

**SALE—RESCISSION—FALSE REPRESENTATIONS—EVIDENCE—OPINIONS—PARTIES.**

1. Where plaintiff, defendant, and M. carried out an agreement that plaintiff should convey a certain tract to M., that M. should pay plaintiff \$1,000, and convey a certain other tract to defendant, and that defendant should convey

<sup>1</sup> For supplemental opinion, see 47 S. W. 738.

<sup>1</sup> Writ of error denied by supreme court.



his stock of cattle to plaintiff, plaintiff may, in an action to rescind for fraudulent representations of defendant, recover the land conveyed to defendant, though title thereto was never in plaintiff.

2. Declarations made by defendant to witnesses relative to his cattle a few days before he sold them to plaintiff, and which the witnesses, at his direction, communicated to plaintiff, are admissible against him in an action by plaintiff to rescind the sale for fraudulent representations.

3. One acquainted with the cattle business may give his opinion as to the number of cattle contained in defendant's stock, basing it on information given him as to the number of calves branded by defendant in a year, and the rule which he states is in general use by stockmen, to multiply the number of calves branded by four to get the number of cattle in the brand.

4. Estimate as to the number of cattle in a stock running loose on a range, which had never all been rounded up, may be given by one familiar with the stock and their range.

5. One cannot, without accounting for non-production of a letter, testify to its contents.

6. That plaintiff, at defendant's suggestion, wrote to certain persons inquiring about defendant's cattle, for purchase of which plaintiff was negotiating, does not show that he did not rely on defendant's representations as to them.

7. One selling stock is responsible to the purchaser for representations in regard to them by one to whom the seller refers the buyer for information.

8. Though one selling a stock of cattle refuses to warrant the number of them, he may be liable for fraudulent representations as to their number.

9. That a purchaser of cattle, after discovery of the seller's fraudulent representations to him, instructed his agent to sell them, which, however, was not done, does not conclusively show a waiver of the fraud.

10. Defendant cannot object, in a suit to rescind a sale made by him, that a certain person who furnished part of the consideration was not a plaintiff, such person having, on death of the original plaintiff, become a plaintiff as one of his heirs, and adopted his pleadings, and thus estopped himself to assert any further claim on his own account.

11. A material misrepresentation, if acted on, may be ground for rescission, though innocently made.

12. Formal demand for rescission of trade by buyer before suit therefor is unnecessary where the seller refuses to do anything in the matter, on the buyer's telling him of the falsity of the representations, and insisting that he be made whole in the transaction.

Appeal from district court, Falls county; Sam R. Scott, Judge.

Action by S. W. Holland, for whom, on his death, his heirs were substituted, against M. W. Cabaness. Judgment for plaintiff. Defendant appeals. Affirmed.

The original plaintiff, S. W. Holland, filed this suit in the district court of Falls county on the 5th day of November, 1890, against the defendant, M. W. Cabaness, to rescind a contract of sale. Plaintiff alleges: That in December, 1889, he owned a tract of 350 acres of land in Falls county, Tex., near the town of Reagan, which he valued at \$3,000; and the defendant, Cabaness, owned a stock of cattle running on the range in Mitchell and adjoining counties, which he valued at \$2,000; and McDowell & Peyton owned a tract of 95 acres of land near Reagan, which they

valued at \$2,000. That it was agreed between the plaintiff, McDowell & Peyton, and the defendant that plaintiff should convey to McDowell & Peyton his tract of 350 acres, and that McDowell & Peyton should pay him \$1,000 in cash, and convey to the defendant, Cabaness, the tract of 95 acres owned by them, and that the defendant should convey to the plaintiff his stock of cattle in Mitchell and adjoining counties. This tripartite transaction was consummated. Plaintiff alleges that the defendant falsely and fraudulently represented to plaintiff that he had in said stock on said range, 24 four year old steers, which could be gathered; that he had branded and turned loose on said range, in the year 1888, 40 head of calves, and that he had branded and turned loose on said range, in the year 1889, 60 head of calves; and that there were now in said stock in said range 250 head of cattle that could be gathered. Plaintiff averred that he relied upon these representations and statements, and was induced by them to make the trade; that these representations were knowingly false, and were made for the purpose of swindling the plaintiff; that there were no four year old steers at all in the stock; that only 15 calves were branded in 1888, and only 30 in 1889, and that there were not more than 125 head of cattle in the entire stock. The petition also avers that the representations were material, in that Cabaness at the time of the trade did not own near the number of cattle that he represented to own, and that they were of much less value than the cattle really owned by him. It is also alleged that the transaction with McDowell & Peyton cannot be disturbed, because they were innocent purchasers, and were not parties to the fraud perpetrated by Cabaness. The plaintiff prayed that he have judgment for the 95 acres conveyed by McDowell & Peyton to defendant, Cabaness, and that the title to the same be divested out of the defendant and vested in plaintiff, and that defendant be decreed to have been a trustee therefor for plaintiff. He also prayed for rents, issues, and profits of said land from the date of the transaction, or, if it be decreed that he could not recover the land, he prayed in the alternative for \$1,500 damages. The defendant answered by general and special exceptions and general denial. All the exceptions were overruled. At the January term, 1897, a supplemental petition was filed, wherein it is alleged that the original plaintiff, S. W. Holland, died on the — day of July, 1896, intestate, and that there was no administration on his estate, and the following named parties allege that they were the only heirs at law of said S. W. Holland, deceased, and prayed that they be made parties plaintiff herein, and be allowed to prosecute this suit in their names as plaintiffs, adopting the original pleading of the plaintiff in the case, to wit: W. P. Windzer for himself and as next friend of James Eddle Windzer; Thomas Davis for himself

and as next friend of Ida Davis, R. L. Holland and Jane Holland, May Hargrove and husband, Fayette Hargrove, Beulah Holland, Joe Holland, and Earnest Holland, all minors, by their next friend, R. L. Holland; Joe H. Holland and wife, Mattie Holland, James H. Holland, by his next friend, Joe H. Holland, Sam W. Holland, and J. T. Brown and wife, S. E. Brown. The case was tried before a jury, and there was a verdict for the plaintiffs for the 95 acres of land in controversy and \$750 rent, on which judgment was rendered by the court.

J. A. Martin and Z. I. Harlan, for appellant. Rice & Bartlett and Dyer & Dyer, for appellees.

FISHER, C. J. (after stating the facts). This case was once before this court, and will be found reported in 30 S. W. p. 63, to which reference is made for further statement concerning the issues involved in the case, and some of the rulings of the trial court on the demurrers here complained of. We find the facts substantially in accord with the case made by the plaintiff's pleadings. In addition, we also find that J. H. Holland, a son of S. W. Holland, executed to McDowell & Peyton a deed to 100 acres of the tract of 350 acres conveyed to them as consideration for the trade alleged in the petition. This conveyance from J. H. Holland went in as a part of the consideration for the trade between plaintiff and the defendant and McDowell & Peyton. We also find that S. W. Holland was ignorant of the true condition of the cattle, and that the stock of cattle sold him were what were understood as stock cattle, and that the defendant, Cabaness, possessed some knowledge of their number, ages, and sex, and that the cattle at the time were in the range in Mitchell county, and were being handled for defendant by one Beall and Nat Smith, both of whom were familiar with the number, condition, and quality of the cattle; and before the trade between the plaintiff and defendant was consummated Cabaness referred plaintiff to Beall and Nat Smith, and requested him to write to them concerning the number and condition of the cattle, and especially to Nat Smith. In pursuance to this request, plaintiff wrote letters to these parties, and received from Nat Smith a reply as follows: "Colorado, Texas, Dec. 6th. Mr. S. W. Holland—Dear Sir: Have just returned from a cow hunt, and found your letter awaiting me, which will account for the delay. Judging from the number Mr. Cabaness turned loose, what I have seen in the range, and number of calves branded, I would say there were about 250 head. Yours, &c., N. L. Smith." The information thus received by plaintiff from Smith, together with representations of the defendant, Cabaness, induced the plaintiff to make the trade in question. The statement contained in this letter, together with the representations of the defendant, were not true. He, at the time, did

not own such number of cattle, but did in fact own about the number as stated in plaintiff's petition; and there is some evidence in the record which tends strongly to show that before this letter was written by Smith, the defendant in effect requested him to misrepresent to plaintiff, Holland, the number and quality of the cattle.

Appellant's second assignment of error complains of the ruling of the court in failing to sustain a special exception to the petition on the ground that it shows no right of action in the plaintiff to the land in controversy, because the title to the same was never vested in plaintiff, but passed directly from McDowell & Peyton to the defendant. This question was, in effect, ruled upon adversely to the appellant on the first appeal of this case. The real consideration for the 95 acres in controversy was advanced by the plaintiff. The effect of the transaction between all the parties was that plaintiff's 350 acres of land was conveyed to McDowell & Peyton for \$1,000 cash, paid by them, and the 95 acres in controversy; and this latter tract was received by the defendant in consideration for the cattle sold by him to plaintiff. The consideration received by the defendant was furnished by the plaintiff, S. W. Holland, and, in the enforcement of grounds for cancellation by plaintiff of the transaction between him and the defendant, the defendant can be required to account to the plaintiff for the consideration received. A court of equity, in rescinding the trade, would enforce plaintiff's equities in the light of the real facts; and if plaintiff in fact advanced the consideration received by the defendant, the court would have the power to hold him responsible to the plaintiff therefore.

It is complained that the court erred in admitting the testimony of witnesses Windzer and Davis as to conversations had with the defendant, and as to messages sent by him through them to the plaintiff, some 15 or 20 days prior to the day on which the trade was made, concerning the number and quality of the cattle. This testimony was to the effect that in the conversations with the defendant he told these witnesses that he had 24 or 25 head of four year old steers, and that he had branded about 40 calves the first year that the cattle were carried out to Mitchell county, and the second year about 60 calves. This testimony was clearly admissible. It was admissible as declarations of the defendant a few days before the trade, as to the number of cattle claimed by him; and it was also admissible as information furnished the plaintiff by these witnesses at the request of the defendant, they having further testified that they furnished Holland with this statement of the defendant.

The sixth assignment of error complains of the ruling of the court in permitting plaintiff to introduce the evidence of witness Beall to the effect that "cattle men generally multiplied the number of calves branded by four

to get the number of cattle in said brand. According to this rule, the defendant ought to have had 140 head of cattle on the range in the summer of 1889." The objection, as made, was because it did not appear that Beall had any personal knowledge of the number of calves actually branded, and that Beall knew nothing about the cattle and calves branded, except as told him by others. The testimony shows that Beall had been in the stock business for a number of years, and that he knew of the stock of cattle owned by Cabaness in Mitchell county since 1887, and that he had, in some respects, control of these cattle; and he also testified that when Cabaness was at his house, in December, 1889, he told him the whole number branded during the year was 35 calves. We can see no objection to this evidence. The witness' familiarity with the handling of stock and his knowledge of that business qualified him to express an opinion as to the number of cattle contained in the stock owned by Cabaness, and to give the rule in general use by stockmen, upon which his estimate was based.

The seventh assignment of error complains of the admission of the testimony of Nat Smith, wherein he stated: "I do not know the exact number [referring to the cattle owned by Cabaness] on the range in Mitchell county in December, 1889, but supposed there was about 100 head. If there were any four year old steers, there were but just a few, that could not be found. I do not know the number of calves branded, as the tally lists were turned over to John T. Beall each year by various parties. The value of these cattle on the range in December, 1889, was probably about \$800 or \$1,000. I think there were about 100 head of cattle on the range in December, 1889, and they were in fair or good condition." The objection was that this testimony was not the statement of facts, but was the supposition of the witness. The testimony clearly shows that this witness was possibly more familiar with the number and the range of the cattle owned by Cabaness than any one else. He had gathered the cattle, and had worked with them for some time. His using the expression "supposed" was simply his statement of his estimate of the number of cattle in the stock in December, 1889. In the nature of things, it was almost impossible to give the accurate number of cattle in a stock running loose upon the range; and where they were not all gathered and collected, as was the condition of these cattle, the best evidence, generally, that can be furnished as to their number is the estimate of those who are familiar with the stock and their range.

There was no error in refusing to admit the evidence of witness Waite, as complained of in the eighth assignment of error. Testimony concerning the Waite cattle was foreign to any issue made in this case. There was no connection between Waite and the plaintiff and the defendant. Further, his pro-

posed testimony concerning what Beall reported to him was clearly hearsay.

The defendant proposed to testify as to the contents of certain letters written at the dictation of plaintiff, S. W. Holland, to John T. Beall and Nat Smith, and upon objection by the plaintiff this evidence was excluded, of which ruling complaint is made in the appellant's tenth assignment of error. The letters were the best evidence of their contents. They were not produced, nor was any effort made to account for their nonproduction. The object of this testimony was to show that Holland did not rely upon the representations made by Cabaness, but wrote letters to Beall and Smith, inquiring about the cattle. If the contents of these letters could have been testified to by the defendant, or the letters themselves had been before the court, it could have added no force to the defendant's case, because it clearly appears from the evidence of Cabaness himself that these letters were written by Holland to Beall and Smith at the request of Cabaness. He testified: "Mr. Holland wrote these letters to Beall and Smith at my suggestion. I suggested them, because they had been handling the cattle. \* \* \* Then I suggested that he write to Smith and Beall." And such is also the evidence of Holland. This clearly shows that Holland did not, independently, seek information concerning the cattle, but he sought it from sources furnished by the defendant, Cabaness. When Cabaness pointed out Beall and Smith to Holland as the parties who could furnish him information concerning the cattle, he became responsible for the representations that they would make concerning the stock; and he cannot be heard to say, because Smith made a false statement, and thereby misled Holland, that he is absolved from responsibility. When he selected Smith as the medium of information, the law would hold him responsible for any representations that were made by Smith that were calculated to mislead or deceive Holland.

The defendant requested the court to give the following instructions to the jury: "The court erred in refusing to give in charge to the jury special charge No. 1 requested by the defendant, and refused by the court. Special charge No. 1 is as follows: 'The defendant asks the court to charge the jury that if they believe from the evidence in this case that at the time of the consummation of the transaction between Holland and Cabaness Holland was informed in any way that Cabaness did not know the number of cattle he owned in Mitchell county, and would not warrant any number, and that Holland completed the trade with a knowledge of that fact, they should find for the defendant.' " "The court erred in refusing to give in charge to the jury special charge No. 3 requested by the defendant, and refused by the court. Special charge No. 3 is as follows: 'The defendant asks the court to charge the jury that if they believe from the evidence in this case that the

defendant, in talking about the trade with Holland, and in finally consummating the same, only told said Holland what had been told to him (defendant) by others, giving the names of his informants, and the plaintiff, Holland, knew that the statements and representations of Cabaness were made upon hearsay, and not of his own knowledge, and were not stated or warranted as true, then, in that event, they will find for the defendant."

The first of these charges makes the whole case turn upon the proposition that, if Cabaness would not warrant any number of cattle, and Holland completed the trade with knowledge of that fact, they would find for defendant. If it was sought to hold Cabaness liable upon the warranty, then this charge would have been proper, for Cabaness testified that he refused to warrant the number of cattle, and the bill of sale executed by him contains no warranty; but Holland's case was not based upon any such theory. The cause of action asserted by him was that Cabaness had perpetrated a fraud upon him by false and fraudulent representations concerning the number and quality of the cattle. If it could be conceded that he had refused to warrant the number and the quality of the cattle, that would not absolve him from responsibility for the fraud that he perpetrated in falsely representing their number and quality, and thereby misleading Holland. This charge ignores that branch of the case; consequently there was no error in the court refusing to give it.

Under the facts in the case it was proper to refuse the second charge requested. This charge loses sight of the fact that Cabaness referred Holland for true information as to the number and quality of cattle to Smith. There may be evidence coming from Cabaness tending to show that he made no distinct representations concerning the number and quality of cattle, and that his statement concerning that matter was simply based upon information received from other sources, and not upon his own knowledge; but, if this had been true, and he referred Holland to a source from which he could gather correct information, and Holland, acting upon that direction, and relying upon the information received from this source, which the evidence shows was the case, Cabaness would be bound, although he himself made no positive statement concerning the condition and quality of the cattle. This theory is not covered by the charge. This charge, if it had been given, would have authorized the jury to find for the defendant, notwithstanding the fact that Cabaness' agent, Smith, the party to whom he referred Holland, deceived and misled Holland by the false representations he made concerning the cattle.

The appellant, in his twelfth assignment of error, complains of the refusal of the court to give the following charge: "The defendant asks the court to charge the jury that if they believe from the evidence in this case

that the plaintiff, Holland, went to Mitchell county in May or June, 1890, and there met one J. T. Beall, who then told him that the 70 or Cabaness cattle in that county were not as numerous, and did not consist of the kind or classes of cattle, as it is alleged by said Holland that Cabaness represented them to be; and that, after receiving such information from said Beall or any one else, he instructed said Beall to sell all or any part of said cattle,—then, and in that event, you will find for the defendant." There was no error in refusing this charge. It conclusively assumes that because Holland, in May or June, 1890, after a discovery of the fraud, instructed Beall to sell the cattle, he elected to retain the cattle, and waived the fraud. An instruction to sell the cattle after a discovery of the fraud, without an actual sale, does not conclusively establish a waiver, and an instruction by the court that such would be the case would be a charge upon the weight of evidence. Such fact would be admissible as a circumstance bearing on the question of waiver; but it could not be conclusively assumed that a naked instruction to sell the property would constitute a waiver of his right to hold the seller responsible for the fraud perpetrated. The evidence upon this question shows that Holland did not retain possession of the cattle, nor did he dispose of them; and that very soon after he discovered the fraud, in an interview with Cabaness, he informed him of the fraud that had been perpetrated upon him, and requested Cabaness to correct the matter, and to make him whole in the transaction, all of which Cabaness declined and refused to do; and the facts in this connection do not show that there was any unreasonable delay upon the part of Holland in the discovery of the fraud or in notifying Cabaness of that fact, and in bringing suit to rescind the transaction.

There are several assignments of error to the effect that because J. H. Holland conveyed to McDowell & Peyton 100 acres of the 350 that they received from plaintiff, Holland, he (J. H. Holland) would have an interest in the cattle in controversy, and that the transaction could not be rescinded unless he was a party. It is true that J. H. Holland was not a party plaintiff to the original suit, but he became a party after the death of S. W. Holland, and in the supplemental petition by which he became a party he adopted the pleadings that had been filed by the original plaintiff, S. W. Holland. This made him virtually a party to the suit, and his connection with it would estop him from ever asserting any further litigation concerning this matter, and any judgment rendered would be conclusive and binding upon him. If he was content that the trade between S. W. Holland and Cabaness should be rescinded without a judgment in his favor for the amount of the consideration furnished by him, it is a matter of which the defendant cannot complain. J. H. Holland was a party to the suit

and to the judgment rendered, and if he saw fit not to ask any separate relief in his behalf it did not affect any interest or right of the defendant, as J. H. Holland was conclusively bound by the judgment rendered.

The appellant requested a charge to the effect that if he, in good faith, referred the plaintiff to Nat Smith for information concerning the cattle, and that Smith falsely misrepresented their condition, he would not be bound. The court refused to give this charge, and in this connection the defendant also complains of the charge of the court wherein the jury were instructed that defendant would be responsible for the false information furnished by Smith. There was no error in refusing the charge requested, nor was there error in the instruction given by court. According to the uncontroverted evidence in the record, Smith was pointed out to Holland by Cabaness for correct information concerning the cattle; and, however innocent Cabaness may have been in the transaction, he would be bound by the representations made by Smith, because he voluntarily selected Smith as the medium through which information should be furnished to the plaintiff concerning the cattle.

The charge complained of in the twentieth assignment of error is not on the weight of evidence. It does not assume that misrepresentations were made to Holland, but it leaves that question for the determination of the jury; and it is not a correct proposition of law to say that a rescission cannot be based upon innocent misrepresentations concerning the character and quality of property, which are relied upon, and which are material, and which induced the plaintiff to act in consummating the trade. *Pendarvis v. Gray*, 41 Tex. 328. A misrepresentation concerning a fact which is important, and which is represented as true, although innocently made, if acted upon by the plaintiff, may be the ground for a rescission. The mala fides of the party making the representations or the knowledge of their falsity is simply an aggravation of the situation, but is not solely selected by a court of equity as the only instance in which relief will be granted.

The appellant insists that the judgment cannot be maintained, because Holland did not demand a rescission of the trade before suit was filed. This, we believe, is an incorrect conclusion reached from the evidence. It is true that Holland did not formally, in terms, demand of Cabaness a rescission of the contract; but soon after a discovery of the fraud he informed Cabaness of the falsity of the representations made to him, and insisted that he be made whole in the transaction. Cabaness declined, and refused to do anything in the matter. Thereupon Holland instituted this suit to rescind. This was tantamount to a proffer to rescind. The absolute and unqualified refusal of Cabaness to do anything in the premises relieved Holland from making any further formal demand for

rescission or tender of the property before suit. In fact, this question was, in effect, passed upon adversely to the appellant in the former appeal of the case. His petition did offer a reconveyance back of the cattle to Cabaness.

These are all the errors that we deem it important to consider. We find no error in the record, and the judgment is affirmed. Affirmed.

## BELCHER v. MISSOURI, K. & T. RY. CO. OF TEXAS.<sup>1</sup>

(Court of Civil Appeals of Texas. Oct. 15, 1898.)

### CARRIERS—FREIGHT—LIABILITY FOR DELAY—INSTRUCTIONS.

1. A carrier is not liable for injury to stock by reason of delay in transportation of feed, unless the carrier, at the time of making the contract of shipment, has notice that the shipper has immediate need of the feed for his stock.

2. An instruction in a case where freight was delivered to a carrier at 2 p. m. Saturday, and was not shipped till 6 p. m. Monday, there being no train Sunday, that in considering the question of negligence of the carrier in failing to transport the freight within a reasonable time it "was under no obligation to run its train on Sunday, and cannot be charged with negligence in failing to transport \* \* \* on Sunday, if it ran no freight train over the line that day," is not open to the objections that it is on the weight of evidence, that it presents a hypothetical issue, and not a real question of fact, or that it singles out and lays undue stress on an issue not in the case.

3. The court having charged on the subject of negligence of the carrier in failing to transport in a reasonable time in a case where the freight was received at 2 p. m. Saturday, and not shipped till 6 p. m. Monday, there was no necessity of giving an instruction to find for the shipper if the carrier was negligent in not getting the car out on Saturday.

Appeal from district court, Cooke county; D. E. Barrett, Judge.

Action by John H. Belcher against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for defendant. Plaintiff appeals. Affirmed.

Yancey Lewis, G. H. Giddings, and J. T. Adams, for appellant. Head, Dillard & Muse, for appellee.

HUNTER, J. This suit was brought by appellant in the district court of Cooke county on the 23d day of February, 1893, to recover of appellee special damages to 1,500 head of beef cattle, caused by the negligence of appellee in failing to transport from Sherman to Gainesville, within a reasonable time, a certain car load of cotton-seed hulls, delivered to it on Saturday, December 24, 1892, consigned to appellant at Gainesville, by reason whereof his said cattle were for three days deprived of their proper and accustomed food, and were thereby greatly injured and damaged. It was also alleged that at and before the time of delivery of said hulls to appellee at Sherman, it was informed and knew plain-

<sup>1</sup> For opinion on rehearing, see 47 S. W. 1020.

tiff's purpose in ordering said hulls, and that he was out of feed for his cattle, and that the same would suffer great injury without said food. The answer was a general denial, and specially that the hulls were received on the 24th of December, 1892, and were forwarded without unreasonable delay; that the next day was Sunday and Christmas,—a legal holiday,—and that it did not run trains from Sherman on such days, and was not bound to do so; that appellant was guilty of contributory negligence in not laying in earlier a sufficient stock of hulls for his cattle to cover Sundays and holidays; that he might have avoided the damages complained of by buying other food in Gainesville, where there was plenty; and that appellee had no notice of the necessitous condition of appellant at the time it received the hulls for shipment; and that the damages sued for were, therefore, not in contemplation of the parties at the time the contract was made. The record discloses that the car of hulls was delivered to appellee at Sherman before 2 p. m. on Saturday, December 24, 1892, and at that time we conclude the local agent at Sherman who received same and issued the bill of lading had no notice of the necessitous condition of Belcher at Gainesville, although there is some evidence that he did then have such notice. However, at 2:05 of the same afternoon a message was sent by appellee's local agent at Gainesville to its train master at Denison, informing him of the facts, and requesting that the car of hulls be forwarded from Sherman immediately. This message was, in substance, repeated by the train master to the local agent at Sherman at 5:52 p. m. of the same afternoon. Appellee had a freight train which left Sherman that afternoon at 6 o'clock, and arrived at Denison at 7:05 p. m. of the same day. There was no freight train out of Sherman to Denison on Sunday over appellee's line. The hulls were not started from Sherman until Monday, the 26th, at 6 p. m., and consequently arrived at Gainesville on Tuesday about noon. The cattle lost considerable flesh by reason of having no hulls to feed with the meal. The evidence tends to prove that the meal is not fit to feed without the hulls, and also that where cattle have been fed for 60 days, as in this case, on cotton meal and hulls, neither straw, hay, nor corn will suffice to take the place of hulls, and that any change in the food causes the cattle not to eat it, and seriously affects them in weight and otherwise. Our supreme court, on a former appeal in this case, upon certified questions from us, held, in effect, that unless the local agent at Sherman who made the contract of shipment had notice of Belcher's necessitous condition at the time he accepted the hulls or entered into the contract, the appellee would not be liable for the special damages to the cattle caused by the delay in the transportation thereof. *Railway Co. v. Belcher*, 89 Tex. 428, 35 S. W. 6.

The second assignment complains of the

47 S.W.—25

court's action in giving a charge to the effect that in considering the question of negligence on the part of appellee in failing to transport and deliver the hulls within a reasonable time after the same was received, appellee "was under no obligation to run its train on Sunday, and cannot be charged with negligence in failing to transport said hulls from Sherman on Sunday, if it ran no freight train over that line that day." The objections made to this part of the charge are (1) that it is on the weight of the evidence; (2) that it presents a hypothetical issue, and not a real question of fact; and (3) that it singles out and lays undue stress upon an issue not in the case. These objections, we think, are untenable, and the assignment is overruled.

The third assignment complains of the court's refusal to give the following charge: "Plaintiff requests the court to supplement its charge as to the duty of defendant to run a train on Sunday by giving the following: 'But if you find that the defendant was guilty of negligence in not getting the car of hulls out of Sherman on December 24, 1892, on which day it ran a train from Sherman to Denison, and if you further find that, but for this negligence, the delay in the transportation would not have occurred, then you should find for plaintiff, if you find the other issues submitted to you in his favor. If you find that the defendant ran a train from Denison to Gainesville on December 25, 1892, and that it was guilty of negligence in holding that car in Sherman on December 24, 1892, and that but for this negligence the car of hulls would have been transported to Denison in time to have been brought to Gainesville in the train which it ran from Denison to Gainesville December 25, 1892, then, upon this issue, you should find for the plaintiff.'" The court had correctly charged the jury in paragraph 2 of its charge on the subject of negligence of the company in failing to transport the car of hulls within a reasonable time, and this special charge was properly refused. The third assignment is therefore overruled.

The fourth assignment is as follows: "The court erred in instructing the jury, in the sixth paragraph of its instructions, as follows: 'It was the duty of the plaintiff, and the law required it of him, to exercise ordinary care to prevent his cattle from suffering injury for want of feed, notwithstanding the defendant may have been guilty of negligence in transporting said cotton-seed hulls; and if you find that plaintiff, by the exercise of such ordinary care as a reasonably prudent man would have exercised under similar circumstances, could have procured other feed for his cattle after he saw that said cotton-seed hulls had not arrived, and if by his failure to procure such other feed he contributed to the injury of his cattle, you will find for the defendant. Or if you find that he failed to exercise ordinary care by delaying longer in ordering the car of hulls from Sherman than an ordinarily prudent man would have done under

similar circumstances, and thereby contributed to his cattle's injury, you will find for the defendant, notwithstanding you may find that defendant was guilty of negligence in failing to transport said hulls from Sherman to Gainesville in a reasonable time,—because, if plaintiff was guilty of contributory negligence at all, the evidence presents the issue whether or not some of plaintiff's damages might not have occurred before he became guilty of contributory negligence, and this damage the jury should have been instructed to award him if he was otherwise entitled to recover." There are no propositions made under this assignment, and the ground of error urged therein, we think, is not well taken, because the evidence totally fails to furnish any data for apportioning the damages to any subdivision of time, as contended for in this assignment, if, indeed, it establishes any sum, even in gross. None is pointed out in the statement made under this assignment, and we have failed to find any estimate thereof in the statement of facts. We find no error in the judgment, and it is therefore affirmed.

# SMITH et al. v. RICHARDSON LUMBER CO.<sup>1</sup>

(Court of Civil Appeals of Texas. Oct. 15, 1898.)

RES GESTÆ—QUESTION FOR JURY—INSTRUCTIONS  
—NOTES—ATTORNEY'S FEES.

1. Declaration of plaintiff, on examining a deed made out to him, while in the hands of a third person, with whom it was left after its execution, that he would not accept it with a certain recital in it, is admissible as *res gestæ* on the issue whether he accepted it.

2. There is no error in refusing to submit an issue to the jury where only one reasonable deduction can be drawn from the evidence.

3. The court having submitted to the jury the question whether a deed was accepted or rejected, it need not grant a special instruction that acceptance or rejection may be shown.

4. Attorney's fees provided for in a note in case of collection by suit may be recovered against the payee in action by an indorsee.

Appeal from district court, Cooke county; D. E. Barrett, Judge.

Action by T. M. Richardson Lumber Company against W. B. B. Smith and another. Judgment for plaintiff. Defendant Smith appeals. Affirmed.

Stuart & Bell, for appellant. W. E. Murphy, for appellee.

TARLTON, C. J. The appellant was indebted to the appellee (doing business under the name of E. A. Butt & Co.) in the principal sum of \$186 for a bill of lumber. The appellant sold to one J. C. Tyree certain realty in the town of Gainesville, for which, secured by vendor's lien, Tyree executed to him a promissory note in the principal sum of \$400, dated November 27, 1895, due 90 days after date, bearing interest at 10 per cent. from date, and providing for 10 per cent. on the principal

and accrued interest as attorney's fees if the note should be placed in the hands of an attorney for collection, or if it should be collected by suit. Before the maturity of the note, the appellant, Smith, transferred and indorsed it in blank to the appellee, to secure the indebtedness for lumber. On February 1, 1897, the appellee brought this suit against J. C. Tyree, as principal, and W. B. B. Smith, as indorser, upon the promissory note above described. On November 11, 1897, the plaintiff recovered against both defendants a verdict and judgment in the sum of \$186 principal, \$20.77 interest, and \$48.20 attorney's fees, making a total of \$254.97, with foreclosure of the vendor's lien. From this judgment the defendant W. B. B. Smith appeals. We dispose as follows of the several assignments of error presented:

1. Among the defenses urged, the defendants pleaded that on or about May 23, 1896, the plaintiff purchased the realty in question from J. C. Tyree, and assumed payment of the note sued on. In support of this plea they introduced in evidence a deed executed and acknowledged on that date from Tyree to E. A. Butt & Co., purporting to convey the realty in question. A controverted issue of fact was whether this deed had been accepted by the plaintiff, or by E. A. Butt, acting for it. After the execution of the deed, it seems to have been left in the custody of one H. Hulén, and while there it was examined by E. A. Butt. One Dr. Hodge was permitted to testify, over the objection of the appellant, that upon examination of the deed by Butt, and of the recital therein binding E. A. Butt & Co. or the plaintiff to assume the payment of the note, Butt stated to Hodge that he would not accept the deed. Under the circumstances disclosed by the record, we do not regard this testimony as in the nature of a self-serving declaration, but rather as in the character of *res gestæ*, bearing upon the issue of acceptance or not by the plaintiff. Under the issue made by the pleadings and the evidence of the appellee, the transaction involving the execution and acceptance of the deed had not been consummated at the time of the declaration.

2. Another defense urged by the appellant was that he had been released from all liability upon the note on account of the failure of the plaintiff to institute suit against the principal, Tyree, at the first or even at the second term of the court after the maturity of the obligation. This court finds as a conclusion of fact upon this issue that the principal was actually insolvent when the note matured, and at the first and second terms of the court thereafter. Upon this issue we think that no other reasonable deduction could be drawn from the evidence. *Burrow v. Zapp*, 69 Tex. 474, 6 S. W. 783. Hence the court did not err in failing to submit in any form this question of insolvency to the jury.

3. The court submitted as an issue of fact the question involving the acceptance or re-

<sup>1</sup> For opinion on motion for rehearing, see 47 S. W. 753.

section of the deed by Tyree to E. A. Butt & Co. We do not think that it was called upon to grant the special instruction requested by the appellant that such acceptance or rejection may be shown by circumstantial evidence.

4. The charge of the court authorizing a recovery for 10 per cent. attorney's fees was justified under the recitals of the note sued upon, providing for such attorney's fees under the conditions therein stipulated, and which we have hereinabove set out. The judgment is affirmed.

**LANCASTER GIN & COMPRESS CO. v. MURRAY GINNING-SYSTEM CO.<sup>1</sup>**

(Court of Civil Appeals of Texas. May 14, 1896.)

**TRIAL—DIRECTION OF VERDICT—CORPORATIONS—PROMOTERS' ACTS—RATIFICATION.**

1. Where the evidence, though conflicting, would not justify a verdict otherwise than for plaintiff, there was no error in directing a verdict in his favor.

2. Where one acting for a promoter of a corporation purchased machinery for the corporation before it was organized, and it received and used same thereafter, it is liable for the price, since the receipt and use thereof amounted to a ratification.

Appeal from district court, Dallas county; W. J. J. Smith, Judge.

Action by the Murray Ginning-System Company against the Lancaster Gin & Compress Company for a balance due on a sale. From a judgment for plaintiff, defendant appeals. Affirmed.

Crawford & Crawford, for appellant. Coke & Coke, for appellee.

**RAINEY, J.** We find the statement of the case as contained in appellant's brief to be correct, and we adopt the same, as follows: This suit was instituted in the district court of Dallas county by the Murray Ginning-System Company against the Lancaster Gin & Compress Company on April 18, 1897. The amended original petition, filed November 17, 1896, in substance alleged: That in 1895, and prior to the month of August of that year, plaintiff, at the special instance and request of defendant, sold to defendant certain goods, machinery, and appliances, specified in Exhibit A attached to the petition, for which defendant promised to pay \$2,665.35, as follows: One-third cash on delivery, and the balance in equal amounts, to bear date about the date of delivery of the property, and to become due November 1, 1895, and November 1, 1896, to be secured by a chattel mortgage on the property. That the goods were delivered to, and accepted by, the defendant in July and August, 1895. That on August 17, 1895, and after the delivery of the goods, defendant paid the cash payment of \$884.45,

but failed and refused to execute the notes or pay the balance. It was further alleged that in July, August, and September, 1895, plaintiff sold and delivered to the defendant certain goods and merchandise of the value of \$93, which are set out in the exhibit to the petition. February 18, 1897, appellant filed its amended original answer: (1) A general denial. (2) Specially, that prior to May and August, 1895, defendant was operating five 70-saw gins and compress at Lancaster, and if plaintiff ever furnished the goods sued for it was for the purpose of completing the ginning plant, and to be used in operating the five 70-saw gins; that the plaintiff knew that the machinery was to be used in connection with the five 70-saw gins, and that if defendant ever purchased the machinery it was upon the understanding and agreement that it was entirely adequate, and adapted to the uses for which it was intended,—that is, for the operation of the five gins aforesaid; that the machinery and apparatus was intended to be a complete ginning system, to be used in connection with the said five gin stands; that before any of the machinery was put into the building plaintiff was advised that the machinery would not operate more than four gins, but it insisted that it would operate the five gins; that the machinery was valueless for the purpose for which it was intended; that, if the machinery had been adequate for the operation of the five 70-saw gins, it would have been worth \$4,000. Defendant further pleaded as to certain specific parts of the machinery, and asked a judgment against the plaintiff for \$2,085. In reply the plaintiff filed a supplemental petition, and alleged that all the machinery furnished under the contract with defendant, except the elevators and feeders, was manufactured according to the plans and specifications furnished by defendant; that plaintiff was not consulted as to the fitness of the machinery for the work intended, and did not know the purposes for which the machinery was intended, and that the same was constructed in a good and workmanlike manner, and made out of proper material; that plaintiff had nothing to do with the placing of the machinery in position, and made no representation or guaranty in reference to it. The case was tried by a jury February 20, 1897. The court instructed the jury to find for the plaintiff in the sum of \$1,780.90, with interest from the date of the delivery of all the goods mentioned in Exhibit A, and for \$93, with interest from January 1, 1896. The jury returned a verdict for the plaintiff for \$2,041.88, upon which judgment was duly entered. Defendant's motion for new trial being overruled, it has duly perfected its appeal.

**Conclusions of Fact.**

In the spring of 1895, S. D. Murray ordered of the Murray Ginning-System Company, appellee, certain gin and compress machinery for the appellant, Lancaster Gin & Compress Com-

<sup>1</sup> Writ of error denied by supreme court.



pany. The consideration for said machinery was to be paid one-third cash, and the balance in two notes, in equal amounts, payable at different times in the future. This machinery was manufactured during the spring or early summer of 1895, the exact date not being definitely shown, and delivered to appellant during July and August of said year. S. D. Murray at the time the machinery was ordered was acting under the instructions of W. F. Ladd, who was the main promoter of the Lancaster Gin & Compress Company. Subsequent to the ordering of said machinery, Ladd and Murray entered into the following contract: "Memorandum of agreement entered into this 8th day of May, 1895, between S. D. Murray, of Dallas, and W. F. Ladd, of Galveston, Texas, viz: Mr. Murray agrees to furnish plans and specifications for new gin plants to be erected in time for next season at Palmer, Ferris, and Lancaster, and agrees to take charge and exercise general supervision over the same during their construction; also to furnish the machinery needed at Palmer and Ferris, and also at Lancaster, if it can be so arranged in the contracts with Morris & Staples; also to have charge of such changes in the present plans as may be required. The said Murray further agrees to apply for patents on such improvements in the Rembert machinery as may be discovered in the year 1895, including the cleaner recently designed by him, and also such patentable improvements as may be suggested during the construction of the three plants above mentioned; said patents to be promptly applied for by said S. D. Murray, and assigned by said Murray to W. F. Ladd. In consideration of the above, the said Murray is to receive twelve hundred dollars (\$1,200) for his services, and six hundred dollars (\$600) in addition, said \$600 to cover patent to be applied for on his improved cotton cleaner. Expense of getting patent to be borne by W. F. Ladd. Murray to receive \$5 per day and traveling expenses for such time as he is absent from Dallas on the business above referred to." On May 10, 1895, Ladd and Morris & Staples entered into the following contract: "It is hereby mutually agreed between Morris & Staples, of Lancaster, Texas, and William F. Ladd, of Galveston, Texas, acting for himself and associates, that a company shall be formed at Lancaster for the purpose of carrying on a ginning and compressing business, with such rights and privileges as appertain thereto, buying and selling cotton, cotton seed, and its products, and such other business as may hereafter be agreed upon, same to be fully set forth in the charter of the company. The name of the company shall be the Lancaster Gin & Compress Company, with headquarters in Galveston. So soon as the cost of making the proposed changes in the plant shall be ascertained, the stock will be issued in proportion to the amount contributed by the respective parties hereto. It is agreed

that Morris & Staples shall put in their present plant, real estate, buildings, machinery, and good will at \$8,000, of which \$5,000 shall be paid in stock, and \$3,000 shall be paid them in cash, which \$3,000 shall be used by them for the purpose of paying off all incumbrances, of whatever kind or nature, against their present plant, so that it shall be turned over to the company unincumbered of any indebtedness. One thousand dollars per annum shall be allowed the resident manager or managers of the company. This agreement is signed in duplicate, this 10th day of May, 1895." On June 1, 1895, articles of incorporation were signed by W. F. Ladd, W. H. Seaman, and J. A. Jackson, and the same were filed in the office of the secretary of state, June 6, 1895. The directors named for the first year were W. F. Ladd, W. H. Seaman, J. A. Jackson, T. A. Morris, and C. C. Staples. When Ladd entered into the contracts before mentioned he was acting for the parties who finally became the incorporators of appellant company. At the time Morris & Staples entered into the contract above mentioned they owned a gin plant in the town of Lancaster, which was to be transferred to the appellant company, for which they were to receive \$3,000 cash, which was duly paid to them, and the balance of \$5,000 they were to take in stock in the company, which stock was never issued. During the year 1895 said gin plant was operated by said company, said Staples managing said property at a salary of \$1,000 per year. The appellee knew nothing of the various contracts between the various parties above mentioned, and had nothing whatever to do with their arrangements, but manufactured the machinery for appellant, and shipped and delivered it to appellant, who received same, had it erected, and on August 17, 1895, paid the first installment in cash, which was \$884.45. From all the evidence, we think it conclusively appears, and we so find, that Murray, when the machinery was ordered, was acting for the promoters of the Lancaster Gin & Compress Company; that the machinery was made according to his directions, and that appellee know nothing whatever of the arrangements between Murray and the promoters; that said machinery was delivered to, and received by, the Lancaster Gin & Compress Company, which had the same erected, and was used by it, but finally laid aside, not being proper for the work it was intended for; and that the amount of the verdict of the jury was the amount due the appellee by appellant at the date of said judgment.

#### Conclusions of Law.

The first error assigned is: "The testimony was conflicting, and the court erred in instructing the jury to return a verdict for the plaintiff for the amount sued for." We are of the opinion, after duly considering the evidence, that no other legal conclusion could

properly have been reached than that appellant was liable to appellee for the value of the machinery, as claimed in the petition. Therefore there was no error in the court's instructing the jury to return a verdict for plaintiff.

It is insisted by appellant that, its charter having been procured after the contract for the machinery was made, it was therefore not liable to appellee for the amount due on said contract. This contention would be correct had there been no ratification of said contract by appellant or had it not received benefits therefrom. We think the evidence in this case clearly shows that the corporation, after its organization, ratified the acts of the promoters. It received and used the machinery, by which the contract made by Murray for the machinery became its contract, and appellant is liable for the amount due. *Railway Co. v. Granger*, 86 Tex. 350, 24 S. W. 735; *Alger, Promoters Corp.* § 202; *McArthur v. Printing Co. (Minn.)* 51 N. W. 216; 1 *Mor. Priv. Corp.* § 549. Appellant requested several special charges, but, as no other verdict than that rendered would have been justified under the evidence, the court did not err in refusing to give them. Judgment affirmed.

# NEW ENGLAND LOAN & TRUST CO. v. WILLIS et al.<sup>1</sup>

(Court of Civil Appeals of Texas. May 21, 1898.)

**VENDOR AND PURCHASER—EXECUTORY CONTRACT—TRANSFER OF VENDOR'S INTEREST—EFFECT—TRESPASS TO TRY TITLE—RIGHT TO BRING—ELECTION—RESCISSION.** ●

1. Where a deed reciting that notes were given in part payment for the land does not expressly reserve a lien thereon, but the notes recite that they were so given, and expressly retain a lien to secure payment, the deed and notes will be construed as one instrument evidencing an executory contract to sell, and preventing the title from passing by the deed.

2. Where a vendor holding for part payment notes reciting their consideration and expressly retaining a lien for their payment transferred one of the notes and all his interest in the land, the transferee takes the legal title to the land.

3. Where a vendor holding for part payment two notes reciting their consideration, and expressly retaining a lien for their payment, transferred one of the notes and all his interest in the land for part payment of the note assigned, and receipted on the record the payment of the other note for the purpose of giving his assignee priority over the balance due on the land, the transferee does not hold the legal title to the land in trust simply to insure payment of his priority, but may recover the land by trespass to try title on default of payment of the note assigned to him.

4. Where a vendor brings trespass to try title on default of payment, it is an election to rescind.

Appeal from district court, Hunt county; Howard Templeton, Judge.

Trespass to try title by the New England Loan & Trust Company against Martha J. Willis and others. From a judgment in fa-

vor of an intervener, plaintiff appeals. Reversed and rendered.

This was an action brought by appellant December 8, 1896, against Y. O. McAdams, J. M. Johnston, and the administrator and heirs of H. J. Willis, deceased, to try the title to 125 acres of land in Hunt county, Tex. Defendants in the court below, Y. O. McAdams and J. M. Johnston, filed disclaimers. The other defendants filed pleas of general denial and not guilty. June 22, 1897, appellee Joe Chandler filed a petition of intervention, alleging that J. M. Johnston sold the land in controversy to H. J. Willis, the deed reciting the consideration to be \$2,500,—\$500 cash, one note for \$500, due November 1, 1891, and one note for \$1,500, due March 1, 1892; that some time in 1892 H. J. Willis borrowed \$900 from appellant, giving a deed of trust on the land in controversy; that said sum was borrowed for the purpose of paying J. M. Johnston part of the balance due him on the \$1,500 purchase-money note; that, in order that appellant might have a prior lien on said land, said Johnston transferred the \$1,500 note to appellant, together with all interest he might have in said land; that, after paying said Johnston the sum of \$900 borrowed from appellant, there remained a balance due from H. J. Willis to Johnston, for which said Willis executed his note for \$1,286 to said Johnston, bearing date February 11, 1891, due October 1, 1893, reciting that it was given in part payment of the purchase money for said land, and expressly reserving the vendor's lien; that thereafter said Willis died, and F. M. Newton was in due time appointed administrator of the estate of said decedent; that said Johnston, after the appointment of said administrator, and within one year thereafter, presented his said claim, properly probated, to the administrator for allowance; that said administrator, on August 19, 1895, rejected said claim; that Y. O. McAdams and H. W. Williams became the holders of said claim, holding the same as collateral security, and on the — day of —, 1895, instituted suit in the district court of Hunt county against F. M. Newton, administrator, to establish said claim; that afterwards the debts for which said McAdams and Williams held said claim as collateral security were paid off, and said J. M. Johnston, for a valuable consideration, transferred said claim to Joe Chandler, intervener, as collateral security, and in trust to secure Craddock & Looney; that appellant had wholly failed to present its claim for said loan of money to the administrator for allowance as a claim against the said estate, and more than one year had elapsed since said administrator was appointed. Wherefore intervener, appellee Chandler, said that appellant had lost its priority, and prayed for judgment against said administrator for his said claim, with foreclosure of his lien on the land in controversy, that his lien be adjusted prior to the rights of appellant, and

<sup>1</sup>Writ of error denied by supreme court.

that appellant take nothing as to him, said intervener, and for his costs and general relief. Appellant filed its first supplemental petition replying to said plea of intervention, containing the following exceptions: "(1) That said petition in intervention shows that the court has no jurisdiction of the matters therein alleged. (2) Plaintiff specially excepted to so much of said petition of intervention as seeks in this action to fix said intervener's claim as a lien on the land in controversy, or seeks to adjust any lien of the plaintiff and the lien of intervener, or seeks to establish the intervener's lien as superior to the rights of plaintiff, because the court has no jurisdiction of such matters, but that the same are properly adjustable in the probate court," etc. Said exceptions were overruled by the court. November 15, 1897, judgment was rendered in said cause that plaintiff therein (appellant) take nothing by its suit, and establishing said intervener's notes as a claim for the sum of \$2,462.25 against the estate of H. J. Willis, deceased, and as a lien on the 125 acres of land in controversy, and foreclosing said lien on the land as against this appellant and all the defendants in the court below. It was ordered by said judgment that, in so far as judgment was rendered against F. M. Newton, administrator, the same should be certified to the county court of Hunt county for observance and enforcement; and further provided that appellant should not, by said judgment, be in any way prejudiced from the prosecution of any claim it may have for money against the estate of H. J. Willis, deceased. From this judgment the appellant loan and trust company has duly perfected its appeal to this court.

Chambers & Bartlett, for appellant. Craddock & Looney, for appellees.

BOOKHOUT, J. (after stating the facts). Appellant, in its second assignment of error, complains of the judgment rendered by the trial court, in that the same is contrary to the facts and law, because the transfer to the appellant of the \$1,500 vendor's lien note, together with the interest of Johnston in the land in controversy, vested in appellant the superior title to the land, and judgment should have been rendered for appellant for the land as against the defendants and intervener. The record discloses: That on the — day of —, 1891, J. M. Johnston conveyed to H. J. Willis 125 acres of land in Hunt county, being the land in controversy, for the consideration of \$2,500. Of this sum \$500 was paid in cash, and the balance was evidenced by two promissory notes of H. J. Willis, payable to Johnston; the first note being for \$500, due November 1, 1891, and the second for \$1,500, due March 1, 1892. The notes were recited and set out in the deed, and they further recited in their face that they were given in part payment of the

purchase money for the land, reserving a vendor's lien on the land to secure their payment. These notes were not paid at their maturity, and in May, 1893, H. J. Willis borrowed from appellant \$900, giving a trust deed on the 125 acres of land in controversy to secure the payment of said \$900. This money was borrowed by H. J. Willis for the purpose of paying J. M. Johnston on the balance due him on the purchase money for said land, and was so applied by Willis. In order that appellant might have priority over J. M. Johnston in the payment of said \$900 over the balance that might be due to Johnston by Willis on the purchase-money notes, Johnston executed the receipt of the \$500 note on the margin of the deed record, and also indorsed and transferred the \$1,500 note above mentioned, and a credit was indorsed thereon of \$600, and also executed and acknowledged the written transfer of the said note and his interest as vendor in the land in controversy. After being paid the money borrowed by Willis from appellant, there remained due Johnston on the purchase money \$1,268, for which the first note offered by Chandler was given by Willis to Johnston, and dated back so as to be of the same date as the deed. That the second note introduced by Chandler was given by Willis to Johnston for the interest accrued on the first note down to October 1, 1893, and a credit to that effect was indorsed on the note for \$1,268. After the execution of the above instruments, H. J. Willis died, in Hunt county, Tex., and F. M. Newton was appointed administrator of his estate, which administration is still open. Within the year J. M. Johnston presented the said notes, legally probated as provided by law, to F. M. Newton for allowance, and said claims were by said administrator rejected; and within the time allowed by law H. W. Williams and Y. O. McAdams, the then holders of said notes, filed suit on said notes in the district court of Hunt county against said administrator. The claims, after being presented and rejected as aforesaid, were transferred by Johnston to H. W. Williams and Y. O. McAdams to save them harmless against liability as sureties for Johnston, which suit was pending when appellant filed this suit, and is yet pending. The debt for which Williams and McAdams were sureties was paid off by Johnston, who thereupon transferred said notes to intervener, Joe Chandler. Appellant never presented its claim to the administrator of the estate of H. J. Willis for allowance.

It is insisted that there is no express lien reserved in the deed from Johnston to Willis to secure the payment of the two notes therein set out. It has been held that a deed absolute upon its face, containing covenant of warranty, which recites the execution of notes for the purchase money, but discloses no lien, passes title of the property to the purchaser. If, however, contemporaneous with the execution of such deed, the vendee executes notes

for the purchase money, which, on their face, recite the purchase, and in terms declare the existence of a lien until the notes are paid, this will be as effectual to prevent the title from passing by the deed as though the lien was reserved by the terms of the deed itself. *McKelvain v. Allen*, 58 Tex. 383. In this case, while the deed recites the giving of the notes in part payment of the land, it does not, in express terms, reserve a lien upon the land. The notes, however, recite that they are given in payment for the land, and expressly remain a lien thereon to secure their payment. Under such circumstances the notes and deed will be construed as one instrument, and evidence an executory contract to sell the land. *McKelvain v. Allen*, supra. The superior title to the land remained in Johnston until the notes were paid. Willis having failed to pay the notes, in May, 1893, he borrowed from appellant \$900 for the purpose of paying Johnston, and executed a deed of trust upon the same land to secure that sum. For the purpose of giving appellant priority over the balance due on said land, Johnston executed a receipt on the margin of the county record containing the record of the deed from Johnston to Willis of the payment of the \$500 note therein recited. He also indorsed a credit of \$600 on the \$1,500 note, and transferred the same, after being so credited, to appellant. He also executed and acknowledged a written transfer of the note and all his interest as vendor in the land to appellant. The intention of the parties was to give appellant the prior lien upon the land, and to effectuate this purpose Johnston conveyed the superior title to the land to appellant. By his transfer of the note and all his interest in the land, Johnston conveyed the legal title to the land to appellant. *White v. Cole*, 87 Tex. 500, 29 S. W. 759. Upon default being made in the payment of the note at its maturity, the appellant was authorized to maintain a suit of trespass to try title for the recovery of the land. *White v. Cole*, supra (see 29 S. W. 1148, for opinion of this court in same case); *Hamblen v. Folts*, 70 Tex. 132, 7 S. W. 834.

Appellee Chandler contends that the effect of the transfer of the note and legal title to the land by Johnston to appellant, and the receipt upon the record of payment of the \$500 note, was to give appellant priority in the payment of its loan of \$900; and that it holds the legal title in trust simply to insure and safeguard the payment of its priority, and cannot use it offensively in an action of trespass to try title. The transfer of the note from Johnston to appellant, after describing the note, also describes the land, and concludes: "To have and to hold the above-described land note, together with all and singular the contract lien, vendor's lien, rights, equities, and interest in said land which I have by virtue of being the original vendor in said deed and the payee in said note, and the legal owner and holder of said

note." This transfer was duly acknowledged and recorded. It is not claimed that it does not recite the true contract between the parties. We are referred by appellee Chandler in support of his contention, to the case of *Wiggins v. Wiggins*, 40 S. W. 643, decided by the court of civil appeals for the Third district. In that case it was held that the grantee in a deed absolute, but which was intended to operate as a mortgage, could not recover possession in an action of trespass to try title after default in the payment of the purchase money, and while the grantors are in possession, but his remedy is a suit to foreclose. In that case the grantee in the deed did not, under the facts of the case, have the legal title to the land, but only had a lien upon the property to secure his debt. Neither that case nor the other cases referred to by appellee sustain him in his contention.

Appellant's fifth assignment of error reads: "The court erred in rendering a money judgment in favor of intervenor Chandler, and establishing and foreclosing same against this appellant as a vendor's lien upon the land in controversy, because the evidence showed that, if said intervenor had any lien on said land, it was second and inferior to the superior title of this appellant." We think this assignment is well taken. We have already held that the appellant had the superior title to the land. Under this holding the trial court should have rendered judgment for appellant for the land, and against the intervenor on his plea of intervention seeking to foreclose a lien upon the land.

The case having been tried by the court without a jury, this court will proceed to render such judgment as should have been rendered by the trial court. The judgment of the court below is reversed, and here rendered for appellant for the land.

The administrator has not appealed from and does not complain of the judgment against the estate of H. J. Willis, deceased, establishing the claim against the estate, and that judgment is not properly before us for revision. Judgment reversed, and rendered for appellant.

#### Additional Conclusions.

(June 25, 1898.)

At the request of the appellee Chandler, we file the following additional conclusions of fact: The note executed by H. J. Willis to J. M. Johnston for \$1,500, dated February 11, 1891; retained a vendor's lien on the land sued for, and became due on March 1, 1892. This note, after being credited with \$600 in May, 1893 was transferred by J. M. Johnston to appellant in consideration of \$900 loaned by appellant to H. J. Willis, to be paid to J. M. Johnston. It was so paid, and as a further consideration Johnston transferred his superior legal title to the land sued for to appellant. There is no evidence in the record of the terms of the loan by appellant to H. J.

Willis. At the time of the transfer of the note to appellant the same was past due, and has so remained. H. J. Willis was in default on the note previous to and at the time of his death, and his estate was in default at the time of the institution of this suit. The record does not show when appellant elected to rescind the contract of sale of the land by Johnston to Willis, and assert its superior title, except in the filing of this suit, which was on December 8, 1896, which we find was such an election. The record does not show the date of the granting of letters of administration upon the estate of H. J. Willis.

**BAMMEL et ux. v. KIRBY et al.<sup>1</sup>**  
(Court of Civil Appeals of Texas. June 23, 1898.)

**STREET RAILROADS—NEGLECT—LIABILITY OF RECEIVER.**

The expression "any railroad," in Rev. St. 1895, art. 3017, giving a right of action when the death of a person is caused by negligence of the receiver or other person in charge of "any railroad," his servants or agents, the same as if the road were being operated by the railroad company, includes street railroads.

Appeal from district court, Harris county; John G. Tod, Judge.

Action by William Bammel and wife against John H. Kirby, receiver of the Houston City Street-Railway Company, and another. From a judgment sustaining a general demurrer to the petition and dismissing the action, plaintiffs appeal. Reversed.

F. F. Chew, Sr., and Ed. S. Phelps, for appellants. Jones & Garnett, for appellees.

**WILLIAMS, J.** By their petition in the court below plaintiffs alleged that while the property of the Houston City Street-Railway Company was in possession and under the control of the appellee Kirby, as receiver thereof, appointed by the United States circuit court, the child of plaintiffs was negligently run over and killed by a car operated by servants of such receiver, and plaintiff sought judgment against such receiver as well as against the Houston Electric Street-Railway Company. As against the latter company, it was averred that, after the institution of this action, the property and franchise of the Houston City Street-Railway Company had been sold by the receiver at public sale, and bought in by an agent for that company, and that it had been reorganized and incorporated under the laws of this state, under the name of the Houston Electric Street Railway, which company was in possession of and operating all of such properties, and that such property was now owned and possessed by the same persons who owned same prior to sale. A general demurrer was sustained to the petition, and the

suit was dismissed, on the ground that the statutes of this state gave no cause of action against the receiver of a street railway for the death of a person caused by the negligence of his servants.

Whether or not this ruling is correct depends upon a construction of article 3017, Rev. St. 1895, which gives rights of action as follows: "(1) When the death of any person is caused by the negligence or carelessness of the proprietor, owner, charterer, hirer of any railroad, steamboat, stage coach, or other vehicle for the conveyance of goods or passengers, or by the unfitness, negligence or carelessness of their servants or agents; when the death of any person is caused by the negligence or carelessness of the receiver or receivers or other person or persons in charge or control of any railroad, their servants or agents, and the liabilities of receivers shall extend to cases in which the death may be caused by reason of the bad or unsafe condition of the railroad or machinery or other reason or cause by which an action may be brought for damages on account of injuries, the same as if said railroad were being operated by the railroad company. (2) When the death of any person is caused by the wrongful act, negligence, unskillfulness or default of another."

We believe that it has not been questioned in this state that street railroads themselves, when operating their roads, are liable under this statute for damages for deaths caused by the negligence of their servants. If they are generally liable, their liability is created by the inclusion of them within the words "any railroad" used in the first clause of subdivision 1. If that language embraces street railroads, it must necessarily follow that the same language in the second clause, with reference to the receiver of "any railroad," must also include receivers of such railways, because it is impossible to hold that the words are used in different senses in the two relations. It might be urged that liability would attach to such a company as the owner of "vehicles for the conveyance of passengers," but it is hardly to be supposed that the legislature, if intending to make them liable at all, would express its intention by referring to them as the owners of vehicles, while at the same time declaring generally the liability of railroads. The words "other vehicles" follow naturally after "stage coach," and include such instruments of conveyance as are not embraced in the preceding language. They might include street cars, but we think the more natural construction of the statute is to hold that those operating street railways are included among the owners of "any railroad." That the language "any railroad" employed in such a statute does include street railroads is expressly held by the court of appeals of Kentucky in *Johnson v. Railway Co.*, 10 Bush, 231. No reason can be suggested why the legislature would exempt such companies from the liability created against the

<sup>1</sup> Writ of error dismissed for want of jurisdiction.

others named, and there is nothing in the language used to require such a construction. The word "railroad" has often been held to embrace street railways, the question whether or not they were intended depending upon a proper construction of the whole statute; the purpose of the enactment and the context generally enabling the court to see whether or not they are included. *Com. v. Central Pass. Ry. Co.*, 52 Pa. St. 506; *Gyger v. Railway Co.*, 136 Pa. St. 96, 20 Atl. 399; *Millvale v. Railway Co.*, 131 Pa. St. 1, 18 Atl. 993; *Citizens' Pass. Ry. Co. v. City of Pittsburg*, 104 Pa. St. 522; *Price v. State*, 74 Ga. 378. There are decisions holding that street railways were not included within such words as "railroad" or "railway" when used in particular statutes under construction; but in them, as in other decisions construing statutes, the whole law was looked to for the purpose of ascertaining the legislative intent, and the conclusion was reached in accordance with what the courts supposed to be such intent. *Riley v. Railroad Co.* (Tex. Civ. App.) 35 S. W. 826; *Louisville & P. R. Co. v. Louisville City Ry. Co.*, 2 Duv. 175; *Railway Co. v. Johnson* (Wash.) 25 Pac. 1084. Here the scope and purpose of the statute satisfy us that the legislature intended no distinction between different kinds of railroads, and the language "any railroad" repels the idea that a particular class of roads was not intended to be included. In some of our statutes relating to railroads, street railways have been expressly excepted, in order to prevent the application of the enactment to them, as in the "Separate Coach Law," passed at the same session with the amendment in question making receivers of railroads liable for injuries resulting in death (Rev. St. 1895, art. 4509), and the law creating the railroad commission (Id. art. 4580, subd. 1). We are therefore of the opinion that the language "any railroad," in the statute under consideration, includes street railroads, and therefore gives an action against receivers of such roads for the death of a person caused by the negligence of their servants.

It does not follow that either the original corporation or the Houston Electric Street-Railway Company is also liable upon the facts alleged in the petition. We will not enter upon a discussion of the questions upon which the liability of the corporation depends, but content ourselves with referring to some of the decisions upon the subject. *Fordyce v. Du Bose*, 87 Tex. 78, 26 S. W. 1050; *Railway Co. v. Bell* (Tex. Civ. App.) 42 S. W. 772; *Railway Co. v. Norris* (Tex. Civ. App.) 41 S. W. 708, and authorities cited; *Howe v. St. Clair* (Tex. Civ. App.) 27 S. W. 800; *Railway Co. v. Keller*, 8 Tex. Civ. App. 537, 28 S. W. 724; *Sayles' Supp. Civ. St. art. 4260a*.

The judgment cannot be affirmed, because the action of the court in dismissing the suit against the receiver was erroneous, from which a reversal follows, and plaintiffs may be able to amend so as to show liability on

the part of the company. The judgment will therefore be reversed as to both defendants, and the cause will be remanded. Reversed and remanded.

### CITY OF HOUSTON v. PARR.<sup>1</sup>

(Court of Civil Appeals of Texas. June 23, 1898.)

#### CITIES — CONSTRUCTION OF GUTTER — DAMAGES — LIMITATION.

1. Any error in instructing that depreciation in rental value may be allowed as part of the damages, where the measure of damages is the depreciation in the value of the property, and depreciation in rental value merely enters into an estimate of the depreciation of general value, is harmless; the uncontroverted evidence showing damages rightfully recoverable to at least the amount of the verdict.

2. The statute does not commence to run at date of construction of a ditch by a city against action for damages to property by reason thereof, so as to bar recovery for damages thereafter occasioned, where the property was not directly invaded, but the ditch was constructed where the city had a right to construct it.

Error from district court, Harris county; William H. Wilson, Judge.

Action by Andy Parr against the city of Houston. Judgment for plaintiff. Defendant brings error. Affirmed.

John S. Stewart, for plaintiff in error. J. M. Gibson, for defendant in error.

GARRETT, C. J. Andy Parr brought this suit to recover damages of the city of Houston for injuries to two lots belonging to him done by the construction by the city of a drain or gutter. The original petition was filed March 12, 1896. Trial was had in the court below, and judgment was rendered in favor of the defendant in error, September 14, 1897, for the sum of \$475. The gutter was constructed about the year 1878, and remained unchanged, except as to some repairs thereto, up to the time of the trial. By the construction of the gutter water was thrown upon the plaintiff's lots from time to time, and the soil was washed away, and a gully formed and deepened thereon. The fence and a house were washed away, a cistern injured, and the value of the property was almost totally destroyed. The greater part of the damage occurred within two years prior to the filing of the suit. There were three houses on the lots, and the value of the two lots, without the houses, was estimated at not less than \$300 each, while the houses and lots were valued at \$1,500. The witnesses stated that the damage had been continuous since the construction of the gutter, but the evidence was to the effect that the greater part of it had occurred within two years next before the filing of the suit.

We find no error in the record, except that the court heard evidence as to the depreca-

<sup>1</sup> Writ of error denied by supreme court.

tion in the rental value of the property, and instructed the jury that depreciation in rental value and loss of rents might be allowed as a part of the damages. The measure of damages is the depreciation in the value of the property, and the depreciation of rental value would enter into an estimate of the depreciation of general value of the property. To allow for loss of rents or depreciation of rental value in addition to the depreciation in general value would be to allow a double measure of damages. But since the uncontroverted evidence shows that the property depreciated in value by reason of injuries caused by the gutter within two years before the filing of the suit, to an extent at least to the amount of the verdict, the judgment will not be disturbed.

Counsel for appellant contends that plaintiff's cause of action was barred because the statute of limitations was put in operation at the date of the construction of the ditch. This would be the case where the owner's property is directly invaded, as in *Waterworks v. Kennedy*, 70 Tex. 233, 8 S. W. 36. But here, as in *Railway Co. v. Gieselman* (Tex. Civ. App.) 34 S. W. 658, the ditch was constructed where the party constructing it had the right to construct it. Damages could have been recovered at the time of its construction for such depreciation to the value of the property as it then caused, and, if suit had been brought then, any subsequent recovery would have been barred as by former adjudication. But, no suit having been brought, the plaintiff still had the right to sue for and recover all such damages as may have been caused within two years prior to the time of the institution of his suit, and a suit for permanent injuries in depreciation of the property would bar any future recovery for the construction of the gutter and maintenance of it as it was when the suit was brought. The entire damage is assessed in such case with reference to the past as well as probable future injury, the construction being a public work of permanent character. *Rosenthal v. Railway Co.*, 79 Tex. 325, 15 S. W. 268. The judgment of the court below is affirmed. Affirmed.

#### KOEHLER v. COCHRAN et al.<sup>1</sup>

(Court of Civil Appeals of Texas. June 16, 1898.)

APPEAL—EVIDENCE—SUFFICIENCY—DEEDS—DESCRIPTION—MISTAKE—LIMITATIONS.

1. A finding of court will be sustained on appeal, if there is evidence sufficient to sustain it, though the weight of all the evidence is against it.

2. A grantee retaining possession of the land, that he and his grantor supposed was conveyed to him by the deed, long enough to acquire title by limitations, cannot thereafter assert title to other land owned by the grantor at the time of the sale, and mistakenly included in the description in the deed.

Error from district court, Harris county: John G. Tod, Judge.

Action by F. Koehler against J. B. Cochran and others. Judgment for defendants, and plaintiff brings error. Affirmed.

F. F. Chew, Sr., and L. S. Fawcett, for plaintiff. Jones & Garnett, for defendants.

PLEASANTS, J. This is an appeal from a judgment rendered for the defendants in error in a suit of trespass to try title brought by the plaintiff in error to recover one-half of 39¼ acres of land situated within the corporate limits of the city of Houston; the same being a part of the W. ½ of the Luke Moore league, and described in the petition as the W. ½ of lot No. 6. The defense to the suit was, "Not guilty." The case was tried by the judge of the court without the interposition of a jury, and the plaintiff in error insists that the findings of the court are not sustained by the evidence; and we are of the opinion that this contention cannot be maintained, and that the judgment should be affirmed. The facts, as we conclude them to be, from the record, are substantially these: Both parties claim the land under and through one Johan Moehr, now dead. In 1884 the plaintiff, Koehler, desiring to purchase an inclosed lot of land, containing about 20 acres, lying immediately west of and adjoining the land in controversy, and not having the money to make the purchase, prevailed upon Moehr to buy the property, and to sell it to him (plaintiff) on time. At the time of the purchase by Moehr, he was the owner of the land in controversy, and continued to own it until his death, and after his death it was purchased from the representatives of his estate by the defendants. In 1839 the W. ½ of the Luke Moore league, including the land in controversy, and the tract sold the plaintiff by Moehr in 1884, was subdivided by its owner into lots, and in making this subdivision the surveyor erroneously placed the west boundary line of the Luke Moore league 125 varas west of its actual location; and in 1861 this error was discovered by a surveyor of Harris county, and subsequent to that date the identification and location of these lots in this subdivision of the land has been sometimes ascertained and determined by assuming the western boundary of the league to be that line established as such boundary by Surveyor Powars in 1861, and at other times by assuming the western boundary to be the line established as such by Surveyor Trott when he made the subdivision in 1839 for its then owners. The 39¼ acres, of which the land conveyed to Koehler by Moehr in 1884 is a part, is thus described in the conveyance: The W. ½ of 39¼ acres of land, a part of lot 6 of the subdivision of the W. ½ of the Luke Moore league, and bounded as follows: Beginning at the S. W. corner of lot 4 of said subdivision; thence S., 20

<sup>1</sup> Writ of error denied by supreme court.

deg. W., 430 varas, to a pin oak, blazed on three sides; thence N., 70 deg. E., 500 varas, to a pine blazed on four sides; thence N., 20 deg. E., 430 varas, to the S. E. corner of lot 4; thence S., 70 deg. W., to the place of beginning. And by this same description, with same boundaries, this lot or parcel of land had been previously sold and conveyed by several of its owners, and held and occupied by their vendees. In 1860 lot 6, containing 88 acres, was conveyed to John Priest by Samuel M. Frost, who in 1839 purchased lots 6 and 8 of this subdivision, and in the year 1860 Priest conveyed the 39¼ acres of this 88 acres, describing it as a part of lot 6, to one Kuntz; and from the heirs of Kuntz and their vendees the plaintiff takes title through his vendor, Moehr, to so much of this identical land as was conveyed by Moehr's deed in 1884, and upon which he then entered, and which he still occupies and owns. One of the previous owners of the land bought by plaintiff from Koehler, and upon which plaintiff then entered, and still occupies, testified that he fenced this land in 1882. In 1891 one Thacker sued Koehler to recover the land, and Koehler defended the suit, and asserted title to the premises under his purchase from Moehr, and he also pleaded the statute of limitations of five and ten years; and in making out his title by limitation he availed himself of the possession of his vendor, Moehr, by taking same to his own possession. The plaintiff in that suit claimed that the premises were not in lot 6, but in lot 5, and the defendant, Koehler, defended the suit on the contention that the land was, as his conveyance alleged, a part of lot 6. The verdict was for the defendant, and seems to have been rendered for him upon his pleas of limitation. In this suit Koehler now contends that the land he was put in possession of, and which he now holds, is not a portion of lot 6, and was not conveyed by the deed from Moehr to him, and that the land conveyed by that deed is the land claimed by the defendants, which land, as we have seen, was owned by Moehr at the time of his sale to Koehler, and was separated by a dividing fence from the tract upon which Koehler then entered, and which he had requested Moehr to buy for him; and the only basis for his claim of title to the land sued for is the controverted fact, whether or not the land sold by Moehr, and taken possession of by Koehler in 1884, is a part of lot 6. There is evidence in the record to sustain the finding of the court, that the land is in lot 6. The evidence on this point is conflicting. It is true, and we may concede that the weight of the evidence is against the contention of the defendants. Nevertheless, the evidence in support of that contention is simply sufficient to warrant the finding of the court; and, if such be the fact, the plaintiff's claim of title to the land in controversy is baseless, and he is without standing in

court. But whether the land sold to Koehler by Moehr in 1884, and then taken possession of by the former, be actually a part of lot 6 or not, is, in our opinion, immaterial, since it is manifest from the evidence that the land taken possession of at the time by Koehler was in fact the land intended to be conveyed, and was the land purchased for Koehler, at his request, by Moehr, and that it was clearly not the intention of Moehr to convey, and not the intention of Koehler to buy, the land now sued for. When Koehler received the deed from Moehr, and took possession of the land, he took such title as his vendor had, and he cannot now be heard to say that the deed conveyed to him the land in controversy. He should not be permitted to say, under these facts, that the land conveyed by his deed is not in lot 6. *Koenigheim v. Miles*, 67 Tex. 113, 2 S. W. 81.

Affirmed.

CARSON et al. v. TAYLOR et ux.<sup>1</sup>  
(Court of Civil Appeals of Texas. June 9, 1898.)

JUDGMENTS—COLLATERAL ATTACK—MARRIED WOMEN—LIABILITY OF SEPARATE ESTATE—EXECUTION.

1. A judgment against a married woman cannot be assailed collaterally because of being based on an account for goods furnished the husband in his business as a retail merchant, and not for necessities furnished her.

2. Under Rev. St. 1896, art. 2971, providing that if it appears, in an action against a husband and wife for necessities furnished the wife, that the debt was so incurred and was reasonable and proper, the court shall decree that execution may be levied on either the common property or the wife's separate property, execution may issue on a judgment so obtained against the property of the wife, though it does not so direct.

Appeal from district court, Harris county; John G. Tod, Judge.

Suit by Emma Taylor and George F. Taylor against Carson & Foley. There was a judgment for plaintiffs, and defendants appeal. Reversed.

O. T. Holt, for appellants. Burke, Griggs & Co., for appellees.

GARRETT, C. J. On April 29, 1895, Carson & Foley, appellants, recovered a judgment in a justice's court in Harris county against the appellees, George F. Taylor and his wife, Emma Taylor, for the sum of \$156.07. An execution was issued on the judgment within 12 months, and a pluries execution was issued thereon, and levied upon the land described in the petition, which was the separate property of the wife, Emma Taylor. Joined by her husband, the wife brought this suit to enjoin the sale of the land, because, as she alleged in the petition, the judgment upon which the execution was issued was obtained on an account for goods

<sup>1</sup> Rehearing denied.



for which she was not liable, and was obtained through the fraud of the plaintiffs. The injunction was applied for more than one year after the rendition of the judgment, and there was nothing to bring it within any exception contained in article 2991, Rev. St. 1895.

The district judge granted a preliminary injunction restraining the sale, and on final hearing it was perpetuated. Upon the trial the court heard evidence to show that the account was for goods furnished to the husband, George F. Taylor, in the conduct of his business as a retail merchant, and was not for necessaries furnished the wife in any way to render her separate estate liable. The admission of this evidence, as well as the action of the court in the overruling of exceptions to the petition, have been assigned as error. According to the rule of law in this state, a judgment against a married woman cannot be inquired into collaterally, and can only be set aside for error in a direct proceeding. *Howard v. North*, 5 Tex. 290; *Nichols v. Dibrell*, 61 Tex. 541; *Cayce v. Powell*, 20 Tex. 767. It is as binding against her as it would be against any other person who was *sui juris*. In support of the judgment of the court below, however, the appellee relies upon the fact that the judgment in the justice's court did not direct execution against the wife's separate property. She contends that by article 2971 of the Revised Statutes of 1895, in order to bind the separate estate of the wife, the judgment of the court should direct execution to be levied upon her separate property. The judgment of the justice's court, upon which the execution sought to be enjoined was sued out, was rendered against George F. Taylor and his wife, Emma Taylor, and contained no other direction as to execution than the usual one, "for which let execution issue." It is contended that the form of the judgment makes it a judgment against the community estate of the husband and wife, while the land levied upon, and the sale of which was threatened, was the separate estate of Mrs. Taylor.

We are of the opinion that the judgment against George F. Taylor and wife, Emma Taylor, supports the execution against the separate property of the wife, Emma Taylor. *Howard v. North*, supra. The case of *Taylor v. Stephens* (Tex. Civ. App.) 42 S. W. 1048, cited by the appellees in support of the position contended for, does not decide the question, for in that case the execution was sustained; but the court expressed the opinion that article 2971 of the Revised Statutes of 1895, providing for judgment and execution against the separate property of a married woman, requires that a judgment against a married woman should direct that execution be levied upon her separate property in order to support a levy upon such property; that a general direction that execution issue makes the judgment no more

than a judgment against the community. We cannot agree to this. Regarding the conclusive nature of a judgment against a married woman, and that the effect thereof is to shut off any inquiry back of it, there can be no means of information as to what the nature of the claim is upon which it is rendered. Rev. St. 1895, art. 2971, making provision for the rendition of judgment against the wife, applies where necessaries have been furnished to herself or children, or where expenses have been incurred by her for the benefit of her separate property; and, if there be anything in the contention of appellees, it could only be that in such case it would be necessary to provide that execution should be levied upon the separate property of the wife. Other judgments, such as for torts of the wife or for liabilities incurred before marriage, would not require any such recital. When a person, therefore, should be about to buy land at an execution sale against the wife, he would be required to go into an inquiry as to the cause of action upon which the judgment was rendered. From the conclusive nature of the judgment, we do not think that this would be required, nor that the statute should receive the construction contended for. The liability of the wife is made personal and general, and depends on facts which are concluded by the judgment. If, as in some jurisdictions, the statute required a proceeding in rem against specific property belonging to her, as in Alabama, the case would be different. See *Lee v. Ryall*, 68 Ala. 354, cited in *Taylor v. Stephens*, supra. We are of the opinion that the judgment authorized the execution against the separate estate of Mrs. Taylor. We therefore reverse the judgment of the court below, and here render judgment in favor of the appellants, dissolving the injunction and dismissing the petition. Reversed and rendered.

#### WESTERN UNION TEL. CO. v. WALLER.

(Court of Civil Appeals of Texas. Oct. 19, 1898.)

#### TELEGRAPH COMPANIES—NONDELIVERY OF MESSAGE—RIGHT TO RECOVER—DAMAGES—EVIDENCE—INSTRUCTIONS.

1. Where, in an action for damages for failure to deliver a telegram in time for the addressee to attend his child's funeral, a defense was that he could not have obtained money and paid his passage to the place of burial, even if the telegram had been promptly delivered, it was competent for him to show that a certain person owed him.

2. A father is not precluded to recover for failure to deliver to him a telegram in time for him to attend his child's funeral, by the fact that the child, according to the custom of that locality, should have been buried at a time before the father could have arrived there had the telegram been promptly delivered, where, as a matter of fact, the interment was delayed for several hours, and until the arrival of the train on which the father was expected; and

this, though the father did not know that the burial would be so delayed.

3. A message, "Your child is very low. Come at once,"—is sufficient to put the telegraph company on notice that the child might die at any moment, calling for prompt delivery, and may be the basis for damages from the addressee's failure to arrive in time for the funeral, although the child's death was not announced.

4. Where the cause of action was negligence in failing to deliver a telegram, and the petition simply pointed out as a matter of description two localities where delivery could have been made, a charge that the company was required to deliver at only one of the two places is properly refused.

5. A charge on exemplary damages is properly refused where such damages are not sought in the action.

Appeal from district court, Williamson county; R. E. Brooks, Judge.

Action by J. C. Waller against the Western Union Telegraph Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Walton & Hill and Geo. H. Fearons, for appellant. John, Sansom & Wilcox, for appellee.

FISHER, C. J. This is a suit by plaintiff (appellee) Waller against the telegraph company to recover damages arising from failure to deliver the following telegram: "Meridian, Texas, 8-7-1897. To J. C. Waller, Care of E. McLaughlin, Granger, Texas: Your child very low. Come at once. C. E. Stanton." Judgment below was rendered in appellee's favor for \$400. This telegram was sent from Meridian, Tex., by the telegraph company, about 3 o'clock p. m. of the day it was received, and was received by the defendant's operator at Granger, Tex., about 5:50 p. m. of the same day. Plaintiff at the time resided about six miles from the town of Granger, in Williamson county, Tex. E. McLaughlin, a cousin of the plaintiff's wife and a livery stable keeper, resided in the town of Granger, and the facts show that by the exercise of diligence the defendant could have delivered this telegram to McLaughlin on the same evening it was received, before the close of its business hours, which was 7 o'clock, and that it was guilty of negligence in failing to so deliver the telegram to McLaughlin. It further appears from the evidence that, if McLaughlin had received this telegram, he could and would have sent it out and delivered it to the plaintiff; and that the plaintiff, if it had been received, could and would have boarded the train at McGregor at about 2:50 a. m. that night, and could and would have reached Meridian, Tex., about 5 o'clock p. m. the next evening, in time for the burial. The telegram was not delivered to McLaughlin until the morning after it was received. He then promptly sent it out, and had it delivered to the plaintiff, who came to Granger and procured money, and on the first train after the telegram was received started for Meridian, and

reached there after the child had died and was buried. The child, it seems, died about 4 o'clock on the evening that the message was sent, and it was held over the next day, two or three hours after the usual time for burying, in order to await the arrival of the plaintiff. Plaintiff not arriving at Meridian on the 5:20 train, as was expected, the child was buried.

The law is settled against the appellant on the questions raised in the first and second assignments of error.

There was no error in the ruling complained of in the third assignment of error. The petition was sufficient in alleging where the child was buried, and when and how the plaintiff could have reached there in time for the burial, if the defendant had promptly delivered the message.

There was no error in the action of the court in admitting the testimony of the plaintiff to the effect that J. A. West was indebted to him. This issue was brought into the case by the defendant. The defendant contended that, if the message had been promptly delivered, the plaintiff could not have reached Meridian in time for the burial, because he could not have obtained the money to pay his passage upon the railroad. Plaintiff testified most positively, and without contradiction, it seems, that he did procure money to go to Meridian, and he could have procured it, and testified that he was working for one J. A. West, and that West was indebted to him. The purpose of the defendant was to establish the fact that the plaintiff was without means or credit; consequently unable to obtain money from any source. The plaintiff, in rebuttal, testified to the facts here complained of, to the effect that J. A. West was indebted to him. This testimony had a tendency to disprove the theory advanced by the defendant. The indebtedness of West, a farmer for whom the plaintiff was working, would have a tendency to establish the plaintiff's ability to procure money for the purpose of paying his fare to Meridian. The fact that West was indebted to the plaintiff might be considered by a jury in determining the question whether the acquaintances of the plaintiff at Granger, where he expected to procure the money, would loan it to him; because, if West was indebted to him, his acquaintances, if able to do so, might advance him the money upon the strength of his claim against West.

Appellant's fifth assignment of error is as follows: "The court erred in refusing defendant's motion and request for a peremptory instruction to the jury to return a verdict for defendant, because it appeared from the undisputed evidence in the case that, if plaintiff had received the message immediately on its arrival at Granger, and had embarked on the first train leaving that point for Meridian, he could not have arrived at Meridian until a time three hours after the remains of his child would have been bur-

led, if they had been buried at the usual time after death obtaining in the community where it died and was buried, under the circumstances of distance, weather, etc., there being no evidence that the defendant had any notice that the remains would be withheld from burial for such time, and in excess of such usual and ordinary time; the law being that defendant will only be deemed to have contemplated burial within such usual and ordinary time." Following this assignment there are some others of similar import. The facts in the case show that the corpse was kept two or three hours after the usual time obtaining in that community for the burial of bodies. There was nothing unreasonable in the delay. If it was necessary to hold the corpse over for an unreasonable time, in order to await the arrival of the plaintiff, a different case might have been presented; but the telegraph company must have known that, owing to the uncertainty of the arrival of trains upon which one is expected who will attend the burial, in the nature of things, it was impossible, in all cases, to inter the corpse at the exact time usual and customary in the community where the burial occurs, and that it is expected that a reasonable delay might occur in such cases. The time of the delay in this particular case was not unreasonable.

It is further contended that the message announcing the sickness of the child did not put the defendant upon notice of the child's death, and a cause of action based upon damages arising from failure to be present at the funeral could not be based upon a message simply announcing the serious illness of the child. The message was to the effect that the child was very low; "come at once." This was sufficient to put the defendant upon contemplation of the fact that the child might likely die at any moment, and that death might result from the sickness of which the message on its face conveyed information, calling for its prompt delivery, and the notice actually conveyed was sufficient to put a prudent person upon notice that death might likely result.

The defendant asked a charge to the effect that the defendant was only required to deliver the message to McLaughlin at his place of business or at his residence, taking the position in the assignment that the allegations of the petition complained of the refusal to deliver at those places, and which being the case, the defendant would only be required to deliver at the places named. Plaintiff's cause of action was negligence in failing to deliver. The petition simply pointed out as a matter of description two localities where delivery could have been made. The pleadings upon this question were simply descriptive of the locality of McLaughlin. The cause of action was the negligence in failing to deliver to him. There was no error in refusing to give the charge.

In response to the fourteenth assignment

of error, there is no contention upon the part of plaintiff that a delivery should have been made to other parties than McLaughlin. Consequently there was no error in the refusal of the court to give any charge upon that question.

The charge of the court, considered as a whole, is not subject to the criticism urged against it in the sixteenth assignment of error. It is not upon the weight of evidence, and it leaves the issues there presented to the determination of the jury.

The charge of the court was sufficient upon the question as to the right of the defendant to transact its business during certain office hours, and there was no error in refusing the charge requested by the defendant upon that question.

There was no error in refusing the charge requested by the defendant to the effect that the jury should not be permitted to consider any element of exemplary damages, because there was no issue of that kind in the case, and no damages of that character were asked by the plaintiff. The court is not required, in any case, by a charge, to negative the existence of a state of facts or theory which does not exist and is not contended for. We find no error in the judgment, and it is affirmed. Affirmed.

McGREGOR et al. v. SKINNER et al.<sup>1</sup>  
(Court of Civil Appeals of Texas. June 9, 1898.)

APPEAL—RECORD—POSTPONEMENT—AMENDMENT  
—NOTES—CONDITIONS.

1. In the absence of an exception to the denial of a continuance, assignment of error based on it cannot be considered.

2. Postponement of trial is in the discretion of the court.

3. There is no error in refusing to allow defendants to amend their answer on the trial to state matters which were necessarily within their knowledge before trial.

4. That the understanding at the time a loan was made was that the note therefor should be signed by all the stockholders of a corporation, and that the two who did sign should obtain their signatures, does not relieve such two from liability on the note, they having delivered it without procuring the names of others, and it having been accepted.

Appeal from district court, Harris county; William H. Wilson, Judge.

Action by Sarah R. Skinner and husband against J. D. McGregor and others. Judgment for plaintiffs. Defendants McGregor and another appeal. Affirmed.

W. G. Love, for appellants. Ed. S. Phelps, for appellees.

WILLIAMS, J. By the amended petition on which the cause was tried, Skinner and wife sought to recover of the Texas Automatic Light Company and appellants, Moore and McGregor, the sum of \$1,000, with inter-

<sup>1</sup> Rehearing denied.

est, and a stipulated attorney's fee, upon a note payable to Mrs. Skinner, signed by the corporation, and upon the back of which the other defendants were alleged to have written their names as original joint undertakers at the time of its execution, which note was alleged to have been given for a loan of money belonging to Mrs. Skinner in her separate right, and to be her separate property. The corporation, in answer, undertook to plead in set-off an indebtedness alleged to be due it from Skinner upon subscriptions to its stock, averring that the note sued on was in fact the community property of Skinner and wife. Exceptions were sustained to this answer on the ground that it sought to set off the debt of the husband against the note belonging to the wife. Moore and McGregor answered that they were only indorsers of the note for accommodation, and that they had been discharged by failure of plaintiffs to exercise proper diligence. They also prayed for judgment over against the corporation. When the cause was called on appearance day, it was set by agreement for October 18, 1897. On that day plaintiffs announced ready, and defendants thereupon filed amended pleadings, to examine which the court allowed plaintiffs' counsel until the afternoon, and then, upon his representation that the presence of his client was necessary to meet the defenses set up, the court, over the objection of defendants, set the cause for October 29, 1897. It is stated in the briefs that when the case was called on the last-named day defendants made an application for continuance, which was overruled; that there is such an application in the record, but no bill of exceptions to the overruling of it appears. It cannot, therefore, be noticed, and the assignment based upon it will be disregarded. No error is made to appear in postponing the case, and in forcing it to trial on the second day set for trial. The postponement was within the discretion of the court, and this court cannot say that there was not a good reason shown for it. Besides, no injury is shown to have resulted. When testifying, Skinner stated that the understanding with Moore and McGregor, when the loan was made, was that all of the stockholders were to sign the note, and that these two defendants were to obtain their signatures, but had failed to do so. Thereupon those defendants asked leave to withdraw their announcement in order that they might set up that matter in defense, and the refusal to allow them to do so is assigned as error. There was no error in this. If the facts were as stated by Skinner, they were necessarily known to the defendants, and, if relied on, should have been pleaded before they went into trial. But the facts stated constituted no defense. There was no agreement shown by which plaintiffs should procure the signature of the others before the note should become complete. The defendants themselves were to procure the other signatures, and delivered the note with-

out having done so, and it was accepted by plaintiffs. Plainly, there is no defense in this. The corporation, exceptions to whose answer were sustained, has not appealed, but the appellants have assigned the sustaining of such exceptions as error. It is not very clear that under the facts of this case they have the right to do so. But, conceding that they have, and that the answer showed a binding contract on the part of Skinner to take the stock (which also is doubtful), still we do not see that there was any injury done by that ruling. If the note sued on was the separate property of the wife, the debt of the husband could not be pleaded against it. If it was not her separate property, this suit, prosecuted in her right, could not be maintained. *Owen v. Tankersley*, 12 Tex. 405; *Holloway v. Holloway*, 30 Tex. 179. Hence, if defendants were able to prove that the note was community property, they could have defeated the action. All evidence offered upon the question was heard, and clearly proved that the money for which the note was executed had been previously given to the wife by the husband. There is no pleading or evidence that Skinner is insolvent, or that the gift was, for any reason, illegal. There was no error in the finding that the note was Mrs. Skinner's separate property. The evidence clearly showed the fact. Nor was there error in giving judgment against all of the defendants as joint undertakers. Such was clearly their relation to plaintiffs under the evidence. That they signed for the accommodation of the corporation, and received no benefit from the loan which they negotiated, they do not prove. They did not prove the facts entitling them to be treated as sureties, and to have execution first levied upon the property of the corporation, and they do not make it appear that they called the court's attention to that point, or asked that such judgment be rendered. It is too late to complain upon that point in this court. Affirmed.

#### FOSTER et al. v. EOFF et al.

(Court of Civil Appeals of Texas. Oct. 19, 1898.)

**VENDOR AND PURCHASER — PROOF OF TITLE — RECOVERY OF LAND — USE AND OCCUPATION — BETTERMENTS — INFANCY — PLEADING AND PROOF — AMENDMENT — JUDGMENT.**

1. A vendor does not show good title, so as to put in default the vendee, who was not to pay till furnished a good and perfect title by warranty deed, where he merely connects himself with the original grantee by deed executed by persons claiming to be the heirs of such grantee, but furnishes no evidence that they were such heirs.

2. Title acquired by a vendee under possession given by the vendor will not inure to the benefit of the latter; she having falsely represented to the vendee that she had good title, and failed to execute deed giving good title, as she agreed.

3. A vendor who sues the vendee and one to whom the vendee has sold his interest cannot complain that the judgment provided for the

return to the latter of purchase money which the vendee had paid, and which one of them was entitled to recover back; the vendee making no complaint, and being bound by the judgment.

4. Value of use and occupation of land cannot be had in trespass to try title, no claim therefor being asserted in the pleadings.

5. Minority cannot be set up in defense of a claim, where not pleaded.

6. Allowing the filing by defendants of a trial amendment after judgment is not error, where the ruling allowing it to be filed was made before trial.

7. Judgment for recovery of land having been obtained against vendees not in default, by the vendor and by another, both of whom admitted receipt of payment of part of the purchase money, the vendees are entitled to judgment for the purchase money paid, and for the improvements made by them.

Appeal from district court, Brown county; J. O. Woodward, Judge.

Action by J. E. Foster and another against J. H. Eoff and others. From the judgment, plaintiffs appeal. Affirmed.

T. C. Wilkinson and I. J. Rice, for appellants. Goodwin & Grinnan, for appellees.

FISHER, C. J. This action is by J. E. Foster and Cora B. Foster against J. W. Turney, Nat Burns, William Burns, and J. H. Eoff, as stated in their amended petition, filed January 3, 1898, wherein they sue in ordinary action of trespass to try title to recover from defendants the land in controversy, and in a further count state that, in the event they are not entitled to recover the land, then they pray for a foreclosure of a vendor's lien. On this branch of the case they plead that the plaintiff J. E. Foster, through his guardian, Mary A. Chase, and Cora B. Foster for herself, contracted to sell and did sell to defendants J. W. Turney and J. H. Eoff the tract of land described in plaintiffs' petition, for the sum of \$3 per acre, aggregating the total sum of \$1,080; that by the terms of sale one-half of this amount was to be paid in cash, and the other evidenced by a note executed by Turney and Eoff, with a vendor's lien on the land to secure the payment thereof (this sale is alleged to have been made on the 15th of December, 1887); and that in the probate court of Harris county, where the matter of the guardianship of J. E. Foster was pending, on the 21st of March, 1887, a report of sale was made, and was approved by the court, and the guardian ordered to make a proper conveyance to Turney and Eoff. The petition then goes on to allege that in pursuance of said trade a deed was made and tendered to the defendants, and that defendants paid, as a part of the cash consideration, the sum of \$287.50, and refused and failed to pay the balance of said purchase money, and refused and failed to execute and deliver the note, or, if the same has been executed and delivered, it has been lost, and that the plaintiffs were at all times ready and willing to comply with the contract; and that the defendants are in possession of the land, claiming the same by

virtue of their purchase from plaintiffs; that in 1889 Eoff sold all the interest that he claimed in the land to his co-defendant Nat Burns; and that the latter expressly agreed and contracted, as part of the consideration of the sale, to assume the payment of the amount due and owing the plaintiffs by Eoff. They pray for an enforcement of this contract, and for foreclosure of the vendor's lien. On January 3, 1898, J. W. Turney and Nat Burns filed their second amended original answer, setting up a general demurrer, general denial, and plea of not guilty, and specially pleaded: First. That, if any such sale as that alleged in plaintiffs' petition was ever made (which fact is denied), the plaintiffs on or about November 1, 1887, sold said land to said Turney and Eoff, and authorized them to take immediate possession, and occupy, use, and improve it as their own; agreeing on or before December 6, 1887, to make, execute, and deliver to said Turney and Eoff a warranty deed, conveying a good, clear, and perfect title to said land; the said Turney and Eoff agreeing to execute a note for \$540, and deposit same and \$540 in money in the First National Bank of Comanche, to be delivered to plaintiffs after they had executed and delivered said deed. Second. That defendants performed their part of said contract, and, believing the plaintiffs would perform theirs, took possession, and in good faith made improvements, and paid taxes and part of purchase money. About August 7, 1890, Nat Burns purchased from Eoff one-half of said land, and he and said Turney made other valuable improvements thereon. That plaintiffs did not have and have not now any title to said land, and were and are wholly unable to perform their part of said contract; and, in the event the court should find that such a contract was made, defendants pray that it be rescinded, and that they have judgment for said taxes, purchase money, interest, improvements, etc. Third. That Cora B. Foster, representing that she owned said land, about November 1, 1887, sold same to J. W. Turney and J. H. Eoff, and authorized them to take immediate possession and improve same, agreeing and assuring them that she would on or before December 6, 1887, execute to them a warranty deed, conveying a good, clear, and perfect title; the said Turney and Eoff to execute a note for \$540, and deposit same, with \$540 in money, in the First National Bank of Comanche, to be delivered to said Cora B. Foster when her said deed was so executed and delivered. Said Turney and Eoff performed their part of said contract, and believing that said Cora B. Foster would perform hers, and without any notice of any right, title, or interest of J. E. Foster in said land, and without any notice that said Cora B. Foster had parted with her interest therein, they in good faith paid taxes and made valuable improvements, aggregating \$—, and about August 7, 1890, Nat Burns purchased from J. H. Eoff one-

half of said land, and he and J. W. Turney in good faith paid taxes and made other improvements thereon, aggregating \$——. That said note and \$287.50 of said deposit were received by Cora B. Foster as part payment for said land. That said Cora B. Foster never did execute to defendants said deed, and that since paying said purchase money and taxes, and making said improvements, they have been informed, and charge, that Cora B. Foster only owned at the time of her said sale to defendants Turney and Eoff a life estate in one-third of said land, and that she is now unable to convey to defendants a greater title. That the consideration already paid by defendants is more than sufficient to pay for Cora B. Foster's interest in said land,—at least, to the extent of said purchase money paid, taxes, and improvements. That defendants made said improvements and paid said taxes and purchase money in ignorance of any claim, title, or interest of J. E. Foster in and to said land, all of which was known to said J. E. Foster at the time, and he stood by and received the benefits thereof, and is estopped from setting up any title to said land without first accounting to defendants for said taxes, purchase money paid, and improvements. And defendants ask a recovery of said Cora B. Foster's interest in said land, and that said land be partitioned, and defendants' rights to said improvements be respected, or that they recover for said taxes, purchase money, interest, and improvements, etc. On December 17, 1897, plaintiffs filed their second supplemental petition, which set up a general demurrer, and a special plea that J. E. Foster was a minor until 1894, and alleged a sale to defendants, the same as in the second count of plaintiffs' said petition. Plaintiffs, by supplemental petition, deny any of the allegations of defendants' answer, but admit that they received the sum of \$287.50 paid by the defendants, and say they have refused to further comply with their contract to purchase; and they tender a deed from Mary A. Chase, former guardian of J. E. Foster, and they also tender a deed executed by themselves to these defendants for the land in controversy. Judgment was rendered dismissing the suit as to William Burns, and that the plaintiffs recover of the defendants Turney, Nat Burns, and Eoff the land and premises sued for (giving a description thereof), and in favor of J. W. Turney for the sum of \$500, against the plaintiffs for the value of the improvements placed on the land, and in favor of Nat Burns for the sum of \$287.50 and legal interest from the time it was received by the plaintiffs as part of the purchase money, and also the further sum of \$70 as the value of the improvements placed on the land by him, declaring said sums to be a lien on the land. It is from this branch of the judgment that the plaintiffs have appealed. They make no complaint of the judgment in their favor for the land in controversy, but contend that un-

der the facts, and the law as applied thereto, the defendants stand in the attitude of defaulting vendees, and that the plaintiffs were entitled to recover the land, without being charged with that part of the purchase money received, and for the value of the improvements placed on the land by the defendants.

There are facts in the record which, in our opinion, support the judgment of the court below. It appears from the evidence of the defendant J. W. Turney that he and J. H. Eoff in October or November, 1887, purchased the land from Mrs. Cora B. Foster, one of the plaintiffs, through her agent, W. C. Burns; that no contract or trade was ever made concerning the purchase of the land with Mrs. Mary A. Chase, the then guardian of J. E. Foster, nor was any trade ever made with J. E. Foster, but, upon the contrary, that at the time of the contract to purchase they believed that Mrs. Cora B. Foster was the sole owner of the land, and Burns, as her agent, represented to them that she had a good title to the land, and would furnish them a warranty deed therefor. The purchase price agreed upon was \$1,080,—one-half cash, and the balance represented by a note payable 12 months after date. This amount was to be paid, and the note delivered to Mrs. Cora B. Foster when she should execute and deliver to the defendants a warranty deed conveying a good and valid title to the land. Upon this branch of the case he testified: "We were to pay for said land \$540 cash, and execute our note for \$540, payable 12 months after date; said money and note to be deposited by us in the First National Bank of Comanche, Texas, to be delivered to Mrs. Cora B. Foster when she had executed and delivered to us a warranty deed conveying to us a good and valid title to said land. Mrs. Cora B. Foster wrote to W. C. Burns, accepting said trade, and told him to tell us to go on the place and improve it, and that the deed would be forthcoming in due time. She was to perfect her title to said land and deliver said deed in December, 1887. By the terms of our contract, we were to get a good and perfect title to said land, and Mrs. Cora B. Foster was to execute us a warranty deed therefor, and the purchase money and note we deposited in said bank were not to be delivered to Mrs. Foster until after she had made us said title and deed. At the time of the purchase we deposited in the bank \$487.50, and a check for enough to make up the balance of the \$540 in cash; but there was something the matter with the check, and the bank would not receive it, but the check was afterwards collected by J. H. Eoff, and the money deposited in the bank to make up the sum of \$540. The money was deposited, under our contract, by Mr. Eoff. It remained in the bank over the time for the deed to be delivered, and Eoff drew out all except \$287.50, and said he would replace it when the deed came. I paid no part of the

\$287.50,—Eoff paid it all,—and that amount is all that has ever been paid on the land. We moved upon the land 15 or 20 days before said payment was made by us. We went upon the land because we bought it from W. C. Burns, the agent of Mrs. Cora B. Foster. We took possession of the land about November 1, 1887." And in November and December, 1887, he testified that he made the improvements for the value of which he recovered judgment, and further said that "at the time said purchase money was paid, and the time the improvements were made, I did not know that J. E. Foster had or claimed any interest or title in said land. We did not know of the partition decree in the estate of J. E. Foster, deceased, in Harris county [the J. E. Foster here spoken of is the father of the plaintiff J. E. Foster], allotting said land to J. E. Foster, and we did not know that Cora B. Foster had in any way parted with her title or interest in said land. We did not purchase the land from J. E. Foster, or from his guardian, Mary A. Chase, but we purchased from Mrs. Cora B. Foster, who was acting through her agent, W. C. Burns; and at the time we made the improvements and paid the purchase money we were assured by W. C. Burns that she had a good and valid title to the land, and that she would make us a warranty deed, conveying a good and perfect title, and upon this belief we paid the purchase money and made the improvements in good faith, believing that Mrs. Foster would carry out her contract. We did not know of any defects in the title at the time we purchased, and made the improvements, and paid the purchase money, and did not agree to take such title as Mrs. Foster could give; but, on the contrary, we made special inquiry of Burns, Mrs. Foster's agent, as to the title, and he told us the title was perfectly good. No deed was ever delivered to us, but one was executed and deposited in the First National Bank of Comanche, Texas. At the time the improvements were made a deed had not been sent to the bank at Comanche, Texas, and had not been delivered to us. It was some time after that, in March, 1888, a deed was sent to the bank; and this deed, it appears, was one made by Mary A. Chase. I think that the deed remained in the bank until the following fall. Mrs. Foster sent for it, because some other parties were claiming the land, or that the land was involved in litigation. Mrs. Foster has never executed and delivered the deed to us, or to any one for us, and she has never returned the purchase money or note to us; and we do not know where said note is, and we have never paid it." And he further states that "I claim said land by reason of possession thereof, and by reason of my contract with Cora B. Foster." Then he states that the defendants paid the taxes on said land since 1887.

It appears from the facts that in 1890 Nat

Burns purchased the interest of J. H. Eoff in the land, and in this connection we think the facts in the record, together with the transfer from Eoff to Burns, conveyed to Burns such interest and right as Eoff had in the land. Burns testified to facts which in effect showed that he in good faith purchased the land, and in good faith placed the improvements thereon for which he recovered judgment; believing at the time that Mrs. Cora B. Foster had the title, and not knowing of any interest in J. E. Foster. It appears from the facts that the defendants Turney and Burns have, through tenants, been in actual possession of the land in controversy since the purchase from Mrs. Foster, and that the improvements placed by them upon the land were worth the value stated in the judgment, and that plaintiffs have received as a part of the purchase price on said land the sum of \$287.50, which was paid by Eoff, and that Mrs. Foster has never executed a title or deed to the land, as testified to by defendant Turney, but that upon the trial the plaintiffs did tender to the defendants a deed to the land. The land was in 1854 patented by the state to John Bollinger. Plaintiffs claim to deraign title under a deed executed by a number of persons who claim to be the heirs of the original grantee. There is no evidence whatever in the record establishing the fact that these parties are the heirs of John Bollinger.

The court, on the trial of the case, excluded certain deeds offered by the plaintiffs, executed subsequent to the time of the deed executed by these pretended heirs, of which ruling the plaintiffs complain; but, in the view that we take of the case, it is unnecessary for us to decide whether the court erred in these particulars. The court did in fact render judgment for the plaintiffs for all of the land in controversy. Consequently the plaintiffs should not be heard to complain of the ruling of the court in excluding certain deeds in their line of title, because they have recovered title, and they have recovered all that they could have recovered if these deeds had been introduced. But the contention is that, if the deeds had been admitted, it would have had a tendency to establish the fact that the plaintiffs had a good and perfect title to the land, and consequently the defendants would not have been excused in refusing to receive and accept the deed tendered to them, conveying title under the contract of purchase that they had entered into. There might possibly have been some force in this contention, if the plaintiffs had connected themselves with the sovereignty of the soil; but, as said before, they failed to prove title from the original grantee. It is true, the record shows that they introduced in evidence a deed executed by persons who claimed to be the heirs of the original grantee, but there is not one word of evidence in the record establishing this fact. The contract, as testified to by Turney, which was entered into for

the purchase of the land, and which (we must take to be true for the purposes of this appeal), has a tendency to support the judgment, shows that the agreement was that Mrs. Cora B. Foster was to furnish and deliver to the defendants a good and perfect title to the land by warranty deed, before the defendants would be required to pay the purchase money, or become bound therefor. The heirship of these parties under whom the plaintiffs claim, who pretend to be the heirs of the original grantee, was a fact necessary to be established before the defendants should be required to accept the title offered by the plaintiff Mrs. Foster. There is no presumption of law that they were heirs, nor does the recital of that fact in their deed establish their heirship; and the defendants would not be required to accept the title of parties claiming to be the heirs, upon the mere assertion of those parties that such was the fact. Heirship from the original grantee in this case was a link in the plaintiffs' title, and, if it was missing, or, in other words, not established, it would be as complete a hiatus in the chain of title as would be the want of a deed conveying the interest of some one connected with the sovereignty of the soil.

The plaintiffs contend that the contract under which the defendants went into possession of the land was executed, and that they could not, for that reason, resist the payment of the purchase money. In view of the testimony of the witness Turney, we do not so regard the contract. It was not executed, nor is there any written evidence thereof; but the conditions upon which the defendants would become liable were not performed by the plaintiffs, because they have never executed any conveyance of the land in the terms agreed upon, as shown by the defendants' evidence. According to the facts, the defendants only became bound when Mrs. Foster would deliver to them a warranty deed conveying a perfect title. This was a prerequisite to her recovery, and her failure in this respect, if established clearly, would release the defendants.

It is also contended that, as the defendants have been in actual possession of the land for more than 10 years, their possession would inure to the benefit of the plaintiffs, and that, having acquired title by virtue thereof, the defendants would be bound under the contract, and would occupy the position of defalcating vendees, who should lose the purchase price already paid, together with the value of the improvements that they placed on the land. Under the facts as found, there is no privity between the defendants and the plaintiff J. E. Foster, and their possession would not inure to his benefit. As to the plaintiff Mrs. Cora B. Foster, it is clear that it was never contemplated when the contract was entered into that the possession of the defendants would ripen into a title for her benefit, although she might refuse and fail to execute the character of deed called for in

the contract, and to tender them a perfect title, as then agreed upon and contemplated by the parties. Her representation, through her agent, Burns, that she had a good title to the land, and misleading the defendants in that respect, and leading them to believe that such was the case when they entered into possession, which the facts show to be false, should be regarded in law as a fraud; and, such being the case, their possession would not inure to the benefit of Mrs. Foster.

It is contended that the court erred in rendering judgment in favor of defendant Burns for the amount of consideration that had been previously paid by his vendor, Eoff. The facts show that this consideration was received by the plaintiffs. In fact, it is admitted in their pleading. It is true that there was no express agreement between Eoff and Burns at the time of the transaction between them that Burns should acquire the right to the cause of action that Eoff might have against the plaintiffs for the \$287.50 paid by him as part consideration for the land, but it is believed that under the facts it was the intention of Eoff and Burns that Burns should succeed to whatever rights Eoff might have arising from the transaction in the purchase of the land from Mrs. Foster. Besides, we do not believe that there was any error in the judgment in this respect, because Eoff was a party to the judgment, and would be bound by it. If he suffered judgment to go in favor of Burns against the plaintiffs for a sum which he might be entitled to, it would estop him from asserting against the plaintiffs, in any subsequent litigation, a recovery of that sum. Plaintiffs, if not indebted to Burns for the sum received, would be due that amount to Eoff; and if in a suit where that sum was sought to be recovered by Burns, and Eoff was a party to that suit, where he could and should have urged his claim, if any, and failed so to do, he would be bound by the judgment that was rendered in favor of Burns. That sum was in litigation,—it was a matter of controversy before the court; and the right of Eoff, if any, should have been urged, and the failure to do so would estop him from ever asserting it against the plaintiffs. Consequently, such being the case, a recovery in favor of Burns, although he might not be entitled to that amount, would not injuriously affect the plaintiffs.

It is also contended that as the defendants have been in possession of the land, and enjoying its use and occupation, the court erred, in rendering its judgment, in not charging them with the value of that use. There is no pleading or evidence in the record on behalf of the plaintiffs asserting any claim of that character. If the plaintiffs had desired to have charged the defendants for the value of the use and occupation of the premises, they should have made some claim of that character in their pleadings, which was not done.

It is also contended that the judgment



against the plaintiff J. E. Foster is erroneous, because at the time that the purchase money was received he was a minor. A sufficient answer to this is that he did not plead his minority in answer to this branch of the defendants' case. He did not claim by supplemental petition, or any pleading, that he was exempted from liability because of his minority, and the only instance in which minority was pleaded was in answer to the defendants' plea of limitation. In replying to the right asserted in the answer of the defendants claiming limitation, J. E. Foster pleaded that he was a minor, but he nowhere pleads minority in defense of any cause of action asserted by the defendants on a moneyed demand.

An objection is urged to the ruling of the court in permitting the defendants to file a trial amendment after judgment was rendered. The bill of exceptions upon this question shows that the court sustained a demurrer of the plaintiffs to the defendants' answer setting up failure of title upon the part of the plaintiffs. The explanation appended to the bill of exceptions shows that upon this ruling the defendants asked leave to file a trial amendment. The court granted the leave, but stated that it could be filed later on, and proceeded with the trial, and did subsequently permit the defendants to file the trial amendment, in which specific objections were urged to the title tendered by the plaintiffs. If we could concede that it was irregular for the court to permit a trial amendment to be filed after the judgment, we think, under the facts, that no harm resulted to the plaintiffs from the action of the court in this respect. The facts stated in this connection do not show a surprise upon the part of the plaintiffs, but the explanation appended to the bill of exceptions shows that they were apprised of the ruling of the court upon that question, and that the right, before the trial, was given to the defendants to file the trial amendment; and, from anything that is shown to the contrary, it appears that the plaintiffs may have acquiesced in this course.

The only remaining question that we further desire to notice is whether the facts present a state of case in which the defendants were entitled to hold the plaintiffs responsible for the value of the improvements put upon the land, and the purchase money paid by them. We regard these questions, in the main, as already decided by what has been previously said; but, in further consideration, we are clearly of the opinion that there was no error in the judgment in this respect. The plaintiffs have recovered the land, and, such being the case, they should clearly be held responsible for the improvements placed thereon by a vendee who is not in default, and for the consideration that had been previously advanced as a part of the purchase price. The plaintiffs, under the facts of this case, ought not to be entitled to recover both the land and the improvements, and to retain

the purchase price, when it is clear, under the evidence, that they were in default, and not the defendants. It is true that no title to the land had been shown in Mrs. Cora B. Foster; but, by reason of the false representations made by her concerning her title to the land, thus inducing the defendants to go into possession and make improvements, we would hold her responsible for the cost of those improvements, and the consideration that she had received, especially in view of the fact that she had recovered a judgment for the land. If we concede that J. E. Foster was not a party to that contract, and was not a party to the fraud perpetrated upon the defendants, he would still be liable for the value of the improvements, and for the purchase price received by him. The plaintiffs in their petition admit that they received \$287.50. Consequently, having received this consideration, he would be as much bound therefor as Mrs. Foster, upon a recovery of the land; and, as to the claim for improvements, he having recovered title, he should be held responsible for the value of the improvements put upon the land, because it appears that they have enhanced the value of the land, and they were placed there by the defendants in good faith, believing that they were acquiring a good title to the land.

Those assignments of errors that are not specifically noticed in the opinion do not present any reversible error. Therefore, finding no error in the record, the judgment is affirmed. Affirmed.

#### SILVERMAN v. LANDRUM et al.

(Court of Civil Appeals of Texas. Oct. 19, 1898.)

TRUST DEED—SALE—DEATH OF OWNER—EFFECT—EXTENSION OF TIME OF PAYMENT—NOTICE TO PURCHASER—HOMESTEAD—QUESTIONS FOR JURY.

1. The power to sell land under a deed of trust on default in payment of the debt is not affected by death of the owner, where the time in which letters of administration might have been taken out has expired.

2. In trespass to try title, where plaintiff claims as bona fide purchaser under a power of sale contained in a trust deed, and defendants rely on a parol extension of time for payment of the debt to defeat the sale, notice to plaintiff of such extension must be shown.

3. In trespass to try title, where plaintiff claims as purchaser under a trust deed, and there is evidence that the land was a homestead when the trust deed was executed, the question of homestead must be submitted to the jury.

Appeal from district court, Falls county; Samuel R. Scott, Judge.

Trespass to try title by S. A. Silverman against Mary E. Landrum and others. From a decree in favor of plaintiff, he appeals. Reversed.

Appellant's statement of the case is substantially correct, and is deemed sufficient for the purposes of the questions decided, with such additions as we make. The statement is

as follows: "This was an action of trespass to try title, in the ordinary form, brought by the appellant, S. A. Silverman, on May 28, 1895, to recover 100 acres of land in Falls county, out of the southeast quarter of the George Allen league, and for reasonable rents of the land in controversy since April 2, 1895, alleged in appellant's petition to be of the value of \$150 per annum, against Mary E. Landrum, wife of Samuel Landrum, and the following children of Samuel Landrum: John B. Landrum, Edna Antoinette Landrum, Rowena Landrum, Sarah Rebecca Landrum,—by a former marriage, and also against Martin Diaz and R. D. Moreing, tenants in possession when the action was brought. Plaintiff's title to the land in controversy grew out of a loan of \$600 to Samuel Landrum and Mary E., his wife, evidenced by their bond of October 1, 1885, payable to the order of Joseph B. Fisher, of New York City, at the National Bank of Commerce, in New York City, five years after date, with interest from date at the rate of 6 per cent. per annum, payable semiannually. Landrum and wife executed a trust deed of even date, in which the premises in controversy were conveyed to J. B. Watkins, trustee, to secure this loan. At the same time Landrum and wife executed a second deed of trust to M. J. Dart to secure interest coupons payable to J. B. Watkins or order at the office of the J. B. Watkins Land-Mortgage Company, in New York City. Both deeds authorized a sale of the premises if default was made in the payment of the interest or principal. Default was made in the payment of the loan at maturity, but no action was taken by the company to enforce payment under the trust deed until April 2, 1895. The property was sold under the first trust deed at the last-mentioned date, and plaintiff became the purchaser. The trust deed provided, among numerous other provisions, that in case the original trustee, Watkins, died or refused to act, the then acting sheriff of Dallas county should succeed to the trust, and be clothed with all the powers and authority vested in the original trustee, and further that the recitals in the conveyance to the purchaser should be full evidence of the matters therein stated, and all prerequisites to the sale shall be deemed to have been performed. Samuel Landrum died July, 1890, leaving his wife, Mary E., and the above-named children, surviving him. No one qualified as his administrator. On April 2d, and prior thereto, there was \$250 or \$255 of the loan remaining unpaid. J. B. Watkins, trustee, having refused in writing to act, the company instructed Ben E. Cabell, the then acting sheriff of Dallas county, and substitute trustee, to sell the property at public auction, in accordance with the provisions of the trust deed, in satisfaction of this balance; and he, after giving the notice stipulated in the trust deed, and having fully complied with all the terms and provisions of same, proceeded to sell the

property, as above stated, at public auction, for cash, on April 2, 1895, and it was knocked down to plaintiff, who was the highest and best bidder, for \$355. Plaintiff paid this sum to the substitute trustee, and on the same day received from him a warranty deed, on behalf of Samuel Landrum and wife, to the premises; the power to warrant being conferred on the trustee by the trust deed. On the trial, plaintiff introduced and read in evidence a chain of title from the sovereignty of the soil down to Samuel Landrum; the bond, trust deed, J. B. Watkins' refusal to act, and substitute trustee's deed to plaintiff, all duly acknowledged and recorded in the deed records of Falls county. The defendants filed a general demurrer, general denial, and pleaded 'Not guilty' to plaintiff's petition, and at the trial introduced in evidence a deed of the date of June 22, 1876, by Samuel Landrum and Mary E., his wife, conveying to E. C. Stuart and E. H. Featherstone, as trustees, 920 acres of land owned by him in Texas, describing the same by metes and bounds, offered for the purpose of showing an outstanding title in the trustees (said trust was duly accepted in writing by the trustees July 4, 1876, and the acceptance made a part of the trust conveyance), and in the same connection offered subsequent instruments executed by Landrum and wife to Benson Landrum and William Shankle, as trustees, executed after the death of Featherstone and Stuart, appointing them to carry out the terms of the trust, and their acceptance of same. (The provisions of this deed pertinent to the issues raised in this case will be hereinafter referred to and quoted.) Defendants further relied upon a parol agreement between Milliard Story, agent of the J. B. Watkins Company, and Benson Landrum and William Shankle, defendants' trustees, on October 4, 1892, to extend the time of payment of the mortgage debt until the fall of 1895, and that the premises had been sold in violation of this agreement; the consideration of this agreement being certain rent notes, amounting to about \$300, or probably a little over, delivered to Story as collateral security at the date of the contract; the understanding being that the rent notes so delivered should be collected by the company in 1893, and applied to the payment of the interest then due, and about half the principal sum; that defendant should pay the interest which should accrue from the fall of 1893 to the fall of 1894 in the fall of the latter year, and the remainder of the debt, principal and interest, in the fall of 1895. Plaintiff claims that this contract, as shown by defendants' testimony, was conditional, and that the continuance of the extension was made to depend upon the payment of the interest in 1894. Defendants dispute this, and claim that the contract was an absolute one, to extend the payment of the loan to the fall of 1895. Defendants, in addition, introduced some evidence tending to prove that the land in controversy was the homestead of Samuel

Landrum. The trial resulted in a verdict and judgment for defendants for the land in controversy, and a finding and judgment in favor of plaintiff for \$355, the purchase price of the land, with legal interest from the 22d day of April, 1895, with a lien on the land in controversy to secure this sum, and a foreclosure of same. From this judgment plaintiff appeals."

It was not shown that Silverman had notice of the agreement to extend the time of the execution of the deeds of trust at the time he purchased the land, paying a valuable consideration therefor, nor is there any testimony impeaching his good faith in the purchase. The land in controversy was the separate estate of Samuel Landrum, purchased by him before his marriage. He died in July, 1890, —more than four years before the sale to Silverman,—and there was no administration upon his estate. Defendants sued are his heirs at law.

Finks & Gordon, Rice & Bartlett, and John N. Wharton, for appellant. Martin & Eddins and Z. I. Harlan, for appellees.

COLLARD, J. (after stating the facts). The death of Samuel Landrum did not affect the power to sell under the deed of trust. The time in which administration upon his estate might have been taken out had expired. So the right of the heirs to have the estate settled under our probate laws was not interfered with. *Heirs of Rogers v. Watson*, 81 Tex. 403, 404, 17 S. W. 29. It follows that Silverman, by his purchase at the sale, took the legal title to the land, to defeat which defendants must show that he had notice of the agreement to extend the time of enforcement of the deed of trust by sale. The equity set up by defendants must be proven by them, and they must show that Silverman was bound by it, by notice to him of its existence. *Saunders v. Isbell*, 5 Tex. Civ. App. 513, 24 S. W. 307; *Baldwin v. Root*, 90 Tex. 546, 40 S. W. 3; *Barnes v. Jamison*, 24 Tex. 362. So much for the burden of proof.

As to the proposition that Silverman, purchasing the land for a valuable consideration, without notice that the time for the enforcement of the deed of trust had been deferred by the parol agreement set up by defendants, should be protected as an innocent purchaser, that is, we think, the law. *Jones, Mortg.* § 1899; 26 Am. & Eng. Enc. Law, 937, 938; *Beatie v. Butler*, 21 Mo. 313; *Holland v. Bank* (R. I.) 19 Atl. 654. There was error in refusing a charge declaring the law, in effect, as stated in the foregoing. The question arises in other forms. As shown by the record, Silverman was not permitted by the court to testify that he had not heard of the parol agreement to extend the time of selling under the trust deed; but this ruling seems to have been upon the ground that the case, as to evidence, was closed. We do not discuss that ruling, as doubtless upon another trial the testimony

will be offered at a time when no such objection can be made.

There are other questions in the case,—as, for instance, that of the land being the homestead of Landrum and wife at the time of the execution of the deed of trust, and the sale, which, if true, would defeat the suit of plaintiff for the land. The court did not submit the question, though, as appellant says in his brief, there was some testimony tending to establish homestead. Hence we reverse the judgment of the lower court, and remand the cause. Reversed and remanded.

#### RUSSELL v. BUTLER.

(Court of Civil Appeals of Texas. Oct. 22, 1898.)

#### FOREIGN JUDGMENTS—ACTIONS—BURDEN OF PROOF.

In an action on a foreign judgment, which, with the return of the officer attached, is in evidence, the burden of proving that process was not served is on the defendant.

Appeal from Cooke county court; J. P. Hall, Judge.

Action by William M. Butler against George H. Russell on a foreign judgment. Judgment was for plaintiff, and defendant appeals. Affirmed.

J. T. Adams, for appellant. Robt. E. Cofer, for appellee.

STEPHENS, J. The judgment appealed from in this case was obtained perforce of a judgment already had by appellee against appellant before a justice of the peace in Lincoln county, Tenn., appellee being a citizen of Tennessee and appellant a citizen of Texas. The conclusive effect of the Tennessee judgment was denied upon several grounds, but principally because it was rendered upon the same day that the summons purported to have been issued and served upon appellant, who was then on a visit to Tennessee; and upon the further ground that no process had in fact ever been served on him, the answer (which was sworn to) denying this fact, and averring that the judgment had been fraudulently obtained.

It seems clear, from the laws of Tennessee read in evidence on the trial of this cause, that a justice of the peace in that state had the power, when the judgment in question was rendered, to try the case and enter judgment, there being personal service, as in this instance, on the very day the summons was issued and served. These laws contain provisions for fixing the hour of trial, and for a continuance of the case if the defendant is not ready for trial. The procedure is not such as to deprive him of his day in court. The judgment was not, therefore, void upon this ground.

Upon the issue of fact raised, as to whether or not the process was really served, the evidence was conflicting. In submitting this issue the court gave the following charge, of which counsel for appellant vehemently com-

plaints: "The plaintiff has introduced in evidence a copy of said judgment, with the return of the officer attached thereto. Therefore the burden of proof is on the defendant to show, by a preponderance of evidence, that said return was not true." That this charge placed the burden of proof where the law places it seems quite clear. The matter set up, and which appellant sought to establish by proof, was in avoidance of the Tennessee judgment. It was essentially matter of defense. As was said by our supreme court in *Redus v. Burnett*, 59 Tex. 576: "It is well settled as the law of this state that, where an action in our courts is based on a judgment of a sister state, the party can show by way of defense that he was never served with process." It was held in *Norwood v. Cobb*, 15 Tex. 500, that such defense amounted to an attack upon the judgment for fraud, and in this case, as before seen, this charge was expressly made by appellant. That the burden of proof rests upon him who makes such a charge is too well settled to require the citation of authority. The line of cases cited and relied on by appellant in his motion for rehearing, concerning charges upon presumptions arising in the course of the evidence, is wholly inapplicable. These conclusions, contrary to the usual course of procedure where county court judgments are affirmed, are stated in writing at the request of counsel, because of the purpose indicated by him of carrying the case to the supreme court of the United States.

#### WADE et al. v. ODLE et al.

(Court of Civil Appeals of Texas. Oct. 22, 1898.)

On motion for rehearing. Denied.  
For prior report, see 46 S. W. 887.

STEPHENS, J. It is now insisted in support of the motion for rehearing that the exclusion of the evidence offered by appellant to show fraud in the deed of trust was immaterial, because of the acceptance on the part of some of the preferred creditors without notice of and participation in the fraud, the further contention being that on this account the trustee's sale and deed passed the title to the purchaser at that sale. We have consequently re-examined the statement of facts, and fail to find the proof of any such acceptance. True, it was shown that some of the creditors did accept, but how or under what circumstances the record does not disclose. Rehearing denied.

#### COLE et al. v. METTEE et al.

(Supreme Court of Arkansas. Oct. 8, 1898.)

EJECTMENT—EQUITY JURISDICTION—PARTNERSHIP—HARMLESS ERROR.

1 Courts of equity do not have jurisdiction of suits for ejectment to establish one legal

title against another, although one party claims superiority of his title over the other because the execution lien and sale on which it is based were prior to the mortgage lien and sale on which the other title is based, as the fact that liens are involved does not affect the jurisdiction.

2. Where a firm name contains the surname of all the partners, a conveyance to the firm vests title in the partners.

3. Where, in an ejectment suit, a question of fact as to the time of an abandonment of a homestead is involved, the transfer of the cause to the equity court is prejudicial error, as the parties have a right to a jury trial.

Appeal from circuit court, Greene county; Felix G. Taylor, Judge.

Ejectment by Lewis Mettee and another against G. E. Cole and another. Judgment for plaintiffs, and defendants appeal. Reversed.

Cole & Wall, pro se. Luna & Johnson, for appellees.

RIDDICK, J. The controversy in this case concerns the title to two lots in the town of Paragould and the improvement thereon. The litigation was commenced by an action of ejectment brought by appellees, Lewis Mettee and George Kanne, to recover of appellants, Cole & Wall, possession of such lots. Appellant Cole was at one time the owner of the lots, and Mettee & Kanne base their right to recover upon a sheriff's deed made in pursuance of a sale of such lots under an execution against Cole. On the other hand, the appellant Wall denied the validity of the title set up by appellees, and claimed to be the owner of the land by virtue of a mortgage executed by Cole, which had been foreclosed, and the lots purchased by Wall. Both parties set up a legal title to the land, but the circuit court, on motion of Mettee & Kanne, and over the objection of Cole & Wall, transferred the case to the equity docket. The case was there heard, and judgment rendered in favor of Mettee & Kanne for the possession of the lots. Wall & Cole appealed, and the first question presented arises on the exceptions of appellants to the order of the court transferring the case to the equity docket.

Counsel for appellees, as a reason for the transfer of the case to the equity docket, assert that a question of priority of liens was involved. But courts of equity do not have jurisdiction of suits brought merely to recover the possession of land, and to establish one legal title against another conflicting legal title, even though a question concerning liens be involved. It avails nothing that in such a contest the owner of one legal title undertakes to establish its superiority over the opposing legal title by showing that the execution lien and sale upon which it is based were prior, in point of time, to the mortgage lien and sale upon which the title of his adversary is based. Such matters furnish no ground of equity jurisdiction, for, to call forth the interposition of a court of equity, it is imperative that equitable relief be ask-

ed. *Ashley v. Little Rock*, 56 Ark. 391, 19 S. W. 1058; *Fussell v. Gregg*, 113 U. S. 550, 5 Sup. Ct. 631. The equitable doctrine of priorities of which counsel speak has no application in a contest between opposing legal titles to the same tract of land such as we have here. 2 Pom. Eq. Jur. §§ 679, 681, 735. Counsel for appellees cite the case of *Percifull v. Platt*, 36 Ark. 456, as supporting the jurisdiction of the court of equity in this case. That was an action of ejectment in which the plaintiff recovered a judgment at law. The plaintiff had only an equitable title, and the judgment was reversed on that ground; this court holding that he could not support the action of ejectment upon an equitable title, but must seek his remedy in chancery. In the case at bar the plaintiffs have, or at least claim, a legal title, and in this respect the two cases are easily distinguished.

In saying that the appellees claim under a legal title, we do not forget the contention of appellants that the deed of the sheriff was not sufficient to vest a legal title in appellees for the reason that in such conveyance they were described only by their firm name of Mettee & Kanne, and we will now proceed to state our grounds for not concurring in that contention. It was decided by this court in *Percifull v. Platt*, supra, that, if a partnership name contained the name of one partner only, a conveyance to the partners by their firm title would vest the legal title in the one partner whose name appeared in the firm name, and that, if the deed be to a partnership name which includes the name of no party, it passes nothing at law. But in this case the partnership name contains the surname of both partners, and, although their Christian names are omitted, we still think the deed sufficient in form to vest the legal title in such partners. If there be any uncertainty in the description, it is what the law denominates a latent ambiguity, and parol evidence may be introduced to remove the same and identify the grantees. The law on this point can hardly be better stated than it was by the supreme court of Vermont in *Morse v. Carpenter*, 19 Vt. 613. "There is," said Chief Justice Royce in that case, "an important difference between a description which is inherently uncertain and indeterminate and one which is merely imperfect, and capable, on that account, of different applications. To correct the one is, in effect, to add new terms to the instrument, while to complete the other is only to ascertain and fix the application of terms already contained in it. Indeed, the most usual and approved description of the grantee—that which gives his Christian and surname and the town in which he lives—may prove to be imperfect, as others bearing both those names may be living in the same town; and, if the Christian name or place of residence be omitted, the description is only rendered the more

imperfect. It is less certain than it might be, or usually is, made. But a grantee is still designated, though imperfectly, and, for aught that the deed discloses, the party accepting the conveyance may be the only person answering the description given. In all these cases, a resort to extraneous facts and circumstances may become necessary, in order to ascertain the individual to whom the description was intended to apply; but it is not perceived that the greater or less probability of this should, in either case, affect the validity of the deed." The law as thus announced by the learned court is fully sustained by later decisions. *Beaman v. Whitney*, 20 Me. 413; *Menage v. Burke*, 43 Minn. 211, 45 N. W. 155; *Sherry v. Gilmore*, 58 Wis. 324, 17 N. W. 252; *Jones v. Neale*, 2 Pat. & H. 339; 1 Jones, Real Prop. § 244; 1 Dembitz, Land Tit. p. 335.

It has been held that a deed to one person, describing him by his surname only, is not for that reason void (*Fletcher v. Mansur*, 5 Ind. 267); and there are stronger reasons why a deed to two partners by their firm name, when the same consists of a union of their surnames, as in the case of appellees, Mettee & Kanne, should not be held void on account of ambiguity as to the grantees, for the union of their surnames alone in the deed indicates that the parties mentioned were partners doing business under that firm name, and serves to point out and identify the persons thus described. When we consider how easily the grantees could be identified in such a case, we see the futility of the argument against the validity of the deed to Mettee & Kanne. We therefore hold that this deed was sufficient in form to vest the legal title in such partners.

The case then stands that we have here a plain action of ejectment to recover possession of land. No equitable relief was required, and none was asked by either party. It follows, therefore, that the court erred in transferring such cause from the law to the equity docket.

The facts, as presented in the transcript before us, show that the decision of the controversy as to the title to this land turns mainly on the question whether Cole had abandoned his homestead in the premises before the levy and sale upon which the deed of Mettee & Kanne was based and under which they claim. With the exception of this question of abandonment, there seems to be no dispute as to the facts, and little room for doubt as to the law. But this was a question of fact that the appellants had the right to submit to a jury, and the transfer to equity over their objections, by which they were deprived of this right, was prejudicial error. *Ashley v. Little Rock*, 56 Ark. 391, 19 S. W. 1058; *Sand. & H. Dig.* § 5617. The judgment is therefore reversed, and the cause remanded for trial at law.

## O'NEAL et al. v. KELLEY.

(Supreme Court of Arkansas. Oct. 1, 1898.)

**PRINCIPAL AND SURETY—CONTRACTOR'S BOND—CHANGE IN CONTRACT—DISCHARGE OF SURETY—EFFECT OF CONTRACTOR'S REPRESENTATIONS—PERFORMANCE OF SUBSTITUTED CONTRACT.**

1. Where a contract provided for the construction, before a certain date, of a building, the lower story of which should be 96 feet long and the upper story 75 feet long, an agreement between the owner and contractor, without the consent of the sureties on the latter's bond, to extend the upper story to the same length as the lower within the agreed time, was a material change, which released the sureties.

2. The assurance of a contractor to the owner that an alteration in the building contract would not affect the original contract does not bind the sureties on the contractor's bond, who did not consent.

3. Where a contractor agreed to perform a substituted contract which materially changed the original contract, without the consent of his sureties, it is immaterial that he failed to perform it, since it is the execution, and not the performance, of the substituted contract, that discharges the sureties.

Appeal from circuit court, Miller county; Rufus D. Hearn, Judge.

Action by Michael Kelley against C. A. O'Neal and others on a bond for the performance of a building contract. From a judgment in favor of plaintiff, defendants appeal. Reversed as to all defendants except O'Neal.

The facts in this case are as follows: The plaintiff, Michael Kelley, on 28th day of April, 1894, entered into a contract with defendant C. A. O'Neal, by which O'Neal, for the sum of \$2,000, to be paid by Kelley, agreed to furnish materials and erect for said Kelley a two-story brick house in the city of Texarkana. The contract required that the building should be constructed according to specifications named therein, and that it should be completed and turned over to Kelley free of all liens, on or before the 1st day of July, 1894. The defendants C. C. Dorrian, H. Wolf, W. L. Snow, and T. J. Wheeler became sureties on the bond of O'Neal for the performance of such contract. O'Neal having failed to perform his contract, Kelley brought this action on his bond to recover the sum of \$1,000 as damages suffered by him on account of such failure. The sureties set up that there had been a material alteration of the contract. On this point Kelley testified at the trial as follows: "The contract called for a building 96 feet long for lower story, and 75 feet long for upper story. After the Webber building had given away, I said to O'Neal: 'I wish the upper story of my building had been the same length as the lower story, because I was afraid we would have the same trouble they were having with the Webber building.' Mr. O'Neal said it would only take a little extra work, and would in no way affect the contract, to make the change. I told him I did not want to do anything that would change the contract, and, if

it could be done so as not to change the contract, to figure it up, and say how much it would cost. He did so, and said it would cost me \$25, and I gave him a check immediately. The only extra work was the ceiling, flooring, and upper joists. The longitudinal walls were already there, and I estimated that \$25 was a reasonable price for extra work, and therefore paid it." There was a judgment against the defendants for the sum of \$500, from which they appealed.

King & Searcy, for appellants. J. D. Cook, for appellee.

RIDDICK, J. (after stating the facts). This is an action upon a bond given by O'Neal to Kelley for the performance of a building contract. The contract for the full performance of which the bond was executed required that, for the sum of \$2,000 to be paid by Kelley, O'Neal should furnish materials and erect a brick building, the lower story of which should be 96 feet long and 14 feet high, and the upper story 75 feet long and 12 feet high. During the progress of the work, O'Neal contracted with Kelley that for the additional sum of \$25, paid him by Kelley, he would build the upper story 96 feet long, instead of 75 feet, as required by the original contract. The appellant sureties contend that this alteration of the contract discharged them from further liability on the bond, and we are of the opinion that this contention must be sustained. "The contract by which a surety becomes bound," says the supreme court of Pennsylvania, "is voluntary on his part, \* \* \* without having in view the prospect of gain. It is an act of benevolence to the obligor, and of convenience to the obligee, and of emphatic use to both. The obligations of social duty require, therefore, that he should be dealt with in fairness, and in a spirit of the utmost good faith. The obligor and the obligee are bound to know that, if they find it convenient to change or vary the terms of the original contract, they must seek the assent of the surety, because it is his contract as well as theirs. And, if they will not do so, they take upon themselves the hazard, and thus loosen the bonds of the surety." *Hibbs v. Rue*, 4 Pa. St. 348. Any material alteration in the terms of such a contract discharges the surety if he has not consented to the change; and this is so even if the alteration be for the benefit of the surety, for, although the principals may change their contract to suit their pleasure or convenience, they cannot thus bind the surety, and, as the new contract abrogates the old, the surety is discharged from all liability unless he has consented to the alteration. *Warden v. Ryan*, 37 Mo. App. 466; *Judah v. Zimmerman*, 22 Ind. 388; *Simonson v. Grant*, 36 Minn. 439, 31 N. W. 861; *Bethune v. Dozier*, 10 Ga. 235; 24 Am. & Eng. Enc. Law, 837; 2 Brandt, Sur. §§ 378, 388.

The alteration of the contract shown in this

case was material, and there is nothing to show that the sureties consented thereto. It required that O'Neal should erect a building of dimensions different from that required by the original contract, and for which he was to receive a different consideration. It called for the erection of a more expensive building, but no extension was made in the time within which the building was to be completed. As the sureties had undertaken that O'Neal should complete the building within a limited time, an alteration of the contract by which he was required to build a larger and more expensive building within the same time was, in our opinion, not only material, but directly against the interest of the sureties; and, as the same was made without their consent, it clearly operated to discharge them.

The fact that Kelley refused to agree to the alteration until O'Neal, the contractor, had assured him that it would not affect the original contract, is a matter of no moment; for O'Neal did not represent the sureties, and they are not bound by his opinion on a question of law. Nor does the fact that he afterwards failed to carry out the contract as altered affect the question. It is the execution of the new contract, and not the performance thereof, that discharges the sureties. There is no dispute about the facts of this case, and, after considering same, we are of the opinion that the judgment of the circuit court against the sureties of O'Neal is not supported by the evidence. The judgment as to them is reversed, and the case is dismissed, but as to O'Neal it is affirmed.

#### STATE v. AMOS.

(Supreme Court of Tennessee. Oct. 12, 1898.)

INDICTMENT—SIGNATURE BY ASSISTANT ATTORNEY GENERAL.

As the constitution contains no provision authorizing a district attorney general to appoint an assistant, such an assistant, appointed under Acts 1897, c. 24, authorizing certain district attorney generals to appoint assistants, has no power to sign an indictment, except in the presence of, and by the special direction of, the district attorney general.

Appeal from circuit court, Marion county; Floyd Estell, Judge.

An indictment charging E. F. Amos with perjury was quashed, and the state appeals. Affirmed.

G. W. Pickle, Atty. Gen., for the State.  
B. E. T. Tatum, for respondent.

**WILKES, J.** This is an indictment for perjury. There is a plea in abatement that it is not signed by the district attorney general nor by his authority nor in his presence. To this plea there was replication that the indictment was signed by an assistant of the district attorney general duly appointed by him under Acts 1897, c. 24. There was demurrer to this replication, alleging that the assistant of the district attorney could not

sign an indictment, and this was sustained. and, upon the refusal of the district attorney general to plead further, the indictment was quashed, and the state has appealed.

The question presented is the constitutionality, validity, and construction of chapter 24 of the Acts of 1897, authorizing district attorneys general in certain counties to appoint an assistant, and as to the power of the assistant if lawfully appointed. The constitution provides for the election of district attorneys general by the people, and for the appointment of a pro tem. officer in the absence of the regular officer; but there is no provision in the constitution authorizing the district attorney general to appoint any deputy or assistant. Const. art. 6, § 5; Shannon's Code, §§ 393, 394. It appears that other constitutional officers have been empowered and have employed deputies during almost the entire existence of the state, such as clerks, trustees, sheriffs, etc. These appointments have been made under various statutes, as there is no constitutional provision on the subject. These officers are, however, of a clerical or executive character, and none of them are judicial or quasi judicial in their functions. It has been uniformly held that an indictment must be signed by the district attorney general, and it is likewise held that he may authorize another to sign his name officially, or he may adopt and ratify a printed signature. This is upon the theory, however, that there is a specific adoption or ratification of each signature, and not upon the idea that he may delegate authority generally to an assistant to sign his name in his absence, and to perform the functions of the officer generally. In the present case the district attorney in his sworn replication states that the signature was made by his assistant under and by virtue of the act of 1897, and the inference is that in this way and to this extent it was by his consent and direction; for it does not negative the averment in the plea that it was not done in his presence. Moreover, the demurrer to this replication raises the question that such signature could not be made under and by virtue of the act of 1897, and that is the question with which we have to deal.

We are of opinion that, while the act of 1897 is valid, it is only upon the construction that the assistant therein provided for is authorized to do clerical work alone, and not to exercise the functions of the officer generally. While, therefore, the district attorney might authorize the assistant or clerk to sign his name to an indictment, it must be the particular indictment and in his presence; and the assistant is not by this act clothed with the power to exercise the functions of the office generally. Const. art. 6, § 5, provides that "In all cases where the attorney for any district fails or refuses to attend and prosecute according to law the court shall have power to appoint an attorney pro tempore." It is clear that in such cases as pro-

vided in this section the legislature could not empower the district attorney general to appoint an assistant, with power to exercise the functions of the office, but the office can only be filled *pro tempore* by the court as the constitution provides. The indictment in this case having been signed under the authority of that act, and not otherwise, and not being alleged to have been done in the presence of the district attorney nor by his consent and direction, except so far as the same is authorized by that act, is bad, in the opinion of the majority of the court, and the action of the circuit judge in quashing the same is affirmed, and the indictment is quashed, and the state will pay the cost.

**STATE v. WILBUR. SAME v. MARTIN.  
WALKER, County Judge, v. STATE  
ex rel. HENDERSON.**

(Supreme Court of Tennessee. Sept. 25, 1898.)

**CLERK OF COURT—FEES—MANDAMUS.**

1 A clerk of the circuit court, who certifies a copy of a bill of costs to the county judge, as required by Shannon's Code, § 7594, is not entitled to a fee under section 6898, giving him 25 cents "for every certified copy or order."

2 A clerk of a circuit court is not entitled to a fee for entering bills of costs certified to the circuit court by a justice of the peace for costs in cases before the latter.

3 Where items of costs in a cost bill claimed by a clerk of the circuit court, which the county judge refuses to audit, are illegal, mandamus will not issue to compel him to issue his warrant for their payment, although the act permitting a county judge to pass upon such bills after approval by the circuit judge and attorney general is unconstitutional and void.

Error to circuit court, Hamilton county; Floyd Estell, Judge.

Mandamus, on the relation of R. B. Henderson, clerk of the circuit court, against Seth M. Walker, county judge, and motions by Seth M. Walker, county judge, to retax costs in the cases of the state against Mattie Wilbur and John Martin. From a judgment allowing the writ, defendant brings error. Reversed. Judgment taxing costs reversed as to one item, and affirmed as to one.

C. R. Evans and Cooke, Swaney & Cooke, for plaintiff in error county judge. Trewitt & Stanfield and M. H. Clift, for defendant in error R. B. Henderson.

McALISTER, J. These causes present questions in respect of costs claimed by the circuit court clerk of Hamilton county. It appears from the record that the county judge, Hon. Seth M. Walker, had refused to audit these bills of costs; and thereupon the relator, R. B. Henderson, commenced proceedings by mandamus to compel the county judge to issue his warrant on the county trustee for their payment. The bill of costs presented to the county judge for payment amounted to \$1,292. The particular items of costs objected to by the county judge were:

First, a fee of 35 cents for entering bills of costs of record; and, second, a fee of 25 cents for certifying bills of costs. It should be remarked that the cases in which these fees are alleged to have accrued originated before justices of the peace, where defendants had either submitted their cases under the small-offense law, or, upon examination, had been discharged by the justice. In such cases, when the costs were not paid by the defendant, it was the duty of the justice to certify the same to the circuit court, where they were examined by the circuit judge and attorney general, and, if found correct, judgment allowing same was entered upon the minutes of the court. It was insisted by the county judge there was no statute allowing the clerk a fee of 35 cents for entering these bills of costs of record, and a fee of 25 cents for certifying same. It was further insisted that as a matter of fact said bills of cost had not been entered of record or certified, and hence no services had been performed for which said fees were charged. The circuit judge heard the cause upon petition and answer, together with the exhibits thereto, upon consideration whereof he awarded a peremptory writ of mandamus, commanding the county judge to issue his warrant upon the county trustee for said costs. The judgment of the circuit court further recites that it was admitted at the bar that the relator had obtained a judgment for these bills of costs in said circuit court at the May term, 1895, but by mistake the clerk failed to enter said judgment and the bills of costs upon the record, and at the present term upon motion and notice to defendant Walker, which was not resisted, the judgment then rendered was entered *nunc pro tunc*. The circuit judge was further of opinion that Acts Ex. Sess. 1891, c. 22, § 5, is unconstitutional. That act empowers the comptroller of the state and the county judge, after bills of costs have been examined and approved by the circuit judge and attorney general, to examine, inspect, and audit them, and to disallow any bills of costs wrongfully or illegally taxed against the state or county. The circuit judge was of opinion this act was not within the scope of the call of the governor convening the general assembly in extraordinary session, and therefore void. It is stated that the court in this proceeding refused to adjudge the legality or illegality of the two items charged in these cost bills, but based his judgment exclusively upon the unconstitutionality of the act of 1891, authorizing the county judge to review and disallow bills of costs after they have been certified by the judge and attorney general.

Our first inquiry shall be in respect of the legality of the two items of cost in controversy. The principle is axiomatic, and in this state is embodied in a statute, that no officer is allowed to demand or receive fees or other compensation for any service further than is expressly provided by law. Shan-



non's Code, § 6352. In respect of the item of 25 cents for certifying bill of costs, we find no law authorizing such a charge. On the contrary, it has been expressly decided by this court in *Perkins v. State*, 9 Baxt. 3, that such a fee is not authorized. In that case it was held that while, by Shannon's Code, § 7594, the clerk is required to certify a copy of the judgment and bill of costs with the certificate of the attorney general and judge, there is no allowance to him for making said certificate. The fee allowed for every "certified copy of order," under section 6398, subsec. 5, Shannon's Code, does not authorize the charge. The clerk's certificate is in no sense a "copy of any order."

It is next assigned as error that the court erred in not striking out the fee of 35 cents for entering bill of costs of record. This assignment of error is well taken, since the question presented has already been adjudicated by the court. In the case of *State v. Henderson*, 15 Lea, 277, this court held, viz.: "The only other exception taken to the action of his honor by the attorney general is to the allowance of ten cents per hundred words for copying bills of costs on the record or minutes of the court. In support of the ruling by his honor we are referred to section 5301, subsec. 35, and section 6442, Mill. & V. Code. By subsection 35 of section 5301, the clerk, 'for copies of any pleadings, papers and proceedings in a cause, is entitled per hundred words to ten cents from the person to whom or for whom they are furnished.' But there is no statute requiring him to copy a bill of costs upon the minutes of the court before judgment that county or state shall pay them." It is insisted, however, that the county judge could not lawfully refuse to issue his warrant for these costs after they had been allowed and certified by the attorney general and judge, and that the act of 1891, authorizing the state comptroller, judge, or chairman of the county court, to examine and disallow any part of a bill of costs illegally taxed against the state or county, although the same may have been approved by the circuit judge and attorney general, is unconstitutional and void. The objections to this act are twofold, to wit: First. The legislature does not establish a new court, but attempts to give superior authority to the judge of a county court, and takes from the appellate court the rights properly belonging to it. It is insisted this act violates article 6, § 1, Const. Tenn., which provides, viz.: "The judicial power of this state shall be vested in one supreme court and in such circuit, chancery and other inferior courts as the legislature shall from time to time ordain and establish." Second. That said act is unconstitutional because the legislation attempted is not contemplated or called for in the proclamation convening the general assembly in extraordinary session. Article 3, § 9, Const. Tenn., in enumerating the powers of the governor, provides, viz.:

"He may, on extraordinary occasions, convene the general assembly by proclamation in which he shall state specifically the purposes for which they are to convene; but they shall enter on no legislative business except that for which they were specially called together." The proclamation of the governor convening the Forty-Seventh general assembly in extra session, after enumerating certain specific purposes of the call, embodies the following, viz.: "(3) To pass statutes to modify, amend or add to the system of criminal laws and procedure in this state." In pursuance of this call the legislature assembled, and, among other statutes, passed the one now in controversy. That act is entitled "An act to amend sections 5586 and 5587 of the Code of 1858 relative to the payment of costs in criminal cases, and to more clearly define, what cost in criminal cases the state and county shall be held liable." The fifth section of that act is, viz.: "That the state comptroller, judge, or chairman of the county court after said bills have been examined and approved by the judge and attorney general are hereby granted full power, and it is hereby made their duty to examine into, inspect and audit all bills of cost accruing against the state or county and disallow any part of said bills of cost that may be illegal or wrongfully taxed against the state or county, and the state comptroller, judge or chairman of the county court may disallow any or all costs taxed against the state or county on account of malicious, frivolous, or unnecessary prosecutions, in the event the attorney general and judge should be mistaken or otherwise approve any of such bills." This legislation will at once commend itself as eminently wise and wholesome. It had been held by this court in *State v. Puckett*, 7 Lea, 709, that the county judge had no authority to revise a bill of costs properly adjudged against the county, taxed, examined, and certified according to law. The power to examine and adjust bills of cost was conferred by statute upon the comptroller prior to the passage of the act of 1891, and, if it appeared that judgment had been rendered against the state for costs for which it was not liable, the comptroller might refuse to draw his warrant. *Morgan v. Pickard*, 86 Tenn. 208, 9 S. W. 690. But the question now is whether the statute conferring this power upon the county judge is constitutional. It is argued that the first sentence, namely, "(3) To pass statutes to modify, amend or add to the system of criminal laws and procedure in this state," is limited by the sentence immediately following, and embraced within the same section, namely, "The passage of laws prohibiting the use of scrip or its equivalent by persons or corporations in payment of their debts, providing penalty for violation of same, and laws that will punish with penalties any interference with state convicts, will be commended to the attention of the legislature under this

general head." It is insisted that the power of the legislature under the call "to modify, amend or add to the system of criminal laws and procedure" extends only to the specific matters set out in the second paragraph of the section. It is further insisted that the first sentence of this section, when considered alone, is not in conformity with the constitutional requirement, for the reason that it does not state specifically the objects for which the legislature is to be assembled, but that the specific purposes of the call, as required by the constitution, are pointed out in the second clause, and hence the scope of the first clause is circumscribed by the specifications of the second paragraph. However, we pretermitt the decision of this question, since it is not necessarily required in the disposition of this case. It affirmatively appears that at least two items in the bill of costs now sought to be enforced by mandamus are illegal, and this remedy will not be allowed for the enforcement of an illegal demand. Says Mr. High: "The right of mandamus being justly regarded as one of the highest rights known to our system of jurisprudence, it issues only when there is a clear and specific legal right to be enforced, or a duty which ought to be and can be performed, and where there is no other specific and legal remedy. The right which it is sought to protect must therefore be clearly established, and the writ is never granted in doubtful cases. The person seeking the relief must show a clear legal right to have the thing sought by it done, and done in the manner and by the person sought to be coerced. The writ, if granted, must also be effectual as a remedy, and must be within the power of the respondent, as well as his duty, to do the act in question. It follows, also, from the important position which this writ occupies as a remedial process, as well as from its nature as an extraordinary remedy, that the exercise of the jurisdiction rests to a considerable extent in the sound discretion of the court, subject always to well-settled principles which have been established by the courts, or fixed by legislative enactment. Causes may therefore arise where the applicant for relief has an undoubted legal right, for which mandamus is the proper remedy, but where the court may, in the exercise of a judicial discrimination, still refuse the relief." High, Extr. Rem. (3d Ed.) § 9; *Harris v. State*, 96 Tenn. 517, 34 S. W. 1017. It results that the judgment of the circuit court will be reversed, and the petition for the alternative writ of mandamus will be dismissed.

The other cases involve the same items of costs, and were motions made by the county judge in the circuit to retax under section 673, Shannon's Code, viz.: "If the judge or chairman of the county court when a bill of costs thus authenticated [by attorney general and circuit judge] is presented to him and his warrant for payment of same is de-

manded, conceive that said costs, or any part of it, is not lawfully chargeable to the county, he may defer the issuance of his warrant until he has moved the court for a correction of the taxation." The circuit judge sustained the motion to retax as to the item of 25 cents for certifying bill of costs, but allowed the fee of 35 cents. The item of 35 cents is a charge for entering bill of cost on the minutes, and, as there are 350 words in each bill of costs, the charge is 35 cents. Both sides appealed from the ruling of the circuit judge. The judgment of the circuit judge in allowing the charge of 35 cents for entering bills of cost of record is reversed, but, in disallowing the item of 25 cents for certifying bills of cost, his judgment is affirmed.

### KIMBRO v. CONTINENTAL INS. CO.

(Supreme Court of Tennessee. Sept. 26, 1898.)

APPEAL—RECORD—RULINGS ON EVIDENCE—INSURANCE—POLICY—CONSTRUCTION—PREMIUMS.

1. The remedy for a failure of the court of chancery appeals to find and report facts, and to recite evidence to which exceptions were taken, is an application to said court for a more full and definite finding.

2. Rejection of evidence cannot be complained of where the court states that in making its findings it considered it as competent.

3. Application, policy, and premium notes may be considered together, to arrive at a proper construction of the policy, it being ambiguous.

4. Premium is due on the 1st day of March of each year, under policy providing that the note of \$23.80 "shall fall due as follows: \$5.95 on the first days each of March, 1893, 4, 5, and 6."

5. A policy taken out March 10, 1892, to extend to March 10, 1897, providing for a payment of \$4.20 premium, at time of issue, and \$5.95 on the 1st day of March in each of the four succeeding years, is in force on March 9, 1894, by reason of the payment of March 1, 1893, without any payment March 1, 1894.

Appeal from chancery court, Hamilton county; T. M. McConnell, Chancellor.

Action by R. H. Kimbro against the Continental Insurance Company. From judgment of the court of chancery appeals reversing judgment for plaintiff, he appeals. Reversed.

W. T. Murray, for appellant. White & Martin, for appellee.

WILKES, J. This is an action to recover upon a fire insurance policy. The chancellor gave judgment for a portion of the amount covered by the policy, to wit, \$375, and interest from filing the bill. The court of chancery appeals reversed this judgment, denied the insured any relief, and dismissed his bill, and the cause is before us on his appeal and quite a number of assignments of error.

The first and second errors assigned are, in substance, that the court of chancery appeals failed to find and report the facts of the case so as to enable this court to properly apply the law, and that it failed to recite certain

evidence to which exception was taken in the court below. These assignments are not well made. The report of the court of chancery appeals as to the facts and law is quite full, and fairly presents the case in its legal aspect. While the evidence is not set out verbatim, it is not necessary it should be done; so that the questions at issue and those settled are clearly presented, and the same may be said of the evidence as to which exception was made. Besides, if this contention were good, the remedy is an application to the court of chancery appeals for a more full and definite finding.

The third assignment is not well made. This is in regard to the admission of certain evidence. The court of chancery appeals report that they considered all the evidence, both that objected to and that not excepted to, as it considered it competent and admissible in one aspect of the case. Then the appellant had the benefit of the testimony to the rejection of which they excepted, and the appellant has no ground to complain. The materiality of this question as to the testimony arises out of the fact that appellant desires to add to the policy, and to show that the real contract with the insurance company was not fully embodied in the policy, that blanks were improperly filled in by the agents of the insurance company, and that fraudulent statements were made to procure the same, and that conditions as to time of payments of premium were waived. The court of chancery appeals states that it did consider all the evidence objected to as if it was competent, but was still of opinion upon all the evidence that the appellant had not as a fact made out his contention, so that there is no error in this matter of testimony to which the appellant can now assign any error. If there was error, it was against the insurance company. The fourth assignment is that it was not proper to consider the application, the policy, and premium notes, together, in order to arrive at a proper construction of the policy as to when the premium was due. This was not error, but was correct when there was any ambiguity in the policy, as may be said to be the case here. *Dale v. Insurance Co.*, 95 Tenn. 38-52, 31 S. W. 266.

The fifth assignment is that the court of chancery appeals incorrectly held that the premiums on the policy, by its terms, were payable on 1st of March each year, and that the language implied that such premiums might be paid on any day of March, near the 1st. The language of the policy is that the installment note of \$23.80 shall fall due as follows: "\$5.95 on the first days each of March, 1893, 4, 5, and 6." While the language is awkward and ambiguous, it evidently means that the premium is due on the 1st day of March of each year, and the plural is used, not to designate more than one day of the month, but to designate one day in each year. All the papers, we think, are in accord with this view.

The sixth assignment is a general one that the court of chancery appeals erred in reversing the chancellor and dismissing the bill, and virtually embraces the others. The grounds for this assignment have already been considered separately. The facts are that the policy was taken out March 10, 1892, to extend to March 10, 1897. The premium was to be paid on 1st day of March each year, as we think from the policy and all other papers, and as found by the court of chancery appeals. The policy provided against liability if a loss occurred while a premium note was past due and unpaid, and the note had a like provision. The fire occurred March 9, 1894. The premium due 1st March, 1894, was then past due and unpaid; and the court of chancery appeals was of opinion, therefore, there was no liability. Looking to the findings of the court of chancery appeals, and agreeing therewith, as we do, still we are of opinion it is in error in holding that the company is not liable. Looking to the policy and all the papers, we are of opinion that while they provide that the note shall fall due on the 1st of March, each year, and not later, still it is, we think, perfectly evident that the policy could not lapse or be forfeited until the 10th of March, each year, which was the limit of expiration of its life. The cash payment of \$4.20 was clearly intended to keep the policy alive for one year from the 10th of March, 1892. The first installment note of \$5.95 was to be paid by the 1st of March, 1893, and was to keep the policy alive for the second year; that is, until March 10, 1894. While, therefore, the insurance company had a right to treat the policy lapsed and forfeited on and after March 1, 1894, if the note then due was not paid, such lapse could not take effect until the termination of the time to which it was paid up; that is, the 10th of March, 1894. In other words, the installment note due March 1, 1894, was to pay for insurance for the year commencing March 10, 1894, and ending March 10, 1895, and could not affect the insurance up to March 10, 1894, which was already paid up. The installments were payable in advance yearly on the 1st of March, but, when paid, they insured the property until the 10th of March of each succeeding year; so that, when the last note should be paid, on the 1st of March, 1896, it would make the insurance effective until the 10th of March, 1897. It could not be contended that if the loss occurred between the 1st and 10th March, 1897, the property was not covered and the insurance not in force, all notes being paid; and yet, if we hold that the advance payment on the 1st of March only kept the policy alive till 1st March thereafter, then the payment of the same premium on March 1, 1896, would keep it alive 10 days longer than the similar payments made the years before. That the policy would be alive and extend to March 10, 1897, at 12 o'clock noon, there can be no doubt, under

its express provisions. The clear construction of the policy is that each yearly installment was to pay for insurance for one year, and that this year was to run from 10th March to 10th of March in each year, though the yearly premium was payable in advance on 1st of March. Why the cash premium was only \$1.20 for the first year is not explained, and we need not stop to consider, as it is immaterial. The decree of the court of chancery appeals is reversed, and the decree of the chancellor affirmed, with interest and costs.

### BROWN v. CHATTANOOGA ELECTRIC RY. CO.

Supreme Court of Tennessee. Sept. 26, 1898.)  
PERSONAL INJURIES—RIGHT OF ACTION—ASSUMPTION OF RISK.

1. Settlement by one of his claim for personal injuries bars action by his wife therefor on his death therefrom.

2. One employed in digging a ditch, though illiterate, not being shown to have been weak-minded, assumed the danger of its caving; the loose character of the soil, consisting largely of cinders, which had been filled in, being apparent.

Appeal from circuit court, Hamilton county; Floyd Estell, Judge.

Action by Emma Brown against the Chattanooga Electric Railway Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Case & Case, for appellant. Brown & Spurlock, for appellee.

**WILKES, J.** This is an action for personal injuries resulting in the death of plaintiff's husband, Andrew Brown. Defendant introduced no evidence, but demurred to that of plaintiff, which was sustained by the trial judge, and the suit dismissed, and the plaintiff has appealed, and assigned errors.

The defendant, as one of his pleas, stated that the matter of damages arising out of this accident was compromised and settled with the deceased in his lifetime. There was a replication to this plea, among other things to the effect that this settlement was before the husband died, and before the plaintiff's right of action accrued, and was no bar to it. The court, on motion, struck out this part of the replication, and this is assigned as error. There was no testimony on this feature of the case, and, under the shape it has assumed, it is not material to be considered. It may be said, however, that it was not error to strike out the replication, since, if there had been a settlement and adjustment made by the deceased in his lifetime of his claim for damages, it would bar any subsequent action by the widow. Of course, the good faith and binding effect of such settlement could be put in issue, as was done; but that also becomes immaterial under the demurrer, which raises and relies solely upon

the theory that there was no cause of action to any one arising out of the accident.

The facts, as disclosed by plaintiff's proof, are that her husband was an illiterate negro,—an ordinary laborer,—but there is no proof that he was weak-minded or imbecile. He was employed with another to dig and uncover an escape pipe at or near the defendant's power house, in an alley between the power house and a frame house on the east of it. This alley was some 10 feet wide. The ditch started in at a depth of 3 or 4 feet at the north end, and deepened to 7 feet or more at the edge of Seventh street. Beneath the surface the dirt to be excavated was loose for some distance, and then there was clay, and it was thrown out as excavated on the east side of the ditch next to the power building. There was a ledge of about 3 feet on which the dirt was banked up. There were no stays across or along the ditch, and no protection from its falling in or caving in. It did fall in on Andrew Brown while he was excavating at a place where it was about 6 feet deep, and crushed him so that he died. An expert engineer, Fritzwater, had charge of the work, and Brown was working under his directions and obeying his orders. After the accident defendant took precautions to avoid further caving. The pipes were rusted.

It is insisted that this is not a case where the employé has full knowledge of the danger, and assumes the risk; that he was an ignorant negro, and could not be presumed to know his danger from the character of the soil, which was filled in with cinders and debris, nor that the banking of the dirt upon the narrow ledge would cause it to cave in, and that all these facts, and the danger consequent on them, were well known to the engineer, and not communicated to the employé; that it was the duty of the employer to furnish a safe place to work, in that the work was done under the immediate supervision of the engineer, who was present; that stays and supports for the excavation should have been provided and used; and that the evidence should have gone to the jury, especially in view of the ignorance of the deceased, as to whether he knew of the danger. The right of recovery is resisted on the idea that the danger, if any, was patent; that it could be appreciated and known by the weakest intelligence; and that the deceased, when he undertook the work, assumed the risks incident to it. If the plaintiff in this case was aware of the danger attending his work, or it was so obvious and apparent that a man of ordinary intelligence would have seen it, then he must be held to have taken its risks and hazards, and would not be entitled to recover. Baily, Pers. Inj. §§ 501, 502a, 796, 796a. The witnesses state that the loose character of the soil and the banks was apparent, and the danger of their caving in must have been obvious to the most ordinary intelligence, and to a common laborer. The witness McQuade says that "it could be

seen, as you went down into the ground, that it was made earth, and any man of ordinary sense could see the kind of soil it was; that it was principally filled in with cinders, which was loose stuff, and the person who was digging could tell this better than any one else." The witness Gass states, substantially, to the same effect, and says that any man of ordinary sense could tell whether he was digging through cinders or clay. It clearly appears, therefore, that the deceased knew the danger to which he was exposed, and continued to work, and in such cases he must be held to have assumed the risks, and is not entitled to recover for injuries sustained. Danger from a bank or wall of earth falling is one open to common observation, and is a risk assumed by any one working therein. *Olson v. McMullen*, 34 Minn. 95, 24 N. W. 318; *Pederson v. City of Rushford*, 41 Minn. 290, 42 N. W. 1063; *Swanson v. Railway Co.* (Minn.) 70 N. W. 978; *Loughlin v. State*, 105 N. Y. 159, 11 N. E. 371; *Del Sejnore v. Hallinan* (N. Y. App.) 47 N. E. 308; *Evans v. City of Council Bluffs*, 65 Iowa, 237, 21 N. W. 584; *Krantz v. Railway Co.*, 123 N. Y. 5, 25 N. E. 206; *Hughes v. Gaslight Co.*, 168 Mass. 396, 47 N. E. 125. Let the judgment of the court below be affirmed, with costs.

#### HAMILTON COUNTY v. RAPE.

(Supreme Court of Tennessee. Sept. 27, 1898.)

HIGHWAYS—ABUTTING OWNERS—FEE—CHANGE OF GRADE—DAMAGES.

1. Registration of a plot does not, in general, vest in the public the fee of the streets therein designated.
2. An abutting lot owner has an easement of access in the street, the taking or destruction of which by a change of grade of the street is a taking of property for public purposes.
3. A deed to platted lots by number, describing them as adjoining and fronting "each 50 feet on the west side of Central avenue," does not imply that grantee does not own the fee of the said avenue.
4. The damage entailed to abutting lots by a depression of a street grade is for the jury, and is not limited to the cost of a retaining wall or terrace, since that would not put the lots in the same condition as before the grade was changed.

Error to circuit court, Hamilton county; Floyd Estell, Judge.

Action by W. E. Rape against Hamilton county. From a judgment for plaintiff, defendant brings error. Affirmed.

C. R. Evans and Cooke, Swaney & Cooke, for plaintiff in error. T. C. Latimore, for defendant in error.

WILKES, J. This is an action against the county of Hamilton by one of its citizens. There was a trial before the court and jury in the court below, and a judgment against the county for \$650, and the county has appealed, and assigned error.

Plaintiff, Rape, owns five lots in Hamilton county, in one of the unincorporated suburbs of Chattanooga. This property, with other lands, originally belonged to C. E. James. It was divided up by him into lots and streets, and a plat was registered of the property as thus divided and appropriated. The streets were partially graded, and the one in front of the property in controversy was cut down some two to three feet below the level of the abutting lots. In this condition the road was used by the public from about 1891 to 1895, when the county of Hamilton took control of the roadway as a public or county road, and cut down the grade of the road in front of the property from three to seven feet. The theory of this action is that in so doing the county impaired the means of access or ingress and egress to the lots on the front. These lots were improved with residences, the yards running down to the roadway, but a strip of some three feet was left on the margin as a pavement in front of the lots outside the inclosures. Pedestrians could reach and enter the front of these lots from the ends of this sidewalk, but neither footmen nor animals could reach the lots on their front without going up an embankment some five to seven feet high. There is a way by which the lots can be reached on their rear both by footmen and vehicles. The court charged the jury that if the plaintiff owned these lots, and a street, avenue, or road had been dedicated to public use by the former owners, about 1891, and the defendant county, in 1895, so changed the grade of this road that it destroyed or impaired the egress and ingress from the roadway to and from plaintiff's property, the plaintiff would be entitled to recover whatever damages the proof shows he has sustained in the matter. This charge fairly presents the only real question in controversy in the case.

It is insisted on behalf of the county that the action is virtually for a supposed tort, and that such action will not be against a county for the management, etc., of its highways. *Elliott, Roads & S.* p. 323. On the other hand, it is insisted that this action is not for a tort, but is for the taking of property of an individual for public use without compensation. It is argued for the county that when a street is laid out by an owner, and lots platted with reference thereto, and such plat of street and lots is registered, it is a dedication of the street to the public, and vests the fee-simple title to the street in the public, and abutting owners have no further interest in it than other citizens, and numerous authorities from other states are cited to sustain this proposition. See 9 Am. & Eng. Enc. Law, 374, and note. Whatever may be the law of other states, or where there is a statutory dedication, we do not think such is the law generally, nor of this state; and, unless there is something to indicate to the contrary, the abutting lot owners own the fee to the center of the street, and the public has an easement

for road or street purposes only so long as it is used for such purposes. The argument, therefore, that, when the county changed the grade of the road, it was only dealing with its own property, in which the abutting owner had only the right of other citizens, is not sound. The abutting lot owner is presumed to own to the center of the street. Elliott, Roads & S. p. 519. He has a right of ingress and egress to his property, or, as it is called, an easement of access; and if this is taken away, or if it is impaired or incumbered, without his consent, it is a taking of his property for public purposes, for which he is entitled to compensation. Elliott, Roads & S. pp. 161, 523; Anderson v. Turbeville, 6 Cold. 153; Railroad Co. v. Bingham, 87 Tenn. 323, 11 S. W. 705. This right of ingress and egress may be valuable or not, and may be of more or less value, according to the location of the property. Thus, in the country districts, when a grade is changed through a man's farm, the right of ingress and egress may at any particular point be of little or no value, and for it the abutting owner would be entitled to little or no damages; but, in case of suburban property, a way of ingress and egress to the front of every lot is a matter of importance, and the destruction or impairment of such way is a proper matter for compensation, to the extent of the value of the right thus taken away. It is not a question of tort, under the pleadings, but of taking a valuable property right without compensation, and the charge is not erroneous. Gray v. Knoxville, 85 Tenn. 101, 1 S. W. 622; Railroad Co. v. Bingham, 87 Tenn. 523, 11 S. W. 705. The case of Humes v. Knoxville, 1 Humph. 403, may seem to be in apparent conflict with this holding, but in that case the action was for a tort, and the questions of taking property and the consequent right to compensation were not considered. So, likewise, in the case of Railroad Co. v. Adams, 3 Head. 596-600, the action was for a tort, and the distinction between the actions for tort for injuries to real estate and for compensation for its taking was considered and plainly drawn. This action is for compensation, and does not proceed upon the idea of a tort, as was done in the two cases above cited. This view accords with our recent statutes relating to the establishing of streets, and changing and altering grades of the same, by municipal corporations (Shannon's Code, §§ 1265-1268), and is in harmony with the modern trend of judicial opinion as to what constitutes a taking, and what property may be made the subject of a taking (Memphis & C. R. Co. v. Birmingham, S. & T. R. Co. [Ala.] 11 South. 642).

It is said, however, that the deed to the plaintiff only gave him a right to the margin of the road. The deed conveys the lots by numbers, and says they adjoin and front each 50 feet "on west side of Central avenue," and extend westwardly to Grand avenue. The descriptive term, "west side of Central ave-

nue," does not mean that the line is the margin of Central avenue, but simply that the lots lie on the western side or direction from Central avenue. It does not expressly provide, nor does it at all imply, that the plaintiff's line stops at the margin of the street.

It is said the damages are excessive, and that, in any event, they should not exceed \$369. This was a matter for the jury. It appears that ingress and egress were cut off almost entirely on the front of the lots; that the cutting down of the grade caused the banks to cave in and the fence to fall, so that it had to be moved back and reset. It uncovered the water pipes, and caused a pond of water to settle on the lots. The estimates as to the market value of the lots before and after the change ranged from \$1,000 to \$2,000. The remedies suggested by the county as to terracing and erection of steps and building a retaining wall, which might have been done, at cost of from \$30 to \$360, would not put the party in the same condition as to his property as before the grade was cut. We see no error in the record, and the judgment of the court below is affirmed, with costs.

#### STATE ex rel. DONALDSON v. WALKER, County Judge (two cases).

(Supreme Court of Tennessee. Sept. 28, 1898.)

COUNTIES—CRIMINAL COSTS—ALLOWANCE—CONCULSIVENESS—WARRANT—ITEMS—DISTRICT ATTORNEYS—FEES—MANDAMUS—PLEADING.

1. Where a warrant for fees of a district attorney covers some items improperly allowed, the remainder being undisputed, it is proper for the county judge to refuse to issue a new warrant for the correct items unless the previous warrant is surrendered.

2. The fact that conclusions of law are stated in connection with the facts in a pleading does not subject it to be stricken out on demurrer.

3. Under Shannon's Code, § 6380, providing that in cases of misdemeanor, where a nolle prosequi is entered, no fee shall be allowed the attorney general, and section 6383, prohibiting fees to the attorney general where a bill of indictment is ignored by the grand jury, the district attorney is not entitled to fees from the county in cases in which a nolle prosequi was entered after indictment, and in those which were ignored by the grand jury, and no indictments found.

4. Under Shannon's Code, § 673, allowing the judge of the county court, when he conceives that an authenticated bill of costs presented to him for his warrant contains improper items, "to defer the issuance of his warrant till he can move the court for a correction of the taxation," the application for a retaxation of costs need not be made at the first term of the court thereafter, since the time when such retaxation is to be made is not limited.

5. The issuance by the county judge of a warrant for district attorney fees inadvertently or erroneously does not preclude him, as financial agent of the county, from forbidding its payment until it can be purged of illegal and unauthorized items.

6. A judgment against the county for costs not authorized by statute is void, and hence open to collateral attack.

Appeal from circuit court, Hamilton county; Floyd Estell, Judge.

Actions of mandamus by the state, on the relation of W. E. Donaldson, against S. M. Walker, county judge. From a denial of peremptory writs, and a dismissal of the petitions, plaintiff appeals. Affirmed.

Trewhitt & Stanfield, for appellant. C. R. Evans and Cooke, Swaney & Cooke, for appellee.

WILKES, J. These cases are heard together, and involve the same questions. They are actions of mandamus by the plaintiff to enforce the payment of county warrants issued to and held by him for certain costs or fees claimed as district attorney for the Fourth judicial circuit. The plaintiff has been district attorney of this circuit since September 1, 1894, and the defendant has been county judge of Hamilton county for the same time. Plaintiff prosecuted persons charged with various offenses, and judgments in his favor were entered, it is claimed, for certain fees arising out of such prosecutions, amounting in the aggregate to the sum of \$970. After the judgments were entered in the circuit court the clerk of that court made out bills of cost, and they were examined and approved by the circuit judge and district attorney, placed of record, and presented to defendant for payment. He issued his warrant accordingly, but soon after directed the county trustee not to pay it, and payment was thereupon refused. Mandamus proceedings were thereupon commenced to compel the payment of the warrant. It is admitted by the defendant that \$227.50 of the amount included in the warrant is correct, and an offer is made to issue a new warrant for this sum upon return of the old one, which it is claimed is incorrect, and contains and embraces improper items, as against the county. Defendant bases his refusal to pay upon the provisions of the act of the extra session of 1891 (chapter 22, § 585, Mill. & V. Code; Shannon's Code, §§ 672, 673), and claims that under the provisions of these and other statutes he has a right to refuse to issue a warrant for costs, if he considers them illegal or not properly taxed, until he can move the circuit or criminal court for a re-taxation, and that he can strike out under the acts of 1891 (Shannon's Code, § 674), and refuse to pay, costs, if he deems them illegal, and that these remedies continue, though he may have issued a warrant recognizing such illegal costs, when done through misapprehension and mistake, inasmuch as such warrants are not negotiable, and that he has a right to interdict the payment of a warrant improperly and inadvertently issued for fees not justly due. He charges that a portion of the fees claimed, and for which warrant has issued, are not justly due the petitioner, and are improperly taxed without warrant of law. Upon the coming in of the answer of the county judge, the petitioner moved to make the mandamus peremptory; and upon

the record as thus made up, together with the bills of cost, execution and rule dockets, and judgments of the court allowing the costs, the causes were heard. The court overruled the motion for a peremptory writ, and dismissed the petition at petitioner's cost, from which action plaintiff has appealed to this court, and assigned errors.

It is said that the bills of cost for which the \$970 warrant was drawn included 199 cases at the May term, 1896, which were ignored by the grand jury, and no indictment was found, and 98 cases at the same time in which a nolle prosequi was entered after the indictment was found, making a total of 297 cases in which a fee of \$2.50 was charged and allowed against the county, aggregating a total of \$742.50. As to the remainder of \$227.50 no complaint is made, and for that amount the county judge expresses willingness to issue a warrant upon return and surrender of the original warrant for \$970. The answer admitted that \$294.50 of the \$970 was correct, but this appears to have been a clerical mistake in calculation, and only \$227.50 is actually due, according to the county judge's contention and view of the case. It is insisted in the assignment of errors that judgment should have been entered at least for the amount conceded to be due. This, we are of opinion, is not error. If the warrant for \$970 is not correct, the county judge should not be required to issue another warrant covering in part the same items, so long as the \$970 warrant is outstanding, and claimed to be valid.

It is said that clauses 1, 2, 3, 4, and 5 of section 7 of the answer of the county judge should have been stricken out on demurrer, or on the motion for peremptory mandamus, which is its equivalent, because they state conclusions of law, and attempt to collaterally attack judgments of the court unappealed from, and because subsection 4 is not borne out by the remainder of the record. We think this assignment is not well made. The clauses referred to state facts, as well as conclusions of law thereon, and, upon demurrer, should be treated as true. So far as they are contradicted by the record, we must presume the court was not influenced thereby. The whole of the matters set up in this assignment are fully covered by other assignments, and disposed of therein.

It is said the court erred in holding that the district attorney is not entitled to fees in cases where a nolle prosequi is entered. It is said that his right to such fees is clearly fixed by statute, and we are referred to Shannon's Code, §§ 7157, 7619, 7621, and to the decision of this court in *State v. Farris*, 4 Lea, 183. We are of opinion this matter of district attorney's fees is governed and set at rest, so far as the county is concerned, by section 6380, Shannon's Compilation, which is as follows: "In all cases of misdemeanor where a nolle prosequi is entered and cause stricken from the docket and the

county is taxed with the cost no fee shall be taxed or allowed the attorney general." Also, section 6383: "No cost or tax fee is allowed the attorney general when a bill of indictment is ignored by the grand jury or the prosecution fails by reason of any defect in the pleadings." It is said that application to retax the costs should have been made at the first term of the court, and it is too late now to ask for a retaxation, inasmuch as the judgments for costs were not appealed from, and the warrant has been issued for them, and is now in the hands of the plaintiff. The provisions of the statute relating to this matter are sections 672 and 673 of Shannon's Compilation, and are in the following words and figures:

"Sec. 672. No warrants shall be drawn for costs against a county unless the same has been regularly taxed by the clerk, examined by the district attorney and presiding judge of the court in which the costs accrued, and by them certified, under the seal of the court, to be correctly taxed and lawfully chargeable upon the county.

"Sec. 673. If the judge or chairman of the county court, when a bill of cost thus authenticated is presented to him, and his warrant for the same demanded, conceive that said costs, or any part of it is not lawfully chargeable to the county, he may defer the issuance of his warrant till he has moved the court for a correction of the taxation."

We need not consider nor pass upon the provisions of section 674, which is the act of 1891 (chapter 22, § 5), and the validity of which is questioned, as the matters involved may be determined without regard to that act. The provisions of sections 672 and 673, providing for a retaxation of costs, are not limited as to the time when such retaxation may be had. It is, of course, the policy of the law, and the proper practice, for the county judge to make an examination as soon as may be of all bills of cost against the county, and to promptly move for a retaxation as soon as he discovers any errors and opportunity offers. It is also evident he should do so before he issues his warrant for the costs. But the statutes have interposed no time limit which should defeat a revision, and this court would not be disposed to fix one. Nor would the issuance of a warrant inadvertently or erroneously preclude and stop the county judge, as financial agent of the county, from denying and forbidding its payment in the hands of the party to whom it is issued, or perhaps others (as it is not negotiable paper), until it could be purged of its illegal and unauthorized items.

Again, it is said the action of the trial judge and district attorney in examining and certifying costs has the force and effect of a judgment of the circuit court, and, if unappealed from, cannot be collaterally attacked in such proceeding as this. The court below was of opinion that, if these certifications should be treated as judgments, still they

would be void, because they show upon their face that they embrace items not allowed by law. The statute provides (Shannon's Code, § 6352) "that no officer is allowed to demand or receive fees or other compensation for any service further than is expressly provided by law." And again (section 7583): "Officers are entitled to no other fees in criminal cases except such as are expressly provided by law, and in no case are they entitled to payment from the state or county unless expressly allowed." The whole system shows that the legislature intended to throw double safeguards around the state and county treasuries, by providing that bills of cost against the state and county should be made out so as to show the specific items; that they should be examined, entered of record, and certified to be correct by the court or judge before whom the cause was tried or disposed of, and also by the district attorney; and they are given full power, and it is made their duty, to examine into, inspect, and audit all bills of cost accruing against the state or county, and disallow any part or all of said bills of cost that may be illegally or wrongfully taxed against the state or county. Shannon's Code, § 7593. When this has been done, still, if the county judge deem that any items are improperly taxed and embraced in the bill of costs, he may bring the matter before the trial judge, and ask for a retaxation of costs, and the cutting out of all illegal and unauthorized items. Neither the issuance of a warrant nor the certification by the judge and attorney general would preclude this retaxation of costs. A judgment for costs against the state or county which is not authorized by statute is void, and the county judge cannot legally pay a void judgment. *Morgan v. Pickard*, 86 Tenn. 211, 9 S. W. 690.

The trial judge denied the prayer for the writ of mandamus, and in doing so we think there was no error, as petitioner does not show a right to this extraordinary writ; and we affirm the judgment of the court below, and dismiss the petition, at the costs of relator and his surety.

#### IRVINE et ux. v. MAYOR, ETC., OF CHATTANOOGA.

(Supreme Court of Tennessee. Oct. 3, 1898.)

##### CITIES—NEGLECTANCE OF FIRE DEPARTMENT.

A city is not liable for loss by fire through the negligence or inefficiency of its fire department, though a tax is specially levied to support such fire department; the duty to extinguish fires being a public, and not a corporate, one.

Appeal from circuit court, Hamilton county; Floyd Estell, Judge.

Action by John J. Irvine and wife against the mayor and aldermen of the city of Chattanooga. Judgment for defendant. Plaintiffs appeal. Affirmed.



Richmond, Chambers & Head, for appellants. Case & Case, for appellee.

**McALISTER, J.** The object of this suit is to hold the city of Chattanooga liable for the loss of a dwelling house by fire, which it is alleged to have occurred in consequence of the negligence and inefficiency of the fire department. The fire occurred about 10 o'clock on the morning of June 28, 1896, and the dwelling was totally destroyed. It originated in the roof, near the chimney, and as soon as it was discovered the plaintiff turned in an electrical alarm to fire hall No. 2, situated about two blocks distant. The fire department having failed to respond, a general alarm was given to all the fire halls in different portions of the city, but there was still no response. Plaintiff then undertook to reach the department by telephone, but was unsuccessful. In the meantime the fire had slowly spread to other parts of the building, and, notwithstanding the utmost exertions on the part of plaintiff, the house was totally destroyed. It seems reasonably certain from this record that if the fire company at hall No. 2 had responded the flames could have been arrested, and the property saved. The failure of the fire department to respond was due to the fact that on that morning it had been ordered on parade duty to attend the funeral of the city physician, which occurred about two miles distant from plaintiff's property, and in an opposite part of the city. A demurrer was interposed on behalf of the city, which was sustained by the circuit court, and plaintiff's suit dismissed.

The principal assignment of demurrer was that the duty to extinguish fires is a public, and not a corporate, one, and the city is not liable for the negligent failure of its officers, agents, and servants to extinguish fires. The general rule is that the neglect of duty for which an action will lie against a municipal corporation must be a plain, absolute duty, which pertains to the corporation as such, and from which it is to derive special benefit in its corporate capacity, and not merely such duties as it exercises for the benefit of the public. 2 Dill. Mun. Corp. § 976 et seq. Says Judge McFarland in *Mayor, etc., v. Kimbrough*, 12 Helsk. 133, viz.: "A municipal corporation is, upon the principle of respondeat superior, liable for the negligence of its officers and agents in the exercise of that class of powers conferred upon it, not for public purposes only, and as pertaining to its functions as a local government, exercising in that aspect a position of the sovereign power of the state, but for its own corporate advantage and immediate emolument." It has been held in this state, upon the principle just stated, that no action lies against a city for the acts of its police officers, such as an assault and battery in the arrest of an offender or the unlawful refusal of a recorder to accept bail. *Pesterfield v. Vickers*, 3 Cold, 205. So, in a recent case decided at Nashville this

court held no action would lie against a city for the negligence of an employé, in charge of a sprinkling cart, whereby injury was occasioned to plaintiff's buggy. 2 Dill. Mun. Corp. § 975. Again, at section 976 the same author says: "So, although a municipal corporation has charter power to extinguish fires, to establish a fire department, to appoint and remove its officers, and to make regulations in respect to their government and the management of fires, it is not liable for the negligence of firemen appointed and paid by it, who, when engaged in their line of duty upon an alarm of fire, ran over plaintiff in drawing a hose reel belonging to the city on their way to the fire, nor for injuries to the plaintiff caused by the bursting of the hose of one of the engines of the corporation through the negligence of a member of the fire department, nor for negligence when any sparks from the fire engine of the corporation caused the plaintiff's property to be burned. The exemption from liability in these and the like cases is \* \* \* that the service is one in which the corporation as such has no particular interest, and from which it derives no special benefit in its corporate capacity; that the members of the fire department, although appointed and paid by the city corporation, are not the agents and servants of the city for whose conduct it is liable, but they act rather as officers of the city charged with a public service, for whose negligence in the discharge of official duty no action lies against the city without being expressly given. The maxim of respondeat superior has therefore no application." In *Foster v. Water Co.*, 3 Lea, 48, this court, in considering this subject, said, viz.: "The conclusion of the courts has been not to press the pecuniary liability of municipal corporations, which is distinctly recognized where the duty is a corporate one, absolute and perfect, and owing to an injured party, to cases where a duty is assumed, not for the corporate comfort, but for the common good. They have refused to hold the city liable for the acts of its police officers, although they are appointed by it, or for the acts and negligence of its agents and employés in charge of patients in a public hospital; for the misconduct of members of its fire department; or for the city's neglect to provide suitable engines or fire apparatus, or to keep in repair public cisterns, or continue the supply of water to particular hydrants. The reason is that the hazard of pecuniary loss might prevent the corporation from assuming duties which, although not strictly corporate nor essential to the corporate existence, largely subserve the public interest. The supplying water for the extinguishment of fires is precisely one of these acts which bring no profit to the corporation, but are eminently humanitarian. To hold a city responsible for the loss of a building, or of a whole street of houses, as sometimes happens, because it might be thought or because in reality some

of its indispensable agents had been negligent of their duty, might well frighten our municipal corporations from assuming the startling risk."

Plaintiff, however, undertakes to exempt this case from the operation of the general rule upon the ground that a tax was especially levied to support the fire department, and hence there was an implied contract to furnish an efficient service for the extinguishment of fires, and a corresponding liability on the part of the city for a breach of this duty. But, as is well argued, the health department, police department, the workhouse department, and others are supported by money raised for that purpose by taxation. In Chattanooga the expenses of the fire department are estimated each year in fixing the tax rate, just as the expenses of the police department are estimated. The exemption from liability in this class of cases is rested upon the ground that powers of this nature conferred upon such corporations are public and governmental functions, and are not strictly corporate functions. The distinction may be a little metaphysical, and at times difficult of application, but it is well settled. Judgment affirmed.

#### HOLTZCLAW v. HAMILTON COUNTY.

(Supreme Court of Tennessee. Oct. 8, 1898.)

COUNTIES — CONTRACT WITH JUDGE — ACTIONS — PLEADING—APPEAL.

1. In an action against a county on a contract made between plaintiff and the county judge, an answer denying that the county made the contract raises the issue whether the judge had power to make the contract.

2. A county judge or county court has no authority to engage a person to examine bills of costs which have been paid by the court to the clerk of the circuit court and the district attorney.

3. In an action against a county on a contract made between plaintiff and the county judge, the question of the power of the judge to make the contract may be inquired into in the appellate court, although not raised by assignment of error.

Appeal from chancery court, Hamilton county; T. M. McConnell, Chancellor.

Action by Graham T. Holtzclaw against Hamilton county. From a decree of the court of chancery appeals reversing a judgment for plaintiff, he appeals. Affirmed.

Pritchard & Sizer, for appellant. C. R. Evans and Cooke, Swaney & Cooke, for appellee.

**WILKES, J.** This is an action against Hamilton county for compensation for services rendered and to be rendered in the examination of bills of cost which have been paid to the clerk of the circuit court and district attorney by the court for a period of six years before the investigation ordered.

The theory of complainant is that he was employed by the judge of the county court for the county to make such investigation at a fixed rate of compensation, and was discharged after only a few days' service, and while the work was unfinished, and without any legal cause. The defense is that the complainant was not employed by the county, but by the county judge, and that he had no power to make such contract or bind the county under the law. It is assigned as error in this court that the power of the county judge to make such contract is not put in issue by the pleadings, proof, or assignments of error. The answer denies that the county made such contract, but it is insisted that this contention was not that the county judge did not have the power to make the contract, but that as a fact he did not make it. We think the true question is not whether the county judge had the power to make the contract, but did he have the power to bind the county by it; and the defense that the county did not make the contract puts in issue, not only the fact, but the authority of the county judge to make such contract for the county. We are aware of no law authorizing the county judge or county court to employ any person to make an investigation of this kind as a matter of contract. It is true, the county court represents the county, and, if it conceives that it has the power to make such investigation, it could do so directly as a body, or by appointing some of its members to do the work, as was afterwards done. Whether such appointees would be entitled to compensation we need not consider, as that question, is not involved, and is one of very grave doubt.

It is also true that the county judge is the financial agent of the county; but it is equally true that it is his duty officially to audit all accounts against the county, and this power he cannot delegate. If he can, by virtue of his office, overhaul accounts already audited and passed, about which we express no opinion, we know of no statute or law authorizing him to employ another, at the county's expense, to do such service. Such person or the justices in case they act could only gather information for such further action as the law warrants, and neither could exercise the judicial functions of passing on bills of cost. The court of chancery appeals was of opinion that, although there was no assignment of error raising the question of the power of the county judge to make such contracts, still the court must repel any claimant who fails to show a valid contract with the county. In this conclusion we concur. If there is no authority to hold the county for any particular item of cost or expense, the courts must arrest any proceeding for that purpose, even if prosecuted by consent. The decree of the court of chancery appeals is affirmed, with costs.

**UNION TRUST CO. v. CHATTANOOGA  
ELECTRIC RY. CO. et al.**

**BAYLEY et al. v. SAME.**

(Supreme Court of Tennessee. Oct. 5, 1898.)

**MORTGAGES—PREMATURE FORECLOSURE.**

A bill of foreclosure was filed within two months after maturity of interest coupons. The mortgage provided that, if default was made in the payment of interest, the mortgagor would within "six months after such default shall have occurred, the same default still continuing," give possession; and that, if such default was made and continued, the trustee could take possession of the property, receive the income and profits, and, after paying expenses, pay the default interest, or, by a proceeding in court, might sell the property, and pay the default interest and principal of the mortgage, whether due or not. *Held*, that the foreclosure was premature, since under the provision of the mortgage there was no right of foreclosure for the mere default, either in or out of court, until after such default had continued for six months.

Appeal from chancery court, Hamilton county; T. M. McConnell, Chancellor.

Bills by the Union Trust Company against the Chattanooga Electric Railway Company and others and by N. R. Bayley and others against the same defendants. From a decree, defendants appeal. Dismissed.

Brown & Spurlock, for appellants Chattanooga Electric Ry. Co. Wheeler & McDermott, for appellee Union Trust Co. J. H. Barr, for appellees Bayley and others.

**WILKES, J.** These two causes are proceedings to foreclose mortgages of the Chattanooga Electric Railway Company because of default in payment of interest coupons. The suits were brought within two months after the coupons matured. Before the lapse of six months after maturity, but after the bills were filed, the defendant company paid all interest in default.

As the cases come to us, two questions only are presented: (1) Whether the bills were prematurely filed; and (2) whether the trustee in the first case should be allowed compensation for himself and counsel, and in the second case whether the counsel of complainants should be allowed fees, the trustee in the latter case having failed and being unable to act, and the suit being brought by the bondholders who are beneficiaries under the trust.

The first assignment presents a question of difficulty, and its solution depends upon the proper construction of the provisions of the mortgages as to the remedies of the trustee or beneficiaries in case of default in payment of the interest coupons at maturity. The provisions of the mortgage in the first case are substantially, so far as need be stated, "that if default is made in payment of any interest," etc., "the mortgagor covenants and agrees that within six months after such default shall have occurred, the same default still continuing, it will, on demand of the trustee, give possession to him or his agent

of all the mortgaged property, and he may operate the same, and receive the income and profits, and, after paying expenses, pay the interest in default," etc. It is further provided by the next section that if "default shall be made as aforesaid, and shall continue as aforesaid, the trustee, after entry as aforesaid, or other entry, or without entry," by itself or agent, or by "proceeding in court," may sell the property, etc., and pay the proceeds on said interest, and on the principal of said bonds, whether due or not. The provisions of the mortgage in the second case are that, if default is made in payment of principal or interest, and if such default continue for six months, the mortgagee or trustee may take possession, and proceed to operate, and, after paying expenses, pay the interest and principal, and may sell the property, etc. It further provides: "Upon default and entry as aforesaid, or without such entry, the party of the second part may proceed to sell the mortgaged property either by virtue of the power of sale herein contained, or by proceedings in a court of equity, in the manner and for the purposes herein mentioned," etc.

The question of controversy in the case is whether the mortgagor company, under these provisions, has six months after default in which to pay interest before any steps can be taken to foreclose, or whether the right to foreclose by court proceedings is immediate upon the default. The court of chancery appeals held the latter view, and therefore concluded that the suits to foreclose were not premature, and as a result the complainants were allowed counsel fees (and trustee's compensation, in the last case). They base their conclusion on the holding of the court in *Railroad Co. v. Fosdick*, 106 U. S. 47, 1 Sup. Ct. 10; *Guaranty Trust & Safe-Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137, 11 Sup. Ct. 512; *Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co.*, 61 Fed. 543. The identical same cases are relied on by appellant to sustain a contrary view, and are urged by appellees to sustain the court of chancery appeals.

As an original proposition, free from any controlling or persuasive authority, we would hold that a proper construction of each mortgage is that it is not until after default in payment of interest had continued for six months that foreclosure proceedings or other proceedings to take possession could be had, either in or out of court. Upon any other construction, we are unable to give any force or effect to the words, "within six months," contained in one mortgage, and "if such default continue for six months," in the other. "Within" a certain time embraces the last day of the time limited, as does the word "after." 29 Am. & Eng. Enc. Law, 524; 26 Am. & Eng. Enc. Law, 4; 1 Am. & Eng. Enc. Law, 323. If the provision that "within six months after default, it still continuing," does not mean that the mortgagor shall have the six months after default for breathing time

to make good the default, we can see no rational meaning to attach to it. It could have but one other meaning, and that is that the possession and foreclosure proceedings may commence at once, but must begin within six months, or not at all,—a construction which would lead to absurd consequences. Take the illustration put by counsel for complainant of a note or bond payable within six months. This would clearly mean that the maker would have the whole of six months in which to pay, and so it has been held. 29 Am. & Eng. Enc. Law, 524, note. If it was intended that a right of immediate entry should be had, why put in the six-months limit and why not provide in plain terms that, if default is made, the trustee may at once or forthwith enter and proceed with foreclosure? This would be the result if no limit was made in the mortgage. Why, then, is six months mentioned, unless it was to give that time to make good the default? So, in the other mortgage, the entry and foreclosure are to take place, and court proceedings may be had if such default continues six months. If it do not continue for that time, the right of entry and foreclosure, in or out of court, has not accrued, under the terms of the mortgage.

But it is said the right to go into court and foreclose on default does not depend on the provisions of the mortgage, and that there is an immediate right of foreclosure by court proceedings in all such cases upon default made. Grant this to be so in cases when it is not otherwise provided (as the decisions hold), still, when the time when the entry is to be made and foreclosure commenced is prescribed by the mortgage, that will control, in the absence of some superior equity. The jurisdiction and power of the chancery court to foreclose and execute trusts cannot be taken away from it, even by agreement, express or implied. Nor is it cut off by mere silence on the subject; but when parties make a reasonable stipulation in the mortgage that it shall be foreclosed only on certain conditions, and in certain contingencies, this stipulation will be respected by the courts, unless there arises some unexpected and overriding occasion to demand the aid of the court to preserve the property or the rights of the parties. While there are cases, some of which are cited by counsel, holding, more or less strictly, a contrary view, this is in accord with the rulings of this court in similar cases. *Clark v. Jones*, 93 Tenn. 642, 27 S. W. 1009; *Irvine v. Shrum*, 97 Tenn. 263, 36 S. W. 1089. We do not understand the case of *Railroad Co. v. Fosdick*, 106 U. S. 47, 1 Sup. Ct. 10, to be in conflict with this view. In that case the provisions are very similar to those now under consideration, and the court does say that, upon default in payment of any interest, the trustee or any bondholder may file a bill to foreclose; but the court was evidently speaking of the right to file such a bill, and not, in that

immediate connection, of the time when it might be filed. See 27 U. S. (Lawy. Ed.) bottom page 54. But just prior to this the court says that the condition of the mortgage "was broken, and, continuing for six months, entitled the trustee to take possession," etc., "and sell," etc. See same page, near middle. In that case, moreover, the interest had been in default from October, 1873, to February 27, 1875, before the bill was filed, so that the questions of time and prematurity of suit were not material, and really not considered. It will be noted, also, that in the *Fosdick Case* the provision of the fourth article of the mortgage, as stated by the court, was that the mortgagor's right of possession was to terminate upon a default in the payment of interest as well as principal; while in the mortgages now under consideration the clear intent is that the mortgagor is to remain in possession until the termination of the six months and until demand is made. The rule is, we think, correctly stated, in general terms, in *Farmers' Loan & Trust Co. v. Chicago & A. Ry. Co.*, 27 Fed. 151, substantially as follows: "When the trustee may proceed to foreclose on account of default depends on the construction of the mortgage. It is generally held that the right exists to proceed at once, unless it appears from the terms of the mortgage to be the intent of the parties to postpone the right." The case of *Guaranty Trust & Safe-Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137, 11 Sup. Ct. 512, is in accord with this view. In that case the mortgage provided that the trustees should take possession and sell after default for a time stated, but made no mention of foreclosure proceedings in any court, and there was no provision therefor, and it was held that the limitation did not apply to court proceedings to foreclose, nor to judicial sales, but only to foreclosure in the mode provided in the mortgage, and that the right to court foreclosure exists, though not provided for in the mortgage. The general rule is that, when no provision is made for court foreclosure, it may be had at any time after default, although proceedings out of court may be provided for differently in the mortgage; and the converse of the rule is equally good, that when court foreclosure is provided for in the mortgage it is a stipulation that the court may be resorted to only upon the terms and at the time provided in the mortgage. The mortgage in each of the cases now under consideration provides for a sale under court proceedings, at the same time and on the same conditions that sale may be made out of court, and, under such provisions, it is the clear intention of the parties that the court proceedings should be had only in like cases and conditions where foreclosure might be had out of court, and we do not think the provision for court foreclosure can be treated as simply and alone in aid of proceedings out of court. We are of opinion that, under the provisions

of these mortgages, there is no right of foreclosure for mere default, either in or out of court, until after default has been continued for six months, and until demand made, the demand being an additional prerequisite, and not affecting the time limit, and the suits were prematurely brought, therefore; and the defendant should not be operated with the compensation of the trustee, or his counsel, or counsel for the bondholders; and the decree of the court of chancery appeals is therefore reversed. Costs of the appeal and of the court below will be paid by the original complainants and their sureties on their prosecution bond, and the bills are dismissed. In this view, we need not consider the second assignment.

#### TYLER et al. v. WALKER et al.

(Supreme Court of Tennessee. Oct. 5, 1898.)

PROMISSORY NOTES — ATTORNEY'S FEES — TRUST DEED — FORECLOSURE — USURY — COSTS.

1. An attorney's fee provided in a note to be paid in case of suit cannot be recovered, where plaintiff sues on the note for an amount as due thereon which includes usurious interest.

2. In a suit to enjoin foreclosure of a trust deed which defendant was attempting to foreclose for an amount greater than was actually due, and which included usurious interest, where defendant filed a cross bill asking that the deed be foreclosed, he was not entitled to costs, under Shannon's Code, § 4947, providing that, where usurious interest has been intentionally taken or reserved, the person taking or reserving the same shall pay full costs, on a decree of foreclosure.

Appeal from chancery court, Hamilton county; T. M. McConnell, Judge.

Suit by Mary F. Tyler and others against P. H. Walker and others. From a decree for plaintiffs, without costs, they appeal. Affirmed.

J. H. McLean, for appellants. Pritchard & Sizer, for respondents.

WILKES, J. The original bill in this case was filed to enjoin a foreclosure of a deed of trust. It alleged that the complainant had tendered the amount due under the deed of trust, but that defendant had collected usury, and was demanding more, and seeking to collect a larger sum than was justly owing. Defendant answered, and denied that tender had been made, and said that he was aware he could only collect the proper amount owing, without usury. He filed a cross bill, and asked that the deed of trust be foreclosed for such amount, and an attorney's fee as stipulated in the deed of trust, and also for another attorney's fee which had been incurred in some negotiations for an extension of time. On demurrer to the cross bill it was dismissed as to this latter fee of \$25. On final hearing, the court found the amount due, and held that, while a tender had not been made, still defendant was attempting to foreclose his deed of trust for

more than was legally due; that the bill was therefore properly filed to enjoin the sale; and that defendant, under the facts, was not entitled to recover any attorney's fee, but must pay all the costs except that of the sale. There was a decree of sale, and the property was sold, and bought by defendant; but, before the confirmation, complainants paid off the judgment, and interest and such costs as were adjudged against them, whereupon the sale was set aside. From so much of the decree as adjudged costs against him, and denied him attorney's fees, defendant appealed, and also appealed from the decree on the demurrer refusing the \$25 attorney's fee. The court of chancery appeals affirmed the decree of the chancellor, and complainant has appealed to this court, and assigned errors.

The only errors assigned in this court are that the defendant was improperly required to pay all the costs except those incident to a sale of the property, and was denied an attorney's fee for collection of the note by suit. The provision in the note as to fees is this: "We further agree that, if suit is brought on this note, we will pay all attorney's fees and costs of collecting." The note was signed by Tyler and wife, but it is doubtful from its language whether the mortgage recognizes this provision as to attorney's fees as a valid charge on the property for which a sale may be had. It does not do so in express terms, but perhaps by implication does, and we so treat it. It is not denied that this provision is a valid and legal one in cases where suit is necessary and brought in good faith, and the stipulation is not a device to cover up and collect usury. This is well settled. *Parham v. Pulliam*, 5 Cold. 497; *Weatherly v. Smith*, 6 Am. Rep. 663; *Clark v. Jones*, 93 Tenn. 643, 27 S. W. 1009. But such fee is not collectible when suit is needlessly brought, or when it is brought to enforce an unjust demand, or to coerce more than is actually and justly due. *Id.*; *Boyd v. Jones (Ala.)* 11 South. 405. The authorities construe strictly in favor of the debtor all similar provisions as to attorney's fees. *Fowler v. Trust Co.*, 141 U. S. 406, 12 Sup. Ct. 7; *Myer v. Hart*, 40 Mich. 517; *Bynum v. Frederick*, 81 Ala. 489, 8 South. 193; 26 Am. & Eng. Enc. Law, 965, subd. 24. It clearly appears from the holding of the chancellor and the findings of the court of chancery appeals that the defendant was attempting to foreclose his trust deed for an amount which embraced usury, and was greater than was legally owing, and that, while defendant in his cross bill disclaimed any right of recovery for any amount beyond legal interest, still in it he was not willing to give credit for such payments of usury as he incorrectly thought were barred by the statute of limitations. The cross bill was, moreover, unnecessary, as the trust deed could have been enforced out of court for the amount legally due.

As to the costs, we are of opinion this question is settled by the statute (Shannon's Code, § 4947), which is as follows: "If it be made to appear in the action that usurious interest has been intentionally taken or reserved, the person taking or reserving such usury shall pay full cost." It is clear from the findings of the court of chancery appeals that the defendant did collect and reserve usurious interest, and that he sought to retain all the usury paid more than six years before the litigation began; and the whole litigation in this case arose out of the usury claimed. We cannot see that the chancellor or court of chancery appeals was in error in thus holding as to costs; and, even if it be held a matter of discretion, this court would not reverse unless there was a clear abuse of such discretion. *State v. Lewis*, 10 Lea, 168. We see no reversible error in the decree of the court of chancery appeals, and it is affirmed, with costs.

#### TROTTER v. CHATTANOOGA FURNITURE CO.

(Supreme Court of Tennessee. Sept. 28, 1898.)

##### INJURY TO EMPLOYE—ASSUMPTION OF RISK.

An employé who continues in his employment after expiration of the time at which the master has promised to repair a defect, without the repair being made, assumes the risk.

Appeal from circuit court, Hamilton county; Floyd Estill, Judge.

Action by John Trotter against the Chattanooga Furniture Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Payne & Payne, for appellant. Pritchard & Szer, for appellee.

**WILKES, J.** This is a suit by an employé against his employer for injuries sustained in his employment, and alleged to be due to the employer's negligence. The declaration alleges unsafe, unsuitable, and dangerous condition of a saw, and the machinery and apparatus attached thereto. The first count charges that this want of safety was known to defendant company, but not to the plaintiff. The second count alleges that the defendant promised plaintiff to have same repaired immediately, and plaintiff, relying upon said promise, and believing that defendant would repair as it had promised to do, continued to operate it. The plaintiff introduced his evidence, and it was formally demurred to, and there was joinder in the demurrer, and a trial before the judge, who sustained the demurrer and dismissed the plaintiff's suit; and he has appealed, and assigned as error this action of the trial judge, and his refusal to submit the evidence to the jury which had heard it, and his dismissing the suit.

The evidence showed that the plaintiff was a man about 28 years of age, and that he

had been in the employ of the defendant company several years, for two of which he had operated the saw which injured him, and for six or seven years had operated a rip saw. About ten days before the injury a rope attached to the saw frame operated by the plaintiff broke. It was attached to the frame at one end and to a weight at the other, and its function was to hold the saw frame back against the wall when not in use. It was pulled out, when wanted for use, by a handle attached to the frame, and, after being used, the handle would be released, and the weight would pull the frame back out of the way. When the rope broke, the plaintiff reported the fact to Lockwood, the repairer of the defendant's machinery, and he tied the rope together; and on plaintiff's objecting to running it that way, because it was dangerous, Lockwood went to Parham, general manager, and told him the rope was broken, and he would like to have a new one. Parham asked, "Do you want it now, or will morning do you?" to which Lockwood replied, "I will let it go until morning," and Parham said, "I will bring it down with me in the morning." Lockwood returned to plaintiff, and told him what Parham had promised, and said he thought the mended rope was sound and sufficient until then, and for him to go on with it until the next morning. The new rope was not brought in the morning, and plaintiff continued to operate the saw with the old rope as it was for some 10 days without further complaint, when it again broke, and the saw flew out and struck plaintiff's arm and injured his elbow. The plaintiff went to his mother and had his arm bound up, and she attended to it for some 10 days or more, when a physician examined it, and dressed the arm several times. Plaintiff was disabled from work for some months, and according to his statement his arm is stiff and severely injured.

It is evident that plaintiff could not, on this evidence, recover upon the first count in the declaration, which alleged knowledge of defects on part of the company, and want of knowledge on plaintiff's part. If he can recover at all, it must be on the second count. The general rule is that a servant assumes the risks when he enters or continues in employment when he knows the tools or machinery are dangerous, unfit, and unsuitable, but nevertheless works with them, and is injured. *Bailey*, Pers. Inj. §§ 506, 510; *Railway Co. v. Handman*, 13 Lea, 423; *Brewer v. Railway Co.*, 97 Tenn. 615, 37 S. W. 549. In order to recover in such cases, he must show knowledge or negligent ignorance on the part of the master, and a want of knowledge or excusable ignorance on the part of the servant. *Id.* 430. And, when each is equally competent to judge of the risks and hazards, there is no ground of recovery. *Bailey*, Pers. Inj. § 778. This case must, however, turn largely upon the effect of the promise to repair. The averment is that the prom-

ise was to repair immediately, and that a new rope would be furnished the next morning. The averment is not that plaintiff was led to continue in the employment by the promise, but is only that he believed the repair would be made, and relied on the master's promise. "It must appear that the servant was led to continue the employment by the master's promise that the defect complained of would be removed." *Bailey, Mast. Liab.* p. 208; *Brewer v. Railway Co.*, 97 Tenn. 615, 619, 37 S. W. 549. The assurance of the master that the defect shall be remedied is an agreement by him that he will assume the risk for a reasonable time. This promise will be implied to continue only a reasonable time, and the injury must have occurred within the time within which the defects were promised to be removed. If the employé continues longer than this, he does so without reliance on the promise, and is as hazardous and hopeless of remedy as though the promise had not been made. It is a waiver of the defects agreed to be remedied. *Bailey, Pers. Inj.* §§ 3112, 3112a. In *Eureka Co. v. Bass*, 8 South. 216, 218, the supreme court of Alabama said: "The injury must have occurred within the time at which the defects were promised to be remedied. If the employé continues to expose himself to the danger by remaining in service longer than this, he does so in the face of the fact that the promise of the employer is violated, and that he has no reasonable expectation of its fulfillment. He can therefore no longer rely upon the promise." A promise already broken can afford no reasonable guaranty of the fulfillment of any expectation based on its disappointed assurances. 2 *Bailey, Pers. Inj.* §§ 3106, 3107. In this case the appliance was of the simplest nature. The danger was obvious, and better known to plaintiff than perhaps any one else. He continued to use the broken rope without complaint. He made no demand to have the defect remedied after the failure to furnish the new rope next morning. He continued to operate the saw for 10 days. In the meantime the repairer, Lockwood, had left the employ of the company; and plaintiff made no complaint to his successor, but must be held to have taken the risk, and not to be relying on the defendant's promises. *Erdman v. Steel Co.*, 95 Wis. 6, 69 N. W. 993. The failure to supply the new rope the next morning as promised was no doubt due to the fact that Lockwood, whose business it was to supply it, left the employ of the company; and no doubt the rope would have been supplied if Parham, the general manager, had been reminded of the condition of affairs, and his promise. However this may be, the plaintiff continued without further protest to use the old rope, and must be held to have taken the risk. We do not think it would have been proper in this case to have submitted to the jury the question as to what was reasonable time. The promise fixed the time. Let the judgment be affirmed, with costs.

# KELLY et al. v. MOUNTAIN CITY CLUB et al.

(Supreme Court of Tennessee. Oct. 1, 1898.)

## CREDITORS' BILL—ATTORNEYS' FEES.

Fees of complainants' attorneys in a creditors' suit to wind up an insolvent corporation, which was done through a receiver, should not be paid out of the proceeds of the real estate, which is insufficient to pay the first mortgage bonds, though one of the holders of the first mortgage bonds, who was also a holder of second mortgage bonds and a general creditor, joined as a complainant.

Appeal from chancery court, Hamilton county; T. M. McConnell, Chancellor.

Bill by J. W. Kelly and another against the Mountain City Club and others. The decree was affirmed by the court of chancery appeals, and complainants appeal. Affirmed.

Williams & Lancaster and Cooke, Swaney & Cooke, for complainants. Stephen & Carswell and White & Martin, for first mortgage bondholders.

WILKES, J. The only question in this case is whether the fees of complainants' solicitors are payable out of the proceeds realized from a sale of the real property of the Mountain City Club, a social organization, wound up in this proceeding as an insolvent corporation. There is no contest as to the amount of the fees. They were fixed at \$850, and the court below held that no part of the amount should be charged up against the real estate of the club or its proceeds, and the complainants appealed. The court of chancery appeals affirmed the decree of the court below, and held that no part of the fees should be paid out of the real estate. It appears that upon this real estate there is a first mortgage for \$25,000. There is a mortgage for \$10,000 upon the furnishings, etc., of the club, and this is also a second mortgage on the realty. Complainant Kelly is a holder of some of the latter bonds, and is also a general unsecured creditor of the club to a large amount. The bill in this cause was filed to wind up the affairs of the club, alleging insolvency, and setting out the assets and liabilities; and it was asked that it be taken and treated as a general creditors' bill, and that a temporary receiver be appointed. To this bill the club, as a corporation, and the Southern Bank & Trust Company, as trustee, and one Squair, were made defendants. Squair was a holder of some of the first mortgage and some of the second mortgage bonds. The club answered, admitting insolvency, and agreeing to the proceeding. On the 15th of February, 1896, Bray and others, holders of first mortgage bonds on the real estate, filed a cross bill, asking a foreclosure of their mortgage and sale of the real property for their benefit, and that their cross bill be treated as a general creditors' and bond holders' bill, and that a permanent receiver be appointed, etc. April 26, 1896, Squair, who was a defendant to the original

bill, joined with Kelly, complainant in the original bill, in filing an amended and supplemental bill, in which he insisted it was to the interest of all parties to have the affairs of the club wound up under one proceeding; and he asked that the amended and supplemental bill be treated as a general creditors' bill, and that a permanent receiver be appointed. This bill at chambers was ordered to be treated as a general creditors' bill, and a permanent receiver was appointed under all the proceedings. The property was sold. The real estate brought \$10,500. There are several thousand dollars of other assets. There was a reference as to the fees, reserving the question as to what funds would be liable for them. The amount of fees was reported, and is not excepted to. Under the order of reference, much proof was taken to show that complainants' action in the whole matter was in the interest of the club and general creditors, and to the prejudice of the first mortgage bond holders. Upon final hearing, the chancellor decreed as before stated, and the court of chancery appeals has affirmed his ruling; and the case is before us on appeal of complainants, and error assigned.

The only error assigned is that the court of chancery appeals erred in holding that no part of complainants' attorneys' fees should be paid out of the proceeds of the real estate sold, inasmuch as the amended and supplemental bill filed by Squair, who was a holder of first mortgage bonds, was ordered by the court to be treated as a general creditors' bill, and the litigation was conducted on this idea. It is insisted that under this bill the fund of \$10,500 was brought into court as the proceeds of the real estate, and complainants' solicitors are entitled to fees out of it. Several authorities are cited in support of this contention. We are of opinion the error is not well assigned, and the decree of the court of chancery appeals is correct. It is true, the proceeds of the real estate came into court in the progress of the cause, but not for the benefit of the general creditors. The first mortgage creditors were in no wise interested in having it go into court. They could have realized it without the aid of the court by a foreclosure outside of court. The fact that general creditors or second mortgage bond holders caused the land to be sold in the case, so that the property might be kept together, was a matter wholly for their benefit, and really to the prejudice and delay of the first mortgage bond holders. In winding up the affairs of the corporation, so as to realize whatever of surplus there might be for their debt, the second mortgage bond holders and general creditors would have no right to require the first mortgage bond holders to contribute of their security to pay general creditors and attorney's fees. These first mortgage bond holders had their own attorneys, and to them they are responsible for fees. It is evident that the interests of the

second mortgage and general creditors were not the same as that of the first mortgage bond holders, but really antagonistic. The real merit of the case is that the first mortgage bond holders should not be made to contribute to attorney's fees to benefit second mortgage bond holders and general creditors, when their interests are antagonistic; and informalities, if any, in the proceedings, should not be allowed to work a different result. The fact that Squair was a first mortgage bond holder, and joined in the amended and supplemental bill, can make no difference, since his position was clearly antagonistic to that of the large majority of the first bond holders, and his interests under the second mortgage and as a general creditor may easily account for his position, and place him in antagonism, as it was in this latter capacity that his interests lay. This holding is well supported by authorities: *Garner v. Garner*, 1 Lea, 30; *Schultz v. Blackford*, 9 Lea, 431; *Hume v. Bank*, 13 Lea, 496; *Keith v. Fitzhugh*, 15 Lea, 49. Let the decree be affirmed, with costs.

#### McQUADE v. WILLIAMS et al.

(Supreme Court of Tennessee. Oct. 8, 1898.)

ATTACHMENT—EXECUTION—RES ADJUDICATA—  
FRAUDULENT CONVEYANCES—APPEAL—HARM-  
LESS ERROR—QUESTION OF FACT.

1. A decree setting aside a levy and sale of corporate stock, under execution, on the ground that the stock is under pledge, is not a bar to a subsequent suit to subject the stock to attachment.

2. When the court treats a defense made as that of *res adjudicata*, and finds against the defendant, an erroneous finding that the previous action was pending at the time is harmless error.

3. A finding by the court of chancery appeals that a transfer is fraudulent and void is conclusive on the supreme court.

Appeal from chancery court, Hamilton county; Robert Pritchard, Chancellor.

Suit by H. A. McQuade against J. T. Williams and others. From a decree of the court of chancery appeals affirming a judgment for plaintiff, the defendants appeal. Affirmed.

M. H. Clift and J. H. Cantrell, for appellants. Frank Spurlock and T. C. Latimore, for appellee.

WILKES, J. This is a suit by a judgment creditor to subject to attachment and sale 15 shares of stock of the Chattanooga Opera-House Company, as the property of J. T. Williams. The chancellor granted relief, and the court of chancery appeals affirmed the court below, and defendants have appealed and assigned errors.

The first error complained of is that the matters presented in the controversy are *res adjudicata*; and the court of chancery appeals should have so held. It appears that on November 18, 1891, the complainant, having a judgment against J. T. Williams, levied



on this stock by execution at law, and sold it, and bought it at the sheriff's sale. In January, 1895, he filed a bill, and alleged that when he levied upon this stock, and when he sold it, it was under pledge to a third person, and hence he had failed to get any title, but that the debt for which the stock was pledged had been since satisfied, and that Williams, the debtor, had transferred the stock to Kitty E. Loyd, without consideration; and the court was asked to declare that transfer void, and to compel the corporation to issue the stock to him. The answers in the case denied the case as made out by the bill, insist that the levy and sale were void, but that Kitty Loyd had title to the stock under the transfer, and had paid full consideration for it. The special chancellor in that case held that the complainant took nothing under his levy, because the stock at the time was under pledge. It thus appears that the only question adjudicated in that case was the title and right acquired by complainant by virtue of his levy and sale under execution. The right to subject the property by attachment, and to set aside the sale for fraud in fact, was not passed upon or considered.

It is insisted, however, that the decree in that case must, under well-known rules, be held conclusive, not only of all facts and issues presented, but also of all issues and facts that might have been presented, and we are cited to *Boyd v. Robinson*, 93 Tenn. 2, 23 S. W. 72, and other cases holding this doctrine. The language used in the *Boyd* case is "that the decision is conclusive on every point which properly belongs to the subject of litigation, and which the parties, exercising a reasonable diligence, might have brought forward at the time." Tried by this rule, the decision cannot be treated as conclusive, because the first case in no sense involved the right to proceed to subject the stock by attachment, but it was solely a suit in aid of the sale under execution. The fraudulent character of the transfer could not have been considered, because the complainant, while seeking to hold under an execution sale absolutely void, had no status to question the good or bad faith of the transfer to Kitty E. Loyd, and did not attempt to do so, except that it was not based on any consideration, and was null and void as to his levy and sale. Complainant could have questioned Kitty E. Loyd's title only by showing that he acquired title under his sale; otherwise, he had no status to contest.

It is said the court of chancery appeals erred as a matter of fact in holding that the original cause was pending when the present bill was filed, when such was not the fact; and this, it is claimed, appears from the record in this case. We need not pass on this, inasmuch as it is immaterial to the rights of defendants. The court of chancery appeals treat the defense made as that of *res adjudicata*, and find against defendants. Now, if the former suit were pending, and not

determined, the defense should not have been that of *res adjudicata* or former judgment, but that of former suit pending; and in either event the record fails to show a former suit, involving the same questions, either pending or determined.

This disposes of the only assignment made to the decree of the court of chancery appeals in proper manner. There is a general statement that for other errors reference is made to the original assignment before the court of chancery appeals. It is there assigned that the chancellor was in error in holding that the transfer from Williams to Kitty E. Loyd was fraudulent and void. This is a question of fact, and the finding of the court of chancery appeals is conclusive. We see no error in the decree of the court of chancery appeals, and it is affirmed, with costs.

#### YOUNG v. MUTUAL LIFE INS. CO. (No. 35.)

SAME v. CROZIER et al. (No. 61.)

(Supreme Court of Tennessee. Oct. 5, 1898.)

WILLS—CONSTRUCTION—ESTATE CREATED—POWERS—EXECUTION—APPLICATION OF PROCEEDS.

1. Under a will giving the widow control of testator's property, and authorizing her to dispose of it, and providing, "I further desire that at the decease of my wife" it shall become the property of testator's daughter, the widow takes only a life estate, with remainder to the daughter, with power in the widow to sell and convey the fee.

2. The purchaser from one who sells under a power is not bound to see that the proceeds are applied in accordance with its terms.

3. A conveyance for a fair consideration by a warranty deed which refers to the will as the source of title is a sufficient execution of a testamentary power to sell and convey, and such deed need not show that it is in execution thereof.

Appeal from chancery court, Hamilton county; T. M. McConnell, Judge.

Two bills by Essy May Young against the Mutual Life Insurance Company, and against Helen Crozier and others, to recover possession of property. From a decree of the court of chancery appeals for complainant and against defendant insurance company, and dismissing the bill in the suit against Crozier and others, the aggrieved parties appeal. Both bills dismissed.

Dickey & Peeples, for Young. Bloom & Boody, for Mutual Life Ins. Co. E. Watkins, for Crozier.

WILKES, J. These cases, heard at different times in the court below and in the court of chancery appeals, involve the same questions of law, and have been heard together in this court. The facts, so far as necessary to be stated, are that W. C. Young made his last will and testament, in these words, "I, W. C. Young, farmer and fruit grower, of the 5th civil district of Hamilton county, Tennessee, make this, my last will. I give, devise, and bequeath my estate and property, real

and personal, as follows: That is to say, my farm located on Mission Ridge, and described and bounded as follows: On the northeast and west by the lands of T. D. Dodds, on the south by the lands of N. Huddle,—and containing  $9\frac{1}{4}$  acres, and fully described in a deed given by D. T. Dodds to me, bearing date Octo. 27, 1883. I also give, devise, and bequeath all my personal property and effects. I also devise and wish my wife, S. J. Young, to have full and complete control,—to transfer and reinvest or otherwise dispose of the property, or any part of the same, as she may wish. I further desire that at the decease of my wife the property as above described, or the proceeds thereof, shall become the property of my daughter Essy May Young. I appoint my wife, S. J. Young, sole executor of this, my last will and testament.

\* \* \* Aug. 17, 1885." The complainant was an infant two years old when her father died, and her mother soon afterwards remarried, and has sold the real estate mentioned in the will, and the defendants hold under title from her. The real question presented in each case is the proper construction of the will, and the power of the widow and mother thereunder to dispose of the real estate. In each case the court of chancery appeals held that the widow of W. C. Young took a life estate in the land, with remainder to her child; hence she could not convey the lands as a fee-simple owner. In the first case the court of chancery appeals held that the sale and conveyance by the widow was not a valid execution of the power conferred by the will, taking the statement of the bill as true on demurrer; and in the second case, that the conveyance was a valid execution of such power, as a matter of law and judicial construction. The error assigned is, in substance, that the court of chancery appeals should have held that the widow took an absolute estate in fee in the land under the will. We are of opinion there is no error in this holding. Taking the whole instrument together, while it is indefinite and informal, in not naming the devisee, it was clearly a devise to the wife, with remainder to the child,—with power in the mother, however, to sell and reinvest. Upon this branch of the case we need not dwell. This is not in conflict with *Bradley v. Carnes*, 94 Tenn. 27, 27 S. W. 1007, as is argued.

The second assignment raises the question whether the sale and conveyance by the widow were valid executions of the power to sell given in the will; conceding that the widow has a life estate, with remainder to the child. The defendants are in possession of the lands, and, so far as the proof shows, are innocent purchasers, unless they are rendered otherwise by the recitals in the will and deeds. It is insisted that a will or deed claimed to be in execution of a power ought to show expressly upon its face that it is executed in pursuance of the power. We have no direct adjudication on the precise

question in this state. In the case of *Gee v. Graves*, 2 Head, 239, 243, it was suggested that it was not necessary to the due execution of a power that it should be recited or expressly referred to; that the intention to execute it would become manifest by such description or notice of the estate or property, the subject-matter of the power in the conveyance, as would show that it included something that the party did not have otherwise than under the power; and that the conveyance would be wholly inoperative unless applied to the power. But the question was expressly reserved. The leading case out of the state is *Blagge v. Miles*, 1 Story, 426, Fed. Cas. No. 1,479. In that case it was held that it was not necessary that the intention to execute the power should appear by express terms or recitals in the instrument, but that it must appear by words, acts, or deeds demonstrating the intention. Judge Story lays down three classes of cases which have been held to indicate a sufficient intention to execute the power: (1) When there is some reference in the will or other instrument to the power; or (2) a reference to the property which is the subject of the power; or (3) when the instrument executed would be ineffectual and a nullity, and could have no operation, except as an execution of the power. This case is approved and followed in *Lee v. Simpson*, 134 U. S. 572, 10 Sup. Ct. 631; and the rule is said to be supported by a great weight of authority, and many cases are cited. In *Terry v. Rodahan* (Ga.) 5 S. E. 38, it was held that, when the deed described the property which was the subject of the power, it would operate as an execution of the power, although the grantee supposed himself to be the owner of the property, and that the conveyance would be simply a transfer of his own title. In *Bishop v. Remple*, 11 Ohio St. 277, there was a reference to the property, but none to the power; and it was held that the terms of the deed could not be satisfied, except they be treated as an execution of the power. In *Hall v. Preble*, 68 Me. 100, it is said: "It is not necessary that there should be an express declaration in the deed that it is made in execution of the power. It is sufficient if the deed purports to convey a fee. When a person conveys land for a valuable consideration, he must be held as engaging with the grantee to make the deed as effectual as he has the power to make it." See, also, *Owen v. Ellis*, 64 Mo. 77, *Campbell v. Johnson*, 65 Mo. 439; *Downie v. Buennagel*, 94 Ind. 228; *South v. South*, 91 Ind. 221; *Funk v. Eggleston*, 34 Am. Rep. 136. It is urged that the mother understood herself as owning the fee in this land, and conveyed under this impression, and not intending to execute a power; but this would be immaterial, under the authorities already cited. *Terry v. Rodahan* (Ga.) 5 S. E. 38, and other cases cited. And this is in accord with the theory of conveyancing, under our laws,—that the grantor

parts with whatever and all of the title he has or can convey, unless a contrary intention appears. It is said, or, rather, suggested, that it was the duty of the purchaser to see to the application or reinvestment of the proceeds. But such is not the law. *Davis v. Christian*, 15 Grat. 11, *Cooper v. Horner*, 62 Tex. 356, and *Kinney v. Mathews*, 69 Mo. 520, where a special form of investment was directed, and the rule was nevertheless maintained. In the present cases it appears that the property has been sold for a fair price. The wife made a warranty deed. The deeds referred to the will as the source of title. The property is described as in the will, and the deeds can only take effect, according to their terms, by treating them as executions of the power, and conveying the estate which under the will the widow or mother was authorized to convey. It thus falls clearly within the rules laid down by Mr. Justice Story. The decree of the court of chancery appeals in No. 35 is therefore reversed, and in No. 61 is affirmed. The original complainant will pay costs of both suits, and they are dismissed.

HENDERSON, Clerk of Circuit Court, v.  
WALKER, County Judge (three cases).

(Supreme Court of Tennessee. Sept. 28, 1898.)

#### HABEAS CORPUS—COSTS—TAXATION.

1. Under Shannon's Code, § 673, providing that if the judge of the county court, when a bill of costs certified by the trial judge and attorney general is presented to him, and his warrant demanded for its payment, conceives that the costs are not chargeable to the county, he may defer issuance of the warrant until he has moved the court for a correction, such a motion is not filed too late after the bill of costs has been certified by the trial judge and attorney general.

2. Under Shannon's Code, § 5543, providing that, where accused is discharged on habeas corpus, the costs shall be paid as in cases of acquittal by a jury, if the crime charged was a felony the costs should be paid by the state.

3. Under Shannon's Code, § 5542, providing that costs in habeas corpus proceedings shall be adjudged as the court may think right, and taxed as in other cases, where one accused of a felony is not discharged the costs should be taxed to the state, except where they are taxed to accused.

4. Under Shannon's Code, § 5545, providing that, if plaintiff in habeas corpus proceedings be accused of a misdemeanor, the judge shall deliver the bill of costs to the county clerk, by whom the same shall be allowed as in other cases, the costs of such proceeding should be paid by the county; and this, whether the accused be discharged or not.

5. Shannon's Code, §§ 7619-7621, requiring counties to pay costs in felony cases where a nolle pros. is entered, the indictment ignored, the cause retired, or dismissed on preliminary hearing, does not apply to habeas corpus proceedings.

6. Under Shannon's Code, § 6388, subsec. 7, allowing clerks 25 cents for filing a petition; and section 5540, providing that in habeas corpus proceedings the clerk shall tax costs on the papers as in other cases,—a fee of 25 cents for filing a petition in habeas corpus proceedings is properly taxable.

7. Under Shannon's Code, § 6388, subsec. 8, allowing clerks 25 cents for filing an affidavit to any pleading, such sum is properly taxable in habeas corpus proceedings.

8. The clerk is not entitled to tax any sum for entering judgment in habeas corpus proceedings.

9. Under Shannon's Code, § 6388, subsec. 8, allowing clerks 50 cents for entering bill of costs, such sum is properly taxable in habeas corpus proceedings.

10. Under Shannon's Code, § 6388, subsec. 10, allowing clerks 25 cents for each order or motion or order thereon, costs are not taxable on the order to certify a bill of costs in habeas corpus proceedings.

11. Under Shannon's Code, §§ 5540-5543, providing that all the papers in habeas corpus proceedings shall be returned by the judge to his nearest court, the clerk may properly tax costs for the transcript.

12. Under Shannon's Code, § 7595, providing that clerks need not affix seals of their respective courts to their certificate to a bill of costs in criminal prosecutions, no costs should be taxed for such seal in habeas corpus proceedings.

13. Under Shannon's Code, § 673, providing that if the judge of the county court, when a bill of costs is presented to him, conceives that the costs are not chargeable to the county, he may defer issuing warrant until he has moved the court for a correction; and section 4954, providing that, if retaxation of costs be excessive, the party may move the court for a retaxation, a motion for retaxation in habeas corpus proceedings is properly made in the name of the county and judge of the county court representing the county.

14. Under Shannon's Code, § 495, providing that suit for the use or benefit of any county against delinquent officers for money due the county shall be brought in the name of the state for the use of the county, does not apply to motions for retaxation of costs by the county in habeas corpus proceedings.

15. Judgments taxing costs in habeas corpus proceedings were rendered in cases disposed of at chambers from one to five years previously, on memoranda made at the time of trial. No bills of costs were then certified by the circuit judge, and delivered to the county judge, as required by Shannon's Code, § 5545, and the bills were not certified to by the then district attorney, but by his successor. *Held*, that the judgments were invalid.

Appeal from circuit court, Hamilton county; Floyd Estell, Judge.

Motion to the circuit court to retax costs in habeas corpus proceedings by S. M. Walker, county judge, against R. B. Henderson, clerk of the circuit court. There was a judgment for petitioner, and respondent appeals. Affirmed.

Trewhitt & Stanfield and M. H. Clift, for appellant. C. R. Evans and Cooke, Swaney & Cooke, for appellee.

WILKES, J. These cases are motions to retax costs, made by the county judge of Hamilton county, and counter motions to strike the motion to retax from the files. The cases are test causes brought to try the right to costs in a large number of cases, involving considerable amounts. The matters as presented to the court arise on habeas corpus proceedings, and may be divided into three classes: (1) Cases when the trial judge held the party legally restrained of his liberty,

and taxed the county with the costs; (2) when the trial judge held the party not legally restrained, but entitled to discharge, and taxed the county with costs; (3) when the trial judge held the party legally restrained but reduced the bonds, and taxed the county with costs. It appears that these cases have been heard and acted on at chambers from time to time from 1890 to 1896; the trial judge, on the hearing, making a memorandum upon the papers at the time of trial, and ordering the costs taxed and certified for payment to the county judge at that time. In 1896 entries were made in open court, and formal judgments entered according to these memoranda. The county judge refused to recognize the liability of the county for the costs, and refused to issue his warrant for the same until he could move the circuit court to retax the costs. He has made such motions, and the clerk of the circuit court, by whom said costs are claimed, has moved to strike the motion from the files.

It is insisted that the motion to retax is made too late, inasmuch as the costs have been certified by the judge and attorney general, which, it is insisted, has the force of a judgment final. The statute (Shannon's Code, § 673; Code 1858, § 528) provides: "If the judge or chairman of the county court, when a bill of costs thus authenticated is presented to him, and his warrant for the payment of the same demanded, conceive that said costs, or any part of it, is not lawfully chargeable to the county, he may defer the issuance of his warrant till he has moved the court for a correction." The warrant is demanded in these cases under and by virtue of the judgments entered at September term, 1896. The motions to retax were made by the county judge, June, 1897. In many of the cases involved, the charge on which the prisoner was held was a felony. In such cases, where the petitioner is illegally held, and therefore discharged, the county should not pay the costs, and the motion to retax is sustained. Shannon's Code, § 5543. In felony cases, where the petitioner was held as being legally in custody, the same rule must prevail. Id. §§ 5542-5545. It is true, section 5542 gives the trial judge discretion to tax the costs as he may think right, but this means according to the general provisions and analogies of the law between the petitioner, on the one hand, and state and county, on the other. This section provides that the costs shall be taxed and collected as in other cases. Under the provisions of the statutes in other cases, the state pays the costs of prosecuting felonies unless they are taxed to the defendant, under section 5542, and the county pays such costs in misdemeanor cases. This is the general rule underlying the taxation of costs in felony and misdemeanor cases. It follows in accordance with this general rule that in felony cases, when the petitioners are held as discharged, or the bond reduced on

the petition, the state should pay the costs. In misdemeanor cases, under like conditions, the county should pay them in so far as they are properly taxed.

Nor is this rule affected by the provisions of the act of the extra session of 1891, brought into Shannon's Compilation as section 7619 et sequitur; inasmuch as the act has no application to this case. By that act, counties are required to pay costs in felony cases in four instances only: (1) When nolle prosequi is entered; (2) when the grand jury ignores the indictment; (3) when the case is retired; (4) when the case is dismissed by a justice of the peace on preliminary trial. Shannon's Code, §§ 7619-7621; also, section 7022; *Stout v. State*, 91 Tenn. 405, 19 S. W. 19, and note. We need not therefore consider this act any further.

Specific items of cost are also brought in question in the following cases: "(1) The cost of filing the petition, 25 cents." This is properly taxable. Shannon's Code, §§ 5540, 6388, subsec. 7. "(2) For taking and filing affidavit to petition, 25 cents." This is a proper item of cost. Id. § 6388, subsec. 8. "(3) For issuing writ, 75 cents." This is a proper item. Id. § 6388, subsec. 1. "(4) Judgment, 75 cents." This is not a proper item. The judge himself indorses the judgment on the papers, both the result of the case and the costs. The clerk makes a memorandum of it on his execution docket; but this memorandum on the execution docket is not a judgment for which he is entitled to costs of 75 cents. "(5) Bill of costs, 50 cents." This is proper. Shannon's Code, §§ 5540, 6388, subsec. 48. "(6) Order to certify, 25 cents." This is not a proper item. *Avery v. State*, 7 Baxt. 328. It is not an order or motion and order thereon, under section 6388, subsec. 10, for no such order or motion was made at the time. "(7) Certificate, 25 cents." This is not a proper item. *Perkins v. State*, 9 Baxt. 3. "(8) Transcript to county judge, 25 cents." This is a proper item. Shannon's Code, §§ 5540, 5543. "(9) Seal, 50 cents." This is not proper. Id. § 7595.

The motions are properly made in the name of the county and judge of the county court representing the county. Shannon's Code, §§ 673, 4964. This is not a case which falls under the provisions of the statute. Id. § 495. The judgments of November 14, 1896, are irregular. They purport to be rendered upon proceedings had many years before, in 1891, at chambers. No bill of costs was then certified by the circuit judge, and delivered to the county judge, as the law provides. Id. § 5545. The so-called "judgments" were not rendered in cases at the time before the court, either at chambers or otherwise, but on petitions disposed of at chambers from one to five years before that time. The bills were not certified to by the person who was then district attorney, but by his successor, who could have no personal knowledge of the

cases. It is not intended to hold that a successor in proper cases may not certify. The result is that the judgment of the court below is affirmed, with costs against the appellant.

**CASEY & HEDGES MFG. CO. v. WEATHERLY et al.**

(Supreme Court of Tennessee. Oct. 5, 1898.)

**MARITIME LIENS—PLEADING—DEMAND—WAIVER—APPEAL AND ERROR—REHEARING—OMITTED PROOF—NEW TRIAL.**

1. Shannon's Code, § 5313 et seq., provides that in applications for the enforcement of liens upon boats the petition shall state that demand for the amount claimed has been made of some one of the defendants, or of the captain or agent of the defendants being at the time in the county. *Held*, that such demand is a prerequisite to the enforcement of the lien, and, where it is alleged in the petition, the defense that it was not in fact made may be raised by answer.

2. A petition for a rehearing, after the chancellor has rendered his opinion, seeking permission to prove facts shown by the supplied record (the original file of papers having been destroyed), should not be granted on the ground that the solicitors of the defeated party believed such facts appeared in the supplied record, and were thus taken by surprise.

3. Under Shannon's Code, § 4905, providing that the court shall in all cases where, in its opinion, complete justice cannot be had by reason of some defect in the record, want of proper parties, or oversight, without culpable negligence, remand the cause for further proceedings, on terms, the court cannot remand a cause for a new trial on the ground that the solicitors for the defeated party believed until after the trial that certain necessary proof was in the supplied record (the original file of papers having been destroyed), and were thus taken by surprise.

4. An agreement to give credit for a portion of the purchase price of machinery furnished for a boat, beyond the time within which the lien by statute might be enforced, coupled with the retention of title to the property to secure payment of the price, indicates a waiver of the statutory lien.

5. The default of a debtor will not prevent him from asserting the waiver of a statutory lien, where it appears that such default has been occasioned in part by the default of the creditor.

Appeal from chancery court, Hamilton county; T. M. McConnell, Judge.

Bill by the Casey & Hedges Manufacturing Company against W. E. Weatherly and others. Decree for defendants was reversed by the court of chancery appeals, and defendants appeal. Decree of the court of chancery appeals reversed, and decree of the chancellor sustained, and bill dismissed.

Pritchard & Sizer, for complainant. Chambliss & Chambliss, for defendants.

**WILKES, J.** The original bill in this cause was filed to establish and enforce a lien upon the steamboat Plucky City for the cost of certain machinery and outfit furnished the boat on the order of its master. An attachment was levied on the boat, and it was replevied by defendants on giving the bond re-

quired. As the case comes to this court from the court of chancery appeals, the questions presented are:

Is the suit fatally defective, for the purpose of enforcing the lien, because there is no proof that a demand for payment was made before suit brought, under section 5313 et seq. of Shannon's Code? These sections provide the manner in which the application shall be made to enforce the lien, and, among other things, prescribed that the petition shall state that demand for the amount claimed has been made of some one of the defendants, or of the captain or agent of the defendants being at the time in the county. The petition alleged that such demand was made, but this was denied by the answer, and there is no proof on the point in the record, as now made up. The court of chancery appeals was of opinion that this objection could only be taken advantage of by plea in abatement, and not by setting it up in an answer upon the merits. It was of opinion: That the statutory lien arises under the provisions of section 3547 of Shannon's Compilation, and the existence and continuance of the lien in no wise depends on the question whether demand is made or not. That demand is a provision made by the statute, prescribing the manner of enforcing the lien, and not relating to its creation. That application to enforce the lien under the statute would be premature until the demand had been made, and, if the petition had failed to state such demand, it would have been subject to demurrer or dismissal on motion, and the attachment might properly be discharged; but, when demand was alleged, the remedy of defendants would have been to plead that it had not been in fact made,—not as a denial of the lien, but as a defense that the complainant was not proceeding to enforce the lien as the statute prescribes. The defendants did not take this course, but first demurred to the jurisdiction on other grounds, and then answered on the merits, either of which, it was of opinion, was a waiver of the right to abate by plea.

We are of opinion that the defense of prematurity of suit may be relied on in the answer. *Gib. Suit in Ch. § 268; Pigue v. Young, 85 Tenn. 263, 1 S. W. 889; Robinson v. Grubb, 8 Baxt. 19.* At common law, and under the Codes, where a statute gives a new remedy, and prescribes prerequisite conditions to its enforcement, the performance of these conditions must be alleged and proven. *Enc. Pl. & Prac. 655; Gallup v. Smith (Conn.) 12 Lawy. Rep. Ann. 355, note (s. c. 22 Atl. 334).* We are unable to see why these rules do not apply to and govern the present case. The demand is by the statute made a prerequisite to the enforcement of the lien, and, unless such demand is both alleged and proven, the right to enforce does not exist.

It appears that the original file of papers in the case were destroyed, and the record was supplied in an imperfect and only partial

manner. From this supplied copy it does not appear that any demand was made. After the chancellor rendered his opinion, complainant presented a petition to rehear, and to be allowed to prove that repeated demands were made before suit was brought, and that the original record so showed; and it was stated that complainant's solicitors thought the fact appeared in the supplied record until after the trial was had, and they were thus taken by surprise; and leave to supply and make proof was asked. The chancellor refused to grant this petition, and the decree recites that he based his refusal upon the ground that, even if the facts set out in the petition appeared in the record, it would not change the holding of the court, or entitle the complainant to enforce a lien. From this refusal to grant a new hearing, and on other grounds, the complainant appealed, and this it assigned as one of the errors in the court of chancery appeals. The court of chancery appeals, under the view it entertained of the case, declined to pass upon the question whether the chancellor correctly refused this petition to rehear, so that the matter is not brought directly before us by any assignment. It becomes material, however, in the view we have taken of the case, to consider it. We do not think the application to rehear should have been granted. The parties had made up the record, and gone to trial upon it; and filing the petition to rehear is, in substance, asking to be allowed either to prove facts not shown by the evidence originally, or to show that the record as supplied failed to state facts that appeared in the original record. This would be to allow two trials in a case, the second based upon an omission to have a perfect record in the first trial. If this practice were allowed, there would be but few cases in which a rehearing could not be had, because the losing party frequently neglects some items of proof necessary for his case. We think it is not, moreover, a case which this court can remand for a new trial, under the provisions of the statute (Shannon's Code, § 4905).

We are also of opinion that the other assignment is well taken, and that the court of chancery appeals should have ruled that there was a waiver of the lien, under the facts of this case. It appears that by the terms of the contract the price of the work was \$917.55, subject to be increased by extra work or materials. Three hundred dollars of this amount was to be paid in cash, and a note for \$617.55, payable 90 days after date of completion of boilers and fixtures, was to be given, and title to the boiler, fixtures, and heater was retained to secure payment of the purchase money. The insistence is that this contract created or prescribed a security different from the statutory lien, and was a waiver of it. The court of chancery appeals was of opinion that inasmuch as the \$300 cash was not paid, and the note for \$617.55 was not given, the complainant would no longer

be bound by its contract, but would be remitted to its statutory rights and remedies. The fallacy in this is, we think, in ignoring the fact that the defendants were damaged in the work by complainant \$400, as found by the chancellor, so that there was no cash due. As to the note for \$617.55, there is no proof that this was not given, this being another one of the facts omitted to be shown by the supplied record; and in addition the entire sum of \$617.55 would not be owing, but only the amount less the balance of damages. Even if the note was not given, we can see no ground to hold that the complainants would not still be entitled to retain the title for the amount actually owing. The agreement to give credit for \$617.55 beyond the time within which the lien by statute might be enforced, coupled with the retention of title to the property, indicates a waiver of the statutory lien, and precludes a reliance upon it, or the right to enforce it, and gives the complainant a different remedy, to wit, that provided by statute when title is retained to secure purchase money. Jones, Liens, pars. 1519, 1535, 1536, and authorities there cited; Phil. Mech. Liens, par. 117, 276, foot of page 483; Grant v. Strong, 18 Wall. 623, 21 Lawy. Ed. 859, and note; Peyroux v. Howard, 7 Pet. 345. It cannot be said that the defendants in this case are in such default as to preclude them from insisting upon this contract, and to prevent them from insisting upon the waiver of the statutory lien. It appears from the chancellor's finding that the default has been occasioned, in part at least, by the failure of the complainant to comply with its contract, and in such case the complainant is not entitled to be remitted to his statutory remedies and rights. Jones, Liens, par. 1536; Simon v. Blocks, 16 Ill. App. 450. The decree of the court of chancery appeals is reversed, and the decree of the chancellor sustained, and bill dismissed, so far as it seeks to enforce a lien at complainant's cost.

#### DOTY v. DEPOSIT BUILDING & LOAN ASS'N.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 21, 1898.)

"Not to be officially reported."

Petition for rehearing. Denied.

For former report, see 46 S. W. 219.

PER CURIAM. By petition for rehearing, counsel for appellant urges that Bryant v. Mack (Ky.) 41 S. W. 774, modifies the doctrine laid down in Long v. Montgomery, 6 Bush, 395, but we see nothing inconsistent in the cases. Long v. Montgomery decides that "a judgment, without appearance or citation, is void, and not correctible as a clerical misprision." Bryant v. Mack simply recites the Code provision (section 763), which requires that in the case of a void judgment a mo-

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

tion shall be made in the court which rendered it to vacate. In the case at bar the question presented was whether the judgment was void for want of service of process; and this question the appellant failed to present in such a manner that the court could act upon it, for, no averment was made, as required by the statute, that the return of the officer was incorrectly made, either by the fraud of the party benefited thereby, or by mistake on the part of the officer. It is therefore unnecessary to discuss the admissibility of secondary evidence of the service of process, for appellant made no averment which authorized him to introduce testimony that process was not served. Petition overruled.

#### HALL v. TARVIN et al.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 21, 1898.)  
ASSIGNMENT FOR BENEFIT OF CREDITORS—ALLOWANCE TO ASSIGNEE FOR CLERK HIRE  
—APPEAL—STATEMENT.

1. Where the assignee, after he had brought suit for a settlement of the assigned estate, rented an additional storeroom to the one in which the assignor's business had been carried on, and employed his brother-in-law and the assignor as clerks for a period of five months, without any application to the court for authority, and without the consent of the creditors, the court properly disallowed his claim for wages of such clerks.

2. A statement filed with the transcript, which does not show either the date of the judgment appealed from or the page of the record on which it may be found, is not a compliance with Civ. Code, § 739.

Appeal from circuit court, Kenton county.  
"Not to be officially reported."

Action by Walker C. Hall, assignee of W. H. Tarvin, against W. H. Tarvin and others for a settlement of the assigned estate. Order disallowing certain claims of the assignee, and he appeals. Affirmed.

James P. Tarvin, for appellant. Charles H. Fisk, for appellees.

DU RELLE, J. Appellee Tarvin made a deed of assignment for the benefit of his creditors to appellant, Hall, on July 20, 1893, on which day it was recorded, and on the same day Hall filed a petition as assignee in the Kenton circuit court against Tarvin, setting up the assignment, and asking for a settlement with the commissioner of the assigned estate. On the same day an order was entered directing the creditors of Tarvin to appear before the master commissioner, and prove their claims, and enjoining the prosecution of actions against Tarvin by creditors. It appears that the stock of queensware assigned was appraised at \$3,161.38, fixtures \$400, and good accounts \$367.52. The total receipts were about \$1,860, of which \$105 were realized from the book accounts. In order to realize this amount, the assignee rented an additional storeroom to the one in

which the business had been carried on, and employed his assignor and a brother-in-law of the assignee as clerks for a period of about five months. A part of the goods was sold at auction, at an expense of \$18 for the rent of an adjoining room to the original storeroom, and about \$65 to the auctioneers, realizing some \$820, while the sales in the original storeroom during the five months amounted to some \$934, with an expense for rent, and the wages of Britting and the assignor of \$539.33. All of these transactions, it will be observed, took place after suit had been brought by the assignee for settlement, and were done without any application to the court for authority, and without the consent of the creditors. The trial court was of opinion that such improvident management of the trust estate should be at the expense of the assignee, and not of the creditors, and sustained exceptions to the allowance of the claim for wages of the assignor and the assignee's brother-in-law. A reversal is sought solely upon the ground of this disallowance. Under all the circumstances of the case, the action of the trial court in this behalf seems to us to be proper, and the allowance of \$150 made to the assignee for his services appears sufficiently liberal. Moreover, no sufficient statement was filed with the transcript, as required by section 739 of the Civil Code; the statement filed showing neither the date of the judgment appealed from nor the page of the record upon which it may be found. Judgment affirmed, with damages.

#### MAYSVILLE & L. TURNPIKE ROAD CO. v. WIGGINS.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 22, 1898.)  
COUNTIES—PURCHASE OF TURNPIKE ROADS—LIMITATION OF INDEBTEDNESS—SPECIAL AND LOCAL LAW.

1. Ky. Const. § 179, providing that the general assembly shall not authorize any county to become a stockholder in, or appropriate money for, any corporation, "except for the purpose of constructing or maintaining bridges, turnpike roads, or gravel roads," does not prohibit the general assembly from authorizing a county to purchase a turnpike road from a corporation, as such a purchase is not only not an appropriation for a corporation, but is within the exception.

2. To enable the court to determine whether a county has become indebted in any year in an amount exceeding the income and revenue provided for such year, within the prohibition of Ky. Const. § 157, not only the levy for the year must appear, but also the total indebtedness and the value of the taxable property in the county.

3. A vote by the people of a county in favor of "free turnpikes" is not a vote to increase the indebtedness of the county beyond the constitutional restriction.

4. Act March 17, 1896, authorizing a vote by the people of any county on the question of "free turnpikes," is not unconstitutional as special and local, being expressly authorized by Ky. Const. § 60.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Appeal from circuit court, Nicholas county.  
 "To be officially reported."

Action by Aris Wiggins against the Maysville & Lexington Turnpike Road Company and others to enjoin the levy of a tax. Judgment for plaintiff, and the Maysville & Lexington Turnpike Road Company appeals. Reversed.

Hanson Kennedy, Norvell & Robertson, Kennedy & Williamson, Turner & Hazelrigg, and John F. Morgan, for appellant. Winfield Buckler and J. H. Minogue, for appellee.

**HAZELRIGG, J.** After a favorable vote upon a submission of the question to the voters of Nicholas county at the regular election in November, 1896, whether they were "in favor of free turnpikes and gravel roads," in pursuance of the act of March 17, 1896, the fiscal court in November, 1897, entered into a contract with the Maysville & Lexington Turnpike Road Company, by which it purchased, at the price of \$23,000, payable in yearly installments of \$200 each, some 15 miles of the road situated in Nicholas county. Thereupon Wiggins, a taxpayer of the county, for himself and others, instituted his action to enjoin the levy of any tax on behalf of the contract of purchase, and to have the contract declared void, on the following grounds: Notwithstanding the authority to make the contract is conferred in the act in question, the constitution, by section 179, prohibits counties from buying turnpikes or gravel roads from any company, association, or corporation; and therefore the act of March, 1896, is unconstitutional. The contract incurs an indebtedness in an amount exceeding, in the year 1897, the income and revenue provided for that year; and no election has been held to obtain the assent of the voters of the county, as provided in section 157 of the constitution.

The first contention is easily disposed of. Section 179 of the constitution reads as follows: "The general assembly shall not authorize any county or subdivision thereof, city, town or incorporated district, to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association or individual, except for the purpose of constructing or maintaining bridges, turnpike roads or gravel roads: provided, if any municipal corporation shall offer to the commonwealth any property or money for locating or building a capitol, and the commonwealth accepts such offer, the corporation may comply with the offer." It needs no argument to show that this purchase from the company of its turnpike road, together with all its "rights, privileges, and appurtenances," as expressed in the contract of purchase and conveyance to the county, does not make the county a stockholder in the company; nor does the

county thereby appropriate money for, or loan its credit to, the company. It is said this seems clear enough with respect to the question of the county becoming a stockholder and of loaning its credit, but that it is certainly an appropriation of money for the company. We think not. To buy and pay for the roadbed, toll houses, rights, and privileges of the company is not to "appropriate money for" the company, within the meaning of the constitution. The appropriation is not "in aid of," "for the sake of," or "on account of" the company, and is therefore not an appropriation for the company. It is not a gift or loan of credit to the company. In fact, the company, as to the purchased property and the exercise of further right thereover, becomes extinct, and no longer exists in Nicholas county. But, if it be such an appropriation, it is authorized because of the right conferred in the section on the county to make same for the purpose of constructing and maintaining such roads. It is too narrow a construction of this language to say a county may construct and maintain, but may not buy, such roads when already constructed.

The second ground presents more difficulty. Section 157 of the constitution precludes the county from becoming indebted in an amount exceeding, in any year, the income and revenue provided for such year, without a vote of the people, as prescribed in the section. It is admitted that no vote has been taken under this section, and it is left to us only to determine from the pleadings whether such an election is shown to be necessary, and that depends upon whether, by the creation of such a debt, the county will become indebted beyond the constitutional limit fixed in this section. It is to be noticed that it is not contended that the aggregate debt of the county is in excess of the absolute limitation of indebtedness prescribed in section 158. Admittedly, when that limit is reached, no further indebtedness can be incurred in any event or authorized by any vote. With reference to this debt of \$23,000, the petition avers "that said indebtedness is an amount exceeding, in the said year 1897, the income and revenue provided for such year by said court, which revenue is 34 cents on the \$100 worth of property in said county, and levied for the following purposes: 13 cents for the sinking fund and to meet outside indebtedness, and 4 cents for subscription to the Barefoot Turnpike Road Co., and 15 cents for current expenses." These are the only averments in the pleadings on this subject, and the averment that the indebtedness created by purchase of the turnpike road—the indebtedness of \$23,000—is in an amount in excess of the income and revenue provided for for that year is specifically denied by the answer. This is claimed by Wiggins to be a sham plea, but it is altogether probable that the denial is true. The income and revenue for the county for



the year were doubtless largely in excess of \$23,000. We know from an exhibit filed by the answer that this 34 cents on the \$100 was not the whole of the levy provided for that year, and this fact we can take notice of as against the pleader, although it cannot be used to help out his petition. Whether this additional levy will produce an income sufficient, with the levy of 34 cents, to pay off all indebtedness created or to be paid that year, including the \$23,000, depends upon the amount of taxable property in the county. We are nowhere told what is the indebtedness of the county in the aggregate, or that payable in 1897, or what is the amount of its taxable property. These facts must be known before the question attempted to be raised can be passed on intelligently. As the pleadings stand, the plaintiff was not entitled to the judgment enjoining the levy proposed. Appellee should, however, be permitted to amend his pleadings and make them more definite.

It is suggested by counsel for appellant that, as the proposition to have free turnpikes and gravel roads carried by a two-thirds vote, the indebtedness incurred by the purchase is not inhibited by the constitution, under the section we have been considering. It is manifest, however, that a vote on the question of having such roads free is not a vote to increase the indebtedness beyond the constitutional restriction; and we need not, therefore, inquire into the effect of the conceded fact that "free turnpikes" carried in Nicholas county by a majority of two-thirds of those voting on the question, and not by two-thirds of all those voting at the general election. The act only required a majority of those voting on the question, and, although a majority of two-thirds of those voting on the question voted for free turnpikes, the question of incurring the proposed indebtedness is not thereby affected or the indebtedness thereby authorized. The contention of counsel for appellee that the law of March 17, 1896, is special and local, because operative or effective only on a vote of the people, is without merit, as the constitution in express terms provides that such a law may be passed with respect to this particular subject-matter. Const. § 60. For the reasons indicated the judgment is reversed, for further proceedings consistent herewith.

#### COPE v. COMMONWEALTH.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 20, 1898.)

FALSE SWEARING — INDICTMENT — VARIANCE —  
HARMLESS ERROR—COMMENT ON FAILURE OF ACCUSED TO TESTIFY.

1. An indictment, under Ky. St. § 1174, for false swearing, need not state the nature of the prosecution on the trial of which defendant swore falsely; it being sufficient to allege, in the language of the statute, that defendant was sworn by a person authorized by law to

administer an oath, and that he deposed and gave evidence in a matter then judicially pending.

2. A variance between the indictment and proof as to the date of the trial on which defendant gave the alleged false testimony is not material.

3. Defendant was not prejudiced by the exclusion of testimony tending to show that he was excited when he gave the alleged false testimony.

4. It was harmless error to permit the justice of the peace in whose court the alleged false testimony was given to refresh his recollection as to whether defendant was sworn as a witness at the trial in question by referring to the minutes of the trial; there being other evidence sufficient to satisfactorily show that he was so sworn, and the witness being no more positive after than before referring to the minutes.

5. It was harmless error to permit the prosecuting attorney to inferentially comment on defendant's failure to testify as a witness, so that he might have informed the jury as to the truth of the alleged false testimony, which was peculiarly within his knowledge; there being no doubt, from the evidence, that the testimony was false.

Appeal from circuit court, Graves county.

"Not to be officially reported."

George Cope was convicted of false swearing, and appeals. Affirmed.

Sam'l H. Crossland, for appellant. W. S. Taylor and M. H. Thatcher, for appellee.

LEWIS, C. J. Appellant was indicted under section 1174, Ky. St., as follows: "If any person, in any matter which is or may be judicially pending, or which is being investigated by a grand jury, or on any subject on which he can be legally sworn, or on which he is required to be sworn, when sworn by a person authorized by law to administer an oath, shall willfully and knowingly swear, depose or give in evidence that which is false, he shall be confined in the penitentiary not less than one nor more than five years." The indictment, in substance, charges that appellant, November 10, 1897, on the trial of the prosecution of the commonwealth of Kentucky against John Pace, judicially pending in the Graves justice court of T. H. Cosby, a duly elected and qualified justice of the peace of said county, appeared, and was duly sworn by said justice as a witness on behalf of the defendant, and did then and there knowingly, willfully, and feloniously depose and give in evidence "that he did not strike Joe Lassiter with a stick," whereas in truth he did strike him with a stick, and said statement was false, and known by appellant to be false when he made it. A demurrer to the indictment was filed, which counsel now contends should have been sustained, because it does not appear from the indictment for what offense John Pace was being tried in the justice's court. Under the statute, it was not indispensable to state in the indictment the precise offense for which John Pace was being prosecuted; it being sufficient to state, as was done, that appellant was sworn by a person authorized by

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

law to administer an oath, and that he deposed and gave evidence in a matter then judicially pending.

Upon the trial of this case it appeared that the prosecution against John Pace, mentioned in the indictment, was pending and tried, not on November 10, 1897, as therein stated, but on and from August 31 to September 6, 1897, inclusive; and counsel now contends that the variance between the allegation of the indictment and the proof was fatal to the prosecution. The statement of facts was made in the indictment full and explicit enough to enable a person of common understanding to know what particular offense was intended to be charged, and to enable the court, in case of conviction, to pronounce judgment that would bar another prosecution for the same offense. As held in *Com. v. Davis*, 94 Ky. 612, 23 S. W. 218, the variance of allegation and proof respecting the date of the prosecution against Pace is not material, because it did not, nor can, defeat the right of the case, or prejudice that of appellant. While there would have been no reason for excluding evidence tending to show that appellant was excited at the time he gave the alleged false testimony, we do not see how exclusion of what he averred he would prove on that subject, if permitted, prejudiced, or, if permitted to go to the jury, would have benefited, him. The evidence of the witnesses in this case, without exception or variation, shows that appellant did strike Joe Lassiter at the time and place John Pace stabbed the latter, and that appellant, at the time Pace was being tried before Cosby, as an examining court, for stabbing Lassiter, distinctly stated as a witness that he did not strike him.

It seems to us there was other evidence sufficient to satisfactorily show that appellant was duly and legally sworn as a witness at the trial of Pace. Consequently permission by the court to Cosby, the justice, to refresh his recollection on that subject by referring to the minutes of the examining trial, though erroneous, did not prejudice appellant, especially as his statement on that subject was no more positive after than before he had referred to the minutes.

It appears that appellant did not himself testify on the trial of this case, and a reversal of the judgment is urged upon the ground that the commonwealth's attorney, in his closing argument to the jury, referred to and commented on his failure to do so. The language used by the commonwealth's attorney is as follows: "Where is the witness who swears that defendant didn't hit Lassiter? Why don't defendant bring somebody here to swear it? Does defendant bring anybody to swear it? No; not a living soul comes to swear he did not hit him." Though the commonwealth's attorney did not in terms refer to appellant's failure to testify as a witness, he did do so inferentially. But as there was really no issue of fact, or any doubt whether he did or not hit Lassiter, on the

occasion mentioned, with a stick, created by the evidence, his substantial rights were not prejudiced by the speech of the commonwealth's attorney. Judgment affirmed.

#### WATHEN v. RUSSELL et al.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 18, 1898.)  
ATTORNEY AND CLIENT—LIEN FOR FEES—SET-OFF—COSTS.

1. Under Ky. St. § 107, giving attorneys a lien for their fees on claims in their hands for collection, and on judgments recovered by them, but providing that "if the parties before judgment, in good faith, compromise or settle their differences without the payment of money or other thing of value, the attorney shall have no claim against the defendant for any part of his fee," the attorney for plaintiff in an action which was nominally for the settlement of a partnership, but which had for its principal object the assertion of personal demands by plaintiff against the defendant, has no lien on plaintiff's interest in the partnership funds, which, by agreement of the parties, was adjudged to defendant as a payment on a judgment in his favor against plaintiff for money paid by him as plaintiff's surety.

2. In an action for the settlement of a partnership, personal demands in favor of one partner are the proper subject of set-off against any final balance found due the other partner, especially if insolvent, the rights of partnership creditors not intervening.

3. Ky. St. § 889, providing that in suits to settle partnerships courts shall have a judicial discretion in regard to costs, has no application to extraordinary costs in a suit which, though nominally to settle a partnership, has for its principal object the assertion of personal demands by plaintiff against defendant.

Appeal from circuit court, Marion county.  
"Not to be officially reported."

Action by John Wathen against Barney Wathen to settle a partnership. Motion by W. E. & S. A. Russell to fix a reasonable attorney's fee, to be paid out of partnership funds in the hands of the commissioner. Motion sustained, and defendant appeals. Reversed.

Barnett, Miller & Barnett and Thompson & McChord, for appellant. S. A. Russell, for appellees.

HAZELRIGG, J. The question involved on this appeal is the allowance of an attorney fee of \$600 to appellees out of certain funds in the hands of the court's commissioner. As these funds were finally adjudged to be paid to Barney Wathen, and the appellees were employed by John Wathen only, the question to be determined is whether the allowance can be sustained by reason of the facts growing out of the settlement of the partnership affairs of John and Barney Wathen. John Wathen was the owner of a farm in Marion county, and a number of trotting horses, and in September, 1892, sold a half interest in the horses to Barney Wathen, of Louisville. Thereafter the two Wathens, as partners, conducted the business of

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

raising and training trotting horses, under the firm name of John B. Wathen, Jr., & Co. The partnership was an equal one, but it was agreed that John, who had entire control of the business, was to receive compensation for his services, and rent for his land used by the firm. In February, 1894, the amount due John on this behalf was fixed by arbitrators at \$1,700 per annum, and it was further found by the arbitrators that such sum was to constitute the future compensation for such services and rent if the partnership was continued, but that either party might elect to discontinue the partnership if not satisfied with the award. Barney at once gave notice that the partnership must close with the end of the month of February. John then instituted his suit, through his attorneys, the appellees, against Barney, seeking, among other things, to recover of him the sum of \$10,000 in damages for failing to continue the business as conducted by the firm, also \$3,500 for a barn built on his farm by the firm, and asking a final settlement of the firm accounts. Barney lived in Louisville when he was served with process, but his plea to the jurisdiction of the court having been overruled, he answered, putting in issue the facts upon which the plaintiff relied to authorize any judgment in his favor. He also pleaded that John was insolvent and without credit, and that he was unable to properly care for the partnership property. He also averred that he was bound as John's security on notes to the amount of some \$6,000 to the Marion National Bank, and he sought to have subjected to this debt whatever interest John might have in the partnership property after payment of the partnership debts. In the meantime the chancellor, by consent of both parties and their attorneys, ordered a sale of the partnership property, which was subsequently made. Other parties also intervened in the action, setting up certain claims, with which, however, we are not here concerned. It appears also that John brought a second suit against Barney for damages for breach of the contract of partnership, laying his damages at \$25,000; and this suit, at the instance of the plaintiff, was consolidated with the first one. It further appears that Barney obtained a judgment against John for the amount of debts he had paid to the Marion National Bank as his surety. No proof was ever taken on the issues raised by the pleadings between the partners, but, after a continuance of the case a term or two, the partners agreed to submit their differences to arbitrators, and agreed further that whatever sum might be coming to John out of the proceeds of the sale of the partnership effects, then in the form of sale bonds in control of the court, was to be paid to Barney on his judgment for moneys paid the bank, and he was to indorse his judgment against John as satisfied. After finding that the proceeds of three of the horses sold under the consent order belonged to John individually, the arbitrators

disposed of the firm assets as follows: "All the court costs of the litigation, and the expenses for care and keep of stock after the institution of this suit, to be first paid; then all debts against the firm that may be now unpaid, the rent and salary of John Wathen having been estimated and settled by us up to the institution of this suit. The residue of the firm assets shall be equally divided, and one part be delivered to Barney Wathen. Of the other part, two hundred and six dollars and eighteen cents shall be paid to Barney, to make him equal in firm accounts with John; and the residue of John's share of the partnership assets will be paid to Barney on his judgment in the Marion circuit court against John for money paid to the Marion National Bank as surety. No more of the purchase-money notes in the hands of the commissioner is to be collected than sufficient to pay costs, expenses, and firm debts, as herein provided for, but the remainder of the notes will be delivered to Barney Wathen for his individual control and use. The judgment aforesaid in favor of Barney shall be indorsed 'satisfied,' and neither of the said partners has any claim or demand whatever against the other not satisfied in full by this award, save the claim of Barney with C. C. Cambron and others as sureties of John on a note of \$2,000 to Mrs. Minnie McAfee. This award to be entered as judgment of the court, finally disposing of all matters of differences between John and Barney Wathen, save as involved in the Cambron suit. This award is not, however, to prejudice the right of any other party to any of the suits now pending." Thereupon the appellees, William E. & S. A. Russell, after notice, moved the court to fix them a reasonable attorney's fee, to be paid out of the partnership funds in the hands of the commissioner. After proof heard, the court sustained the motion, and adjudged the appellees entitled to the sum of \$600, to be paid as indicated in the motion.

The complaint of Barney Wathen is that the appellees at no time represented him or the firm, but John Wathen, and in fact rendered no services whatever for the firm, and that, as they recovered nothing for their client, they are not entitled to take the funds adjudged to him to pay the attorney fees of his adversary. As conclusive of the question, he relies on our statute giving a lien for their fees to attorneys at law on claims in their hands for suit or collection, and, when the suit is brought and judgment recovered, a lien on the judgment for money or property, "but if the parties before judgment, in good faith, compromise or settle their differences without the payment of money or other thing of value, the attorney shall have no claim against the defendant for any part of his fee." Ky. St. § 107. It is difficult to see, if this statute applies, how the appellees are entitled to any lien on the funds adjudged, not to their clients, but to his opponent. Certainly there was no judgment rendered in his favor for money or property. Of course, the

proceeds of the three horses were his, and on these proceeds the attorneys may or may not have a lien; but this does not concern Barney Wathen, as these funds did not come to his hands, but were turned over to John. At the outset of the suit, Barney had set up the fact that he was surety on the bank notes. His plea in this respect was demurrable, it is true; but he afterwards paid off the debts for which he was surety, and then it was that the plaintiff, who confessedly owed the defendant the money, agreed, in effect, that it was a proper item of debit against him. And, even without such agreement, we do not doubt that personal demands of this character in favor of one partner are the proper subject of set-off against any final balance found due the other partner, especially if insolvent, the rights of partnership creditors not intervening. This suit was not in fact one merely to settle the partnership. It is rather manifest that none was needed for that purpose. In the letter of Barney to John Wathen notifying the latter that the firm must dissolve on the last day of February, the partner in possession was told to advertise the partnership effects for sale, to the end that an amicable settlement might be had at once. The suit was prominent in the assertion of personal demands on the part of John against Barney. The differences between them in partnership matters proper were immaterial, and, as subsequently shown, were easily adjusted by agreement between themselves. Besides, the court adjudged, in conformity to the award, that the entire costs of the suit should be paid out of the partnership funds, and the costs were therefore chargeable to the plaintiff. The discretion of the court was thus exercised to his advantage, as it is provided may be done, in section 880 of the Kentucky Statutes. That section provides that in suits to settle partnerships, and to settle or enforce trusts, courts shall have a judicial discretion in regard to costs. This can have no application to extraordinary costs in suits like the one we are considering. We are constrained to conclude, therefore, that the chancellor erred in sustaining the motion for the allowance to appellees; and the judgment is reversed, to the end that the proceeding seeking to subject the funds in the commissioner's hands to payment of the fee of appellees may be dismissed.

#### CARROLLTON FURNITURE MFG. CO. v. CITY OF CARROLLTON.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 20, 1898.)

MUNICIPAL CORPORATIONS—LIABILITY FOR NEGLIGENCE OF LESSEE OF WHARF PRIVILEGES.

1. A city is not liable for injury to property on a wharf boat resulting from the negligence of one to whom the city had leased the boat and the wharf privileges.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

<sup>2</sup> For opinion on petition for rehearing, see 47 S. W. 885.

gence of one to whom the city had leased the boat and the wharf privileges.

2. Const. § 203, providing that "no corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise or any of its privileges," applies only to private corporations, and not to municipal corporations.

Appeal from circuit court, Carroll county.

"Not to be officially reported."

Action by the Carrollton Furniture Manufacturing Company against the city of Carrollton to recover damages for injury to property. Judgment for defendant, and plaintiff appeals. Affirmed.

Winslow & Winslow, for appellant. J. B. Duncan, for appellee.

PAYNTER, J. Carrollton is a city of the fifth class, and as such, under section 3637, Ky. St., has the right to hold such real and personal property as may be necessary and proper for municipal purposes; but it is denied the power to sell or convey any portion of any water front, but may rent it for a term not exceeding 20 years, except the wharf privileges, which shall not be leased for more than 5 years. As appears from the petition as amended, the city enjoys wharf privileges and owns a wharf boat, which it leased to W. E. Houghton; and while he was operating under the lease the appellants delivered to his care, on the wharf boat, a lot of furniture. It is averred that the "lessee, his servants and agents, acting as wharf masters under said lease to said Houghton, by their gross negligence, carelessness, and recklessness permitted and allowed said wharf boat to fill with water and sink, together with the aforesaid shipment of furniture, and by reason of the aforesaid negligence, carelessness, and recklessness said furniture became wet," etc., and injured, to the damage of plaintiff in the sum of \$800. While the pleadings, at a place or two, refer to Houghton as agent or lessee, still the facts alleged in the petition with reference to the lease show that he was the lessee of the wharf privileges, and not the agent of the city. A pleading must be construed more strongly against the pleader. It does not appear from the petition what were the exact terms of the lease which the city gave Houghton. If the city had retained its wharf privileges and boat, and charged the public for the use thereof, then the city would have been under an obligation to have kept the wharf, including the boat, in a reasonably safe condition for the use of the public. *Shinkle v. City of Covington*, 1 Bush, 617. There is no allegation in the petition that the city did not furnish the lessee with a wharf boat that was reasonably safe for the purposes for which it was intended and used, nor was there any allegation to the effect that the appellee's damage was the result of the city's failure to furnish a wharf boat which was

reasonably safe for the purposes for which it was used. If such allegations had been made, then the question would arise as to what the obligations of the city were with reference to providing the lessee with a reasonably safe wharf boat. We do not decide what obligations the city was under in this regard, but, assuming that it was liable, still it is not liable under the allegations of the petition. It alleges that the damage resulted from the gross negligence, carelessness, and recklessness of the lessee, his servants and agents, acting as wharf masters. In no state of case could the city be held responsible for such acts of the lessee. The lessee was not the agent of the city, and therefore it cannot be held liable for his negligence. Suppose it was the duty of the city, under the law, to furnish the lessee with a reasonably safe wharf boat, and it did so, and, further, that the lessee had scuttled it, and caused damage to persons who had property stored upon it; the city would not have been liable for his wrongful act. Suppose, again, after having furnished such boat it became unsafe; then the city, if at all, could not be held liable for damages resulting therefrom, unless it was made aware of its unsafe condition, or by reasonable care could have discovered it, and failed within a reasonable time to make it safe.

Section 203 of the constitution reads as follows: "No corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise, or any of its privileges." Counsel for appellant contend that under this section of the constitution the city cannot lease the wharf privileges so as not to be liable for the acts of the lessee in operating under the lease. We are of the opinion that that section does not apply to municipal, but to private, corporations. Sections 190 to 208, inclusive, are under the heading "Corporations," and relate to private corporations. The language of section 203 precludes the idea that it has any reference to municipal corporations. The judgment is affirmed.

**LOUISVILLE & N. R. CO. v. VICTORY.**<sup>1</sup>  
(Court of Appeals of Kentucky. Oct. 15, 1898.)

MASTER AND SERVANT — INJURY TO RAILROAD  
BRAKEMAN FROM DEFECTIVE TRACK — BURDEN  
OF PROOF — VARIANCE.

1. Testimony showing that railroad ties torn up in a wreck appeared, from a casual examination, not to be very sound, and to be old ties, and that some of them were a little decayed on the ends, is not sufficient to support a verdict for the death of a brakeman obtained solely on the ground that the track was in such bad condition before the wreck that defendant might, by the exercise of ordi-

nary care, have known it in time to prevent the accident.

2. The burden being on plaintiff to show negligence, a verdict in his favor is against the evidence, where he has presented a state of facts from which either negligence or reasonable care may be inferred with equal plausibility.

3. Where plaintiff specifies in his petition the negligence complained of, he cannot recover by showing a different character of negligence.

4. Granting that the derailment of a train is evidence from which negligence may be presumed, it does not support the averment of negligence in permitting the track to remain in an unsafe condition.

Appeal from circuit court, Hopkins county.

"To be officially reported."

Action by J. M. Victory, administrator of C. C. McGary, deceased, against the Louisville & Nashville Railroad Company, to recover damages for the death of plaintiff's intestate. Verdict and judgment for plaintiff, and defendant appeals. Reversed.

B. D. Warfield, Gordon & Gordon, and H. W. Bruce, for appellant. James Breathitt, W. T. Fowler, and Petrie & Downer, for appellee.

DURELLE, J. The appellee brought suit against appellant company, alleging that his intestate, who was a brakeman, received injuries, from which he died, while engaged upon a freight train of appellant; that the "train was thrown from the track near Robard's Station, in Henderson county, Ky., and the said C. C. McGary received serious bodily injuries, from which he died; \* \* \* that 22 cars were thrown from the track in the said wreck, and that the derailment of the said train was caused by the defective condition of the roadbed at the point where said train was thrown from the track; that there had been, a few days prior to said accident, a slipping of the earth or roadbed from under the track, and that on the day of said accident the section boss and hands were at work at said point; that, in addition to the defective condition of said roadbed, the right of way at said point had grown up with weeds and bushes close up to said railroad track, and that old logs and cross-ties were piled up close to said road, and that said train at said time was running at a dangerous and reckless rate of speed, and came in contact with a yearling calf, which could not be seen on account of said bushes, weeds, and logs. The plaintiff charges that said accident was caused by the gross negligence of said defendant, its agents and servants, in not keeping said roadbed in a safe condition, and by the gross negligence of the agents and servants of the defendant superior to plaintiff's decedent in authority, in the running of said train at a dangerous and reckless speed at the point of said wreck, and over and upon said calf, and upon allowing said weeds, bushes, and logs to lie so near the roadbed as to obstruct the view of said agents and servants who operated said train. The plaintiff says that the con-

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

dition of said roadbed had been well known to the defendant, and its servants and agents, for some days prior to said accident, and in sufficient time to have put said roadbed in safe condition prior to said accident; and he further charges that the dangerous condition of said roadbed was well known to defendant's agents and servants, whose duty it was to keep said roadbed in proper condition, and that its dangerous condition was known to them for sufficient length of time to have put same in repair in time to have avoided said accident and injury to the plaintiff's decedent; and he further charges that the dangerous and unsafe condition of said roadbed was well known to the agents and servants of the defendant in charge of and running said train, and who were superior in authority to said decedent." By an amended petition, the plaintiff said that he was in error in stating that, at the point where his intestate was injured, weeds and bushes had been permitted by defendant to grow upon the side of the track so as to obstruct the view of the operators of defendant's train; "but plaintiff now charges that at the point where said C. C. McGary was injured, and from which he died, that the track of defendant's road is straight for a great distance, and that there was nothing to prevent the agents of defendant who were operating said train from seeing any object on the track for a great distance at that point. Plaintiff further charges that a lot of cattle came upon defendant's track at or about said point of wreck, and defendant's engineer negligently failed to blow the whistle in order to scare said cattle from the track, and recklessly ran the engine and cars over one of said lot of cattle, and by reason of which, and the rotten and unsound condition of the cross-ties at said point, the rails spread, and the spikes were drawn from the rotten ties, and a number of cars were ditched or overturned, and in the said wreck said McGary received fatal injuries."

By the first paragraph of the answer all the material averments of the petition as amended were traversed. By the second paragraph it was averred that the derailment of the cars and the accident to plaintiff's intestate "was caused by a yearling calf coming upon its track immediately in front of its engine, and so near to the same that it was impossible, from the time it so appeared upon the track, for its engineer and trainmen to check the train or stop it and prevent striking same; that its said engine did strike and run over said calf, and that the body of same went under its engine and cars, and caused the cars to jump the rails and leave the track; that it was impossible, from the time the engineer first saw the calf upon the track, or saw that it would come upon the track, by reason of its nearness to him, to stop or check the train or avoid striking it; that the coming of the calf upon the track was not or could not have been foreseen nor expected in time to have avoided striking it, and the

consequent derailment of its train; that the running over of the calf and the derailment of the train were unavoidable; that the injury, suffering, and death of plaintiff's intestate was caused under and by these facts and circumstances, and was unavoidable."

By the reply, appellee stated "that he does not know to what extent the wreck of defendant's train in which the said C. C. McGary received injuries that resulted in his death was caused by the calf, which defendant admits was struck by its said train, and over which said train or a portion of same passed on that occasion. He believes that the running over said calf by said train, as described in defendant's answer, did cause in part said wreck, and the subsequent injuries to plaintiff's intestate, but he denies that said wreck, and the injuries to plaintiff received therein, were caused alone by said striking and running over said calf." After a denial that it was impossible for the engineer to have checked the train in time to prevent striking the calf, the reply continues: "He denies that the running over said calf as aforesaid by itself caused the cars to jump the rails and leave the track, although that did, as he believes, help to produce that result."

It will be observed from the pleadings that the original theory of appellee that the accident was caused in part by permitting weeds and bushes to grow so near the track that the engineer could not see cattle about to come upon the track was abandoned, and the right to recovery was sought to be established upon the ground—First, that the roadbed was in a defective condition by reason of a slipping of the earth from under the track prior to the accident, of which appellant knew or could have known; and, second, that the engineer negligently failed to give the cattle alarm when he saw, or should have seen, cattle upon the track in front of his engine. At the conclusion of appellee's testimony a peremptory instruction was asked for and refused, and it is mainly upon this refusal, and upon the ground that the verdict was flagrantly against the evidence, that a reversal is now sought of the judgment which was rendered against appellant.

No evidence was introduced by appellee to show that the engineer failed to give the cattle alarm for cattle which appeared upon the track, but, upon the contrary, several of appellee's own witnesses proved that he gave such alarm. Nor was any evidence introduced to show that the train was running at a dangerous or unusual rate of speed. The case turned—and, by the instructions, was made to turn—solely upon the question whether the roadbed was in a defective condition at the time of the accident. Upon this point the testimony introduced on behalf of appellee tended to show that the track was in good order, with perhaps one exception, to be noted hereafter. A fellow brakeman of the intestate, no longer an employé of the

company, testified that the cattle alarm was given and brakes called for by the engineer, and that he saw a cow standing some distance ahead of the engine, beside the track; that after setting a brake he saw the cow go off the track, and immediately thereafter he saw a car turn across the track, "and from that on the wreck commenced," the other cars piling up against it, the train then running at the usual rate of speed,—between 25 and 30 miles an hour. This witness testified that the passenger train had passed over this track a few minutes before; that he had ridden over this track on his train on that same morning, and the track seemed all right. Of the other witnesses for appellee, those who were in sight of the wreck at the time it occurred testified to the cattle alarm being given, and all testified as to a part of the remains of the calf being found where it was struck, while the hide and a part of the shoulder had been carried with the truck of one of the cars to a point near where the wreck occurred, a distance of from 40 to 60 yards. Their testimony showed that seven or eight cars had been piled up together; that the rails were bent and torn loose; and that some rails, with the ties attached to them, had been slipped to the west side,—the side upon which most of the cars went off. Upon the west side it appeared that the embankment had been considerably torn away. The only evidence which, in any sense, could be construed as tending to show that the track was in bad condition before the wreck, was the statement of the witness Eakins, who was asked: "Please state the condition of the cross-ties, and the place where they had slipped, and where the track was torn up; I mean their condition as to soundness or the reverse,"—to which he answered: "Some of them were not very sound; I did not examine them very closely; they were old ties; a good many were mashed up,"—and the statement of the witness Henry A. Book: "The ties—some of them—seemed to be a little decayed on the ends where the trucks cut them off."

Is this sufficient evidence to support a verdict obtained solely upon the ground that appellant company's track at that point was in bad condition before the wreck, of which condition it knew, or by the exercise of reasonable care might have known, in time to have taken measures to prevent the accident? We think not. The fact that some of the ties under the wreck seemed to a witness not to be very sound, upon a very cursory examination,—or, rather, upon mere casual observation,—is not evidence, in our judgment, in support of the proposition that the track was in a defective condition at that point before the wreck. This same witness states that a good many of them were mashed up, and, as matter of course, they did not look as well in that condition as new ties freshly laid in a track. Nor does the fact that the witness Book states that some of the

ties seemed to be a little decayed on the ends where the trucks cut them off show that they were unsound where the rails were spiked to them. It is matter of common knowledge that ties might be decayed on the ends, and yet perfectly sound, where soundness was necessary. This being so, we are forced to the conclusion that there was no evidence before the jury that the track, at the point where the wreck took place, was in a dangerously defective condition, of which the company knew, or, by the exercise of reasonable diligence, could have known, in time to prevent the accident.

The burden was upon the plaintiff to show the negligence averred. Instead of showing facts from which the negligence averred on the part of the company might reasonably be inferred, he has presented a state of facts from which we may, with equal plausibility, infer either negligence or reasonable care on the part of the company. Under this state of fact, as the pleadings appear in this case, the verdict appears to us to be flagrantly against the evidence. *Hughes v. Railroad Co.*, 91 Ky. 531, 16 S. W. 275; *Wintuska v. Railroad Co. (Ky.)* 20 S. W. 819; *Railway Co. v. Lewis (Ky.)* 38 S. W. 482; *Johnston v. Railway Co. (Ky.)* 30 S. W. 415. The case of *Railroad Co. v. Ritter*, 12 Ky. Law Rep. 385 has no application to the case at bar, for in this case the plaintiff presented a definite issue of negligence, of which the appellant company was averred to have been guilty in a particular specified manner. Having elected to specify wherein the negligence consisted upon which he bases his claim for recovery, he cannot, under these pleadings, recover by showing a different character of negligence. See *McCain v. Railroad Co.*, 11 Ky. Law Rep. 334. And in *Greer v. Railroad Co.*, 94 Ky. 169, 21 S. W. 649, it was held to be error to admit evidence as to acts of negligence in addition to those averred in the pleadings. So, granting that the derailment of the train, resulting in the death of plaintiff's intestate, was evidence from which negligence might be presumed, it nevertheless does not support the averment in the petition of negligence in permitting the track to remain in an unsafe and dangerous condition. For the reasons given the judgment is reversed, and the cause remanded, with directions to award appellant a new trial, and for further proceedings consistent with this opinion.

#### OVERALL v. LOUISVILLE ELECTRIC LIGHT CO.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 18, 1898.)  
ELECTRICITY—CARE REQUIRED OF ELECTRIC COMPANIES—FAILURE TO FURNISH PERFECT INSULATION.

An electric light company is liable for injuries resulting from its failure to furnish perfect protection from electric currents at point

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

where persons will probably come into contact with its wires, it not being sufficient to relieve it from liability that it has exercised the "highest degree of care and skill usually exercised by prudent persons, engaged in the same or similar business, to keep its wires so insulated as to be reasonably safe and free from danger."

Appeal from circuit court, Jefferson county.  
"Not to be officially reported."

Action by Wade Overall against Louisville Electric Light Company to recover damages for personal injuries. Verdict and judgment for defendant, and plaintiff appeals. Reversed.

Janius C. Klein and Matt O'Doherty, for appellant.

BURNAM, J. Plaintiff alleges in this action that he was employed as lineman by the Ohio Valley Telephone Company, and that while engaged in fastening a stay or guy wire for that company to the top of one of its poles without fault on his part, it came in contact with one of the wires of the defendant company, which was heavily charged with electricity, and which was not properly insulated, and that by reason of such defective insulation of the wire of defendant company he received a severe shock, which seriously injured him, and for which he seeks to recover damages herein. Defendant denies all the affirmative allegations of the petition, and alleges that the injuries complained of were caused by the contributory negligence of the plaintiff, and that without such contributory negligence they would not have occurred. The trial resulted in a verdict for appellee, and appellant prosecutes this appeal, asking a reversal for a number of alleged errors. The proof conduces to show that the wires of the Ohio Valley Telephone Company and those of the Louisville Electric Light Company were both strung along arms which had been called to poles on the same side of the street, with the poles of each company alternating; that the wires of the electric light company were put up subsequently to those of the telephone company, and were about 12 or 15 inches lower; that appellant was engaged with a force of workmen under a foreman of the telephone company, in passing a guy or stay wire from the top of one of the telephone poles to a stay pole across the street on the opposite side; that this guy wire was necessary to hold the pole in an erect position, as the telephone company had several wires leading from the pole in the opposite direction up an alley; that it was the duty of appellant to fasten his end of the wire to the top of the pole, and the duty of the other workmen to fasten the other end to the guy pole on the opposite side, and that appellant succeeded in getting the wire—which consisted of three strands—in proper position, and had about completed his job, when he suddenly received the shock and injuries complained of.

The testimony is not clear as to the precise manner in which this accident occurred, but

it is the contention of appellant—and we think the proof conduces to support his contention—that the guy line came into contact, momentarily, with the outside line of the defendant company, which at that time was charged with over 2,000 volts of electricity. There is proof in the record which tends to show that there is no such thing as perfect insulation of a wire of this size charged with this amount of electricity, but the evidence also conduces to show that the insulation used by appellee at the point of the accident was not the best employed by it, as its own witnesses testify that it uses a rubber insulation around awnings, windows, and places where its wires are likely to come into contact with some object, which is much safer than the insulation employed at the point where the accident occurred; and it also tends to show that where a larger wire is used a much less voltage is sufficient to perform the same work, and is therefore much safer.

Appellant at the time he was struck was in a place where his business required him to be, and where he had a right to be, and it was the duty of the electric light company to know that linemen of the telephone company would have to come into close proximity to its wires in attending to their duties, and it was its duty to use every protection which was accessible to insulate its wires at that point, and at all points where people have a right to go for business or pleasure, and to use the utmost care to keep them so, and for personal injuries resulting from its failure in that regard it is liable in damages. Mr. Thompson, in his work on Electricity (section 65), says: "It may be doubted whether persons or corporations employing for their own private advantage so dangerous an agency as electricity ought not to be regarded as quasi insurers, as towards third persons, against any injurious consequences which may flow from it. It may be doubted whether one who collects, or rather creates, so dangerous an agency, ought not to be held to the obligation of restraining it,—that is, of insulating it,—at his peril." And in the recent case of *McLaughlin v. Light Co.*, 37 S. W. 856, this court says: "It seems clear to us that appellee should have been required to have had perfect protection on its wire at the point and place where appellant was injured. The fact that it was very expensive or inconvenient is no excuse for such failure. 'Very great care' might be sufficient as to the wires at points remote from public passways, buildings, or places where persons need not go for work or business; but the rule should be different as to points where people have a right to go for work, business, or pleasure. At the latter points or places the insulation or protection should be made perfect, and the utmost care used to keep it so." And this doctrine has been laid down in a number of well-considered opinions cited in the opinion supra. Electricity is the most powerful and dangerous element known to science. It can not be



seen, and it is as silent as it is deadly, and it follows that those who manufacture and use it for private advantage must do so at their peril. The only way to prevent accidents, where a deadly current is used, is to have perfect protection at those points where people are liable to come in contact with it. And the jury in this case should have been instructed that this was the duty of the defendant. To have told them "that it was the duty of defendant to observe the highest degree of care and will usually exercised by prudent persons engaged in the same or similar business, to keep its wires so insulated as to be reasonably safe and free from danger to persons who might come into contact with them," was not sufficient. The law requires, at those points where such contact is likely to take place, perfect protection from this unseen and terrible power. For the reasons indicated the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

#### FLEMING et al. v. DYER et al.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 14, 1898.)

**MANDAMUS TO COMPEL LEVY OF TAX—CONSTITUTIONAL LAW—CONFERRING LEGISLATIVE POWERS ON JUDICIAL TRIBUNAL.**

1. Under Act March 18, 1878, providing for the issuance of bonds by Muhlenberg county, and the levy of a tax to pay the interest thereon, mandamus lies to compel the county court, composed of the county judge and justices of the peace, to levy a tax to pay a judgment for amount of past-due interest coupons detached from such bonds.

2. A section of the act attempting to impose on the circuit judge the duty of levying the tax in the event of the failure of the county official to act is unconstitutional, as conferring legislative powers and duties on a strictly judicial tribunal.

Appeal from circuit court, Muhlenberg county.

"Not to be officially reported."

Action by Azro Dyer and others against D. J. Fleming and others to compel defendants, as county judge and justices of the peace of Muhlenberg county, to levy a tax. Mandamus awarded, and defendants appeal. Affirmed.

D. J. Fleming, for appellants.

HAZELRIGG, J. After obtaining a judgment at law and a return of nulla bona, the appellees demanded of the justices of the peace and the county judge in and for Muhlenberg county that a tax be levied for payment of judgment, it having been rendered for amount of certain past-due interest coupons detached from certain bonds of the county issued under authority of the act of the general assembly of March 18, 1878. Upon the failure of these officials to comply with the terms of the act, this proceeding was commenced to compel such action by mandamus. The answer of the officials raises no

issue of fact, but seeks simply to question the legal right of appellees to this remedy,—a question in fact raised by their demurrer to the petition. It is well settled that mandamus will lie against municipal bodies to compel the proper authorities thereof to levy a tax when by law the duty of so doing is so plain and imperative as to admit of no element of discretion in its exercise, and when the applicant has no other appropriate remedy. The use of this writ has been quite frequent in compelling city and county authorities to levy taxes for payment of ascertained debts of cities and counties. *Justices of Clarke Co. Ct. v. Paris, W. & K. R. Turnpike Co.*, 11 B. Mon. 154; *Spencer Co. Ct. v. Com.*, 84 Ky. 37; *Anderson Co. Ct. v. Stone*, 18 B. Mon. 852. The provision of the law relied on to authorize, and indeed to require, the county authorities of Muhlenberg to levy the tax, is as follows:

"Sec. 19. That for the purposes of this act, the county court of said county composed of the county judge alone, in case there be no justices of the peace in commission, or in case a majority of them refuse to act or concur with him, shall have full power and authority and it shall be his duty to levy and impose the taxes herein provided for, but this grant of power shall not extend to taxation for any other purposes whatever."

This act was passed with reference to the very taxes that are now sought to be imposed, and there is no escape from the conclusion that the appellants must perform the duty required of them. It is true that, by a succeeding section of the act, the duty of so levying the tax is attempted to be imposed on the circuit judge upon refusal of the county officials to act; but this section has been held unconstitutional, as imposing legislative powers and duties on a strictly judicial tribunal. *Muhlenberg Co. v. Morehead* (Ky.) 46 S. W. 484; *Pennington v. Woolfolk*, 79 Ky. 13; Const. §§ 27, 28. There was therefore no other appropriate remedy open to the appellees, and the judgment granting the relief sought must be affirmed.

#### COLLINS et al. v. BURGE et al.<sup>2</sup>

(Court of Appeals of Kentucky. Oct. 14, 1898.)

**NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—CONSTRUCTION OF WILL.**

1. Where, on the trial of an action involving the construction of a will, neither the will nor a copy was produced, none having been found after diligent search (the county court records having been destroyed), the discovery, soon after the trial, of a copy of the will in an old gourd, in which it was not known that the custodian, since deceased, had kept papers, was sufficient to entitle defendants to a new trial, provided the newly-discovered evidence would have required a different judgment.

2. A testator devised his farm to his widow for the support of the family during her widowhood, providing that: "If she shall marry again, then I want her to take her

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

<sup>2</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

part, and the court the balance for the benefit of my children; and my will further is, when the youngest child comes of age, that a division shall take place of all the property that she has in her hands, equal with my children." *Held*, that the widow, having died before the youngest child reached his majority, took only one-third of the farm for life; the intention being to give her a child's share only in the event she should not marry until the youngest child reached his majority.

Appeal from circuit court, Graves county.

"Not to be officially reported."

Action by W. T. Burge and others against J. A. Collins and others for a new trial. Judgment granting new trial, and defendants appeal. Reversed.

Robbins & Thomas and W. W. Robertson, for appellants. R. O. Hester and Park & Colley, for appellees.

PAYNTER, J. In 1840 Jeremiah Collins died testate, leaving his widow, Amanda, and three sons. In 1848 the widow married the appellee Burge, by whom she had children. Mrs. Burge died in 1893. The will of Jeremiah Collins directed his widow to sell his perishable property to pay his debts, and the remainder to be applied to the raising of the children. It contained language as follows, to wit: "That I will to her for the benefit of her and family, \* \* \* and that my will is that she keep my slaves at home for the support and raising of my children, and that she shall not account for their time in any other way. Also, I will her my farm for the support of the family, with her to rent out or cultivate the same as she may think proper; and I bind my wife to give each of my children a good, classical education out of the proceeds of my farm and slaves, and that neither of the slaves shall not be hired out of the county. The above is my will and request during of her widowhood. If she shall marry again, then I want her to take her part, and the court the balance for the benefit of my children; and my will further is, when the youngest child comes of age, that a division shall take place of all of the property that she has in her hands, equal with my children." By a proceeding in court shortly after the marriage of the widow to Burge, the real estate was partitioned among the widow and the children of the testator. From that time until her death, Burge and his wife lived upon the land which had been allotted to her. After the death of their mother the Collins children instituted a suit against Burge and others to recover the land which had been assigned to her. They claimed that under the will of their father she took only a life estate in the land. The records of Graves county had been destroyed by fire, and neither the will nor a copy of it, nor the record of the proceedings partitioning the land, was produced on the trial of the case, because none was supposed to be in existence at that time. The trial of the case resulted in a judgment for the plaintiffs.

That case was tried in December, 1895, and this action was filed January 25, 1896. By it the defendants in the former action seek to have adjudged to them a new trial because of newly-discovered evidence. It appears that shortly after the first trial the defendant Burge (an old man, who could neither read nor write) was moving away from the land which had been adjudged to the plaintiffs, and that he carried his household goods to the home of his daughter, among which was an old gourd, in which his wife had kept garden seed. The daughter, on looking in it as a matter of curiosity, discovered a copy of the will of Jeremiah Collins, deceased. Diligent search had been made for a copy of it before the trial of the original case, but it could not be found. It appears that no one knew that Mrs. Burge had kept papers in this gourd, and we are of the opinion that reasonable diligence was used to discover a copy of the will before the former trial.

The question remains to be determined, what effect the will should have had upon the trial of the original case. If the widow took the fee, and not the life estate, in the land assigned to her, which is the subject of this controversy, then a new trial should have been awarded, as the court below did. By the terms of the will the proceeds of the perishable property, after the payment of the testator's debts, were to be for the benefit of the widow and children, and the slaves were to be used for the support of his children, and his land was to be rented out or cultivated by the widow for the support of the family, and from the proceeds of the farm and slaves the widow was to give the children a good, classical education. The testator here added, "The above is my will and request during of her widowhood." It will be observed that he clearly directed what should be done with his estate during the time his wife should remain his widow. He then said, "If she shall marry again, then I want her to take her part, and the court the balance for the benefit of my children." This language was used by him to express his desire as to how his estate should go in the event of the marriage of his widow. She is to take "her part, and the court the balance for the benefit of my children." Evidently he had in view a marriage which would take place during the minority of the children, or he would not have directed the court to take charge of the interest belonging to them. Other language in the will shows that he believed the children would be capable of taking care of their estate when the youngest one arrived at the age of 21. He had not used any language, preceding the last quoted, designating what interest the widow should take in the land. We are of the opinion that the testator, by the use of the words "her part," intended that she should take what the law gave her,—her "lawful part,"—which, in the land, was the

use of one-third of it during her life. But it is contended that as the will provided that, "when the youngest child comes of age, that a division shall take place of all the property that she has in her hands, equal with my children," the widow took the fee-simple title to one-fourth of the land, and the three children one-fourth each. This claim is based upon the idea that the word "equal," as used, shows that was the purpose of the testator; in other words, that it designates what he means by the words "her part." When the widow married, she was to take "her part," and the court that of the children. If the marriage took place during the minority of the youngest child, then there could not be any division under the clause of the will which had in view a possible division when the youngest child became of age, because the division would have then taken place. The testator never contemplated that there was to be, or that there might be, two divisions of his estate among his widow and children. If she married before the youngest child arrived at the age of 21, then she would not have any property in her hands, except her own interest, and certainly the testator never intended that it should be divided equally among her and the children. Considering the entire will, our conclusion is that the testator meant there should be a division of the property when the youngest child attained his majority, if the widow had not previously married. If she had married, she took the part which the law of descent and distribution gave her; but, if she remained a widow until the youngest child arrived at the age of 21, then all the property was to be divided equally among her and her children. The widow married when the youngest child was about 10 years of age; hence took a life estate in the land devised. The judgment is reversed for proceedings consistent with this opinion.

**MITCHELL v. FIDELITY TRUST & SAFETY-VAULT CO. et al.<sup>1</sup>**

(Court of Appeals of Kentucky. Oct. 19, 1898.)

**MORTGAGES—VARIANCE BETWEEN MORTGAGE AND PETITION—MISTAKE IN JUDGMENT IN DESCRIPTION OF LAND—PERSONAL JUDGMENT ON SERVICE OF SUMMONS IN ANOTHER COUNTY—NECESSITY OF SUMMONS ON CROSS PETITION.**

1. In an action to enforce a mortgage lien, a variance between the petition and mortgage as to the number of acres in the mortgaged tract is immaterial, the boundary given being the same.

2. A slight variance between the description of the land given in a judgment enforcing a mortgage lien and that given in the petition or mortgage will not invalidate the sale or judgment, in the absence of an averment showing that land has been sold which was not covered by the mortgage.

3. In an action to enforce a mortgage lien brought in the proper county, service of summons in any county in the state will author-

ize a personal judgment for the mortgage debt, as well as a judgment enforcing the lien.

4. Under Civ. Code, § 692, providing that the plaintiff in an action for the enforcement of a lien on property shall state the liens held by others, making them defendants, and may ask and obtain a judgment for the sale of the property to satisfy all the liens, but that such defendant shall not withdraw any part of the proceeds until they have shown their right thereto by answer and cross petition, upon which, however, no summons shall be necessary unless personal judgment is asked, a judgment for the sale of property to satisfy a lien asserted by cross petition upon which summons has not issued is void as to the cross petition plaintiff, where he was merely made a defendant to the original petition, without any statement as to whether he had a lien; and is erroneous as to the original plaintiff, though he was adjudged to have a prior lien, and the property has not sold for more than enough to satisfy his claim.

5. That section of the Code does not apply to the lien of a defendant acquired pending the action.

Appeal from circuit court, Bath county.

"Not to be officially reported."

Action by Fidelity Trust & Safety-Vault Company against R. A. Mitchell and John S. Wilson to enforce a mortgage lien. Judgment enforcing plaintiff's lien and also lien of John S. Wilson asserted by cross petition. Motion to set aside judgment as void, and exceptions to report of sale made thereunder, overruled, and defendant R. A. Mitchell appeals. Reversed.

R. A. Mitchell, in pro. per. C. W. Goodpaster, for appellee Wilson. Reuben Gudge & Son, for appellee Fidelity Trust & Safety-Vault Co.

GUFFY, J. The appellee Fidelity Trust & Safety-Vault Company instituted this action in the Bath circuit court against R. A. Mitchell and John S. Wilson. It is alleged in the petition that R. A. Mitchell, on the 9th of August, 1892, executed to the plaintiff his bond, by which he agreed to pay, one year thereafter, the sum of \$4,000, with interest at the rate of 6 per cent. per annum from date until paid, the interest to be paid in semiannual installments of \$125 each; that said Mitchell, to secure the payment of said indebtedness, executed to the plaintiff a mortgage upon a tract of land, in Bath county, Ky., containing 90 acres, 1 rood, and 17 poles (giving the boundary). Plaintiff prayed judgment for its debt, and for an enforcement of its lien upon the land. The mortgage filed shows that the tract of land contained 99 acres, 1 rood, and 17 poles. It seems that summons was executed on Wilson, in Bath county, December 28, 1893, and upon Mitchell in Montgomery county, on the 14th of December, 1893; the action having been instituted on the 13th day of December, 1893. It further appears that on the 24th of February, 1894, no answer having been filed by either defendant, judgment was rendered in favor of the plaintiff against defendant Mitchell for the debt claimed in the petition, and for an enforcement of its alleged lien upon

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

the 99 acres of land mentioned in the mortgage. It further appears that on the 27th day of February, 1894, on motion of defendant John S. Wilson, the aforesaid judgment was set aside and held for naught; and John S. Wilson filed his answer and counterclaim, and on the same day the case was submitted for judgment. The answer and cross petition of the defendant Wilson in substance shows that J. M. Reid, at the — term, 1893, of the Fulton circuit court, recovered judgment against said Mitchell for \$2,250, with interest from September 11, 1893, until paid, and \$21.35 for costs; that afterwards, on October 10, 1893, the clerk of the Fulton circuit court issued an execution on said judgment for the amount thereof, directed to the sheriff of Bath county, on the 12th day of October, 1893; and that the sheriff levied upon the land described in the petition and in the mortgage, and after advertising the time, place, and terms thereof, as required by law, the said sheriff, on the 1st day of the regular term of the Bath county court, January 8, 1894, sold said land at public outcry, subject to the debt of plaintiff; and that John S. Wilson became the purchaser of said land at the price of \$1,000, for which he executed sale bond. It is claimed by said Wilson that, by virtue of his said purchase, he has a lien on said land subject to plaintiff's debt for said bid of \$1,000, with interest from January 8, 1894, until paid; wherefore he made his answer a cross petition against R. A. Mitchell, and asked that he be adjudged a lien to secure his bid of \$1,000, with interest and cost, and that said land be sold, or a sufficiency thereof, to be applied to the payment, first of plaintiff's debt, interest, and cost, then to the payment of this defendant's claim, with interest and cost, and all proper relief. On the 28th of February, 1894, a judgment was rendered in favor of the plaintiff against the defendant Mitchell for the aforesaid debt, and for a sale of the land in satisfaction thereof. It is further adjudged that said Wilson has a lien upon the same tract of land, subordinate to that of plaintiff, for the sum of \$1,000, with interest at the rate of 10 per cent. per annum from January 8, 1894, until paid; that the said land or enough thereof be sold to satisfy the judgment of plaintiff aforesaid, and, secondly, to satisfy the aforesaid lien of defendant John S. Wilson. It further appears that on the 5th day of April, 1894, the commissioner appointed by the court sold said land, and that John S. Wilson became the purchaser thereof at the price of \$4,500.90. At the May term, 1894, on the 17th day of May, it appears that the defendant Mitchell moved the court to set aside the judgment rendered herein on the 28th day of February, 1894, because it was void, having been rendered without service of process, and because it ordered a sale of more land than the parties claimed, or asserted a lien upon.

The following exceptions were also filed to

the commissioner's report of sale, by said Mitchell: (1) Because the judgment of sale rendered herein on the 28th of February, 1894, and under which the land was sold, was void; (2) because the plaintiff, in its petition, did not state the liens on said property, sought to be sold, held by others, nor did it make such lienholders parties defendant, as required by section 692 of the Civil Code; (3) because the commissioner sold more property than plaintiff and defendant claimed liens upon by their pleadings herein; (4) because the property sold at a great sacrifice by reason of the void judgment or defects in said judgment; (5) because the said judgment under which the land was sold was rendered without any process of any kind having been issued or served upon defendant Mitchell in the cross action of defendant John S. Wilson, who was the purchaser; (6) because the sale of the property was forbidden under and by section 69 of the Civil Code; (7) because the judgment ordered a sale of and 10 acres more was sold than the parties claimed by their pleadings to have a lien on; (8) because the property was not advertised, as required by judgment of sale; (9) because the purchaser, John S. Wilson, is the same man in whose favor the void judgment was rendered, and, by it being in favor of Wilson, it deterred others from bidding, or would deter intelligent persons from bidding, at the sale; because intelligent persons who might have bid at the sale were deterred by reason of the void judgment. The aforesaid motion and exceptions of appellant having all been overruled, and the sale confirmed, he has appealed to this court, and asks a reversal of the judgment as well as of the sale.

It is true that the petition alleges a lien on 90 acres, 1 rood, and 17 poles of land, with the description thereof, but the mortgage fixes the number at 99 acres, 1 rood, and 17 poles. The description in the judgment may in some immaterial respects differ from the description given in the mortgage or the petition; yet it seems to us that the description is substantially the same, and, in the absence of an averment on the part of appellant showing that land had been sold which in fact was not covered by the mortgage, that the difference in the boundaries as given in the judgment from those in the mortgage or petition is not sufficient to invalidate the sale or judgment. It is a well-settled rule of law that, in actions to enforce a mortgage lien instituted in the proper county, a summons may be served in any county in the state, and that plaintiff will be entitled to a personal judgment, as well as a judgment for the enforcement of the lien. If, in fact, there is a misdescription of the land covered by the mortgage, the same can be cured upon the return of this case. It seems to us that the court below erred in rendering a judgment adjudging to appellee Wilson any lien upon the land in controversy, and adjudging a sale

thereof to pay same, without any summons having been served upon appellant to answer the cross petition of said Wilson. It is true that section 692 provides that the plaintiff in an action for the enforcement of a lien on property shall state in his petition the liens held therein by others, making them defendants, and may obtain a judgment for a sale of the property to satisfy all of said liens which are shown to exist, though the defendants fail to assert their claims; but such defendants shall not, however, be allowed to withdraw or receive any of the proceeds of said sale until they have shown their right thereto by answer and cross petition; but, unless a personal judgment be prayed for in such cross petition, there need not be any summons thereon, and it shall be treated in reference to the time of answering thereto as a set-off or counterclaim.

It will be observed, however, in the case at bar, that the plaintiff failed to make any allegation as to the amount of Wilson's lien, or, in fact, state whether he had any lien, but merely made him a party in the caption of its petition, and proceeded, first, to take a judgment against Mitchell for the debt claimed and for an enforcement of the mortgage lien; and afterwards Wilson, so far as this record shows, without objection from plaintiff, procured that judgment to be set aside, and by answer and cross petition set up his alleged lien, making his answer a cross petition against Mitchell, and on the next day judgment was again rendered in favor of plaintiff as before, and also adjudged to Wilson a lien for \$1,000 with 10 per cent. interest, and adjudged a sale of the property in question for the payment of both of these alleged debts. It further appears in this record that Wilson purchased the land under the execution in favor of Reid after the institution of plaintiff's action; and his lien, if any he acquired, was acquired pending suit; and this case cannot come within the provisions of section 692 of the Civil Code, heretofore referred to. It therefore seems clear to us that the judgment under which the sale of the land was made was void so far as Wilson's claim was concerned, and erroneous as to plaintiff. No judgment should have been rendered until service of process upon Mitchell, or until he entered his appearance to the cross petition of Wilson. The fact that the land only sold for enough to pay plaintiff's judgment in no wise affects the validity of the judgment under which it was sold, nor the propriety of confirming the report of sale. It may also be worthy of notice that it does not appear that any execution had been issued to Fulton or to Montgomery county upon the judgment in favor of Reid against Mitchell, as required by law before the execution was sent to Bath county. For the reasons indicated, the judgment of sale and the judgment confirming the report of the commissioner are both reversed, and cause remanded, with directions to set aside the judgment of

the 28th of February, 1894, and to set aside the sale made and report, and for proceedings consistent herewith.

### WORSHAM v. LANCASTER et al.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 15, 1898.)

APPEAL—CORRECTION OF CLERK'S MEMORANDUM AS TO GRANTING OF APPEAL—RES ADJUDICATA—EXECUTION—LIEN OF PURCHASER—STATUTE OF LIMITATIONS.

1. Where the court, on motion of appellant, after notice, has made an order directing the clerk to correct his memorandum on transcript so as to show that an appeal was granted when transcript was filed, the question is res adjudicata, and cannot be reviewed on final hearing.

2. Where, in an action at law to recover land, the court rendered judgment adjudging that plaintiffs were entitled to the land, reserving all questions of equity, and transferring the case to the equity docket to adjudicate liens, improvements, rents, etc., the judgment was final and conclusive as to the right to recover the land.

3. An execution debt being barred by limitations, the lien of the execution plaintiff, acquired by his purchase of mortgaged land at a sale made under the execution, is also barred.

4. A mortgage debt being barred by limitations, the lien is also barred.

5. A judgment enforcing a mortgage lien is barred by the lapse of more than 15 years since its rendition.

6. Where the plaintiff in an execution became the purchaser of mortgaged land sold under the execution, he acquired a lien thereon junior to the mortgage lien, and when the property was sold to satisfy the mortgage lien all liens were extinguished, though the property brought no more than the mortgage debt, the execution plaintiff being the purchaser.

7. The court having erroneously given defendants a lien on land recovered by plaintiff to secure a debt that had been extinguished, they cannot complain that they were compelled to pay rents, the judgment as a whole being more favorable than they were entitled to have.

Appeal from circuit court, Fayette county.

"Not to be officially reported."

Action by Mary Lancaster and others against E. L. Worsham to recover land. Judgment for plaintiffs, and defendant appeals. Affirmed.

Beauchamp & Allen, O. S. Tenny, and Morton & Darnell, for appellant. Z. Gibbons and J. Henning Nelms, for appellees.

WHITE, J. The appellees brought this action in the Fayette circuit court, seeking to recover a certain lot in the city of Lexington. Appellant denied their right to recover, and on this question the law and facts were submitted to the court without a jury, and in December, 1891, the court rendered judgment, on the issue of a right to recover the land, that appellees were entitled to the land, and the court reserved all questions of equity, and transferred the case to the equity docket to adjudicate liens, improvements, rents, etc. The case was prepared in equity, and proof

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

was taken on the issues there made, and in August, 1894, the chancellor rendered judgment adjudging that appellees were entitled to three-fifths of the land, and to rents at \$45 per year from September 13, 1875, and to draw interest at 6 per cent. from the end of each year; that appellant was entitled to \$1,400, being three-fifths of the value of improvements made by him, and also to a lien for \$600, being three-fifths of \$1,000 execution debt due Eagle, with interest from September 13, 1875, at 10 per cent., the latter two sums being a lien on the three-fifths interest of appellees, but declined to set off the lien debts adjudged to appellant against the rents adjudged to appellees, and adjudged a sale of the whole property, and provided for a distribution of the proceeds. At the March term, 1895, after the property had been sold under the decree of sale, appellant moved the court to correct the order of distribution, which motion the court overruled. Appellant afterwards, by pleading, sought to have the debts due appellant under the judgment of August, 1894, offset against the amount due appellees under the judgment, and this motion was in August, 1895, dismissed and overruled, and from that order an appeal was prayed and granted in the lower court. In December, 1895, the appellant produced this record to the clerk of this court, with this statement, after naming parties: "The judgments appealed from were rendered on the 9th of August, 1894, and on the 5th day of August, 1895, and can be found on pages 187 and 204 of the record. Do not wish any process in the case,"—and this was signed by counsel for appellant. The clerk thereupon indorsed on the transcript: "1895, Dec. 11. Filed; tax paid; appeal granted below. Att. A. Addams, C. C. A." There was no summons issued on the appeal, and by the statement none was desired. As to the judgment rendered August 5, 1895, and from which an appeal was granted below, appellees were before the court, and no summons was necessary. In April, 1897, appellant, after notice, moved this court to have the clerk of this court correct his memorandum of December 11, 1895, so as to show an appeal was granted by him as to the judgment of August, 1894. This order was made, and the memorandum was corrected and summons issued. In January, 1898, appellees, after notice, asked the court to set aside the order of April, 1897, and to dismiss the appeal as to the judgment of August, 1894, and this motion is before us and should be determined before we enter into the consideration of the judgment of August, 1894,—for, if it be sustained, then the judgment is not before us; otherwise it will have to be considered. When in April, 1897, the appellant moved the court to order the clerk to correct his memorandum so as to show that an appeal had been granted by him when the transcript was filed, the appellees had due notice of the motion, and entered an objection thereto, and the motion, with

the objection, was submitted to the court, with the result that the motion was sustained and the order entered.

Whatever our opinion may be on this question, as an original proposition, it is clear that in this case it cannot be disturbed. It is res adjudicata. By the order entered, it was necessarily determined that there was an omission on the part of the clerk to make a memorandum granting an appeal. The judgment of this court as to that fact, entered in April, 1897, will not now be disturbed. We are of opinion that the judgment of December, 1891, was final and conclusive as to the right of appellees to recover the land, and is not now subject to review.

By appellant's answer on the equitable issues made, he pleaded that in 1875 this property was sold under execution against appellees' ancestor, on judgment due Eagle, and that September 13, 1875, Eagle purchased the land for the amount of the executions, subject to a mortgage lien prior to the executions; that afterwards the property was sold under the mortgage lien, and brought the mortgage debt only, being again bought by Eagle; that Eagle had sold the property to appellant by deed of general warranty, and appellant pleaded that he be subrogated to the rights of Eagle in the premises, and adjudged a lien on the property for the execution and mortgage debts, as well as for improvements made by him. To this answer appellees replied, denying the liens, and pleading the statute of limitation as to the execution and mortgage debts. A demurrer to this plea was sustained, the court finally rendering judgment for a lien for three-fifths of the execution debt, and refusing to allow a lien for the mortgage debt.

We are of opinion that the court erred in sustaining a demurrer to the plea of limitation. Both the execution and mortgage debts had long since been barred by limitation, and when the debt ceases to exist the lien must necessarily cease with it. However, aside from that question, the answer of appellant shows on its face that he was not entitled to a lien. When the property was sold under execution, and bought by Eagle subject to the mortgage lien, the debt, so far as it personally applied to appellees' ancestor, was satisfied; the plaintiff in the execution and purchaser, Eagle, obtaining by his purchase a lien on the property junior to the mortgage lien, and when the property was sold under the mortgage lien all liens were extinguished. That the property when sold under the mortgage brought no more than the mortgage debt can avail appellant nothing, for it was purchased by Eagle, and he could not have a lien on his own property to secure a debt due himself. The judgment foreclosing the mortgage lien was rendered in February, 1871, and it was barred by the statute of limitation when this action was filed, at least so far as the appellees were concerned.

There was an attempt to revive that judg-

ment in 1878, and an order directing a sale of the property then entered, but the lower court by its judgment of December, 1891, necessarily determined that there was no revivor; that the order of 1878 does not affect these appellees.

It is clear to us that the court erred in its judgment of August 9, 1894, in adjudging appellant a lien for the \$600, with interest from September 13, 1875; but of this error appellant will not be heard to complain, and appellees have not asked a cross appeal, and do not complain in any way of the judgment, and this error, though apparent to us, cannot be remedied.

The lower court having fallen into the error of adjudging this old execution debt a lien on the property, and that it drew interest from September 13, 1875, the date of the execution sale, it was but equitable and just to appellees that they be allowed rents from the same date, and the rent fixed by the court is certainly reasonable.

The judgment, as a whole, is more favorable to appellant than he was entitled to, and he will not be heard to complain. Appellees have been out of the use of their property since 1875, and it is finally sold under this judgment, and bought by appellant, to pay a debt that was satisfied in 1875, even if not barred by limitation, and he will not be heard to complain that he must pay rents.

What we have said above applies equally to the judgment of August 5, 1895, and is a sufficient reason for its affirmance. But there is another equally as conclusive. The motion to offset one judgment against the other was first made November 28, 1894, more than 60 days after the judgment was rendered, and, as the judgment passed on the question of distribution of the proceeds of sale, the court after 60 days had no power to alter or change it, or set it aside, either by order or judgment, except in the ways pointed out by the Code, none of which appear here. For the reasons stated above, the judgments of both August 9, 1894, and August 5, 1895, are affirmed.

**CLEMENT v. COMMONWEALTH.**<sup>1</sup>  
(Court of Appeals of Kentucky. Oct. 14, 1898.)

**LARCENY—FIXTURES.**

Copper boxes connected with a still by a pipe screwed into the still, though constructively a part of the freehold, are the subject of larceny.

Appeal from circuit court, Crittenden county.

"Not to be officially reported."

Elzie Clement was convicted of petit larceny, and appeals. Affirmed.

Blue & Nunn, for appellant. W. S. Taylor, for the Commonwealth.

**PAYNTER, J.** The defendant was indicted for grand larceny, but found guilty of

petit larceny. The proof tends to show that he stole two copper boxes from a still house, which were located, at the time they were detached, between the still and worm, and connected to them by a pipe, one end of which was screwed into the still, which is incased by brick, and the other into the worm; the worm being attached to a platform built up from the ground floor. The pipe by which the boxes were attached to the still was broken, and the boxes were carried away, by the defendant. The only question in this case is whether the defendant was guilty of larceny by thus breaking the pipe and carrying away the boxes. In *Smith v. Com.*, 14 Bush, 31, it was held that the chandeliers attached to the freehold were the subject of larceny. The court was of the opinion that they were personal chattels, which were constructively annexed to the freehold, and to feloniously take and carry them away the defendant was guilty of larceny. We are of the opinion that the boxes in this case were personal chattels constructively annexed to the freehold, and the subject of larceny. The judgment is affirmed.

**HACKETT v. ROSENHAM et al.**<sup>1</sup>  
(Court of Appeals of Kentucky. Oct. 14, 1898.)

**NEW TRIAL—FILING OF PETITION IN ORIGINAL ACTION.**

Under Civ. Code, § 344, providing that, if grounds for a new trial be discovered after the term at which the decision is rendered, the application may be made by a petition filed with the clerk, on which a summons shall issue as on other petitions, the petition may by leave of court be filed in the original action; and when so filed it is error to overrule it, as a motion for a new trial, without requiring the adverse party to plead in any way.

Appeal from circuit court, Jefferson county. "To be officially reported."

Petition by John L. Hackett, surviving partner, against L. E. Rosenham and others, for a new trial. Judgment dismissing petition, and plaintiff appeals. Reversed.

W. H. Holt, for appellant. Barnett, Miller & Barnett and Barnett & Barnett, for appellees.

**BURNAM, J.** In the appeal of *Collins v. Rosenham*, this court reversed the judgment appealed from because it fixed the value of the whisky recovered by plaintiff at 60 cents per gallon, when the proof showed that it was not worth exceeding 50, and for the additional reason that the lower court overruled appellants' motion to correct the taxation of costs for taking certain depositions in New York; and the case was remanded, with instructions to correct the judgment appealed from in these respects. Otherwise it was not disturbed. See 43 S. W. 726. Upon the return of the case to the lower court, appellants filed the

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opinion and mandate of reversal, and consented that the action should be revived in the name of Collins' executor, one of the appellants, and agreed that the court might at once take up the action, and render judgment in accordance with the opinion and mandate. Before this was done the Hamburger Company filed an intervening petition, asserting a lien upon the judgment recovered by Rosenham of Collins & Co., by virtue of an attachment served upon appellant as garnishee; and on January 29, 1898, plaintiff filed an amended petition, making the Hamburger Company and Crone & Co. (who had also attached the judgment as creditors of Rosenham) and Essie R. Johnson defendants, alleging that each of them was claiming the judgment. Essie R. Johnson filed her answer, making same a counterclaim against plaintiff and cross petition against the Hamburger Company and Crone & Co., and alleged that in the year 1891 the plaintiff L. E. Rosenham was indebted to her in the sum of \$3,700, and as part payment thereof, in 1894, after the rendition of the judgment in favor of Rosenham in the lower court, he executed and delivered to one Charles J. Rosenham a writing whereby he assigned all of his right and interest in the claim sued on, in trust for the use and benefit of defendant, and that she had been the owner and holder of the claim ever since such assignment, and that the attachment suits of the Hamburger Company and Crone & Co. were both instituted long subsequently to the assignment of the judgment to Charles J. Rosenham for her benefit, and asked the court to adjudge the title to the fund in controversy to her. On February 4th, thereafter, appellant, Hackett, moved the court to set aside the judgment of December 23, 1893, and, by leave of court, filed his petition in the same case, as surviving partner of the firm of Collins & Co., for a new trial, and to vacate the judgment, upon the ground that the answer and cross petition of Essie R. Johnson revealed to him for the first time that the plaintiff L. E. Rosenham was under obligations to transfer his judgment for the 50 barrels of whisky to Essie R. Johnson (who was the wife of the Johnson, who was a member of the firm of Dickerson & Co.), and contends that this fact (considering the relation which L. E. Rosenham bore to Essie R. Johnson) is conclusive evidence of knowledge on the part of Rosenham that the firm of Dickerson & Co. bought the whisky in question with the antecedent purpose of not paying for it, and that he was acting in collusion with them in such fraud upon appellant. It is also claimed that by suppressing the fact of this transfer to Johnson's wife, and of her interest therein, he was successful in obtaining the judgment appealed from, and that it is sufficient evidence to authorize the court to grant a new trial.

All the issues which were tried out in the case of Rosenham against Collins & Co. were fully disposed of by the opinion in that case, and

the mandate which issued pursuant thereto, and all that the lower court could properly do upon the return of the case was to correct the judgment appealed from as indicated by the opinion. But, as we understand, the purpose of appellant in his petition for a new trial is not to set aside the modified judgment which the lower court was directed to enter by the mandate of this court, as appellee seems to think, but the judgment originally appealed from; and the grounds he relies on—newly-discovered evidence, and fraud practiced by plaintiff in obtaining the judgment—are good grounds, under the Code, for vacating the judgment. It is insisted by appellees that appellant, in filing his petition for a new trial in the old record by leave of court, has not pursued the mode pointed out by section 344 of the Civil Code, which requires the application for a new trial on grounds discovered after the term at which the decision is rendered to be by petition filed with the clerk, on which summons shall issue, and which application shall stand for hearing at the term to which the summons is returned executed; and he relies, to support his contention, chiefly upon the case of *Scott v. Scott's Ex'r*, 9 Bush, 178. In that case the pleading offered to be filed was offered as an amendment to the original answer, treating the case as still in court for further preparation; and the prayer was, not for a new trial, and for a modification or vacation of the judgment, but for credits for sums set up in the answer as payments on the debts sued for; and the court refused to permit the amended answer to be filed, for the reason "that, by section 344 of the Civil Code, appellants had the right to file their petition for a new trial, independent of the action of the circuit court, with the clerk, and even if, after the court had refused to permit the amended answer to be filed, they had presented it in the character of a petition to the clerk of the court, and filed it with him, the rejection of the answer by the court would have presented no obstacle; that the order did not preclude or affect that right secured by the section of the Code, and as the petition for a new trial was their only legal remedy, and was not interfered with by the judgment complained of, they had not been prejudiced thereby." The pleading filed by appellant by leave of court in this case is entirely different from the one rejected in the *Scott Case*. Here it is a petition for a new trial, and to vacate the original judgment on the ground of evidence discovered after the term at which the judgment was rendered. That it was filed by leave of court in the original suit, instead of with the clerk, as a separate and independent action, does not change its nature, and was not prejudicial to appellee. He was not bound to take any notice of it until after process had been issued thereon and served on him, and it did not stand for trial until the next regular term after such service. But it is essentially a suit which



must be tried and determined by the ordinary rules of pleading. If appellee Rosenham wished to test the sufficiency of the fact relied on to support the action, the proper mode of procedure for him would have been by demurrer thereto, or answer. Appellant was certainly entitled to a trial on the issues raised by his pleading. The lower court treated the proceeding precisely as a motion for a new trial for errors occurring on the trial, and overruled it as such a motion, and made the rule absolute, requiring appellant to pay the money into court, without requiring appellee to plead in any way. This was an error, and for the reasons indicated the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

### PARROTT v. COMMONWEALTH.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 19, 1898.)

**CRIMINAL LAW—ARREST OF JUDGMENT—MALICIOUS WOUNDING—IDENTIFICATION OF DEADLY WEAPON—EVIDENCE—MISCONDUCT OF COUNSEL IN ARGUMENT—DEGREES OF OFFENSE.**

1. A motion in arrest of judgment will be overruled if the indictment charges a public offense.

2. The statement of a witness upon a trial for malicious wounding that a club exhibited to the jury was found two days after the difficulty about 60 yards from the scene of the difficulty, and that after he got to town "he thought" he found hair or wool on it, was not sufficient to identify it as the stick or club used by defendant in making the scalp wound complained of, so as to make it admissible in evidence on the issue as to whether the weapon used was a deadly weapon.

3. It was error to permit physicians to give their opinions as to whether the person wounded was struck from in front or behind, without a minute description of the wounds so as to enable the jurors to judge for themselves.

4. It was error to permit the prosecuting attorney to comment in his argument on what occurred at the examining trial, there being no evidence as to that matter.

5. Cr. Code, § 223, subsec. 1, providing that the defendant in criminal prosecutions may testify, "but his failure to do so shall not be commented upon," applies equally to a failure to testify on the examining trial as before a trial jury, and the court should not permit the prosecuting attorney to comment on such failure.

6. The statement of the prosecuting attorney that only certain facts need be proved in order to convict, and that all other material facts were admitted by defendant, may have been in reply to some argument of counsel for defendant, and therefore proper, there being nothing to show in what connection the words were used.

7. The court should have required the jury to find, in order to convict defendant of malicious wounding, that the weapon used was, as used, a deadly weapon.

8. Under an indictment for malicious wounding, the court should have instructed the jury as to assault and battery.

Appeal from circuit court, Taylor county.  
"Not to be officially reported."

John T. Parrott was convicted of malicious wounding, and appeals. Reversed.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

H. S. Robinson, for appellant. W. S. Taylor and M. H. Thatcher, for the Commonwealth.

**WHITE, J.** The appellant, John T. Parrott, was indicted by the grand jury of Taylor county for the offense of malicious wounding, under section 1186, Ky. St. The indictment charges: "The said John T. Parrott, in the said county of Taylor, on the — day of —, 1898, and before the finding of the indictment herein, did unlawfully, willfully, and maliciously strike, beat, bruise, and wound one George W. Craig with a wagon standard or club, a deadly weapon, with the intent to kill the said Craig, but from which wounding the said Craig did not die therefrom." Appellant was tried and convicted, and his punishment fixed at two years in the penitentiary, and after his motions in arrest of judgment and for new trial had been overruled he has appealed.

On the trial the commonwealth proved by the prosecuting witness that while traveling along the public highway at night, without warning, he was struck from behind with a large stick, and was considerably beaten and bruised; that he ran, and got away, and procured a physician, who dressed his wounds. The attorney for the commonwealth, over objection by appellant, introduced and had shown to the jury a dogwood club 4½ feet long and 2 inches in diameter, with a knot on it. Witness Craig could not say that the club exhibited was the one with which he was beaten, but said it looked something like it. This occurred on Monday night. The commonwealth then introduced a witness, who testified that on Wednesday after the difficulty, at about 60 yards from where the difficulty is said to have taken place, witness found the dogwood club that was shown to the jury. He carried the stick to town on sacks of corn, and while at town examined the stick, and found something on it that looked like hair or wool. The commonwealth also introduced two physicians,—one who dressed the wounds, and the other who removed stitches. This testimony was that the wounds were from 1 to 3¼ inches long, and on the head, and a bruise on one hand. These two witnesses were permitted, over objection by appellant, to state their opinion that the licks were struck from behind, and could not have been made by a person standing in front of Craig. The location and character of the wounds do not appear to have been described. Appellant testified in his own behalf, and admitted having a difficulty with Craig, and detailed the circumstances, and by his statements he resisted an attack, and had only a small stick, about one inch in diameter at the large end. He denied absolutely that the stick exhibited to the jury was the one he used. Appellant was corroborated in his statement of the difficulty by a witness who says he saw it. This witness also denied that the club shown to the jury was the one

used by appellant, but said it was about one inch in diameter at the large end. The court gave to the jury six instructions. Appellant objected and excepted to Nos. 1, 2, 4, and 6 as given. Appellant asked, and the court refused to give, instructions X, Y, and Z, to which ruling an exception was reserved. The bill of exceptions shows that one of the attorneys for the prosecution stated in his argument to the jury that there had been an examining trial of appellant, and that on that trial, although he had a right to do so, appellant had not testified, and that the first statement made by appellant about the difficulty was on that trial, when he testified; and then argued to the jury that his story was a fabrication, and should not be believed. To this statement of the attorney appellant excepted, and asked the court to say to the jury that the statements were improper, which the court failed to do. The attorney for the commonwealth, in the concluding argument to the jury, told them that there were only two material facts necessary for them to believe beyond a reasonable doubt in order to convict under instruction No. 1, viz. that the striking was done maliciously, and that it was not in defendant's necessary self-defense, and that all the rest of the material facts necessary to convict had been admitted by defendant. To this statement appellant excepted, and the court overruled the exception. The reasons for new trial contain all the exceptions above, and also as a reason newly-discovered evidence as to a fact occurring some days prior to the difficulty, and about which both appellant and prosecuting witness Craig testified on the trial.

We are of opinion that there was no error in overruling the motion in arrest of judgment. There is no question of a demurrer to the indictment before us, and, if the indictment charges a public offense, a motion in arrest of judgment will be overruled. This is true though the indictment be demurrable. *Tully v. Com.*, 11 Bush, 154.

We are of opinion that the court erred in admitting the dogwood club to be shown to the jury, as it was not identified as the one used by appellant. A very material question presented to the jury, and one they must believe beyond a reasonable doubt, was that the stick used was, as used, a deadly weapon, in order to a conviction for felony. The witness Craig, who was wounded, positively refused to identify the club. The witness who produced the club states he found it on Wednesday, after the Monday of the difficulty, about 60 yards from the scene of the difficulty, and after he got to town he thought he found hair or wool on it. Although, by the commonwealth's witnesses, the witness Craig was terribly beaten, with gashes in his head from 1 to 3½ inches long, and 20 stitches taken to sew the wounds up, it was not pretended that the club produced had any evidences of blood or hair except as above

stated. The club was 2 inches in diameter, with a knot on it, and 4½ feet long, and, no doubt, a very dangerous looking weapon. Its introduction before the jury, without identification, was error and prejudicial to appellant.

It was also error to permit the physicians to give their opinion as to how the witness Craig must have been struck, whether from in front or behind, without a minute description of the wounds, their location and character, etc., so that the jury might have an opportunity to judge of that matter themselves. After the description of the wounds, the physicians might then have given an opinion as to how the wounds must have been inflicted, as they were skilled in that business.

We think the court, upon objection made, should have told the jury that the statements of the assistant prosecuting attorney were improper, and should, on or without motion, have promptly stopped counsel in such statements. There was no proof in the case as to what occurred on the examining trial, and the court would not have admitted such proof. So that counsel was outside the testimony. This was error.

Again, by section 223, subsec. 1, Cr. Code, it is provided that the defendant in criminal prosecutions may testify; "but his failure to do so shall not be commented upon, or be allowed to create any presumption against him or her." This, in our opinion, applies equally to a failure to testify on the examining trial as before a trial jury; for, if it did not, an accused could not testify on an examining trial. So, in either case, the statement of prosecuting counsel was prejudicial error denounced by statute.

Counsel for appellant complain of the action of the trial court in refusing to correct the commonwealth's attorney in certain statements in the concluding argument to the jury. The bill of exceptions does not contain the connection in which these words were spoken. It may have been in reply to some argument of counsel for appellant, and, if so, it might have been proper. In argument of cases to a jury, considerable latitude has always been allowed counsel, and as long as he keeps within reasonable bounds we do not think the court should interfere. This action was not reversible error, as the jury must have known that the weapon and its character were in issue by the testimony.

Instructions Nos. 1, 4, and 6, given by the court and excepted to by appellant, appear to us to fairly state the law. Instruction No. 2, if given at all, should provide that the jury should find that the weapon used was, as used, a deadly weapon, as in instruction No. 1.

The court should also have instructed the jury as to assault and battery, which he wholly failed to do.

For the reasons given, the judgment is reversed, and cause remanded, with directions to award appellant a new trial, and for further proceedings consistent herewith.

**BRECKINRIDGE v. McROBERTS.**<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 15, 1898.)

**PRINCIPAL AND SURETY—WITNESSES—COMPETENCY TO TESTIFY AS TO TRANSACTION WITH AGENT SINCE DECEASED.**

1. The burden is on one who appears on the face of a note to be a principal to show that he was surety merely.

2. Under Civ. Code, § 606, one cannot testify for himself concerning a transaction with an agent since deceased, though the principal be living.

Appeal from circuit court, Lincoln county.

"Not to be officially reported."

Action by Thomas McRoberts against Robert J. Breckinridge to enforce a judgment. Judgment for plaintiff, and defendant appeals. Affirmed.

W. G. Welch, for appellant. Chas. C. Fox, for appellee.

LEWIS, C. J. In 1872 a note for \$2,000 was executed by John R. Breckinridge, R. J. Breckinridge, and H. Helm, payable to Thomas McRoberts. In 1873 suit was brought on that note, and judgment recovered against John R. Breckinridge and H. Helm; R. J. Breckinridge not having been summoned. In 1875 he brought suit against R. J. Breckinridge, and recovered judgment for the amount of the note, less a credit of \$400 and interest paid by John R. Breckinridge in 1873. Upon that judgment an execution was issued, and returned "No property found" in 1883, again in 1888, and again in 1895. But those executions were credited by about the sum of \$1,200 paid out of the estate of H. Helm, that had been assigned for the benefit of creditors. This action was brought in equity in August, 1895, against R. J. Breckinridge, to subject to the satisfaction of the unpaid part of the judgment of 1875 against him certain money in the hands of garnishees. The grounds of defense to the action by appellant Breckinridge are that he was merely surety on the note for \$2,000,—John R. Breckinridge being the other surety, and H. Helm the principal,—and that, in conjunction with other creditors, McRoberts in 1876 executed a written agreement releasing H. Helm, upon the payment by his assignee of said sum of \$1,200, from further obligation on the note. As the note for \$2,000 was written and signed, R. J. Breckinridge is prima facie jointly bound as one of the principals, and the burden is on him to show that he executed it merely as surety. McRoberts testifies that he was not present when the note was executed, being absent in the state of Minnesota, and that he left said sum of \$2,000 on deposit in the First National Bank at Danville to be loaned out during his absence by E. L. Shackelford, cashier of the bank, as his agent, and that upon his return to Kentucky he found \$2,000 char-

ged to him by the bank, and received from Shackelford the note in question. It appears that, when this action was commenced, Shackelford, John R. Breckinridge, and H. Helm were all dead, R. J. Breckinridge being the only living witness of the transaction. And as McRoberts, the obligee, was not present, and does not know personally whether R. J. Breckinridge executed the note as principal or surety, the latter is, under section 606, Civ. Code, as construed by this court, not competent to testify as a witness in regard thereto; for it has been held that the same reason which excludes the testimony of a party or person testifying for himself concerning a transaction with the principal, who is dead when the testimony is offered to be given, likewise excludes it where the transaction was with the agent, who is dead when it is offered to be given. *Harpending's Ex'rs v. Daniel*, 80 Ky. 449, and *Hardin's Adm'r v. Taylor*, 78 Ky. 593. There was consequently no competent evidence offered by appellant showing or tending to show that he executed the note in any other capacity than as principal jointly bound with the other two parties. On the contrary, there is evidence tending to show that he received and appropriated to his own use part of the money borrowed on that occasion. What might appear to have been the posture of appellant if those who were present at the time of the transaction were living to testify in regard to it, we need not surmise. It suffices that he has failed to show affirmatively and satisfactorily, by competent evidence, that he was merely surety on the note. We think he has also failed to show that either appellee or all the other creditors of Helm signed the release in question. Judgment affirmed.

**WELCH v. LEWIS et al.**<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 21, 1898.)

**DESCENT AND DISTRIBUTION—RELEASE OF INTEREST IN ESTATE—MISTAKE—ESTOPPEL—EXEMPTIONS TO WIDOW.**

1. The heirs of a decedent having without consideration released their interest in the estate under the mistaken belief that the estate was insolvent, which was induced by a misunderstanding of representations made to them by the widow, the release will be set aside.

2. The heirs are not estopped to object to a settlement made by the administrator with the county court in accordance with that release, though they failed to appear and resist the settlement, they having previously notified the administrator and the widow that they repudiated the release.

3. The act of 1894, amending the law of husband and wife, and fixing the widow's interest in the deceased husband's personal estate, did not repeal the provisions of the act of July 3, 1893, relating to descent and distribution, which set apart to the widow certain personal property as exempt from distribution.

4. Where all the articles specified in the stat-

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

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are as exempt to the widow are on hand, she is entitled to all of them, but to nothing more, in the way of exemptions, whatever may be their value, though the statute provides that the property or money which may be set apart in lieu of articles not on hand shall not exceed \$750.

Appeal from circuit court, Franklin county.  
"To be officially reported."

Action by Kate Lewis and others against Kate Welch and others to cancel a release, and for a settlement of the estate of James Welch, deceased. Judgment for plaintiffs, and defendant Kate Welch appeals, and plaintiffs Lewis and Newman prosecute a cross appeal. Affirmed.

John W. Rodman, for appellant. John L. Scott & Son and S. A. Thomas, for appellees.

GUFFY, J. It appears from this record that James Welch died, intestate, in Franklin county, Ky., in August, 1804, leaving a widow, the appellant, Kate Welch, but no children, and that Pat Newman was appointed administrator of the estate of said decedent. It further appears that on July 23, 1895, Kate Lewis and Ben Lewis, her husband, instituted an action in the Franklin circuit court against Kate Welch, Pat Newman, administrator of said James Welch, Mollie Driscoll, and John Driscoll, her husband, Annie Connors, and Mike Connors, her husband, and Daniel J. Newman. It is alleged in the petition: That Kate Lewis and Mollie Driscoll were sisters of said decedent; and that Annie Connors was a niece of said Welch, and Daniel J. Newman was a nephew of said Welch, and the only lawful heirs at law of said Welch; and that the said Kate Lewis, Mollie Driscoll, Annie Connors, and Daniel J. Newman were entitled, under the laws of descent, to have and receive one-fourth equal part of the estate of said James Welch, after the payment of debts and costs of administration, and said widow was entitled to one-half of the surplus. That there came to the hands of said Newman, as administrator, \$4,973.72 of assets belonging to the estate of said decedent, one-fourth part of which sum, after the payment of debts and costs of administration and the distributable share of said widow, belonged to, and still belongs to, the plaintiff, Kate Lewis, which one-fourth amounts to at least \$500. That, soon after the qualification of said Newman as administrator, these plaintiffs and the defendant Daniel J. Newman were ignorant as to the financial condition of the estate left by said decedent; and defendant Kate Welch came to these plaintiffs and the defendant Daniel J. Newman, and, for the purpose of deceiving plaintiffs and said Daniel Newman, falsely stated and represented to them that she was in financial distress, and that said James Welch left no money, and that his estate was insolvent, and that said Kate Lewis and Daniel J. Newman could never get anything out of said James Welch's estate, that their claims were worthless, that said Kate Welch could

not carry on her store or get credit any longer for goods unless these plaintiffs and said Daniel Newman would sign a paper releasing their claims to any share in said estate, so that she could show said paper to the wholesale merchants in the East, and thereby obtain more goods on credit, and thereby enable her to make a living by continuing the business, each and all of which statements and representations were false, and known to be false at the time by said Kate Welch, and made for the purpose of having Kate Lewis and Daniel Newman rely on same and make and sign said written release; and these plaintiffs and said Daniel Newman, not knowing or suspecting said statements and representations to be false, and having no means of knowing of their falsity, then and there believing, relying, and acting on the supposition that all of said statements were true, and, so believing, signed said written release without any consideration whatever. That, after said release was signed, they learned that all of said statements and representations were made to them for the purpose of inducing them to sign said release, which statements and representations were false and fraudulent; and that thereupon they notified said Pat Newman and said Kate Welch that they repudiated said written release given by them on account of said false representations and without any consideration, and that said release was void, and they still claim to be the lawful owners, and entitled to have and receive, one-fourth of said estate, which notice was given long before the 18th of May, 1895. That, notwithstanding said notice, said Pat Newman thereafter, on the 18th of May, 1895, acting in conjunction with said Kate Welch and in her interest, and thus disregarding all the rights and interest of said Lewis and Newman in said estate in his hands, went before the county court of Franklin county, and presented said written release to the said county court, representing same to said court as still binding on these plaintiffs, when they both knew said release was utterly void, and thereby caused said court to make a pretended settlement of said estate, by which settlement the plaintiff Kate Lewis and defendant Daniel Newman were deprived of their entire interest in the estate of said Welch, deceased, and the entire estate was wrongfully and unlawfully ordered to be given to the said Kate Welch. That neither of these plaintiffs nor Daniel Newman entered their appearance in said county court in connection with said pretended settlement, and neither of them took any part therein, in any way submitting themselves or either of them to the jurisdiction of said court in making the settlement, and neither of them is bound thereby; and plaintiffs now bring this suit for the purpose of surcharging said settlement, and setting it aside, and recovering from said administrator and widow their one-fourth interest in said estate, which amounts to at least \$500. That it is true that, after

the payment of the debts of said estate and cost of administration, the said widow was entitled to have as her distributable share one-half of the remaining surplus, but no more. That said settlement first gives her one-half of said surplus, and then, in addition, gives her \$750, which in law, as they are advised, belongs to the other heirs at law of said decedent, which said \$750 erroneously given to said widow is composed of two items, of \$144.25 and \$605.75, found on second page of settlement. Said settlement also gives the administrator credit for \$197 as his commission, and, in addition, gives him credit by \$50 as attorney's fee, making in all \$247 for the administrator in settling this small estate, which is greatly in excess of the commission allowed by the statute. They pray that this amount be corrected and reduced, and aver that \$75 is as much as should be allowed to said administrator for services, including any proper attorney's fee. They pray that said papers of transfer or release be canceled, and held for naught, and not binding on these plaintiffs, and that this case be referred to the master commissioner for settlement, and pray judgment over against Pat Newman and against Kate Welch for \$500, with interest, etc. The defendant Daniel J. Newman, by answer and cross petition, substantially made the same averments that were made by the plaintiff in the petition, and united in the same prayer. The answer of the administrator may be treated as a denial of all the averments as to false representations made by the defendant Kate Welch; denies that the settlement made with the county judge is erroneous; and also pleads the fact that he gave all parties in interest notice of his intended settlement, which he made on the 18th of May, 1895, and pleaded and relied on the settlement as a bar to plaintiffs' claim. The answer of Kate Welch may be treated as a traverse of all the material averments in the petition of the plaintiffs, as well as in the answer and cross petition of Daniel J. Newman. After the issues were fully made up and proof taken, a judgment was rendered in favor of the appellees, Kate Lewis and Daniel J. Newman, against the appellant, Kate Welch, for \$300 each, with interest from date, and also against Pat Newman, as administrator, to be made of assets in his hands unadministered; and, from this judgment, appellant, Kate Welch, prosecutes this appeal, and the appellees, Lewis and Newman, have obtained a cross appeal.

It is insisted for appellant, among other things, that the testimony does not sustain the averments in the petition. It may be true that the testimony in chief does not fully come up to the averments in the petition; but it seems to us that the preponderance of the proof conduces to establish that appellees, Lewis and Newman, were not aware of the condition of the estate of James Welch at the time they signed the release. Allowing the appellees and appellant to have all testified

truly as to what took place at the time of the assignment, yet it seems reasonable that, while appellant only aimed to state her own financial condition, the circumstances were such as to reasonably lead appellees to understand that she was referring to the condition of the estate of the decedent, Welch; and, that being true, it would not be equitable to hold them bound by the release executed, they having received no consideration for the execution of the release or transfer.

We are further of the opinion that the appellees are not estopped by their failure to appear before the county judge and object to or resist the settlement made by the administrator; and taking into consideration all the testimony introduced, and giving due weight to the opinion of the chancellor, who may be reasonably presumed to have been in a condition to properly weigh and determine as to all the testimony, we are not inclined to reverse the judgment rendered.

As to the cross appeal of the appellees, we are clearly of the opinion that the act of 1894 does not repeal so much of the acts of 1891, 1892, and 1893 as gives to the widow certain property as exempt from distribution. But it is further contended for appellees that the court erred in allowing to the appellant \$750 worth of property. It is worthy of note that the proof establishes the fact that the father of appellant gave her a considerable amount of money, which was invested in the business, which business seems to have been conducted with profit mainly by the appellant; and while that money and its accumulations, as a matter of law, became the property of James Welch, yet, in making an equitable settlement, it may not be improper to take that fact into consideration. The statute of distribution specifically provides that certain articles of property, if on hand, shall be set apart to the widow, and, if not on hand, that other property or money, not exceeding a specified amount, shall be allowed in lieu thereof; and it is also provided that the property set apart in lieu of the articles not on hand shall not exceed \$750. The pleadings in this case do not specifically point out the errors as to the several species of property set apart to the widow. It does, however, appear that some articles of property were set apart to the widow which the law does not allow her; and it seems to have been the opinion of the appraisers, and perhaps of the court below, that she was certainly entitled to \$750 worth. This conclusion is not by any means necessarily correct. If all the articles allowed by the statute were on hand, the value of them might exceed \$750, and yet the widow would be entitled to all of them. It might also happen that all the articles specified in the statute were on hand, and not worth \$750, and yet she would not be entitled to any more. But, taking the pleadings and evidence in this case altogether, we are of opinion that the judgment of the court below was an equitable settlement of all the

matters in dispute. Therefore the judgment on the original appeal is affirmed, and the judgment on the cross appeal is also affirmed.

**MONTGOMERY COUNTY COURT v.  
CHENAULT et al.<sup>1</sup>**

(Court of Appeals of Kentucky. Oct. 15, 1898.)

**SHERIFFS—COLLECTION OF COUNTY LEVY—SETTLEMENT WITH COUNTY COURT.**

1. The remission of county taxes by the fiscal court, whether authorized or not, will exonerate the sheriff from liability for failure to collect them.

2. The sheriff will not be required to account for taxes neither collected by him nor certified to him for collection.

3. The sheriff is not chargeable with delinquent taxes returned and allowed as such by the fiscal court, though they may not be returned on the day fixed by law.

4. In a settlement with the county court on account of the county levy for a particular year, the sheriff is entitled to credit for exonerations which were omitted to be credited for the previous year.

5. Receipts from the county judge presented by the sheriff in his settlement with the county court were properly rejected as credits in the absence of any showing as to what the amounts were paid for, the court having the right to conclude that they covered other vouchers already credited.

6. The sheriff was entitled to the commission of 25% on taxes collected on property omitted by the assessor, and discovered and reported by him.

7. All taxes, both poll and ad valorem, levied by the county, constitute one fund, and are to be taken in the aggregate in estimating the sheriff's commissions.

8. A settlement on account of the county levy made by the sheriff with the county judge as commissioner, though irregular in some respects, and not recorded as ordered by the full court, will not be disturbed after many of the vouchers have been lost, as it appears to have been substantially correct, and was approved and acquiesced in by the full court when presented.

Appeal from circuit court, Montgomery county.

"Not to be officially reported."

Action by Montgomery county court against J. W. Chenault and others for settlement of defendant Chenault's accounts as sheriff. Judgment overruling plaintiff's exceptions to commissioner's report of settlement, and sustaining certain exceptions of defendants, and overruling others; and plaintiff appeals, defendant prosecuting a cross appeal. Affirmed.

Tyler & Apperson, for plaintiff. H. L. Stone, for defendants.

WHITE, J. This action was brought in the Montgomery circuit court by the appellant against the appellee Chenault, who had been the sheriff of Montgomery county, and his sureties, for a settlement of his accounts as sheriff of Montgomery county, on account of collection and disbursements of the county levy for the year 1884, and sought judgment for

the amount found due the county on said settlement. The petition alleges the total amount of taxable property and the rate of taxation that was levied for that year, as well as the number of polls in the county and the rate of poll tax levied for the year 1884. The defenses presented by appellees were that in 1885, and long before this action was brought, appellee Chenault had made a full and fair settlement of his accounts as sheriff by reason of taxes for 1884, with commissioners duly appointed by the Montgomery fiscal court, and had paid the sum found in his hands by that settlement to the county treasurer. In separate paragraphs, appellees pleaded payments to various persons of sundry sums on orders of the court of claims, and exhibited receipts from these persons. Appellant, by reply filed, denied that appellee Chenault had paid money on the amounts alleged to have been paid by him, and for which he presented receipts; denied that many other sums that appellee alleged to have paid were legal credits to appellee, or legal charges against the county, for the alleged reason that many of them exceeded \$50 in one claim, and were allowed by the county judge, acting without a session of the court of claims, and without any of the justices being present; others were not legal credits to appellee, or legal charges against the county, for the reason that, though being for less sums than \$50, they were allowed by the county judge at a term of court where more than \$100 in claims were allowed, and that the justices were not present; other items of credit were denied by the reply for the reason that the claims had never been allowed at all by the county court or court of claims. Appellee filed rejoinder, denying that at the time he paid the claims he had any information, if it was a fact, that any of them were allowed by the county judge alone, without the justices, or were allowed at a term where more than \$100 were allowed by the county judge, but alleged that he paid same on a certificate of the county clerk, regular in form, and that nothing on its face disclosed any irregularity therein. The rejoinder also denied that any of the claims had been paid by other parties, or had been credited to any other officer than himself.

The court referred the case to the master commissioner, to take proof, make the settlement, and report to court, which he did. The report of the commissioner filed shows that the total taxable property of Montgomery county for the year 1884 amounted to \$3,898,804, and that there were exonerations by the county court of \$101,846.82 and \$5,300, and delinquent property \$504, which several sums deducted from the total valuation leaves \$3,791,153.18 as the total net valuation of property subject to taxation for 1884, which, at the rate of 82½ cents on the \$100, would make a total tax on property of \$31,277.09. It also shows that there were 2,227 polls in the county by the assessor's count, and of this number 1,385 were not chargeable with

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

poll tax, or were delinquents, leaving 842 polls at \$3 chargeable, amounting to \$2,528; these two sums amounting to \$33,808.09. To this sum the commissioner adds a total tax of \$413.12 on account of 22 polls, and \$42,706 in property as certified by the clerk as omitted list, making a total of \$34,216.21 chargeable to appellee as sheriff by reason of taxes for 1884. The commissioner allowed credits for various and sundry receipts and commissions of \$31,920.19, and ascertained a balance due from appellee of \$2,296.02. In making the settlement, the commissioner rejected credits asked for by appellee, being voucher No. 98, J. H. Hazelrigg, for \$400; No. 214, to Traders' Deposit Bank, for \$750; No. 127 and No. 241, both to J. H. Hazelrigg, and for \$350 each, or \$700; No. 452, to J. H. Hazelrigg, for \$200; No. 488, check to J. H. Hazelrigg, for \$49.45; No. 489, check to J. H. Hazelrigg, for \$541.60,—no voucher accompanying either; No. 490, No. 491, No. 492, and No. 493, to J. H. Hazelrigg, and aggregating \$600, no vouchers. To this report both appellant and appellee filed exceptions.

The appellant excepted to the report, because it failed to charge appellee with tax on E. L. & B. S. Railroad and Kentucky & South Atlantic Railroad amounting to \$2,928.37; because it allowed credits by vouchers to Scholl and Craig, Nos. 451 and 478, amounting to \$54.50; because the same were ordered to be paid out of levies for previous years; because it allowed a credit of \$1,510, No. 414, payable to Exchange Bank, for the reason, it is charged, that this was paid by the treasurer; because it allowed credits by Nos. 313 and 335, both to John Corbett, and amounting to \$950, for the reason that said vouchers were payable by the treasurer, and it is alleged that they were paid by the treasurer; because it allowed credit by \$200, No. 42, to J. H. Hazelrigg, for the reason, it is alleged, this was paid by the treasurer; because it fails to charge the appellee with the increase of state board of equalization on the clerk's list; because it credits the appellee with the delinquent list, for the reason, as alleged, that the list was not returned and allowed in the time or manner provided by law; because of credits of exonerations allowed, in that the exonerations to Mt. Sterling & Owingsville Turnpike Company for 1883 were allowed. The appellee also excepted to the report, because it refused to allow claim No. 98, for \$400; claim No. 214, Traders' Deposit Bank, for \$750; claim No. 241, to J. H. Hazelrigg, for \$350; claim No. 452, to J. H. Hazelrigg, for \$200; claim No. 127, to J. H. Hazelrigg, for \$350; claim No. 488, J. H. Hazelrigg, for \$49.45; claim No. 489, J. H. Hazelrigg, for \$541.60; claims Nos. 490, 491, 492, 493, to J. H. Hazelrigg, aggregating \$600; and for refusing to allow commissions on amount collected from Ragan's estate of \$125.25, also same on Ward's estate, \$152.75; and because the report charges appellee with tax on clerk's list of property, \$413.12, when that amount

is already charged in the grand total of property; because of an error of \$10 in adding vouchers Nos. 416 to 445, being allowed at \$465.10, when it should be \$465.10; because the poll and ad valorem taxes are not separated in counting commissions, so that appellee would have commissions at 10 per cent. on the first \$5,000 of each, and 4 per cent. on the remainder; and because of the total debits and credits. The court, on trial of the case and on the exceptions, overruled all of the exceptions of the appellant, and also overruled the appellee's exceptions to the report, except that the court sustained exceptions of appellee as follows: The judgment deducts from the debits \$413.12, the charge of ad valorem and poll tax on the clerk's list, leaving the total debits \$33,808.09, and allows additional credits, voucher No. 98, to J. H. Hazelrigg, \$400; No. 214, Traders' Deposit Bank, \$750; No. 241, to J. H. Hazelrigg, to the extent of \$300; No. 452, to J. H. Hazelrigg, \$200; No. 488, to J. H. Hazelrigg, for \$49.45; No. 489, to J. H. Hazelrigg, for \$541.60,—and also allowed the commissions of \$125.25 on Ragan taxes and \$152.75 on Ward taxes, making total credits allowed by the court of \$34,439.24, leaving a balance of \$636.15 overpaid by appellee; but the court refused to render judgment against appellant for this sum. From this judgment the appellant has appealed, and the appellee has asked, and had granted, a cross appeal.

We are of opinion that there was no error in overruling the exceptions of appellant to the report and settlement of the commissioner as to the E. L. & B. S. Railroad tax, for the reason that said taxes had been remitted by the fiscal court; and, without discussing the power or propriety of that court so to do, it is sufficient to exonerate the sheriff to show that such was done. As to the Kentucky & South Atlantic Railroad tax, the proof fails to show that ever went into appellee's hands for collection; and, unless it was certified to him for collection, he should not be made to account for it, as it is not pretended that he actually collected the tax.

The exceptions as to the claims of Scholl and Craig were properly overruled, for it clearly appears these were just and proper demands against the county, and properly allowed, and were paid by Chenault. The same may be said as to the vouchers 313 and 335 to John Corbett, and 414, to Exchange Bank. That these claims were paid by Chenault we have no doubt, and that they were just and subsisting demands against the county is equally clear.

The exception to No. 42, to J. H. Hazelrigg, for \$200, was properly overruled. The proof is ample that Chenault paid this claim. The exception that the commissioner failed to charge appellee with the increase on the clerk's list was properly overruled; and, for the same reason, appellee's exceptions to the item of \$413.12, charged to appellee for tax on the clerk's list; this amount is included in the

grand total of taxable property and polls, as ascertained from the auditor.

We know of no reason why the sheriff should be chargeable with delinquent taxes returned and allowed as such by the fiscal court, even though they may be not returned on the day fixed by law. If they were in fact delinquent, and this fact was determined by the fiscal court, appellee should not account for them; and this exception was properly overruled.

The exceptions as to the credit for exoneration to Mt. Sterling & Owingsville Turnpike Company for 1883 were properly overruled, for the reason that for the year 1883 this appellee was entitled to credit by that sum; but for some reason it was not obtained, and it is only equitable that he should be repaid out of county levy of 1884. So, we are of opinion that the court did not err in overruling all of appellant's exceptions to the report.

We are also of opinion that the court properly sustained exceptions to the report filed by appellee as to the tax on clerk's list, \$418.12, as stated above, and that the court properly allowed to appellee additional credits as follows, and for the reasons following: No. 33, for \$400, to J. H. Hazelrigg; this certificate of allowance is in due form by the clerk, and was paid by appellee Chenault. No. 214, to Traders' Deposit Bank, for \$750; this was clearly shown to have been paid by Chenault, and was a just demand. No. 241, a claim of J. H. Hazelrigg, for \$350, was allowed to the extent of \$300 (and this was proper, for the reason that to that extent there appeared an order of court allowing same), and was properly rejected for \$50, in the absence of a showing what the extra \$50 was for. Exceptions to Nos. 452, 488, and 489, all claims to J. H. Hazelrigg, were properly sustained, and those amounts allowed as credits, as they were paid by appellee Chenault, and were due Hazelrigg as salary, and were not included in either of the above amounts already allowed as paid to Hazelrigg. Claims Nos. 490, 491, 492, and 493, receipts from Hazelrigg, were properly not allowed as credits; for it is not shown what these amounts were paid for, and, in the absence of proof on the subject, the court, no doubt, concluded these receipts covered other vouchers already credited; and we think this proper. We are of opinion that the court properly allowed credits of \$125.25 and \$152.75 as commissions on the taxes from Ragan and Ward estates, as it appears that these sums are 25 per cent. of the taxes realized by a compromise of the tax claims, and that the property had been omitted by the assessor, and was reported by the sheriff, appellee. He was entitled to the commission, as he made the discovery, and reported the taxable property, and the tax was recovered thereon.

The court did not err in overruling the exceptions to the report because same failed to allow commissions on the poll tax and ad

valorem tax as separate funds. It has repeatedly been held that all the taxes levied by the county constitute one fund, and are to be taken in the aggregate in counting the commissions to the sheriff.

We are also of opinion that the court did not err in refusing to render a judgment for appellee Chenault, as against the county of Montgomery, for the amount of \$636.15, the balance due him on a settlement of his accounts as sheriff, for the reasons as stated in the judgment rendered by the circuit court, which we quote with approval: "It also appears from the evidence that the county judge, during the period covered by the defendant Chenault's term of office, was the appointed or recognized commissioner to make settlements with the sheriff for the county levy taxes, and was also the agent of the plaintiff county in attending to the building of the jail, jail wall, and other matters requiring the expenditure of large amounts of money by the county, and acted as the fiscal agent of the plaintiff county in all these matters, with the consent and approval of a majority of the justices of the peace of the plaintiff county, and frequently having to borrow and disburse money in behalf of the county, which in many instances was obtained from the sheriff from time to time for these purposes, without the formality of regular vouchers or orders of the full court entered of record; yet the money was paid out by the sheriff in good faith, and with the promise on the part of said county judge, and the expectation on his own part, of receiving, in his settlement of the county levy taxes for 1884, credit by said sums; and such settlement was actually made by the defendant Chenault with the said county judge, acting as commissioner for that purpose, on September 14, 1885, by which the accounts of the defendant Chenault, as sheriff, for the taxes of 1884, were squared, and nothing was left due by him to the plaintiff county, which settlement, it appears from the weight of the evidence, was, shortly after it was made, produced by said county judge at a full court, approved, and ordered to be recorded; but owing to the clerk's absence or illness, or from inadvertence, said settlement was not in fact recorded, but was subsequently, in 1888, filed in court, and is produced as an exhibit with the defendant's answer herein, marked 'Report'; and while the court is of opinion that this settlement in some respects is irregular, and contains, under the proof in this case, errors in both debits and credits, which are about equally balanced, it is substantially correct; and having been made in good faith by both county judge, as commissioner aforesaid, and the sheriff, Chenault, and approved and acquiesced in by the full court when presented, as aforesaid, in 1885, this court is not inclined, after many of the vouchers in it have been lost or so misplaced that they cannot be found after diligent search, without the fault of defendant Chenault, to



disturb the same in favor of either party." Wherefore, finding no error therein, the judgment of the circuit court is affirmed on both the original and cross appeal.

# RUBEL v. AVRITT.

## LANHAM v. SAME.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 20, 1898.)

LANDLORD AND TENANT—IMPROVEMENTS TO BE PAID FOR OUT OF RENT—SUBROGATION TO LANDLORD'S LIEN—TRANSFER TO EQUITY DOCKET—RIGHT TO PERSONAL JUDGMENT.

1. Where mechanics and material men made improvements on leased premises under contract with the tenant, upon the faith of the landlord's agreement that the improvements might be paid for by the tenant out of the rent then due and to become due, they are entitled to the benefit of the landlord's lien to secure their claims, and the landlord cannot defeat them by subjecting the tenant's property to the payment of rent which accrued after the improvements were made.

2. An action against the landlord to recover the price of lumber used by the tenant in making improvements on the leased premises, on the ground that it was furnished directly to the landlord, presented only legal issues, and it was error to transfer it to the equity docket.

3. Though the material men were entitled to the benefit of the landlord's lien, they were not entitled to personal judgment against him.

Appeal from circuit court, Marion county. "Not to be officially reported."

Action by John Rubel against Samuel Avritt, and by E. H. Lanham against the same defendant. The proceedings were consolidated. Judgment for defendant, and plaintiffs appeal. Reversed.

H. W. & R. C. Rives, for appellant Rubel. H. P. Cooper, for appellant Lanham. Samuel Avritt, in pro. per.

BURNAM, J. Appellee owned an hotel building in Lebanon, which he had rented in June, 1894, to the firm of B. F. Wilson & Co. for one year at an annual rental of \$800, payable monthly, with the option on the part of the tenants to extend the lease for three years longer, provided they complied with the conditions thereof. The rent for June, July, and August was paid partly in cash, and partly in the board of some of appellee's family. In January, 1895, Wilson & Co. insisted that appellee improve his hotel building by putting in bath rooms, inclosing certain porches, and doing other work, which appellee agreed might be done upon the condition that the work should be paid for by Wilson & Co. out of the rent which was then due by them and in arrears, and that which might thereafter become due. He expressly stipulated that he was not to be called upon to pay for the improvements "out of his pocket," and that the work should be done at a satisfactory price. Pursuant to

this agreement, the tenants, Wilson & Co., employed one Elijah Wise, a carpenter, to make the necessary plans and estimates of the cost of the improvements, which were by them submitted to appellee, Avritt, and they were approved by him; and subsequently contracts were entered into with appellant Lanham to furnish the necessary lumber to be used in the work, and with appellant Rubel to do the proposed plumbing and to furnish the hardware. Before the contract was closed with appellant Lanham, he had several interviews with appellee, Avritt, as to the amount of lumber to be furnished, and how it was to be paid for, and the weight of the evidence shows that appellee informed appellant Lanham that he must look to the rent due by Wilson & Co. to him for his pay; that he was unwilling to take money out of his pocket for the job, but that he had agreed with Wilson & Co. that they should pay for it out of the rent, a part of which was then due; and that enough would fall due before the work was finished to pay for the necessary lumber. And, in entering into the contract with appellant Rubel, Wilson & Co. informed him that appellee had agreed that the rent money due by them should be used to pay for this work and material, for which he had agreed to give them credit upon their obligation to him. At the date of the agreement between appellee and Wilson & Co., they were in default to him for their rent for the months of September, October, November, December, and January. The lumber was furnished by appellant Lanham, and the plumbing work was done by appellant Rubel, pursuant to this agreement; and when the money of Rubel became due under the contract, and Wilson & Co. failed to pay, he required them to execute to him a mortgage upon all their household goods at that time in the hotel building to secure his debt, and took the obligation of Wilson & Co. for the amount due him. Soon thereafter Davis & Bullock, who were creditors of Wilson & Co., instituted a suit in equity, in which they attacked the mortgage made by Wilson & Co. to Rubel on the ground that it was given at a time when they were insolvent, and with the design of giving a fraudulent preference to Rubel; and Rubel instituted his suit to enforce his lien, while appellant Lanham brought a suit directly against appellee, Avritt, alleging that he had sold the lumber furnished by him directly to Avritt. After all these suits had been instituted, the appellee, Avritt, sued out a distress warrant, in which he stated that Wilson & Co. were in arrears for rent in the sum of \$343, of which amount \$143 was due to the appellant Lanham, and \$200 was due to him, and had it levied upon all the property in the hotel. He says in his affidavit that he does not in any way acknowledge that he is responsible to Lanham for the \$143 due from Wilson & Co., but that a landlord's lien exists upon the personal property of Wilson & Co. in favor of the

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

claim of Lanham, and asserts the lien for the debt of Lanham, and the balance of the rent due to him. On motion of appellee the sum of Lanham was transferred from the common-law to the equity docket, against his protest, and all the proceedings were then consolidated. Upon the trial the court adjudged that the lien of appellee as landlord took precedence of the claims of appellants Lanham and Rubel, and adjudged that the whole of the proceeds of the property of the tenants, which had been seized under the distress warrant, should be paid over to him, and from that judgment this appeal is prosecuted; appellants claiming that they were entitled, under the contracts made with appellee and his agents, Willson & Co., to have the proceeds of this property applied to the payment of their debts.

There can be no doubt, from the testimony, that this work was not undertaken by appellants upon the individual credit of Willson & Co., but upon the agreement of appellee, Avritt, that the cost of the improvements which he authorized and approved should be paid by his tenants out of the rent money which they owed to him. As a landlord, Avritt had a special remedy to enforce the payment of this money, as by law he had a preferred lien upon all the property of the tenants upon the leased premises, and it was upon the faith of this fact that appellants consented to do the work and furnish the materials therefor; and it would be wholly inequitable to permit appellee to collect the identical fund which was set apart by him for the payment of the cost of this work, and appropriate it to his own debt, after he had received the benefit of appellants' material and labor. Appellee secured, by these contracts which he authorized, valuable and lasting improvements upon his building, all of which were furnished upon the express understanding that the rent should be applied to their payment. There was an assignment by him of the rent due following by Willson & Co. to pay for this work, and as surety therefor. And it is a well-settled rule of law that by an assignment of a particular claim or chose in action the whole interest of the assignor in the thing assigned passes to the assignee, and also the security for the debt; for the assignment of a debt carries with it every remedy and surety for such debt available by the assignor, as incident thereto, although not specially named at the time of the assignment. See 2 Am. & Eng. Enc. Law (2d Ed.) p. 1084. And appellee cannot be permitted to defeat the claims of appellants to have subjected to the payment of their debts the identical property which stood as security for the fund which he consented should be applied to the payment of these claims, and on the faith of which appellants undertook the work, by appropriating it to the payment of rent which subsequently accrued to him from the use of the same property. Appellants are entitled to have the proceeds of the furniture and prop-

erty of Willson & Co., which was in the hotel building and belonging to appellee, which under the law was liable therefor, applied to the payment of their debts.

It was error on the part of the trial judge to transfer the suit of Lanham to the equity docket, as the issues were purely legal; but, in view of the proof in the case, we do not think he should have been entitled to recover a personal judgment against appellee, Avritt. For the reasons indicated the judgment is reversed, and the cause is remanded for proceedings consistent with this opinion.

### SANDERS v. BROWN.

(Supreme Court of Arkansas. Oct. 8, 1898.)

JUSTICES OF THE PEACE—JURISDICTION—COVENANT OF WARRANTY—TAXES—MUNICIPAL ASSESSMENTS—LIEN.

1. Under Const. art. 7, § 40, denying justices of the peace jurisdiction where a lien on land is involved, the circuit court has jurisdiction of an action for breach of covenant of warranty, notwithstanding the amount claimed is less than \$100.

2. Sand. & H. Dig. § 5334, provides that where the estimated cost of an improvement assessment exceeds 1 per cent. of the assessed value of the property, it shall be payable in annual installments, not exceeding 1 per cent. of such assessed valuation, and section 5335 makes such assessment a lien from the date of the ordinance providing for the assessment. *Held*, that an improvement assessment becomes a lien at once for its full amount, and can be satisfied only by a full payment of such amount.

3. A warranty in a deed against all incumbrances except "taxes" makes the warrantor liable for an improvement assessment.

Appeal from circuit court, Pulaski county; Joseph W. Martin, Judge.

Action by B. J. Brown against George H. Sanders to recover damages for a breach of a covenant of warranty. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Carmichael & Seawell, for appellant. Rose & Coleman, for appellee.

BUNN, C. J. By deed dated January 1, 1894, for the consideration of \$1,600 cash, therein expressed, Brown purchased of Sanders lots Nos. 10, 11, 12, and the north half of lot No. 9, in block 125, in the city of Little Rock, the same at the time and since the 18th of March, 1890, forming a part of street-grading improvement district No. 24, upon all the real property in which the city council, under existing laws, had assessed five years' improvement tax, to be paid in annual installments of 1 per centum each, the installments in the present instance each amounting to the sum of \$61. The defendants claim that the trade, afterwards consummated by the execution and delivery of the deed as aforesaid, was really made in November, 1893. The warranty clause of the deed is as follows, to wit: "And we hereby covenant with the said B. J. Brown that we will forever warrant

and defend the title to said lands against all lawful claims whatsoever, except the taxes of the year 1893, which the grantee is to pay." After the formation and organization of the improvement district, to wit, on the 14th of April, 1890, the city council assessed the real property therein as aforesaid. The last of the five assessments or installments was due on the 1st day of June, 1894, which the defendant and warrantor refused and failed to pay, and which the plaintiff was compelled to pay, and did pay. Presumably this last installment was for the time between June 1, 1893, and June 1, 1894. At least that seems to be the contention of the defendant; and, if so, he contends it was covered by the exception in the covenant as being the taxes of 1893, unless the word "taxes" in fact and in truth has no reference to improvement district assessments. The defendant having failed to pay said last assessment, due June 1, 1894, as aforesaid, the plaintiff, on the 23d of June, 1894, paid the same, as he claims, under compulsion, which appears to be true, to M. L. Volmer, the collector of said district. On June 23, 1894, plaintiff sued defendant for the \$61 so paid by him as aforesaid, before Tom Parsel, Esq., one of the justices of the peace of Pulaski county; and on the 11th July, 1894, the return day, the cause was submitted to the court sitting as a jury, and the same was taken under advisement until the 16th July, when the court rendered judgment for plaintiff, as against defendant, for the amount claimed; and on the 23d July defendant filed his affidavit and bond, and took an appeal to the circuit court. On appeal a general demurrer to the complaint was interposed by the defendant on the ground that the justice of the peace court had no jurisdiction to hear and determine the cause, and that, consequently, the circuit court on appeal was without jurisdiction; and this demurrer was sustained, and, on failure of the plaintiff to plead over, the cause was on a subsequent day dismissed, at plaintiff's cost. Defendant then answered, and, the plaintiff failing to appear, the cause was dismissed for want of prosecution. On the 1st day of December, 1896, the plaintiff brought suit against the defendant upon the same cause of action as previously in the justice of the peace court. The answer of defendant, in substance, raises the following issues of fact, viz.: Whether the sale of the lots was made on the 9th of November, 1893, or the 1st of July, 1894; and, if the former, whether the assessment sued for was at that time a lien on the lots. And the following issues of law: Whether the word "taxes," in the exception in the warranty, includes improvement assessments; and whether, as contended by defendant, the former proceedings in justice of the peace court and on appeal therefrom were res adjudicata, and estopped the plaintiff from a recovery in this action. On the trial, over the objection of defendant, the court excluded from the jury

the record of the proceedings in the justice of the peace court and on appeal therefrom, except the bench docket entries of the circuit judge, showing the disposition of the case therein, which it allowed to go to the jury; also the collector's receipt, at the instance of the plaintiff, and over the objection of the defendant. Thereupon the court directed the jury to return a verdict for plaintiff for the amount claimed. The defendant excepted, and filed his motion for new trial, which being overruled he appealed.

The circuit court had jurisdiction to hear and determine this cause, notwithstanding the amount claimed is less than \$100, for the reason that the question whether or not the amount claimed was a lien on real estate was raised by the defendant, and a justice of the peace court cannot determine that question. Const. art. 7, § 40. The improvement district was duly organized in March, 1890, and immediately the commissioners assessed the property therein at the rate of 5 per centum, to pay the expenses of the same, and this assessment became at once a lien on the property so assessed, which could be only satisfied by a full payment of the whole amount thus to be expended. It is true, this assessment, under the statute, could only be paid in annual installments, neither of which should exceed 1 per centum of the assessed value of the property, and, consequently, the whole assessment necessarily ran over a period of five years; yet this provision was merely for convenience, and to distribute the burden over a space of time greater than one year. See sections 5334, 5335, Sand. & H. Dig. And if the amount so raised by these partial payments under this general assessment was found to be, at the end of the five-years period, insufficient to pay the expenses of the improvement or money borrowed therefor, then, on proper showing, the lots could be held further. On this subject the statute is as follows, to wit: "5366. If the assessment first levied [meaning for the whole estimated costs of the improvement] shall prove insufficient to complete the improvement, the board shall report the amount of the deficiency to the council, and the council shall thereupon make another assessment on the property previously assessed, for a sum sufficient to complete the improvement, which shall be collected in the same manner as the first assessment;" that is, in annual installments, if the assessment amounts to more than 1 per centum of the value of the property. It makes no difference whether we denominate the lien one lien for the whole amount of the estimated costs, or split it up into annual installment liens, and call each one a lien, for the statute makes the lien or the aggregation of liens relate back and commence from the passage of the ordinance organizing the district, and thus every one of the annual installments remaining unpaid at the time of the execution of the deed and covenant against incumbrances was a lien

for so much, and was covered by the covenant. Burroughs, Tax'n, under head of "Lien," p. 488 et seq., gives some general idea of the nature of this lien. Such is the position assumed in *Blacklie v. Hudson*, 117 Mass. 181. A seemingly contrary doctrine is put forth in *Dowdney v. Mayor*, etc., 54 N. Y. 186, but the distinction grows out of the difference in the relative dates of the creation of the lien or that from which it begins to exist. Under the peculiar statute of New York, the date from which the lien existed was the matter in controversy. Our statute settles this. The warranty was against imbrancea, but it contained an exception expressed in the following language, to wit: "Except the taxes of the year 1893, which the grantor is to pay." This is the year for which the assessment in controversy was made, the same being due July 1, 1894. The plaintiff contends that the word "assessment" is not included in the word "taxes," but that the two mean different things, and in this we are of opinion that he is correct. *McGehee v. Mathis*, 21 Ark. 40. The "assessment" sued for, not being covered by the exception to the warranty, the plaintiff was not bound to pay the same, but the defendant was, under the warranty. This disposes of all the questions raised. The judgment is affirmed.

### SARVIS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 26, 1898.)

#### CRIMINAL LAW—NEW TRIAL—AFFIDAVITS—MOTIONS—NEWLY-DISCOVERED EVIDENCE.

1. An affidavit supporting a motion for new trial on the ground of newly-discovered evidence should show what diligence was exercised to find out the facts.

2. Where appellant relies for a reversal on newly-discovered evidence, the record should show enough of the testimony adduced on the trial to enable the court to judge of the probable effect of the newly-discovered evidence.

Appeal from district court, Hopkins county; Howard Templeton, Judge.

Bill Sarvis was convicted of arson, and he appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of arson, and his punishment assessed at confinement in the penitentiary for a term of five years; hence this appeal.

Appellant relies for a reversal of this case on newly-discovered evidence. In his motion for a new trial he states that he was insane, and was brought to trial without an attorney, and that his daughter and son-in-law, who seem to have been his next friends, did not know of his conviction until some two or three days after it occurred; consequently did not attend court or procure counsel for him. He appends a number of affidavits by which he proposes to prove his insanity. We

would state, with reference to the affidavits of Rosenthal and his wife, that they do not show sufficient diligence. We are not informed where these parties lived. If they lived in Hopkins county, and appellant lived with them, certainly they should have known of his indictment and arrest. We are left in the dark as to this matter, and as to what diligence they exercised to find out the facts. An affidavit for newly-discovered evidence should always fully present the matter of diligence. We have carefully examined the affidavits in support of the theory of appellant's insanity, and, while some of them tend to show an insane condition of mind at the time, most, if not all, of the affidavits relate to a time at least two years antedating the alleged arson, and, for aught that we know, appellant may have entirely recovered his sanity at that time, if it be conceded that said testimony shows insanity. In addition to this, we would observe that there is no statement of facts in the record, and we cannot determine what effect the newly-discovered testimony might have had at the trial. The arson may have been shown to have been committed under circumstances indicating malice and showing the absolute sanity of appellant at the time. At least enough of the testimony adduced upon the trial should have been set out in order that we might judge of the probable effect of the newly-discovered evidence. The judgment is affirmed.

HURT, P. J., absent.

### SIMS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 26, 1898.)

#### CRIMINAL LAW—APPEAL—DISMISSAL.

An appeal will be dismissed where the record does not disclose a recognizance, nor show that appellant is in custody.

Appeal from county court, Titus county; P. N. Rogers, Judge.

Barney Sims was convicted of an offense, and he appeals. Appeal dismissed.

Mann Trice, for the State.

DAVIDSON, J. Motion is made by the assistant attorney general to dismiss this appeal. From the record it appears that this case originated in the justice court; thence to the county court on appeal, and was there dismissed on motion of the county attorney. Motion to dismiss the appeal in this court is based upon two grounds: First, that the record does not disclose a recognizance; and, second, that the appellant is not shown to be in custody. We find the record sustains these grounds of the motion, and the appeal is dismissed.

HURT, P. J., absent.

**AGUAR v. STATE.**

(Court of Criminal Appeals of Texas. Oct. 26, 1898.)

**GAMING—SUFFICIENCY OF COMPLAINT—EVIDENCE.**

1. A complaint in a prosecution for gaming alleging that defendant, "in the county of H. and state of Texas, heretofore, to wit, on," etc., "in said county and state, on or about the above-named date, \* \* \* did unlawfully bet at a game," etc., sufficiently charges that the offense was committed in H. county.

2. In a prosecution for playing at craps, uncontradicted evidence that defendant played and bet on a game at a place not a private residence is sufficient to support a conviction.

Appeal from Hopkins county court; R. B. Keasler, Judge.

Simon Aguar was convicted of playing with dice at a game called "craps," and he appeals. Affirmed.

W. P. Leach, for appellant. Mann Trice, for the State.

**DAVIDSON, J.** Appellant was convicted for playing with dice at a game called "craps," and appeals.

Motion to quash the complaint was made because it is not alleged that the offense was committed in Hopkins county. That portion of the complaint is as follows: "That Simon Aguar, in the county of Hopkins and state of Texas, heretofore, to wit, on the 12th, or about the 12th, day of December, 1897, in said county and state, on or about the above-named date, said Simon Aguar did unlawfully bet at a game," etc. There is no merit in this contention. The language is too plain for discussion.

It is also contended that the evidence is not sufficient to support the judgment. The witnesses testified positively to the fact that the defendant played in a game of craps, at a place not a private residence, and bet on said game. There was no contradiction of this fact. The judgment is affirmed.

**HURT, P. J.,** absent.

**MATHIS v. STATE.**

(Court of Criminal Appeals of Texas. Oct. 26, 1898.)

**ASSAULT WITH INTENT TO MURDER—INDICTMENT—CONFESSIONS—CAUTIONS—INTENT TO KILL—INSTRUCTIONS—AGGRAVATED ASSAULT.**

1. An indictment charging an assault with intent to murder need not allege the means used.

2. Declarations of defendant while confined in jail on one charge are admissible against him in a prosecution for another offense subsequently committed, though he was not cautioned in regard to his statements, since Code Cr. Proc. 1895, art. 790, in regard to the admission of confessions, has reference only to the offense for which defendant is in custody.

3. There need not be an intent to kill the person assaulted, to constitute an assault with intent to murder, since an intent to murder any person is sufficient.

4. In a prosecution for an assault with in-

tent to murder, where the real issue was as to the existence of the intent at the time of the assault, it was error to instruct that, if the state had not made a case of assault with intent to murder, the jury might inquire whether it was an aggravated assault, and, if they found the same was committed in a court of justice, to find defendant guilty of an aggravated assault, since the jury might well have thought therefrom that no other circumstance except an assault "in a court of justice" would reduce the crime to an aggravated assault.

Appeal from district court, Tarrant county; W. D. Harris, Judge.

D. L. Mathis was convicted of an assault with intent to murder, and he appeals. Reversed.

O. S. Lattimore, for appellant. Mann Trice, for the State.

**HENDERSON, J.** Appellant was convicted of an assault with intent to murder, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

There is nothing in appellant's motion to quash the indictment, it not being necessary to allege the means used in charging assault with intent to murder.

Appellant complains of the action of the court in admitting, over his objections, the evidence of A. T. Wooten, S. L. Clark, and A. K. Ralston as to declarations of appellant, while in jail, and not being cautioned, showing his animus towards S. P. Clark and A. T. Wooten. It appears that appellant was confined in jail on a charge of theft of cattle, and A. T. Wooten was a state's witness against him. The charge against him, on which he was tried in this case, was for an assault with intent to murder A. T. Wooten; and the state introduced against him the following declaration made to A. K. Ralston, a deputy sheriff, while appellant was in jail, to wit: "If Wooten swears what I have heard he is going to swear against me, I will break a chair over his head, if in my power to do so." And also the following testimony adduced from S. P. Clark, made under the same conditions, to wit: "Appellant stated that, if he ever lived to get out of this trouble, he would get even with Mr. Wooten and Mr. Clark." The court explains the admission of this testimony by the statement that the offense for which the defendant was under arrest was a charge of cattle theft, and the offense for which defendant is now being tried had not been committed, and no charge made against him with reference thereto, and it was admissible and material to show motive and malice. Our statute regulating the admission of confessions evidently has reference to the offense for which the defendant was then held in custody. See Code Cr. Proc. 1895, art. 790. It has been held, however, that the confessions of defendant can be used against him, if made in accordance with said article, if such confessions relate to some other offense or charge

against appellant than the one for which he is held in custody. But such confessions relate to some past offense. We know of no case where statements, acts, or conduct of a defendant of a criminal character, while in jail, concerning an offense then being committed, or concerning some offense to be committed, have been excluded under this article. In *Lewis v. State*, 19 Tex. App. 201, it was held that such evidence is admissible outside of the statute. To illustrate: Suppose A., a prisoner, should assault B., a fellow prisoner, while in jail; would the acts and conduct of A., including his declarations in connection with the offense, be excluded, because no warning had been given under the statute? Certainly not. Again, suppose A., the prisoner confined in jail, should assault B., the jailer, with a stick,—a weapon not necessarily deadly,—and should be subsequently tried for an assault with intent to murder, and the question should be whether or not the assault was made with the specific intent to kill; under these circumstances, would it be competent for the state to show by some fellow prisoner of A. that prior to the assault he had stated that he intended to kill B., the jailer, and make his escape? We think that such testimony would be clearly admissible, without any infringement on said article of our Code of Criminal Procedure. We therefore hold that the court did not err in admitting said testimony.

Appellant also complains that under the facts of this case the court erred in telling the jury in his charge that an assault or an assault and battery may be committed, though the person actually injured thereby was not the person intended to be injured. The contention here is that, before appellant could be guilty of the offense of an assault with intent to murder, he must have the specific intent to kill the person assaulted. We do not agree with this contention. An assault with intent to murder can be committed with implied as well as with express malice, and the statute defining this offense does not restrict the intent to kill to the person assaulted. The assault is only required to be with intent to murder; that is, to murder some one. And we hold that if A. shoots at B. with intent of his malice aforethought to kill and murder B., but accidentally shoots C., and inflicts a wound upon him, that the malice is carried over to C., and that this is an assault with implied malice to murder C.

Appellant further complains that the court erred in charging on the law of aggravated assault committed in a court of justice, and because the court erred in not charging on the law of aggravated assault with a deadly weapon. Inasmuch as it was a crucial point in the case whether or not appellant had the specific intent to kill at the time he made the assault, and the assault was made with a weapon such as might be regarded as deadly, and was also made in a court of justice, we think that same was calculated to mislead

and confuse the jury. They were informed that if appellant made an assault on Wooten with a deadly weapon, with intent to kill him, it would be an assault with intent to murder. They were then told that, if they did not believe that the state made a case of assault with intent to murder, they would then inquire whether or not it was an aggravated assault, and, if they found that same was committed in a court of justice, to find him guilty of an aggravated assault. Under such circumstances the jury might believe that no other circumstances except an assault in a court of justice would reduce to an aggravated assault; that, if it was made with a deadly weapon, it must be an assault with intent to murder. We believe, under the facts of this case, that the court should have given a charge authorizing the jury to find defendant guilty of an aggravated assault, if they believed the assault was made with a deadly weapon, but not with the intent to kill. The evidence is by no means clear and strong, relieving the case of all reasonable doubt that appellant intended to take the life of Wooten. Whether he struck Wooten intentionally, or the chair was knocked out of his hands, is questionable. The attack was certainly not of a very violent character, and is rather a suggestion of bravado than a serious attempt to take the life of either Clark or Wooten. At least, in our opinion, the jury should have been given a full charge on the features of the case which would reduce the offense to an aggravated assault. The judgment is reversed and the cause remanded.

HURT, P. J., absent.

#### HANCOCK v. STATE.

(Court of Criminal Appeals of Texas. Oct. 26, 1898.)

##### ASSAULT WITH INTENT TO RAPE.

Accused, a negro, to reach the kitchen from his room, had to pass through the sleeping room of prosecutrix and her husband. Prosecutrix was awakened by some one touching her on the leg. When she awoke her gown was up to her waist, and she saw accused run from the room to the outside kitchen door, where he was found by the husband. Accused had stated to a fellow laborer that he was going to place the ax where he could get it in case the husband interfered. The ax was found close to the house, but it was not shown that it was not at its usual place or that accused put it there. *Held* insufficient to establish assault with intent to rape.

Appeal from district court, Delta county; Howard Templeton, Judge.

John Hancock was convicted of an assault with intent to rape, and he appeals. Reversed.

L. L. Wood and L. N. Cooper, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of an assault with intent to rape, and his punish-

ment assessed at confinement in the penitentiary for a term of 50 years; hence this appeal.

The only question that requires notice is whether or not the verdict is supported by the evidence. We summarize the material portions of the testimony bearing on this issue: One McCullough and his wife were living on a farm. Appellant, who was a negro about grown, was hired as laborer by them. The house where McCullough and his wife lived contained three rooms, called the "east" and "west" rooms, and in the rear of the west room was the "side" room, connecting with the main west room by a door. McCullough and his wife slept in the west room. Appellant slept in the east room. Appellant is shown, by the testimony of a hand who was working with him in the field, to have stated that he was going to try to get some from Mrs. McCullough. He stated he was going to place an ax so that he could get it in case McCullough interfered with him. An ax was found after the alleged occurrence close by the house, but it was not shown that it was not at its usual place, or that appellant placed it there. On the particular night in question, being about the 1st of June, 1898, the prosecutrix, Fannie McCullough, testified that she was awakened by some one touching her on the leg. When she awoke her gown was up to her waist, and she saw the defendant run from the room to the outside kitchen door, the kitchen being the rear or side room; that she immediately aroused her husband, and told him that some one was in the room; that her husband told defendant, who was then at the rear kitchen door, to lie down and go to bed; that defendant went to his room, and she heard him strike a match; that she then told her husband to get up and run that negro off or kill him; that her husband got up, and made the negro leave; that he first made him go to the barn to sleep, and when he came back she told him to make defendant leave, and he went out to the barn and made him leave the place. Defendant, when questioned by McCullough as to what he was doing in the room, said that he meant no harm; that he was only after a drink of water. McCullough testified in effect as did his wife, except he states that defendant, when he was aroused by his wife, was standing on the outside of the kitchen, and looking in through the kitchen into the room where he and his wife were. That he said, "John, what are you doing there?" Defendant said he was getting a drink of water. That defendant would have to go through his (McCullough's) room to get to the kitchen, where the water was. This was substantially all of the testimony bearing on the guilt of the appellant.

It has been repeatedly held by this court that, in order to constitute the offense of assault with intent to rape, it must appear from the evidence beyond a reasonable doubt that the accused intended, if it became necessary, to force compliance with his desires at all

events and regardless of any resistance made by his victim. See *Dockery v. State*, 35 Tex. Cr. R. 487, 34 S. W. 281; *Price v. State*, 35 Tex. Cr. R. 501, 34 S. W. 622; *Ellenberg v. State*, 36 Tex. Cr. R. 139, 35 S. W. 989; *Kinman v. State* (Tex. Cr. App.) 39 S. W. 574. Of course there are cases where convictions have been sustained where a party has been frightened from his object before it is accomplished. But, before a conviction can be sustained, in every case there must appear with reasonable certainty that, at some time during the progress of the assault, the appellant had the ulterior purpose to copulate with the prosecutrix by force and without her consent. And, recurring to the evidence, we do not believe that the same indicates that appellant had this ulterior purpose. Evidently he committed an indecent assault, but the jury did not find him guilty of this offense, but for a graver crime, and fixed his penalty at 50 years' confinement in the penitentiary. In our opinion, the evidence does not sustain this verdict.

The court also submitted the question of fraud to the jury. It is not necessary to discuss this, as we fail to see anything in the testimony tending to show that appellant attempted to personate the husband of the prosecutrix. There was nothing said to indicate this. The bare fact that he touched her on the leg, and that he may have pulled up her gown, would not, of itself, be such fraudulent personation. The judgment is reversed, and the cause remanded.

HURT, P. J., absent.

#### TIDWELL, v. STATE.

(Court of Criminal Appeals of Texas. Oct. 26, 1898.)

CRIMINAL LAW—CONFESSIONS—CORPUS DELICTI—LARCENY—INSTRUCTIONS.

1. The fact that a confession was obtained by asking questions does not show that it was not voluntarily given.

2. An accused's confession can be considered with other testimony, to establish the corpus delicti.

3. Defendant was accused of stealing a mule which was missing from a pasture. Defendant was near the pasture shortly after the mule was missed, and three days later he was in a town 40 miles away, where the mule was found. Defendant's witness testified that defendant assisted in driving the mule from the pasture to said town as a hired hand. *Held*, that the corpus delicti was proved.

4. On an issue as to whether defendant had assisted in stealing a mule, or had been hired to help drive the mule, in ignorance that it was being stolen, it is not error to charge, in connection with instructions regarding the law of principals, that any person merely present, and agreeing to the commission of an offense, is guilty, though the evidence showed that, if defendant was present at all, he rendered assistance in the commission of the offense.

5. A refusal to instruct that defendant could not be convicted on his confession if it was uncorroborated by other evidence tending to es-

establish the corpus delicti is proper, where the evidence outside the confession is sufficient to establish the corpus delicti.

Appeal from district court, Tarrant county; Irby Dunklin, Judge.

Tebe Tidwell was convicted of theft, and he appeals. Affirmed.

O. S. Latimore and W. R. Parker, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of the theft of a mule, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

Appellant insists that the court committed an error in admitting the testimony of D. P. Clark as to the defendant's alleged confession, on the ground that the same was not voluntary. We understand his contention to be, not that appellant was not properly warned, but that, after he was so warned, his confession or statement was elicited by interrogatories propounded to him by Clark. Because a confession may be elicited by questions is not alone sufficient to render it inadmissible. The questions must be of a character and propounded under circumstances in a manner calculated either to coerce or persuade. There is no evidence here of such facts. The rule with reference to dying declarations does not apply to a matter of this sort. There the statute requires that the questions be not calculated to induce the desired answer. Here the only criterion is that the confession must appear to be free and voluntary, and not made under coercion or persuasion. There is no question here that the confessions were not voluntarily made, and the court did not err in failing to instruct the jury on this subject as requested by appellant.

Appellant further urges that the corpus delicti has not been proven; and in that connection he insists that this must be proven independent of appellant's confessions. In answer to the last proposition, we would state the rule insisted on by appellant is not a sound one, but the confession can be considered along with the other testimony in order to establish the corpus delicti. See *Anderson v. State*, 34 Tex. Cr. R. 546, 31 S. W. 673; *Kugadt v. State* (Tex. Cr. App.) 44 S. W. 989; *Rice*, Cr. Ev. p. 466, § 294. We have examined the testimony carefully with reference to the corpus delicti. The state's case shows that about the 6th of December the mule in question was in the pasture of one Harrison, left there with his mate by the prosecutor. This pasture was some four or five miles from Ft. Worth. The mule was missed by the owner on the 6th of December, its mate being still in the pasture. Search was made for it for one or two days without finding it. About the 10th of December the mule was shown to be in Gainesville, in the possession of a party there. It is said that the pasture fence was down in several places, and that the mule might have strayed off.

There is no testimony, however, tending to show that its range was in the direction of Gainesville, and none tending to suggest any reason why it should have left its mate, and gone a distance of about 40 miles. At the least, this testimony tends to show that said mule was stolen. Now, if, in connection with this, we take the confession of appellant, the evidence becomes very strong to that effect. Indeed, his confession explains in a most reasonable and plausible manner the absence of the mule from the Harrison pasture after the 6th of December, and its presence in Gainesville on the 9th or 10th of December; especially when we take into view the fact that appellant was seen in proximity to the Harrison pasture on the 7th of December, and that he was found in Gainesville on the 10th. We would, moreover, observe, in connection with this matter, that the corpus delicti does not appear to have been contested by appellant on the trial. The very defense set up by him was that, while the mule was stolen, he was not guilty; that he merely assisted in driving the same from the pasture to Gainesville as a hired hand, without knowledge that the said mule was being stolen.

Appellant also insists that the court should have given his special instruction to the jury, to the effect that they must take all the confessions of the defendant made at the same time, and, if any portion of such confession was exculpatory, the state must show that the same was untrue before they could convict. We understand that the court in effect gave the jury this instruction. The exculpatory fact stated by him was that he was a hired hand; and the court gave this defense in charge to the jury, instructing them to acquit appellant on that ground if they believed he was such hired hand. Nor do we believe that the charge of the court on this defense of appellant being a hired hand was calculated to mislead or confuse the jury. While the charge is not artistically drawn, yet the jury were distinctly instructed, before they could convict appellant, that they must believe beyond a reasonable doubt that he was a principal in the offense charged, and, if they believed that the only connection appellant had with the taking of the said mule was that of a hired hand in employment of one Elzie Isham, to acquit the defendant. The doctrine of principals had been previously defined by the court; and in this connection it was not error for the court to state to the jury that "any person who agrees to the commission of an offense, and is present when the same is committed, is a principal thereto, whether he aids or not in the illegal act." As an abstract proposition this is correct; but there is no pretense that the proof merely showed this. If defendant was present at all, he rendered actual and positive aid in the commission of the offense; and, if he was not merely a hired hand, he was unquestionably guilty of assisting in the theft of said mule.



The court did not err in its response to the interrogatory propounded by the jury. He gave a direct answer thereto, and there was no necessity of giving appellant's requested instructions. In fact, the instruction given and that requested were the same thing.

The objection of the defendant to the charge of the court on the ground that it failed to instruct the jury that they could not convict defendant on his confession unless the confession was corroborated by other evidence tending to establish the corpus delicti, we think we have heretofore sufficiently treated. The state did not rely alone on appellant's confession to establish the corpus delicti, but there was other testimony, we think, sufficient to establish the corpus delicti, outside of the confession; and we do not think that the necessity arose in this case for the court to have singled out appellant's confession, and to have given the requested charge. If there had been no proof in the case but confessions to establish the corpus delicti, or if the extraneous proof had been very weak or meager, then the requested instruction might have been called for. But this was not so. And, beyond this, if the corpus delicti had been based alone on the confessions, the court should have instructed an acquittal, or, in case of conviction, the point could be raised in the motion for a new trial on the insufficiency of the evidence. We do not deem it necessary to discuss this matter further, but we refer to it because it was strenuously insisted on in the argument. In our view there was no error in the record, the verdict is amply supported by the testimony, and the judgment is affirmed.

HURT, P. J., absent.

#### HOUSTON v. STATE.

(Court of Criminal Appeals of Texas. Oct. 26, 1898.)

#### CRIMINAL LAW — CONTINUANCE — ELECTION BETWEEN COUNTS—THEFT—INSTRUCTIONS—NEW TRIAL.

1. Where the property alleged to have been stolen is conceded to have been in possession of the person from whom the theft is charged, a continuance because of absence of a witness who will testify that it belonged to him, with whose title defendant does not connect himself, is properly refused, since such person's ownership would not affect the offense.

2. Where separate counts of an indictment charge theft and receiving stolen property, respectively, and there is evidence tending to support both, it is not error to refuse to require the state to elect on which count a conviction will be sought.

3. Where the taking alleged to constitute the theft is conceded and claimed to have been lawful, a failure to charge on circumstantial evidence is not error, even where it is proposed to prove the intent by such evidence.

4. On a trial for theft and for receiving stolen property, an instruction to acquit accused if he bought the property from one whom he in good faith believed authorized to sell, re-

gardless of such person's actual authority, is not prejudicial.

5. Where the evidence tends to implicate accused and another, a charge on the law of principals is proper.

6. A new trial will not be granted because of newly-discovered evidence, where accused failed to exercise due diligence in attempting to procure such evidence in time for trial.

Appeal from district court, Wilson county; M. Kennon, Judge.

Sledge Houston was convicted of theft, and appeals. Affirmed.

W. B. Houston, T. P. Morris, and B. F. Ballard, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of the theft of two certain cattle, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

Appellant asked for a continuance on account of the absence of Mr. and Mrs. Foster. We are inclined to doubt whether sufficient diligence was used for the procurement of these witnesses. The trial was not had until the 16th of June, 1898, and return of process from Bexar county was had on the 13th of June for these witnesses, and no further act of diligence was shown to secure their attendance. Besides, we fail to see how the testimony of these witnesses would be material. The fact that one of said yearlings may have belonged to Mrs. Foster or Gage could not afford appellant any benefit, as he does not connect himself in any wise with her title. His claim was a purchase from Cotton, the alleged owner of the animals, through one Peck. There is no question that the animals were in the possession of Cotton, and if it be conceded that Mrs. Foster owned the property in one of the yearlings, or even in both, it would make no difference.

There was no error in the refusal of the court to require the state to elect upon which count it would seek a conviction before the jury. There were two counts in the indictment, one charging theft of the cattle, and the other receiving stolen property, and there was evidence tending to prove both issues.

Nor was there any error in the failure of the court to give a charge on circumstantial evidence. So far as the possession of the animals was concerned, and the taking of the same, that appears, from the appellant's defense, to be an admitted fact. He claimed he took them under a purchase from Peck, who claimed to sell them as the property of Cotton. The taking being an admitted fact, because the state proposed to prove the intent by circumstantial evidence was no reason why a charge should be given on this subject. See *Russell v. State* (Tex. Cr. App.) 44 S. W. 159; *Thomp. Trials*, § 2506; *State v. Maxwell*, 42 Iowa, 208.

Appellant objects to the charge of the court presenting the defendant's defense of purchase through Gus Peck, especially to that

portion of the same with reference to the authority of Peck, and instructing the jury, if they believed defendant thought or believed that Peck had authority to sell said cattle, to acquit him, although they should believe that Peck did not have such authority. This instruction was certainly liberal towards defendant.

The evidence did not call for any explanation of possession outside of the alleged purchase by appellant, which was given by the court in his charge. Nor did it call for a charge on recent possession. So far as the defendant claimed a right to the property, it was through a purchase from Peck, and this was given to the jury by a proper charge. The court, under the testimony, very properly gave a charge on the law of principals, as the testimony tended to show that both appellant and Orange Wash were guilty of the offense charged.

There is nothing in the newly-discovered testimony. If it be conceded that said testimony would in any wise be material, the defendant was utterly lacking in diligence. There being no errors in the record, the judgment is affirmed.

HURT, P. J., absent.

#### WASH v. STATE.

(Court of Criminal Appeals of Texas. Oct. 26, 1898.)

#### CRIMINAL LAW — INSTRUCTIONS — NEWLY-DISCOVERED EVIDENCE — APPEAL.

1. A requested instruction as to a particular defense need not be given when there is no evidence to sustain it.

2. A new trial will not be granted for newly-discovered evidence to the effect that the accused acted merely as the servant of another, where such defense was not made at the trial.

3. Evidence of statements of a third person that accused was his employé is inadmissible, because hearsay.

Appeal from district court, Wilson county; M. Kennon, Judge.

Orange Wash was convicted of theft of cattle, and appeals. Affirmed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of the theft of cattle, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

This is a companion case to cause No. 1,848 (Houston v. State [just decided] 47 S. W. 468). There is no bill or exceptions in the record, except that contained in the appellant's motion for a new trial, which calls in question the refusal of the court to give the requested instruction as to appellant being a hired hand. We have examined the record carefully, and there is no evidence contained therein suggesting the defense of a hired hand. The court gave a full charge on the subject of principals and conspiracy,—the latter as ap-

plied to the acts and declarations of Sledge Houston not made in the presence of appellant,—and how the jury were to regard the same. Under the facts proven, the charges given were all that were necessary, and there was no occasion to give an instruction as to the defendant being a hired hand.

Appellant in his motion for a new trial claims to have discovered new testimony, to wit, of one R. C. Houston, to the effect that he heard the defendant Sledge Houston say on several occasions that Orange Wash was his employé and hired hand. It does not occur to us that this is newly-discovered evidence. There is no suggestion in the evidence that this defense was relied on by appellant on the trial of the case, and it does occur to us that, if it be true that Orange Wash was the hired hand of Sledge Houston generally, this matter would have been easily susceptible of proof. It does not appear, however, that R. C. Houston would prove that as to this particular case Wash was a hired hand of Sledge Houston. It was hearsay anyway. We have examined the record carefully, and, no errors appearing, the judgment is affirmed.

HURT, P. J., absent.

#### DONAHO v. STATE.

(Court of Criminal Appeals of Texas. Oct. 26, 1898.)

#### CRIMINAL LAW—THEFT—ALIBI—EVIDENCE—INSTRUCTIONS—DEGREE OF CRIME.

1. Where an instruction in accordance with approved forms is given on a defense of alibi, another requested instruction on the same subject need not be given.

2. Where there was evidence that defendant was seen with the stolen property about 7 or 8 o'clock a. m., evidence that he was in another town, 15 miles distant, connected by a railroad, about 9 o'clock a. m. of the same day, does not establish an alibi.

3. Where defendant is charged with the theft of two bales of cotton found in his possession, and there is no suggestion that it was taken at separate times, a request for an instruction on misdemeanor is properly refused.

Appeal from district court, Wilson county; M. Kennon, Judge.

John Donaho was convicted of theft, and appeals. Affirmed.

T. P. Morris, B. F. Ballard, and A. B. Bell, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of the theft of two bales of cotton, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

Appellant excepted to the charge of the court on alibi, and also to the refusal of the court to give a requested charge on that subject. The charge given is in accord with the approved forms, and is correct, and there was no occasion to give the requested charge. Indeed, it is exceedingly questionable whether

the defense of alibi is raised in this case. The testimony of defendant is exceedingly weak as to the alibi at the time the state shows appellant was in possession of the cotton, on the morning of the 9th. Gray testified that he bought two bales of cotton from the appellant at his store in Elemendorf, in Bexar county, early on the morning of the 9th,—about 7 or 8 o'clock. Elemendorf is shown to be about 15 miles from San Antonio. If these towns were connected by rail, it would take but a short time to go from one to the other. Utes and one or two other witnesses testify that they saw defendant in San Antonio about 9 o'clock. This is not inconsistent with the fact, as testified to by Gray, that he bought the cotton from him at Elemendorf at 7 o'clock on the morning of the 9th. Although appellant sold him the cotton under an assumed name, he was positive in his identification of appellant as being the person who made the sale to him.

There was no error in the court's refusal to give the requested charge on misdemeanor. Both bales of cotton were stolen on the same night, and they were found together in possession of appellant only four days thereafter. There is no suggestion in the testimony that they were taken at separate times, and so the charge requested on this subject was not required.

We think the testimony sufficiently established a special ownership of the cotton in George Norrell at the time of the commission of the theft, and also that the cotton found in the possession of defendant was sufficiently identified as the stolen cotton. There being no errors in the record, the judgment is affirmed.

HURT, P. J., absent.

#### RUNNELS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 26, 1898.)

##### BURGLARY—OWNERSHIP—EVIDENCE.

Where the evidence shows that the alleged owners of a burglarized house supervised the construction of the building, and gave instructions, and that the one having custody and control was their agent and acted under their instructions, the ownership is sufficiently proved.

Appeal from district court, Bexar county; I. L. Martin, Judge.

William Runnels was convicted of burglary, and appeals. Affirmed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of burglary, and his punishment assessed at confinement in the penitentiary for a term of three years; hence this appeal.

Appellant contends that the ownership of the house was not proved as alleged; that the evidence shows S. N. Bond was in posses-

sion of the house and property, and not Meerscheldt & Stieren. Appellant asked a special instruction on this subject, which was refused by the court, and he assigns this as error. We have examined the testimony carefully in this respect, and in our opinion the charge of the court on this subject was sufficient, and the evidence amply supports the finding of the jury. True, the testimony shows that S. N. Bond had a certain care and control of the premises, but his status was that of a mere employé. Meerscheldt & Stieren were the actual owners of the property, and one of them came to the locus in quo to supervise and give instructions; and Bond's employment was by them, and he acted under their instructions as employé or clerk. He was not in the exclusive control and management of the property. See *Clark v. State*, 23 Tex. App. 612, 5 S. W. 178; *Graves v. State* (Tex. Cr. App.) 42 S. W. 300; *Livingston v. State* (Tex. Cr. App.) 43 S. W. 1008; *Roeder v. State* (Tex. Cr. App.) 45 S. W. 570. The contention of appellant that the proof failed to show that he committed a burglary is also without merit. True, appellant testified that he went into the house in the daytime, and when the door was open, and stole the paint brushes, but the state refuted this theory by evidence that convinced the jury that appellant's testimony was false beyond a reasonable doubt. There being no errors in the record, the judgment is affirmed.

HURT, P. J., absent.

#### STRICKLAND v. STATE.<sup>1</sup>

(Court of Criminal Appeals of Texas. Oct. 26, 1898.)

##### INTOXICATING LIQUORS—CRIMINAL PROSECUTION—INSTRUCTION—APPEAL—STATEMENTS OF FACTS.

1. A statement of facts cannot be considered on appeal, unless filed in the court below.

2. Where the question whether local option law is in force in a county is in dispute, it is for the jury.

Appeal from Delta county court; C. C. Dunagan, Judge.

J. R. Strickland was convicted of violating the local option law, and appeals. Affirmed.

Sharp & Banister, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of violating the local option law, and appeals.

The statement of facts in the record cannot be considered, because not filed in the court below. Appellant excepted to the charge because it failed to instruct the jury that the local option law was in force in Delta county. If this was an undisputed fact, the court might have so informed the jury, but, if there was an issue upon this question, the court would not be authorized so to instruct the jury. The charge is further excepted to because it failed to charge the law applicable

<sup>1</sup> For opinion on rehearing, see 47 S. W. 720.

to the question of agency. We are unable to say whether or not this was error, in the absence of the statement of facts. The judgment is affirmed.

HURT, P. J., absent.

**Ex parte HARRISON.**

Court of Criminal Appeals of Texas. Oct. 26, 1898.)

**HABEAS CORPUS—CONVICT BOND—APPEAL.**

An appeal from an order entered on a writ of habeas corpus, brought to secure a discharge under a county convict bond, remanding the relator to custody, will be dismissed where, since the notice of appeal, the fine has been paid and the relator discharged.

Appeal from district court, Liberty county; L. B. Hightower, Judge.

Josh Harrison applied for a writ of habeas corpus for discharge under county convict bond. From an order remanding him to custody, he appeals. Appeal dismissed.

S. A. McCall, for relator. O. L. Carter, Dist. Atty., A. T. McKenney, C. W. Robinson, and Mann Trice, for the State.

DAVIDSON, J. Relator resorted to the writ of habeas corpus to secure his discharge under county convict bond, and upon the trial was remanded to custody; hence this appeal.

Since giving notice of appeal he has paid off the remainder of the fine against him, and has been discharged, and the county convict bond is of no further force. These matters are made to appear by affidavit. Relator not being in custody, the motion of the assistant attorney general to dismiss the appeal is well taken, and the appeal is accordingly dismissed.

HURT, P. J., absent.

**POE v. STATE.**

Court of Criminal Appeals of Texas. Oct. 26, 1898.)

**ASSAULT WITH INTENT TO MURDER—INTENT—EVIDENCE—INSTRUCTIONS.**

1. An instruction, in a prosecution for assault with intent to murder, that the jury must acquit unless they believe beyond a reasonable doubt that the assault was made with the specific intent to take the injured party's life, and that if the jury have any reasonable doubt whether defendant was guilty of assault with intent to murder or aggravated assault, they must find him guilty of the latter, is sufficient as to intent.

2. Accused was charged with assault with intent to murder, and claimed that the assault was occasioned by insults by the assaulted party to the former's wife. He had met the assaulted party and talked over the matter, and had drawn a pistol, but replaced it. After the altercation was settled, and the assaulted party had turned away, the accused picked up a bludgeon, and struck him in the back of the head. *Held*, that a verdict for assault with intent to murder was justified.

Appeal from district court, Gregg county; J. G. Russell, Judge.

Will Poe was convicted of assault with intent to murder, and appeals. Affirmed.

E. B. Ragland, G. B. Turner, and Young & Stinchcomb, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of an assault with intent to murder, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

The motion for a new trial calls in question the charge of the court on not sufficiently presenting to the jury the issue in the case as to the specific intent to kill, and in this connection insists that the court should have given the charge on this subject requested by the defendant. An examination of the charge given clearly shows that the court did submit this issue in a very pointed charge. The jury were instructed that, before they could convict appellant of an assault with intent to murder, they must believe beyond a reasonable doubt that he made the assault on the injured party, William Barrow, with the specific intent to take his life; and unless they so believe to acquit him. The jury in this connection were further instructed on aggravated assault and battery, and were told by the court, if they had any reasonable doubt whether the defendant was guilty of an assault with intent to murder or aggravated assault and battery, to find him guilty of the latter offense. The charges on aggravated assault and self-defense, we believe, were in proper form, presenting the issues fairly, as raised by the evidence on these phases of the case.

Appellant urges that the evidence does not sustain the finding of the jury, in that the evidence established conclusively insults to the wife of the defendant, which were adequate cause to reduce the offense to an aggravated assault; and that the evidence left no doubt that this was the moving cause for the assault, and that the same was committed while appellant's mind was excited by passion engendered by the insults to his wife by the injured party, William Barrow. We agree with this contention, so far as the existence of adequate cause is concerned; but it occurs to us that the jury did not believe that the appellant's mind at the time was excited by passion, and in this their verdict is not without support by the testimony. Appellant did not strike the blow when he first met Barrow, but talked the matter over with Barrow as to what had occurred between him and his wife during the morning. He drew a pistol during the first part of the altercation, but replaced it, showing a degree of coolness and reflection; and it was only when it appears that the altercation was settled, and Barrow was leaving him, that he picked up the bludgeon, and struck him in the back of

the head as he was going away from him (appellant). Evidently the jury believed this not only manifested coolness and deliberation, but that appellant availed himself of a cowardly advantage in striking the blow, under the circumstances. With reference to the specific intent to kill, we think the verdict is amply supported by the testimony. The weapon used was unquestionably a deadly one, and the effect produced indicates a deadly purpose. We see no reason to disturb the verdict of the jury, and the judgment is affirmed.

HURT, P. J., absent.

### HULL v. STATE.

(Court of Criminal Appeals of Texas. Oct. 26, 1898.)

CRIMINAL LAW—CONTINUANCE—DILIGENCE—ABSENCE OF WITNESS—CROSS-EXAMINATION—APPEAL.

1. Defendant, on the day he was arrested, obtained subpoenas for certain witnesses, and placed them in the proper office for service. On the next day he propounded interrogatories for the deposition of an absent witness, which the district attorney, after crossing, returned after office hours of the same day. The following day being Sunday, defendant was unable to have the commission with interrogatories in proper shape for forwarding until Monday morning, the day said cause was called for trial, when he had them sent with instructions for immediate attention. *Held*, that defendant had used due diligence authorizing a continuance.

2. On a trial for perjury, in that defendant had testified falsely that a certain woman was not in his company on a certain day, evidence that the woman was elsewhere on the day in question and for several days thereafter is sufficiently material to entitle defendant to a continuance, where he used due diligence to procure the attendance of the witnesses who would so testify.

3. A wife, at the trial of her husband on a criminal charge, cannot be interrogated on cross-examination as to matters not touched on in her testimony in chief.

4. In order to raise the question as to the competency of a wife's testimony against her husband on cross-examination in a criminal charge against him, the bill of exceptions must show the facts to which she testified in her examination in chief, or else have the judge's certificate that she was not examined in chief on the matters brought out on cross-examination.

Appeal from district court, Erath county; J. S. Straughan, Judge.

John Hull was convicted of perjury, and he appeals. Reversed.

W. J. & Eli Oxford and Daniels & Keith, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of perjury, and his punishment assessed at confinement in the penitentiary for a term of 2½ years; hence this appeal.

Appellant filed a motion in arrest of judgment, in which he questions the validity of the indictment. We do not believe the

grounds of the motion well taken. It occurs to us that the indictment is a good and valid indictment.

Appellant filed a motion for a continuance, which was overruled by the court, and he assigns this action of the court as error. The motion was predicated on the absence of S. N. Murphy, T. E. Keith, and Leon McMorris. It is alleged that S. N. Murphy resided in the Indian Territory, at Kosoma, and that T. E. Keith and Leon McMorris resided in Eastland county, Tex. The application further shows that defendant was arrested on the 27th of May, 1898, and that on the same day he made application to the clerk of the district court for a subpoena for the witness Keith, and forwarded the same by mail to the proper office, and also caused to be issued a subpoena for the witness Leon McMorris; that the officer returned said last-mentioned process, but same did not show whether said witness was served or not. As to the witness Murphy, it is shown that the defendant secured from the district attorney a waiver of the affidavit required by law for taking the deposition of nonresident witnesses, and that he propounded interrogatories to said witness on the 28th of May, 1898, and that the district attorney crossed them on the evening of said day, and returned them to the defendant's counsel after office hours on the 28th of May; that the following day, being the 29th, was Sunday, and the defendant was unable to get commission to attach to said interrogatories until the following Monday, which was the 30th of May, 1898, the day said cause was called for trial; that, on the morning of said day, the defendant forwarded to the postmaster at Kosoma, Indian Territory, a copy of said interrogatories, with the commission attached, with request that said postmaster immediately deliver the same to a notary public or other officer authorized to administer oaths, as had been agreed upon between the state and the defendant. The defendant states that he expected to prove by the witness Leon McMorris "that on the 4th of December, 1896, witness was at Granbury when the train passed going west, and saw and shook hands with Miss Nona Edwards; that she was then on the train on her way to Stephenville, from the Indian Territory." Defendant expected to prove by the witness S. N. Murphy "that on the 28th day of November, 1896, he resided at Springtown, in the Indian Territory; that on said date Miss Nona Edwards was at his house at said place, and left there for Stephenville, Texas, some three or four days thereafter." Defendant expected to prove by the witness Keith "that on the 28th of November, 1896, he was at the depot in the town of Stephenville at the time the train came in, and that on that day a trunk came by baggage to the defendant, and that witness assisted him in taking the check off of said trunk, and in loading said trunk on defendant's wagon." In connection with this

satement, we would observe that the case was tried on the 30th of May, 1898. We think the diligence here shown was sufficient.

Was the testimony of a material character? The alleged perjury consisted in appellant testifying in the adultery trial that Nora (alias Nona) Edwards did not accompany him home from Stephenville on the 28th of November, 1896, but that it was his wife who was in the wagon with him, and got out with him, and went with him into the brush, at a point about 300 yards from his home. Referring to the statement of facts, it will be seen that the state proved the alleged adultery between appellant and Miss Nora (alias Nona) Edwards to have occurred on the 28th of November, 1896. The state showed by a number of witnesses this date, and showed by two or more witnesses that appellant committed an act of adultery with Nora (alias Nona) Edwards on said date. Appellant's defense was that on the 28th of November, 1896, it was his wife, and not Nora (alias Nona) Edwards, who was with him in the wagon on the return from Stephenville to his home on the evening of the 28th of November. He proved this by a number of witnesses. In support of this proposition he also proved by several witnesses that on the 28th of November, 1896, Nora (alias Nona) Edwards was not in that county, but only returned to Stephenville about the 4th of December. So, it will be seen that the absent testimony tended to corroborate the witnesses as to this proposition, to wit, as to the alibi of Nora (alias Nona) Edwards at the time of the alleged act of adultery. In the light of the record in this case, we cannot say that this testimony was not probably true. At least, it was competent evidence, and appellant had a right to have it before the jury on his trial; and, having used due diligence to procure it, the court erred in overruling his motion for a continuance.

Appellant objected to the cross-examination of his wife, as follows: "Q. Did you and your husband stop on the road between T. E. Davis' house and your home? A. Yes. Q. Did you get out of the wagon and go out in the brush? A. I did. Q. Did your husband get out of the wagon and go out in the brush with you? A. No, my husband did not get out of the wagon, but remained in the wagon. Q. Did you testify on the trial for adultery that you and your husband both got out of the wagon and went out in the brush between T. E. Davis' house and your home? A. No; I did not give any such evidence. I stated that the wagon stopped, and I got out of the wagon, and went in the brush." The bill shows that appellant objected to said testimony upon the following grounds: "Because the witness was the wife of the defendant, and could not be made to give evidence against him; and because the defendant had not interrogated the witness in regard to the matter inquired about, and had not proven anything by her about stop-

ping between T. E. Davis' house and the home of the defendant, and had not proven anything by her about either herself or the defendant getting out of the wagon on that occasion, and had not proven anything by her about her and defendant going out in the brush at said place, and had not proved anything by her about what she testified on this point on the adultery trial." If, by the grounds of objection stated, it was intended to certify to said facts stating the condition of her testimony in chief prior to her cross-examination, then the objection was well taken. But it has been held that a statement of the grounds of objection by counsel to testimony is not a certificate that the facts were so. In order to present this question, the bill should have shown the existing state of facts upon which she was examined in chief, or else the judge should have certified that she was not examined in chief upon the matters brought out in cross-examination. As explained by the court, there was no impropriety in admitting the testimony of J. W. Jarrott. For the error of the court in overruling the motion for a continuance, the judgment is reversed, and the cause remanded.

HURT, P. J., absent.

### CROSS v. FREEMAN.

(Court of Civil Appeals of Texas. Oct. 26, 1898.)

LANDLORD AND TENANT—AGREEMENTS—CONSTRUCTION—RENT—TITLE OF LANDLORD—ESTOPPEL OF TENANT—EXECUTORS AND ADMINISTRATORS—CONTRACTS—VALIDITY.

1. Defendant took possession of land under a contract with plaintiff to purchase if the title was satisfactory, but if the title failed to pay rent for one year and surrender the premises. Held that, since the relation of landlord and tenant did not arise until the failure of title, plaintiff could not recover rent under the contract until the failure of title was shown.

2. A contract by an administrator to sell land of the estate to defendant, who agreed to purchase if the title was satisfactory, but if the title failed to pay rent for one year, can be avoided if the administrator fraudulently represented that the estate had good title, and defendant relied upon such representation.

3. The rule estopping a tenant from denying his landlord's title does not apply to prevent defendant from claiming in defense that he was induced to make the contract by false and fraudulent representations that he would be furnished good title, upon which he relied.

Appeal from district court, McLennan county; Marshall Surratt, Judge.

Action by John D. Freeman, as administrator of the estate of D. C. Freeman, against Jack Cross. Judgment for plaintiff. Defendant appeals. Reversed.

O. H. Cross and Eugene Williams, for appellant.

FISHER, C. J. This is an action brought by John D. Freeman, as administrator of the estate of D. C. Freeman, against the appel-

plaint, on a certain written contract, to recover rent alleged to be due the estate of D. C. Freeman. The contract is as follows: "State of Texas, McLennan County. This agreement, made this day by and between John D. Freeman and Jack Cross, both of McLennan county, Texas, witnesseth: Whereas, D. C. Freeman, now deceased, before his death agreed to sell to Jack Cross 320<sup>0</sup>/<sub>10</sub> acres of land out of the B. C. Wallace survey, in McLennan county, Texas, and agreed on the location thereof; and whereas, no deed was made, and none can be made, except on order of the court where the administration on the estate of D. C. Freeman is pending: Now, it is hereby agreed, by and between the parties hereto, as follows: J. D. Freeman, administrator of his father's estate, agrees to make said Cross a deed to said 320<sup>0</sup>/<sub>10</sub> acres of land, if the court approves the sale, application having been already made for said sale. Cross is to pay Freeman \$6,720.00 cash on the delivery of satisfactory title for said land. In case the title fails, Cross is to pay Freeman \$3.00 per acre rent for one year for the land in cultivation, and return the premises to Freeman at the end of the year 1896. If the title is satisfactory, Cross agrees to pay 8% interest from the 1st of January, 1896, till delivery of deed, on the \$6,720.00. Cross is to put a division fence through the pasture, for which he is to be paid at the rate of one dollar per day per hand while building said fence, and 10 cents each for good cedar posts he furnishes, in case the title is not satisfactory; but Freeman is to pay for only one-half of said fence, if the said title is satisfactory."

Cross went into possession of the land under this contract. Plaintiff's suit is based upon the theory that the title tendered by the plaintiff, Freeman, under this contract, was not satisfactory to Cross, and he thereby became bound and liable for the rent of the premises at three dollars per acre, the amount stated in the contract. The defendant interposed certain demurrers to plaintiff's petition, which were overruled,—one to the effect that there was no averment charging that the title to the land in the estate of Freeman had failed; contending that, under the contract, the relation of landlord and tenant between the plaintiff and defendant did not arise until it was shown by the plaintiff that the title to the property in the estate had failed. There was no averment to this effect in plaintiff's petition.

We think this a correct construction of the contract. Cross agreed to buy from the estate, if it furnished a good title, and, in case the title failed, he agreed to pay rent for one year. We do not believe that by the use of the expression "satisfactory" in the contract it was intended that Cross could refuse to accept a perfect title if it should be tendered by the plaintiff, but we believe the true construction to be, from a reading of the entire contract, that, if a good title was tendered,

specific performance could be enforced against Cross, and, if the title failed, then Cross, having accepted possession under the contract from Freeman, would become liable for the rent of the land at three dollars per acre. Now, this is an express provision of the contract, and, in order for Freeman to recover on the covenant to pay rent, the burden rested upon him to show that the title had failed, as this was the condition named in the contract under which the defendant promised to become liable for rent. The court overruled the appellant's demurrer to the petition in this respect, and ignored this theory of the case in rendering its judgment in favor of the appellee. We are not discussing any cause of action that the appellee might have had if his action was one on quantum meruit or quantum valebant; for his pleadings do not bring such issues into the case, as his action is based solely upon the contract.

The appellant also pleaded that the execution of the contract sued upon was procured by false and fraudulent representations made by the appellee, Freeman, to the effect that the estate of D. C. Freeman had a good and perfect title to the land in controversy, and that the defendant believed such representations to be true, and that by reason thereof he executed the contract of tenancy upon which the plaintiff sued. The court below sustained plaintiff's demurrers to this defense. If it was true, as alleged, that the administrator, by his false representations, procured the execution of the contract, the defendant could set up this fact in avoidance thereof and the rule of estoppel that ordinarily operates against a tenant, in depriving him of the right to deny his landlord's title, would not apply in such a case. An administrator, although he stands as the representative of the estate, has no more right to enforce a contract obtained by his fraud than would be the case if the contract was made in his own interest. The court erred in sustaining a demurrer to this branch of the case.

We have carefully investigated the questions raised by the remaining assignments, but find no error, except in the respects pointed out; and for the errors noticed the judgment of the court below will be reversed, and the cause remanded. Reversed and remanded.

#### BULL et al. v. JONES.

(Court of Civil Appeals of Texas. Oct. 22, 1898.)

#### ATTACHMENT — CLAIMANT'S BOND — ACTION — ESTOPPEL — ADMINISTRATORS — APPEAL.

1. Where a claimant of attached property resorts to a claimant's oath and bond, and, with the assistance of his sureties, obtains possession of the property as personality, the latter are estopped from claiming immunity on the bond on the ground that it is realty.
2. Where a claimant's bond is quashed, and another substituted, the sureties on the latter cannot escape liability because the bond was executed after delivery of the property.

3. An issue as to the right of an administrator to prosecute an action as such cannot be first raised on appeal.

Appeal from district court, Eastland county; T. H. Conner, Judge.

Action by M. J. Jones, administratrix, against T. D. Bull and others. Judgment for plaintiff, and certain defendants appeal. Affirmed.

D. G. Hunt, for appellants. R. B. Truly and R. H. McCain, for appellee.

**TARLTON, C. J.** This appeal is prosecuted by J. P. Shannon and L. C. Downtain from a judgment in the sum of \$1,132.50 recovered by M. J. Jones, as the administratrix of the estate of G. A. Jones, deceased, against the appellants, as sureties on the claimant's bond of one T. D. Bull. The issue involved is the title to certain property claimed on the one hand by G. A. Jones, the original plaintiff in the proceeding, and on the other hand by T. D. Bull, the claimant.

The case has been several times before our appellate courts. 85 Tex. 136, 19 S. W. 1031; 9 Tex. Civ. App. 346, 29 S. W. 804; 36 S. W. 501; 37 S. W. 1054. It will be seen, by reference to these decisions, that the disposition of the several appeals was made to turn upon the question whether the property involved was realty or personalty. The property is described in the affidavit and in the claimant's bond as "one Simmons cotton press; one 80-saw Brown cotton gin, feeder, and condenser, complete; one 20 horse-power engine, stationary, manufactured by Sinker, Davis & Co., Indianapolis, Indiana." When the opinions were rendered by our supreme court in 85 Tex., 19 S. W., and by this court in 9 Tex. Civ. App., 29 S. W., supra, it did not appear that the machinery had ever in fact been severed from the soil to which it had been attached. The record now requires the conclusion of fact, which we accordingly find, that, whether or not the property should have been regarded in the first instance as personalty or realty, nevertheless, by a resort to the claimant's oath and bond, Bull, aided and assisted by the appellants, as his sureties, obtained possession of it as personalty, thus severing it from the soil. Under this state of facts, the sureties are in no position to claim immunity from liability upon their bond, on the ground that the property was realty. This disposition of the question is in accordance with the conclusion thereon reached after elaborate discussion by our supreme court on the last appeal. 90 Tex. 194, 37 S. W. 1054. The first assignment of error is thus overruled.

The second assignment complains that judgment should not have been entered against defendant L. C. Downtain, because it appears that the bond executed by him was subsequent to the alleged delivery of the property. The record shows that the first bond, signed by Shannon and one Aingell, was

quashed, and that the bond in suit was substituted therefor. We find no merit in the assignment.

The final assignment, that there is no evidence to support the judgment in favor of M. J. Jones, as administratrix, is likewise without merit. It appears from the appellants' brief and from the judgment of the court that M. J. Jones filed the suggestion of the death of G. A. Jones, and that leave was granted her to prosecute the cause as administratrix. No question upon her right to do so was raised either in the pleading or the evidence, and it is too late to make the issue here.

As the record requires the conclusion that G. A. Jones was the owner of the property, and as all the assignments are overruled, the judgment is affirmed.

# **AMERICAN COTTON-BALE IMPROVEMENT CO. v. FORSGARD et al.**

(Court of Civil Appeals of Texas. Oct. 28, 1898.)

**JUSTICES OF THE PEACE—APPEAL—UNDERTAKING—CORPORATIONS—OFFICERS—AUTHORITY.**

1. Plaintiff, who has obtained a judgment before a justice, may appeal therefrom without filing an appeal bond.

2. If a justice had jurisdiction to try the cause, irregularity in entering the judgment does not defeat the right of either party to appeal.

3. Where defendant's president promised that goods manufactured by plaintiff on a written order signed by one not a foreman or manager for defendant would be paid for, plaintiff can recover, though the order directed that no goods should be delivered on defendant's account unless it was signed by a foreman or manager.

4. An officer of a corporation empowered to make a regulation has authority to waive it.

Appeal from McLennan county court; J. N. Gallagher, Judge.

Action by Forsgard & Blum against the American Cotton-Bale Improvement Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Eugene Williams, for appellant.

**KEY, J.** This case originated in a justice of the peace court, and was appealed to the county court. Appellant complains of the action of the latter court in overruling its motion to dismiss the appeal. The motion was predicated upon the fact that the appeal bond was filed before the judgment was entered, and that the judgment showed upon its face that the case was tried before Justice of the Peace Earle, acting in the absence of Justice of the Peace Gallagher, in precinct No. 1, McLennan county, on February 21, 1896, and was not entered of record until June 12, 1896, and does not show that Justice of the Peace Gallagher was then absent. The plaintiffs recovered a judgment in the justice's court, but, not being satisfied, they, and not the



defendant, appealed to the county court. Under such circumstances, no appeal bond was required. *Edwards v. Morton* (Tex. Sup.) 46 S. W. 792.

The other ground of the motion is also untenable. Judge Earle had jurisdiction to try the case, and, though he may have proceeded irregularly, a judgment was entered, from which either party had the right to appeal.

The order for the goods, for the value of which the suit was brought, reads as follows: "Deliver no goods on our account, except on written order signed by manager or foreman, and give instructions that goods and bills must be delivered to manager or foreman except when order says deliver to bearer. \* \* \* Waco, Texas, Oct. 9, 1895. Messrs. Forsgard & Blum: Please deliver to our plant, with bill, six rollers, 30" di. by 64½" long, \$1.00." This in pencil is the notation: "Call Mr. Ball's attention to this. American Cotton-Bale Improvement Co., Chas. R. Botsford, Foreman." It was shown that Botsford was neither manager nor foreman, and it is therefore claimed that appellant is not liable, it never having received the goods. The goods were prepared in accordance with the order, and tendered to the defendant; and the plaintiff Blum testified that D. C. Ball, defendant's president, to whom the order was exhibited, said that it was all right, and that the goods would be paid for. This testimony, though in conflict with the defendant's evidence, justified a finding that the defendant's president, acting for the defendant, agreed to pay for the articles referred to; and, notwithstanding the notice contained in the order to deliver no goods except on written order signed by the manager or foreman, we think the president of the company had authority to bind the company by verbal agreement to pay for the goods. The testimony does not show any restriction upon the authority of the president to act for the company, but does show that he caused to be prepared the printed forms for orders containing the notice not to deliver goods except on the written order of the manager or foreman, etc. Having the power to prescribe such a regulation, he had the power to set aside and disregard the same. *Cohen v. Insurance Co.*, 67 Tex. 325, 3 S. W. 296; *Morrison v. Insurance Co.*, 69 Tex. 353, 6 S. W. 605. The judgment is affirmed.

#### LAMBERT v. WESTERN UNION TEL CO.

(Court of Civil Appeals of Texas. Oct. 26, 1898.)

##### APPEAL WITHOUT BOND.

Under Rev. St. 1895, art. 1401, providing that an application to appeal without security for costs shall be determined by the trial court, if in session, or else by the county court, an order of the district judge, made in vacation, permitting an appeal, in a cause tried by him, without a bond, confers no jurisdiction on the appellate court.

On rehearing. Appeal dismissed.  
For prior report, see 45 S. W. 1034.

KEY, J. Having entered a judgment reversing and remanding this cause, appellee has filed a motion asking that said judgment be set aside, and the appeal dismissed, upon the ground that this court has never acquired jurisdiction. Appellant filed no appeal bond, but undertook to comply with article 1401 of the Revised Statutes of 1895, prescribing the manner in which cases may be appealed when the parties are unable to pay the costs or give security therefor. The record shows that an affidavit showing inability to pay or secure the costs was filed with the clerk of the court in which the case was tried, but after the court had adjourned, and that the judge of the court who tried the case certified that appellant had made proof before him of his inability to pay the costs or give security therefor, and, therefore, that he was allowed to appeal without filing a bond. This action of the judge, however, was in vacation, and was not the action of the court. If the court had been in session, and the action of the judge had been entered of record as the action of the court, it would have been in compliance with the statute; but, the court not being in session, the proof of inability to pay or secure the costs should have been made before the county judge. *Wooldridge v. Roller*, 52 Tex. 452; *Hearne v. Prendergast*, 61 Tex. 627; *Graves v. Horn*, 80 Tex. 77, 33 S. W. 322. Not having complied with the requirements of the statute authorizing appeals without bond, the jurisdiction of this court has not attached; and it becomes our duty, since our attention has been called to the fact, to set aside the judgment heretofore rendered, and dismiss the appeal. *Sanger v. Burke* (Tex. Civ. App.) 44 S. W. 871. Therefore the motion will be granted, and the appeal dismissed.

#### WHITE v. MEYERS et al.

(Court of Civil Appeals of Texas. Oct. 26, 1898.)

##### MANDAMUS—JUSTICE OF THE PEACE—SUFFICIENCY OF PETITION.

Where a justice of the peace dismissed a cause for want of prosecution, mandamus will not lie to compel him to make out a transcript on the plaintiff's giving notice of an appeal to the county court, where the petition does not allege that that court had appellate jurisdiction of the cause.

Appeal from Tom Green county court; T. C. Wynn, Judge.

Application for mandamus by G. M. Meyers and others against John O'K. White. Writ awarded, and defendant appeals. Reversed.

J. W. Hill and Hill & Wright, for appellant.

COLLARD, J. This is an appeal by John O'K. White from a judgment of the county

court of Tom Green county, granting a writ of mandamus against him, as justice of peace of the county, requiring him to make out transcript, together with the original papers in a cause in which the justice had rendered judgment of dismissal for want of prosecution; the plaintiff in the cause having given notice of appeal to the county court, and the justice refusing to make out transcript of proceedings and otherwise comply with the law governing appeals. Rev. St. 1895, art. 1163; Const. art. 5, § 16. The suit dismissed was styled "G. M. Meyers et al. vs. McKenzie Bros." and numbered 1,403. The petition for mandamus nowhere alleged facts showing that the county court had appellate jurisdiction of the case; nor were there any equivalent averments in the petition. Respondent filed special exceptions to the petition upon that ground and others, which were overruled by the court; and afterwards the court rendered judgment granting the writ as prayed for. The same question is raised by assignment of error in this court.

More than ordinary certainty is required in a petition for mandamus to show that the relator is entitled to the writ, and that it is the duty of the officer to proceed as demanded. *Arberry v. Beavers*, 6 Tex. 473; *Railway Co. v. Randolph*, 24 Tex. 333; *Railway Co. v. Locke*, 63 Tex. 630; *Caldwell Co. v. Harbert*, 68 Tex. 324, 4 S. W. 607; *Railway Co. v. Jarvis*, 80 Tex. 466, 15 S. W. 1089. A writ of mandamus will not issue against any public officer, unless it be to compel him to perform an act clearly enjoined upon him by law. *De Poyster v. Baker*, 89 Tex. 155, 34 S. W. 106. In this case probable cause is not shown for the writ. It is not shown that the justice of the peace was not in the full discharge of his duty, as required by law, in refusing to certify transcript and original papers in the cause. It was error to overrule the defendant's exceptions to the petition, as stated above, and to render judgment awarding the writ because it was not alleged or shown that the justice was refusing to perform his duty. The judgment of the lower court is reversed, and the cause remanded. Reversed and remanded.

SAN ANTONIO & A. P. RY. CO. v. RAY.  
(Court of Civil Appeals of Texas. Oct. 26, 1898.)

#### APPEAL—DISMISSAL.

Where appellant fails to file the transcript in time, and no sufficient excuse therefor is given, the right of appellee to an affirmance on certificate, as provided by Rev. St. 1895, art. 1016, becomes absolute, notwithstanding appellant has abandoned his appeal and brought error.

Appeal from Milam county court; W. M. McGregor, Judge.

Action by George R. Ray against the San Antonio & Aransas Pass Railway Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Robson & Duncan, for appellant. Hender-son, Streetman & Freeman, for appellee.

KEY, J. Judgment in this case was rendered in the court below on the 20th day of August, 1897. Motion for new trial was overruled, notice of appeal given, and appeal bond filed August 26, 1897. Not having filed the transcript in this court within the time prescribed by statute, appellant filed a motion attempting to excuse its delay, and asking leave to file the transcript. This motion, filed January 26, 1898, was overruled. Thereupon appellee filed a motion to affirm on certificate. This motion was overruled on account of a defect in the certificate. On the 20th of May, 1898, appellee filed another motion for affirmance on certificate, accompanied by a proper certificate showing that this court had jurisdiction of the appeal. On the 27th day of November, 1897, the San Antonio & Aransas Pass Railway Company, the appellant in the appeal, filed in the court below a petition for writ of error, of which writ the plaintiff, appellee in the appeal, accepted service. Writ of error bond was filed the same day,—November 27, 1897; but the transcript in the writ of error proceeding was not filed in this court until June 3, 1898, 13 days after the plaintiff in the court below had filed his second motion for affirmance on certificate. This latter motion for affirmance on certificate was overruled by this court because the defendant in the court below had perfected its writ of error and filed a transcript in this court at the time the motion was decided; and the case is now before us upon motion for rehearing as to that ruling, and upon submission on the merits of the main case, subject to the motion for affirmance on certificate.

In the motion for rehearing our attention is, for the first time, directed to the case of *Insurance Co. v. Clancey*, 91 Tex. 487, 44 S. W. 482. The doctrine announced in that case sustains the contention of the plaintiff in this case. We quote from the concluding part of the opinion as follows: "Any seeming conflict in the cases cited is apparent, and not real. The rule is deducible from them that a party who desires to complain of a judgment of the trial court may appeal, abandon his appeal, and then sue out a writ of error, but that this privilege is subject to the right of the appellee to have the judgment affirmed on certificate. If he may do this, we see no reason why, upon the suing out of one writ of error, and its abandonment, another may not be prosecuted, subject to the same right of affirmance on part of defendant in error. Where an appeal or writ of error has been perfected, and the transcript has not been filed in time, and no sufficient excuse for the failure to file has been given, the right to an affirmance upon the certificate at the term at which the transcript should have been filed becomes absolute. Rev. St. 1895, art. 1016." The judgment of this court overruling

the motion to affirm on certificate will be set aside, and the motion asking such affirmance will be granted, and the judgment affirmed, without reference to the merits.

### BOYD v. CROSS et al.

(Court of Civil Appeals of Texas. Oct. 26, 1898.)

#### HARMLESS ERROR—INJURY TO PERSON ON TRACK.

1. In an action for negligence, plaintiff is not prejudiced by failure to submit the issue of his contributory negligence, even where the court calls attention to defendants' plea of that issue.

2. Where a person was injured by a railroad train being backed against him at a place which is not a public crossing, the burden is on him to show that the engine was not provided with a proper bell.

3. Permitting its cars to stand on a switch in a street beyond the time prescribed by ordinance does not of itself make a railroad company liable for backing such cars against a person at a place beyond the street, since the violation of the ordinance is not the proximate cause of the accident.

Appeal from district court, McLennan county; M. Surratt, Judge.

Action by Hugh Boyd, next friend to Levi Williams, against Cross and Eddy, receivers of the Missouri, Kansas & Texas Railway Company, and another. There was a judgment for defendants, and plaintiff appeals. Affirmed.

Eugene Williams, for appellant. T. S. Miller, Clark & Bollinger, and Jas. D. Williamson, for appellees.

KEY, J. This is a damage suit for personal injuries against the Missouri, Kansas & Texas Railway Company, and Cross and Eddy, receivers. Though the cause of action, if any, arose while the railway was in the hands of the receivers, it is admitted that, if the receivers are liable, the railway company is also liable. A train of gravel cars was left standing on a switch in the city of Waco, and the plaintiff, Levi Williams, in the nighttime, passed under one of the cars of said train, and stopped near the end of the railroad ties; and, while there, an engine and some other cars were run into the switch, making a connection with the train of gravel cars. The collision between the moving and standing cars put the latter suddenly in motion, and the plaintiff was struck, and his arm broken and injured, as alleged in his petition. The petition charged negligence in the operation of the connecting train, especially in the rate of speed and failure to ring the bell and blow the whistle. The jury returned a verdict for the defendants, and the plaintiff has appealed.

There is testimony in the record to support a finding that the defendants were not guilty of the negligence charged in the plaintiff's

petition; and we therefore find, as a conclusion of fact, that the defendants were not guilty of the negligence charged.

It is claimed that the court erred in calling the attention of the jury to the defendants' plea of contributory negligence, and then not submitting to the jury the question of contributory negligence. We do not think the plaintiff was injured in this respect. If the pleadings and the evidence raised the issue of contributory negligence (and we think they did), the defendants were entitled to have that issue submitted to the jury; but the failure to submit it did not result in injury to the plaintiff. The court's charge made the plaintiff's right to recover depend upon whether or not the defendants were guilty of negligence. Under the instructions given, if the jury had found the defendants guilty of negligence, it would have been their duty to have returned a verdict for the plaintiff, regardless of the question of contributory negligence. Therefore the failure to submit that issue was beneficial, and not harmful, to the plaintiff.

We do not think the court erred, as complained of in the second assignment of error, in refusing the special charge in reference to the weight of the bell. It is true there was no testimony concerning the weight of the bell, and the statute requires persons operating railroad trains to blow a whistle or ring a bell of at least 30 pounds weight, within a certain distance of public crossings. And it is also true that a public road crossed the railroad track near where the plaintiff was injured; but the plaintiff was not traveling the road, nor injured at the crossing. The statute referred to was enacted for the protection of the public while traveling the public highways; and, as to such persons, the failure to give the signals required is negligence per se; but, as to persons not using the public highway, whether or not such failure would be negligence is a question of fact for the jury. *Railway Co. v. Bishop* (Tex. Civ. App.) 37 S. W. 764; 2 Ror. R. R. p. 1004. Without deciding upon which party the burden of proof would rest to show the weight of the bell when an injury occurs at a public crossing, we hold in this case that the burden of proof did not rest upon the defendants in that respect.

The plaintiff's petition did not seek a recovery upon the ground that the defendants were guilty of negligence in permitting their cars to stand on a switch in a street in the city of Waco for a longer period of time than was permitted by the ordinances of the city. Furthermore, if the defendants were guilty of negligence in this respect, such negligence was not the proximate cause of the plaintiff's injuries; and, for these reasons, no error was committed in not submitting that question to the jury. No reversible error has been pointed out, and the judgment will be affirmed. Affirmed.

**SOUTHERN KANSAS RY. CO. OF TEXAS  
v. MCKAY et al.**

(Court of Civil Appeals of Texas. Oct. 29,  
1898.)

**RAILROADS—INJURY TO STOCK—PROXIMATE CAUSE  
—DUTY OF FENCING TRACK—CONTRIBUTORY  
NEGLECT—QUESTION FOR JURY.**

1. Defendant's railroad crossed a large pasture within which was a station. There was no station agent or depot, and the switch yards were unfenced. The fence separating this pasture from a pasture west of it was removed 300 yards west of its prior location, and before defendant placed cattle guards where the fence crossed its track, to protect the inclosed pasture from the depredations of stock, the plaintiffs brought their herd of cattle, with the owner's consent, to the pasture surrounding the station, and, to separate the calves from the cows, put them in defendant's stock pens. After the separation they drove the cows into the west pasture through the gap in the railroad crossing. Some of the calves were unweaned, and their dams returned to them at night by the unfenced gap, and were killed about the stock yards by a passing train. *Held*, that the neglect to construct a cattle guard at the open gap was of the proximate cause of their deaths.

2. Where a railroad company kept in a pasture of 30 sections, across which its road ran, a station, consisting of its section house, stock yards, side tracks, and switch yards, used for shipping cattle and other business, but without an agent or depot, it was not a station exempting the company from fencing its track, to shield itself from presumed negligence.

3. Where one inclosed sucking calves in stock pens near a railroad side track, with the probable knowledge that the cows would naturally seek their offspring, and after being driven away they returned to the pens at night, and were killed by a passing train, whether plaintiff was guilty of contributory negligence, in an action to recover for their deaths, was a proper question to submit to the jury.

Appeal from district court, Hemphill county. B. M. Baker, Judge.

Action by R. M. McKay and others against the Southern Kansas Railway Company of Texas. From a judgment for plaintiffs, defendant appeals. Reversed.

H. E. Hoover and J. W. Terry, for appellant. Smith & Fisher, for appellees.

TARLTON, C. J. The appellant prosecutes this appeal from a judgment recovered against it by R. M. McKay and T. M. Cunningham, the appellees, for the killing of eight cows by a passing train of the defendant, at Mendota, a station on the appellant's road. There is no station agent or depot at Mendota, but the appellant has there its section house, its stock yards, side tracks, and switch yards. Mendota is a way station, and is used for the purpose of shipping cattle and the transaction of other business. Tickets are sold to that place from other points. Freight is handled there. It is a schedule station. Passengers are received there. The stock pens are located there for shipping purposes. The right of way is unfenced. South of the main track the company maintains a

side track 1,037 feet in length. On or near the side track, and connected therewith, are the stock pens of the company, a short distance west of the eastern junction of the main and the side tracks. On the right of way north of the main track the company maintains a section house and a tool house, the former at a point 970 feet from the stock pens, and the latter at a point near the section house, and 82 feet from the west switch. The dead cows were found along the main track east from the stock yards, one about 75 yards away and the others near the stock pens, between the main and the side tracks, and within the switch yards. Mendota is situated in a pasture consisting of 30 sections, inclosed by a wire fence, and controlled by Isaac Bros., from whom the appellees had permission to bring their herd into the pasture. West of this Mendota pasture is the "cc" pasture. The cattle were killed on the night of May 5th, and between the 15th of April and the 1st of May prior thereto the owners of the Mendota pasture moved the fence separating it from the "cc" pasture about 300 yards west of its prior location. At the date of the killing of the cows the appellant had not put cattle guards at the place where the fence crossed its track and right of way. A proper cattle guard had been maintained at the point where the old line of fence had crossed its track. On May 4th the appellees brought their herd of cattle to Mendota, and put them into the appellant's stock pens, for the purpose of separating the yearlings and two year olds from the cows. Some of these yearlings were still sucking the mother cows. After the separation the cows were driven by the appellees into the "cc" pasture, through the gap at the railroad crossing. The theory of the appellees is that during the night the cows naturally sought the yearlings left in the stock pens, and that they passed through the gap at the railroad crossing, and were killed by the appellant's train. It is contended by the appellees (1) that negligence will be presumed from the bare fact of killing, the defendant not having fenced its right of way; and (2) that the killing was due to the negligence of the appellant in its failure to construct proper cattle guards at the point above indicated.

The court's charge contains the following among other instructions: "Again, if you find from the evidence that the defendant, with its train of cars, killed the eight cows of plaintiffs in the manner alleged by plaintiffs, and if you further find that the defendant company were guilty of negligence in not erecting cattle guards at the junction of its railway with the pasture fence within a reasonable time after the erection of such pasture fence, and if you further find that said cattle were enabled to and did get upon defendant's track through the place where said cattle guard should have been erected, and, doing so, were killed by defendant's train of cars, then you will find for the plaintiffs,

and assess their damages at the sum proven, if any damage has been proven." We think that the court erred in the foregoing instruction in submitting the failure to maintain proper cattle guards as an element of negligence. The obligation to maintain cattle guards grows out of the provisions of our Revised Statutes of 1896, as follows:

"Art. 4523. Each and every railroad company whose railway passes through a field or inclosure is hereby required to place a good and sufficient cattle guard or stop at the points of entering such field or inclosure, and keep them in good repair."

"Art. 4525. Such cattle guards or stops shall in all cases be so constructed and kept in repair as to protect such fields and inclosures from the depredations of stock of every description."

Only such damages can be recovered as are reasonably within the contemplation of the derelict party as a result of the negligence of which he is guilty. Now, reading the duty of the appellant with reference to the purposes defined by the statute, viz, the protection of fields and inclosures from the depredations of stock, could it be reasonably inferred that, within its contemplation, the damage claimed of the appellant in this case, resulting from the entry of the stock from the "co" pasture upon its track in the Mendota pasture, would be a natural result? We think not. Hence the submission of this issue of negligence, not of a character, as we think, to be a proximate cause, was irrelevant and misleading.

We sustain the proposition of appellees that Mendota is not such a station as would exempt the company from the requirement of fencing its track in order to shield itself from the consequences of presumed negligence. The condition of the premises at this way station was such that the appellant might easily have fenced its right of way without interfering with the operation of its trains, and without jeopardizing the safety of its employés or passengers. No reasons of public policy exist, under the facts here disclosed, excusing it from fencing its right of way. The case is clearly distinguishable from *Railway Co. v. Ogg* (Tex. Civ. App.) 28 S. W. 347; *Railway Co. v. Blankenbeckler* (Tex. Civ. App.) 35 S. W. 333, and kindred cases.

This latter conclusion would require an affirmation, notwithstanding the error above pointed out, but for the further conclusion by us that the issue of contributory negligence arises upon this record, and that upon this issue the error is material, and is detrimental to the defendant. The issue of contributory negligence springs from the conduct of the plaintiffs in inclosing sucking calves in the stock pens near the track of the defendant, with the probable knowledge that the cows would naturally seek their offspring. It is for the jury to say whether appellees, charged with the duty of ordinary care, should have thus acted, under the circum-

stances disclosed by the evidence. We abstain from considering other assignments of error, as unnecessary to a proper disposition of this appeal. Reversed and remanded.

### SCOTT v. BLACKBURN.

(Court of Civil Appeals of Texas. Oct. 29, 1898.)

#### Sale of School Lands—Presumptions—Forfeiture.

1. In trespass to try title to land acquire under the provision of 2 Sayles' Rev. Civ. St. (Ed. 1889) p. 685, for the sale of lands set apart for the benefit of the common school fund, where the treasurer received of the purchaser exactly one-twentieth of the amount fixed by the surveyor's appraisal, and the commissioner of the land office issued his certificate authorizing the surveyor to sell, which he did, and the sale was thereafter, for nearly 15 years, treated as valid by the state's officers authorized to make such sales, plaintiff has a right to assume that the tabulated statement or report from the commissioners' court had been filed with the commissioner of the general land office, as required by the act allowing the sale.

2. Under Sayles' Rev. Civ. St. (Ed. 1897) art 4218LL, authorizing the commissioner of the land office to declare contracts as to common school lands forfeited for failure to pay amounts due thereon by November 1st of any year, it is necessary to show for what year unpaid interest is due, inasmuch as no presumption in aid of a forfeiture will be allowed the state as against a party who has made payments on a contract with it.

3. Under Sayles' Rev. Civ. St. (Ed. 1897) art 4218LL, authorizing the commissioner of the land office to declare contracts as to common school lands forfeited for failure to pay amounts due thereon by November 1st of any year, a forfeiture declared on August 20, 1897, for nonpayment of interest due March 1, 1897, on such a land contract, is premature.

Appeal from district court, Mitchell county; W. R. Smith, Judge.

Trespass to try title by James Scott against J. M. Blackburn. From a judgment in favor of defendant and a refusal of a new trial, plaintiff appeals. Reversed.

Ben. Randals, for appellant. Earnest & Shepherd, for appellee.

HUNTER, J. The nature and result of this suit is well and succinctly stated in the brief of appellant's counsel, as follows: "This suit was instituted by James Scott, appellant, in the district court of Mitchell county, Texas, on the 22d day of November, 1897, in the ordinary form of trespass to try title to a section of land in said county known as section 30, in block 25, Texas & Pacific Railway Company survey. Scott, the appellant, claimed under a regular chain of title from S. N. Sherwin, who was the original purchaser of said land under an act of the legislature of Texas of 1879, as amended in 1881; and Blackburn, the appellee, claimed under an award issued to him by the land commissioner of the state of Texas, awarding said land as an actual settler, on November 11, 1897. Said land was forfeited by the land commissioner

on August 20, 1897, under an act of the legislature of the state of Texas which took effect on that day. The issues of fact and of law were submitted to the court, and resulted in a judgment for appellee, Blackburn." The facts disclosed by the record show, in effect, that, in accordance with the law, the surveyor of Mitchell county, on July 18, 1881, filed with the commissioners' court his report of the appraisement of the state school lands of said county, which included the section in controversy, classifying this section as arable land, and appraising it at one dollar per acre; which report, classification, and valuation were by an order of the commissioners' court duly entered upon its minutes and approved, and the county clerk ordered to make tabulated reports as required by the law. 2 Sayles' Rev. Civ. St. (Ed. 1889) p. 685. This original report of the surveyor, it seems, was adopted as the tabulated statement required by the act to be made up by the commissioners' court, and the clerk so certified by placing his certificate thereon to that effect, on the 21st day of July, 1881. On September 19, 1882, S. N. Sherwin filed his application in due form with the county surveyor of said county to purchase the land in question, which was duly recorded by the surveyor on September 22, 1882. On December 16, 1882, said Sherwin paid to the state treasurer the sum of \$32, which, at \$1 per acre, was the first payment on said section of land, being one-twentieth of the appraised value; and on December 18, 1882, the treasurer's receipt therefor, together with Sherwin's application to purchase the section, was filed with the commissioner of the general land office. Attached to the certified copy of the application of Sherwin to purchase the section was the following:

"No. 12,661. Treasurer's Office, Austin, Texas, Dec. 16th, 1882. Received of S. N. Sherwin, on account of self, the sum of thirty-two dollars, the same being the first payment on all of section No. 30 of state school lands in Mitchell county, under an act to provide for the sale of the alternate sections of lands set apart for the benefit of the common school fund, approved April 6, 1881. \$32.00. F. R. Lubbock, Treasurer.

"File 12,662, School Land. S. N. Sherwin. Application and Treasurer's Receipt. Filed Dec. 18th, 1882. D. N. Robinson, Chief Clerk.

"General Land Office, Austin, Texas, Dec. 24th, 1897. I, Andrew J. Baker, com'r of general land office of the state of Texas, do hereby certify that the above and foregoing are true and correct copies of the originals, together with all indorsements and erasures thereon, now on file in this office. In testimony whereof I hereunto set my hand and affix the impress of the seal of said office the date last above written. Andrew J. Baker, Com'r Genl. Ld. Off."

The surveyor's application record book showed written across the face of the application the following: "Certificate presented

December 20, 1882. W. W. Marshall, County Surveyor, Mitchell County, Texas. Land sold." Sherwin conveyed the land in 1883, and through seven other mesne conveyances, the last bearing date November 11, 1897, the title has come down to appellant. At the request of appellee's counsel, the district judge found the further fact that "the section of land in controversy was forfeited by the land commissioner of the state of Texas for failure to pay interest on same, said forfeiture having been declared on the 20th day of August, 1897. A list of lands forfeited, embracing the land in controversy, was classified and valued by the commissioner thereafter, and by him forwarded to and filed with the clerk of the county court of Mitchell county, Tex., on the 28th day of August, 1897. Said classification of said section of land was as dry agricultural land, at \$1.50 per acre. On the 28th day of August, 1897, the defendant, J. M. Blackburn, in due form filed his application to purchase said land with the commissioner of the general land office, together with his affidavit that he desired to purchase said land for a home; that he had in good faith settled thereon; that he was then a bona fide settler thereon; and that he was not acting in collusion with others, for the purpose of buying the land for any other person or corporation; and that no other person or corporation was interested in said purchase save himself, and that he was over eighteen years of age; and said application was also accompanied with the obligation of the said defendant to the state for \$936 for said land, bearing interest at the rate of 3% per annum." With all these facts before him, the learned judge further found that "there was no evidence introduced to show that said commissioners' court ever prepared any tabulated report of their action upon said report of said surveyor, and hence it was not shown that any such tabulated report was ever filed either with the county surveyor, the commissioner of the land office, or the treasurer of the state; and there was no evidence introduced that the commissioner of the land office ever approved said report of the same, or that he ever notified said surveyor that he had approved the same." And his conclusions of law show that, because of the want of this proof, the burden being upon the plaintiff, Scott, he found in favor of the defendant Blackburn.

Appellant, by proper assignment of error, complains of the court's conclusion of fact that there was no evidence that the commissioners' court had filed the tabulated statement with the treasurer, commissioner of the general land office, and surveyor, as required by the act under which the sale was made, and this assignment we sustain. We think the presumptive evidence is strong that the tabulated statement or report had been filed. This presumption arises out of the facts that the treasurer received Sherwin's money, exactly one-twentieth of the amount fixed by

the surveyor's appraisal; that the commissioner of the land office issued his certificate, which authorized the surveyor to make the sale to Sherwin; that the surveyor made the sale to him; that the sale was forfeited by the commissioner of the general land office on August 20, 1897; that the sale to Sherwin had been treated as valid by the state's officers authorized to make it for nearly 15 years, during which time they received the regular annual payments, as we must infer from the record, leaving only one-fourth of the purchase money unpaid. The finding of the court that the commissioner had declared Sherwin's contract forfeited for non-payment of interest on same is, to our minds, inconsistent with the conclusion that no contract of sale had been made with him. These facts, and the presumptions deducible therefrom, led the counsel for appellant to go into trial without providing himself with a certified copy of the tabulated statement furnished by the commissioners' court to the commissioner of the general land office, and the approval thereof by the latter; but he attached to his amended motion for a new trial a certificate of the commissioner of the land office showing that such documents existed in his office, and hence could easily be obtained on another trial. It seems from the judge's conclusions that, by reason of the failure to produce this evidence, the appellant had failed, in his opinion, to make out his title, and thus it became the controlling point in the case, and, under all the circumstances, we think that the appellant should have had a new trial.

In reaching this conclusion we have felt that it was necessary to consider whether the appellant's claim to the land had been legally forfeited, because, if the forfeiture of his contract was legally declared by the commissioner of the general land office, that fact would defeat his recovery, and the judgment below would be correct for that reason. We are, however, unable to determine whether the alleged forfeiture of the Sherwin contract is valid or not. The act of the legislature under which the commissioner of the land office declared the forfeiture gave him such power only in the event the purchaser failed to make payment by the 1st of November of any year. The findings of the court fail to show for what year the unpaid interest was due, nor does the statement of facts supply the defect. If the default on account of which the forfeiture was declared was in the payment of the interest due on March 1, 1897, the forfeiture declared on August 20, 1897, was a little too early. Sayles' Rev. Civ. St. (Ed. 1897) art. 4218LL.

Of course, no presumptions will be indulged to help out a forfeiture, nor to help out the state in establishing the right to rescind a contract as against a party who has paid three-fourths of the purchase money, where, in the exercise of such right, the statute declares a forfeiture of all payments previously

made to the state, and does not seem to recognize any equitable rights in the defaulting party, such as courts of equity have administered time out of mind in suits to rescind such partly-performed contracts. We think that the court below should have granted a new trial, and for this reason the judgment is reversed, and the cause remanded.

**GIRAND v. BARNARD et al.<sup>1</sup>**  
(Court of Civil Appeals of Texas. Oct. 29, 1898.)

**REAL-ESTATE BROKERS—CONTRACT—LIEN—VENUE.**

1. A contract to perfect a title to lands, and to sell them at an agreed minimum price, and to receive as compensation one-third the proceeds, and expressly providing that no interest or title in the lands shall thereby pass, does not create any lien on or title in such land.

2. Where a petition states no cause of action against the only defendant residing in the county where suit is brought, pleas to the venue by the other defendants residing in another county are properly sustained.

Appeal from district court, Young county: George E. Miller, Judge.

Action by J. B. Girand against S. P. Barnard and others. There was a judgment for defendants, and plaintiff appealed. Affirmed.

F. W. Girand, for appellant. R. F. Arnold and Johnson & Akin, for appellees.

**STEPHENS, J.** This suit was brought by appellant, November 6, 1897, in the district court of Young county, against S. R. Crawford, a resident of that county, and S. P. and Mary R. Barnard, residents of McLennan county. Crawford's exceptions 1 and 5 to the petition were sustained, and thereupon the pleas of venue and privilege of the other defendants, in due time and form urged, were also sustained. The plaintiff declining to amend, the suit was consequently dismissed. His cause of action was founded upon a written contract made in April, 1894, with Mary R. Barnard, which obligated him at his own expense to clear the title to a tract of 320 acres of land in Young county belonging to her, the same being the J. W. Manning survey, in consideration of which services to be performed by him she agreed to pay one-third the proceeds from the sales of said land, provided out of his one-third of such proceeds he would pay all expenses of litigation and costs of sale. The contract authorized him to sell the land at a minimum price of five dollars per acre, on such terms as, to him might seem best. The fourth clause of this contract, upon which the decision of the case turned, reads: "It is expressly understood that the interest in the proceeds of sales, herein given said Girand, is in no sense to be understood as giving him any interest or title in said land." The petition alleged performance of the contract by Girand, and a fraudulent conveyance of the land by Mary R. Barnard to S. P. Barnard in June, 1896, and an

<sup>1</sup> Application for writ of error dismissed for want of jurisdiction.

execution sale of the same thereafter as the property of S. P. Barnard to S. R. Crawford, but further alleged that this sale was void because the execution issued upon a satisfied judgment, of which Crawford had notice when he bought. The market value of the land was laid at \$5 per acre, and appellant claimed that he was entitled to recover one-third of what the land was worth, and to have a foreclosure of a lien on the land to secure the payment of that sum, in consequence of the facts above outlined; alleging that Mary R. Barnard, by thus making a voluntary conveyance to her son, S. P. Barnard, for the recited consideration of \$1,000, had placed it beyond the power of appellant to sell the land at the price specified in his contract.

Appellant's first assignment of error complains in very general terms of the court's action "in sustaining the special exceptions 1 and 5 to plaintiff's first amended original petition," the only ground of error stated either in the assignment or the proposition under it being that the petition stated a good cause of action against S. R. Crawford. The statement under the assignment merely affirms that "the court sustained the special exceptions of the defendant S. R. Crawford." The appellees, however, without objecting to the manner in which appellant has briefed this assignment, copy the exceptions 1 and 5 in their brief, from which it is manifest that each exception was but a general demurrer, raising the issue whether the contract declared on gave appellant any sort of title to or lien on the land in controversy. We agree with the trial court that it did not. The explicit language of the fourth clause quoted above leaves no room for construction.

As the suit was brought, according to the interpretation given the petition by appellant in his brief, to enforce an equitable lien on the land, we abstain from considering the phase of the case suggested in oral argument, —whether the petition might not be construed as a creditor's action to set aside a fraudulent sale, and thus remove cloud from title in anticipation of a contemplated execution sale. This assignment is consequently overruled. The second and last involves only the question of venue, and is likewise overruled, there being no cause of action against Crawford, and the other defendants being residents of another county. Judgment affirmed.

#### BLACKWOOD v. BLACKWOOD'S ESTATE et al.

(Court of Civil Appeals of Texas. Oct. 29, 1898.)

GUARDIAN AND WARD—ACCOUNT—INCOME—EXPENSES—ORDER OF COURT.

1. At the opening of a guardianship, the court heard testimony as to the allowance for the board of the wards, and fixed \$50 per annum as the amount for each, which allowance exceeded the income from the estate, and made an oral order directing that amount to

be expended, but the order was not entered on the minutes. Such amounts were stated in the annual accounts, and approved by the court. *Held*, that under Rev. St. 1895, art. 2557, requiring orders and judgments in matters of guardianship to be entered on the minutes of the court; and article 2630, which provides, without a direction of the court, "the guardian shall not be allowed, in any case, for the education and maintenance of the ward, more than the clear income of the estate," —the guardian could not be allowed for such expenditures.

2. Rev. St. 1895, art. 2558, provides that "the provisions, rules and regulations which govern estates of decedents shall apply to and govern such guardianships whenever they are applicable and not inconsistent with any provision of this title." Article 1853 provides that all orders relating to decedents' estates shall be void unless entered on the minutes of the court. *Held*, that under article 2557, which provides that "all decisions, orders and judgments of the court in matters of guardianship shall be rendered and entered on the minutes of the court," but contains no provision nullifying the order unless so entered, the order is, nevertheless, void unless so entered.

Hunter, J., dissenting.

Appeal from district court, Young county; George E. Miller, Judge.

L. C. Blackwood filed his final account as guardian of the persons and estate of Willie Blackwood and others. From a judgment of the district court affirming a judgment of the county court disallowing the account, the guardian appeals. Affirmed.

Johnson & Akin, for appellant. John C. Kay, for appellees.

HUNTER, J. The statement of the nature and result of this suit is well made in the brief of appellant's counsel, as follows: "Guardianship of the persons and estate of Willie Blackwood, Emma Blackwood, and Iva Blackwood, minors, aged 11, 9, and 7 years, was opened in 1886. Appellant was appointed and served as guardian till July, 1897, when one of the sureties withdrew from the bond; and, not desiring to give a new bond, appellant filed his final account and application for discharge. Notice was served on the wards, and a guardian ad litem appointed at the October term, 1897. The guardian ad litem filed his report at the January term, 1898, of the county court; and, on hearing the final account and report of the guardian ad litem, the county court entered judgment disallowing the same. Appeal was taken to the district court, and at the February term, 1898, the cause was heard, and the judgment of the county court was affirmed and entered as the judgment of the district court."

The conclusions of fact filed by the district court are adopted by us, and the majority of the court also adopt the conclusions of law so filed, but from the conclusions of law the writer dissents. Said conclusions of fact and of law are as follows:

"In 1886, L. C. Blackwood was appointed guardian of the persons and estate of William Blackwood, age 11 years, Emma Black-



wood, age 9, and Iva Blackwood, age 7, minor children of his brother, and both parents were dead. He qualified, and returned the inventory, which showed the estate to consist of two small tracts of land, containing 264 acres in the aggregate, appraised at \$800, and \$50 worth of personal property. The guardian continued to act until about July, 1897, when he filed his final account, and caused the wards to be served with citation, and J. C. Kay was appointed guardian ad litem. The court finds that the annual accounts of the guardian for ten years of the guardianship were filed, presented to the court, and ordered to lie over, and that citation, which issued, was served and returned according to law, and at the proper terms said annual accounts were formally approved by the court by orders entered of record; that in each of said annual accounts the sum of \$50 per annum for board was stated in said accounts as charged to each ward; that the accounts were approved and recorded; that proper vouchers accompanied said accounts for all items of expenditures and receipts; that the annual accounts, showing the receipts and expenditures, are tabulated and fully set out in Exhibit A, made a part of plaintiff's petition; that the guardian took the children into his home, fed and washed for them as members of the family, clothed them, and sent them to school, paid their tuition, and each of the wards acquired a good common-school education; that the board of each ward was reasonably worth \$50 per annum, as stated in the annual accounts, and the wards had no other means of support; that the expense for betterments and improvements on the land, as stated in the several annual accounts, were reasonable, permanent, and increased the value of the premises to the amount of the expense; that the condition of the premises, when the same came into the possession of the guardian, was bad, and that the items of material and labor are tabulated in said Exhibit A; that prior to the expenditures for material and labor in making said improvements, the guardian had the verbal order of the court to make such expenditures for same as a prudent man would for his own, and that the bills would be approved, and were approved, but no specific order for same is shown to have been entered on the record; that the final account offered for the approval of the county court was substantially the same as shown in the restatement and tabulation set out in Exhibit A. No order of court was shown, except such as may be found in the several orders of the court approving the several annual accounts, and the answer, findings, and conclusions of fact of the guardian ad litem are adopted by the court, and hereto attached and marked 'Exhibit B.' The discrepancy between Exhibit A in plaintiff's petition and B is explained by the guardian, in Exhibit A, dropping out of the calculation one of the minors who had made a settlement out of court with

the guardian, and which settlement the guardian ad litem does not consider, and which settlement, in my opinion, is not in issue in this case.

"Conclusions of law: (1) The guardian could not expend for the education and maintenance of the wards more than the net income of the estate, without being so directed by the court; and such authority could not be shown without a specific order of court entered of record. (2) The judgment of the county court ought to be affirmed."

The assignments of error are all overruled by the majority, and the judgment of the district court is affirmed. I am, however, unable to agree with my brothers in their conclusions of law in this case, because I think the guardian should be allowed the amount expended by him, not exceeding \$50 per year, against each ward's estate, for education and maintenance. The court found that \$50 per annum each was a reasonable amount for such purpose; that the guardian "had taken the children into his home, fed them and washed for them as members of his family, clothed them, and sent them to school, paid their tuition, and each of the wards acquired a good common-school education; that the board of each ward was reasonably worth \$50 per annum, as stated in the annual accounts, and the wards had no other means of support,"—and concluded that, because no order of court was shown to have been entered of record in advance of this expenditure for education and maintenance, the same cannot be allowed, under our statutes. Article 2630 of our Revised Statutes of 1895 provides: "The court may direct the guardian of the person to expend for the education and maintenance of his ward a specific sum, although such sum may exceed the income of the ward's estate; but, without such direction of the court the guardian shall not be allowed, in any case, for the education and maintenance of the ward more than the clear income of the estate." The bill of exceptions upon which is based appellant's first assignment of error is as follows: "Be it known that at the hearing of said cause the late guardian produced and offered undisputed parol evidence on which the court would find as a fact the following facts: That, at the opening of the guardianship, the county court, in open court, heard testimony regarding the allowance for board of each ward over any labor they might do, so long as they stayed with the guardian and did not do for themselves; that the testimony established that the board of each ward was worth \$50 per annum; that the court fixed that as a proper sum to be allowed the guardian, and directed that amount to be expended by the guardian, and the same was expended for board; that the matter [arose] at a subsequent term, with a different judge on the bench, and the court again considered the question of board, and again determined that the allowance of \$50 per annum for each ward was reasonable and

proper, and directed a continuance of the allowance; that the amount of \$50 each per annum was stated in the annual accounts, and duly approved by the county court as allowance for board. The court, trying the case without a jury, heard the verbal evidence, and found it true as a fact, but excluded the testimony from consideration, because no order of the court was shown, except in the several annual accounts, and the formal orders of approval made by the court, authorizing expenditures in excess of the wards' income (the bills for board being in excess of the income), and the record was the best evidence. The late guardian, L. C. Blackwood, objected to the action of the court in excluding and refusing to give effect to the direction of the county court for the allowance expended by the guardian for board, and tenders this bill of exceptions, and prays that the same may be signed, sealed, and made a part of the record, which is done."

I think that when the county court, in open session, heard the evidence on the guardian's application for the order allowing him to expend on each of the minors \$50 per annum for education and maintenance, and, as such court, judicially determined the matter, and orally pronounced judgment directing the expenditure to be made, the above statute was substantially complied with, whether the order thus pronounced orally by the court was ever entered in the minutes of the court or not. It was the duty of the clerk to so enter it, but his failure to do so does not render the order void. Article 2557, Rev. St. 1895, under the title "Guardian and Ward," provides: "All decisions, orders and judgments of the court in matters of guardianship shall be rendered and entered on the minutes of the court at a regular term thereof, and in open court, except in cases where it is otherwise specially provided." This article clearly requires the order to be entered on the minutes of the court; but I think it is only directory, as it contains no provision nullifying the order unless it is so entered, as is found in the title relating to the estates of decedents. See Rev. St. 1895, art. 1853. The article under consideration is not materially different in its provisions and requirements from article 1554, relating to the orders and judgments of the commissioners' court; and our supreme court, in the case of *Ewing v. Duncan*, 81 Tex. 230, 16 S. W. 1000, held that the order of a commissioners' court was valid if pronounced judicially by the court, though not entered of record and signed as required by the provisions of said article. See, also, *Waggoner v. Wise Co.* (Tex. Civ. App.) 43 S. W. 836.

The majority of the court are of opinion that article 2558, Rev. St. 1895, which provides that "the provisions, rules and regulations which govern estates of decedents shall apply to and govern such guardianships, whenever the same are applicable and not inconsistent with any of the provisions of this

title," would render the order null unless entered of record, the same as if it had been pronounced in an administration proceeding in a probate court; but I do not think the general provisions contained in this article would control the special provision relating to the entry of orders, decisions, and judgments in guardianship matters, or change the meaning and legal effect given to similar language by our supreme court in passing on the commissioners' court statute. I think such a construction given this general provision in this case would be a strained one; and I cannot agree to such a construction where it would work palpable injustice, as it does in this case. I think the evidence that the county court made the order directing the expenditure to be made should have been admitted, although the order was never entered; and I think, as the court in the bill of exceptions states what the proof was, and that it was undisputed, and finds that the county court made the oral orders in open court allowing the guardian to expend \$50 per annum for board, etc., the judgment of the lower court should be reversed and here rendered, allowing the guardian said items as stated in his final account.

#### LOOKOUT MOUNTAIN I. & L. L. RY. CO. v. FLOWERS.

(Supreme Court of Tennessee. Oct. 12, 1898.)

##### APPEAL—CERTIORARI—WAIVER OF OBJECTION.

Demand by defendant for jury, and continuance by consent, in the circuit court, in a case appealed to it from justice court, in which petition for certiorari and supersedeas had been granted the preceding term, waive objection to the appeal and certiorari for irregularities.

Appeal from circuit court, Hamilton county; John A. Moon, Judge.

Action by D. H. Flowers against the Lookout Mountain Incline & Lula Lake Railway Company. From judgment of justice of the peace defendant appealed to the circuit court, and from its judgment dismissing writs of certiorari and supersedeas defendant again appeals. Reversed.

C. D. Giddens and T. C. Latimore, for appellant. Shepherd & Frierson, for appellee.

SNODGRASS, C. J. Flowers sued the railway company before a justice of the peace, and obtained judgment for \$132, March 24, 1896. On 27th March the company prayed and was allowed an appeal by the justice of the peace upon consideration that it give bond five days before the May term of the circuit court. A bond was given in accordance with the justice's agreement, but by mistake was not signed by a surety, the president of the company signing its name, and "by him" as president. Thus, conjoining both names, it seems to have been treated as a double sign-

ing of principal and surety, but, of course, did not have this meaning or effect. It therefore appears that the appeal was prayed too late, and no proper bond given. The papers were, however, returned to the May term of the circuit court (4th May). On 5th June (at same term) Flowers moved to dismiss the appeal because the appeal bond was "not filed within the time allowed by law and for want of surety on the bond." This motion was sustained June 9th. The appeal was dismissed, and judgment rendered for the debt and cost. On the day following, on motion of defendant, the judgment was set aside, because the papers in the case had not been filed in the circuit court until May 4th, and "because the same came up too late for action at this term of the court." The motion to dismiss was "stricken out, and with leave to refile at next term of the court." This action was had on the 9th of June, and during the May term. No other steps were ever taken on this motion. It was not remade or renewed at the September term, and nothing further was done as to the appeal. The case remained docketed as it had theretofore been, and under the same number (7,285). But on the next day after the judgment dismissing the appeal was set aside defendant filed a petition for certiorari and supersedeas. Bond was given and fiat for the writs made. Whether or when they in fact issued does not appear by any copies or official indorsements in the transcript. It is to be taken that they issued because later there was a motion to dismiss them by plaintiff, which was sustained, and on the correctness of which action our judgment is invoked in this appeal. The writs were properly returnable to the September term. At this term the following orders appear: "Sept. 7th, 1896, Flowers vs. Ry. Co., No. 7,285. Comes the plaintiff, and demands a jury to try this case." "Nov. 9th, 1896. Flowers vs. Ry. Co. No. 7,285. This cause is continued to next term by consent. At the next term (February 22, 1897) the plaintiff, Flowers, moved to dismiss the writs because the appeal papers showed "that defendant lost its appeal by negligence"; that petitioner showed no sufficient cause why it did not "make application for the writs at the first term of the circuit court after rendition of judgment of the justice." This motion was sustained by the court, and proper judgment rendered on certiorari and supersedeas bond. The defendant appealed, and assigned errors.

It is insisted that it was error to dismiss the petition, because the motion was not made at the return term, as required by law. *Caruth. Lawsuit*, § 670; *Nicks v. Johnson*, 3 Sneed, 326; *Chappell v. Jones*, 8 *Humph.* 107; *Nance v. Hicks*, 1 *Head*, 624; *Uhles v. Nolen*, 2 *Cold.* 529; *Gardner v. Barger*, 4 *Heisk.* 672; *Boyers v. Webb*, 1 *Lea*, 698; *Hodge v. Dillon*, *Cooke*, 281; *Templeton v. Brown*, 86 *Tenn.*

55, 5 *S. W.* 441; *Shannon's Code*, § 4863. These authorities and others sustain the proposition, with the qualification that the motion must be made at the earliest opportunity presented. It must be only, of course, made at the first term after the adverse party has had notice. *Hardin v. Williams*, 5 *Heisk.* 338; *McDowell v. Keller*, 1 *Heisk.* 452; *Beck v. Knabb*, 1 *Overt.* 56. As it does not affirmatively appear that plaintiff had such notice before his motion was made, these questions are out of the way, and we can consider the question on its merits, and in connection with another question yet to be noticed.

The motion on the second ground was not sustainable. "The application" for the writs was made at the first term.

The first objection, however, was well taken. The failure to appeal was negligence not legally excused or accounted for. *Cox v. Kent*, 1 *Leg. Rep. (Tenn.)* 246. But the difficulty in plaintiff's case is that the motion to dismiss the certiorari came too late. It appears that at the succeeding term after the petition was filed plaintiff demanded a jury, and later, at the same term, consented to a continuance. The plaintiff insists that these orders appear to have been made only in the case, without reference to or acknowledgment of the certiorari, and must be applied to the still pending appeal. His counsel put the proposition thus: "The motion to dismiss the appeal does not appear from the record ever to have been renewed, and the case on appeal still stands on the docket for trial." This is true, and as a consequence the whole case is yet there for trial. There were not two cases. There were two efforts, one by appeal and one by certiorari, to bring the one case to the circuit court. So long as it remains there, there could be no final judgment. The dismissal of the petition for certiorari would only be a mere form, on the theory that the appeal was pending. In this aspect the demand for a jury and continuance by consent must be held a waiver of objection to appeal or certiorari for irregularities, and to leave the case standing on its merits for trial in the form it then was,—the certiorari bond supplying the defective appeal bond,—and the petition, under the circumstances, could not be dismissed. The waiver of objection to the appeal, and failure to make objection to the petition, at that term, must be held to be a recognition of the existence of a pending case for trial on the merits, and it must be so tried. Plaintiff's failure to object to the appeal must be taken as conclusive that he recognized the certiorari at that term as obviating all objections. If the case is pending at all, it is pending on all preliminary efforts to make it so preceding the continuance. The judgment is therefore reversed, and the case remanded for trial. The costs of this court will be paid by defendant in error.

## HOPE v. HAMILTON COUNTY.

(Supreme Court of Tennessee. Oct. 5, 1898.)

## COUNTY COURT—POWER OF MEMBER TO CONTRACT FOR EXTRA SERVICE—COMPENSATION—LIABILITY OF COUNTY.

1. A chairman of a building committee appointed from the members of the county court to superintend improvements made upon the court house and jail is not entitled to compensation, although his services were onerous and valuable, owing to the inattention and negligence of the architect employed to oversee the work.

2. A member of the county court cannot contract with such court for extra pay to render services necessary for the proper administration of the affairs of the county.

Appeal from chancery court, Hamilton county; T. M. McConnell, Chancellor.

Action by M. M. Hope against Hamilton county. From a judgment for complainant, reversed in the court of chancery appeals, plaintiff appeals. Affirmed.

Richmond, Chambers & Head and Thomas & Thomas, for complainant. C. B. Evans and Cooke, Swaney & Cooke, for defendants.

**WILKES, J.** This is an action by the complainant to recover for services rendered Hamilton county in superintending the extension and improvement of the court house and yard and jail of the county. The chancellor gave judgment for complainant for \$1,000 and some interest and costs, and the county appealed, and assigned errors. The court of chancery appeals reversed the chancellor, and refused any recovery, and dismissed complainant's bill, and he has appealed, and assigned errors.

The facts, so far as necessary to be stated, are that, in 1890, Hamilton county determined to make extensive improvements upon its court house, jail, and grounds, the work to cost many thousand dollars. A building committee was appointed of the members of the county court, and complainant was its chairman. There was no agreement made for any compensation to the chairman or any member for his services on the committee. Some outside conversations were had with the judge and members of the county court to the effect that compensation would be paid. An architect was employed to oversee the construction and improvements. It appears that he was negligent and inattentive, and that the complainant gave much time and service in looking after the improvements, for a part of the time giving it his undivided attention and entire time. In January, 1896, at complainant's instance, a special committee was appointed to report what his services were worth. This committee reports the facts in some detail, and that complainant should have \$500 for his services. The quarterly court adopted this report, but upon a subsequent day of the term reconsidered this action, and rejected it. This suit was thereupon brought. The chancellor thought complain-

ant entitled to recover, and referred the matter to the master to report the amount. He reported \$1,000 as the proper amount, and this was confirmed by the court, without exception as to the amount.

There can be no doubt of the great value of complainant's services in this case, and of the benefit received by the county, but the difficulty is in finding any ground upon which to rest a legal liability against the county. It is clear in this case that if complainant was not a member of the county court, but had been employed or authorized as a private individual to do this service by it, the law would imply a promise to pay what the services were worth. Complainant cannot, however, claim in this capacity, since he clearly served throughout as a member of the court appointed on one of its committees, and selected as the head or chairman of that committee. It cannot seriously be insisted that a mere appointment of one of its members upon a committee by the county court, and service on that committee by the member, even though the service be onerous and beneficial, carries with it any legal right to compensation, any more than the appointment of a member of the general assembly to serve upon a committee to look after the material interests of the state would confer upon such member right to compensation against the state. In either case the matter of compensation is one which, if compensation can be given at all, addresses itself to the sense of justice and discretion of the body appointing the committee. There is a practice prevailing in the county court of appointing "committees," as they are styled, to look after important business transactions. There is no statute authorizing it, and it is in no sense the creation of an office. At most, it is but a designation of certain individuals to look after the matters committed to them, but they do this as members of the county court, and not as its employes. Every person who becomes a member of the court does so knowing that he may, and probably will, be called on to perform such services. Whether, as a matter of public policy, the court might stipulate to pay for such service, we need not now consider, as that question does not arise. In this case it appears that the services performed by complainant were doubly onerous, and greatly more beneficial, because of the negligence of the architect, but this cannot alter the rule. It does not appear that complainant ever brought notice of this fact to the court, which he might have done, and thereupon no doubt secured an order to meet the exigency. It clearly appears that he rendered faithful services, relying upon the court to remunerate him, which, for its own reasons, it did not do.

We do not consider it necessary to view the large number of cases cited by the court of chancery appeals and by counsel, as we are of opinion the rule governing the case is almost elementary, and can be but little aided by citation of authorities. The case of City

of *Ellsworth v. Rossiter*, 40 Kan. 237, 26 Pac. 674, is strongly relied on for complainant. In that case the city appointed a committee to establish and erect waterworks. One Rossiter was on the committee. No compensation was provided, and he brought suit for his services. He was a civil engineer. It does not appear that he was a member of the city council. The court held, in substance, that he was not a public officer, within the rule which gives no compensation to such officer except as provided by law, but was rather an employé of the city, and gave judgment. In *Leavenworth Co. v. Brewer*, 9 Kan. 210, a county attorney on salary was, at the instance of the county commissioner, sent beyond the limit of the county to attend to a suit for the county, and, the county having refused compensation, he sued for it and recovered. In this case the service was clearly beyond the scope of the employment, and there was raised an implied promise to pay for it. When the attorney was employed to do it he was not a member of the county court, and the case is not in point here. Whatever may be said as to the moral obligation of the county to pay for this service, we can see no ground of legal liability which the court can recognize, and the decree of the court of chancery appeals is affirmed, with costs.

#### Petition to Rehear.

Upon petition to rehear this cause, it is pressed upon the court that the services for which compensation is asked, the superintendence of improvements on the court house and jail, were outside of, and entirely independent of, complainant's duties as a committeeman, and were such as belong to a superintendent or architect, and such as did not devolve as matter of law or duty on complainant as committeeman or member of the county court. It was assumed that this feature of the law was overlooked. A mere glance at the opinion is sufficient to show that this feature was fully considered, and it was stated that the labor performed by the complainant was faithful and continuous, and made more onerous and necessary, and at the same time beneficial to the county, by the failure of the architect to perform his duty. The record shows that the complainant made frequent reports of progress to the county court, and always in the character and capacity of a committeeman, and it does not show that he at any time brought to the court's attention that he was discharging an architect's duties, or that the architect was derelict in the discharge of his own duties. If, however, we were to grant that he did service outside of his duty as committeeman (which, under the record, we could not concede), still it is clear that he did not do it under contract with the county, but as a volunteer, and, under the ordinary rules of law as between individuals, he could not recover for gratuitous services. The theory now pressed upon us that complainant can re-

cover as upon a contract, either expressed or implied, presents a grave question, and that is whether a member of the county court elected to fill that office, his compensation being fixed by law, can contract with the county court, of which he is a member, to render service for extra pay, and especially a service performed upon a committee appointed to attend to a matter necessary for the proper administration of the affairs of the county. It is the policy of the law to prohibit members of the county court and of municipal councils generally from making contracts with their own members for any purpose which calls for compensation out of the public treasury. The theory is that the same individuals shall not authorize a contract, fix compensation for it, and elect or appoint one of their own members to execute it, and then receive pay therefor, no matter how well a member may be fitted for the particular service. Accordingly the act of 1869-70 (chapter 92, § 1) provides that "it shall not be lawful for any officer, committeeman, director or other person whose duty it is to vote for, let out, overlook, or in any manner to superintend any work, or any contract in which any public municipal corporation, county or state shall or may be interested, to be directly or indirectly interested in any such contract." Shannon's Code, § 1133. "Should any person acting as such officer, committeeman, director or other person above referred to be or become directly or indirectly interested in any such contract he shall forfeit all pay or compensation therefor." Section 1134. "Such officer shall be dismissed from such office as he then occupies and be ineligible for the same or a similar position for ten years." Section 1135. It is difficult to see how, under these provisions, the county court or any city council can make a contract with any of its members to do any sort of service for compensation to be paid out of the treasury, or can pay a member for such services upon a quantum meruit. This act is but an extension of the provisions of the act of 1857-58 (chapter 7, § 1) to the county and state as well as to municipal corporations, prohibiting any person holding office from taking any contracts from the body of which he is a member. See Shannon's Code, §§ 1995, 1996. The theory of all these laws is that in rendering services which should be done by members of these bodies, pertaining to their official position, they act simply in discharge of duties for which the statute provides compensation. For all other services they are incompetent to contract, and for such outside work it is unlawful for them to contract or receive compensation. If it becomes necessary to contract for such services, such contract must be made with a disinterested third person, and not with a member of the body whose office it is to make the contract and provide the pay. We cannot ignore these provisions of the statute, no matter how necessary or valuable the services of com-

plaintain may have been, nor how worthy of compensation, if done by a third person. The petition to rehear is dismissed.

### LOGAN v. OGDEN.

(Supreme Court of Tennessee. Oct. 19, 1898.)

ACCOMMODATION INDORSERS—RIGHTS INTER SE.

Two persons concurrently signing as accommodation indorsers before delivery of note are, as between themselves, equally liable thereon, the order in which their names appear being immaterial.

Appeal from chancery court of Knox; H. B. Lindsey, Chancellor.

Suit by S. T. Logan against S. R. Ogden. Decree for complainant for less than asked was affirmed on his appeal to the court of chancery appeals, and he again appeals. Affirmed.

Cornack, Sansom & Cornack, for appellant. D. W. Kuhn, for respondent.

CALDWELL, J. W. H. Salmon executed a negotiable promissory note to Jennie Freymond for \$875, payable in 90 days. Before delivery, and to give credit with the payee, S. R. Ogden and S. T. Logan wrote their names across the back of the note for the accommodation of the maker. Before the name of either Ogden or Logan was so written, each of them knew that the other was to join him in that favor to the maker. Nothing was said about the order in which their names should appear upon the back of the note; but, as a matter of fact, Ogden wrote his name first, and a few minutes later Logan wrote his name under that of Ogden. The note was then delivered. When it matured, the maker made default, and Logan paid the note in full. Thereafter Logan brought this bill in the chancery court against Ogden, to recover from him the whole amount so paid, with interest. This measure of recovery was sought upon the theory that the complainant and the defendant were second and first indorsers respectively, and that, being so, the defendant, as between them, was primarily liable on the note. The defendant, answering, denied that he was first liable, but conceded his liability for one-half the sum paid by the complainant. The chancellor adjudged Logan and Ogden jointly liable, and thereupon pronounced a decree in favor of the complainant against the defendant for one-half the amount paid in satisfaction of the note. Upon appeal by Logan, that decree was affirmed by the court of chancery appeals. Logan has appealed again, and here insists that the theory of his bill is sound in law, and that he should now be allowed a recovery for the full amount paid by him.

It is now well settled that persons who sign their names (as did Ogden and Logan) in blank on the back of a negotiable promissory note, before delivery, for the accommo-

dation of the maker, and to give it credit with the payee, are co-makers with the original promisor, and with him jointly and severally liable to the payee. *National Bxch. Bank v. Cumberland Lumber Co.*, 100 Tenn. —, 47 S. W. 85; *Society v. Edmonds*, 95 Tenn. 53, 31 S. W. 168; *Bank v. Jefferson*, 92 Tenn. 537, 22 S. W. 211; *Morrison Lumber Co. v. Look-out Mountain Hotel Co.*, 92 Tenn. 9, 20 S. W. 202; *Good v. Martin*, 96 U. S. 93. As between themselves and the payee of the note, Ogden and Logan were co-makers with the original promisor. As between themselves and the original promisor, they were joint sureties for him. As between themselves alone, they were joint sureties. In all of these relations they were equally liable for the payment of the note. In no aspect of the facts disclosed did they sustain the relation of first and second indorsers. Each signed his name at the instance of the original promisor, and for his accommodation, and, in so doing, assumed unconditional liability to the payee, with the knowledge that the other was doing the same. They acted concurrently, from the same motive, and to the same end. No importance can be attached to the mere fact that Ogden's name appears first on the back of the note, when it is remembered that each of them knew before either signed that the other would sign with him, and that the sole object of their signing was to give credit to the note. The understanding of both was the same. Both signatures were to be attached for the same purpose, but they could not be attached at precisely the same moment of time, or on the same space. One had to precede the other, and which it was or might be was wholly immaterial under the circumstances of the case. Affirmed.

### CHATTANOOGA ELECTRIC RY. CO. v. LAWSON et al.

(Supreme Court of Tennessee. Oct. 22, 1898.)

INJURY TO EMPLOYE—VICE PRINCIPAL—CONTRIBUTORY NEGLIGENCE—ASSIGNMENT OF ERROR.

1. Assignment of error that the verdict is "against the charge" is superfluous, there being one that it is against the evidence.

2. It is not negligence as matter of law for one working under a track foreman to attempt, at command of the latter, to board a train, consisting of a flat car and trolley car, while going at the rate of three or four miles an hour.

3. A track foreman who is at the time running a trolley car and flat attached, carrying tools and materials to a point on the road, and is controlling the cars, and is in charge of the motor as conductor, is a vice principal as regards his negligence in ordering one of the track hands to board the cars while in motion, or in failing to stop them while such employé is hanging onto the railing which he caught hold of in his attempt to get on board.

Appeal from circuit court, Hamilton county; Floyd Estell, Judge.

Action by Ida N. Lawson and others against the Chattanooga Electric Railway Company.

Judgment for plaintiffs. Defendant appeals. Affirmed.

Brown & Spurlock, for appellant. Marchbanks & Mathews, J. T. Mathews, and W. T. Murray, for respondents.

SNODGRASS, C. J. Suit by children for damages for the negligent killing of their father. Declaration has two counts; first averring general negligence of the railway company, and second negligence resulting in giving sudden order obeyed in an emergency. There was another count, for associating deceased with incompetent fellow servants, but this was abandoned. Judgment for plaintiffs for \$6,000, motion for new trial overruled, and appeal in error.

There are three assignments of error,—no evidence to sustain the verdict, objection to charge given by the court and refused, and excessive damages. The errors assigned also include statement that the verdict was "contrary to the charge of the court," but this is superfluous. It can and does mean only that it is against or not supported by any evidence. If a charge is correct, and there is a verdict without evidence, it is, of course, "against the charge." Therefore, if the charge is satisfactory, the objection that there is no evidence to sustain the verdict necessarily implies that it is "against the charge."

The court had charged correctly that, to justify effort to obey order of a superior in a hazardous matter, the order must be immediate and upon a sudden emergency or exigency. There was no such immediate order, and plaintiffs were not entitled to recover on that count. If entitled at all, it must be for negligence not thus specifically averred; and the whole case turns upon one point,—whether, under the evidence, the track foreman, by whose negligence the injury, it is claimed, was occasioned, was the superior of deceased, in the sense of a vice principal, and was or not his negligence, if proven, personal or official. The plaintiff in error makes through its counsel a lengthy and learned argument to show that such a superior does not so represent the principal as to charge it with responsibility, and cite many cases to that effect. It attempts also to show that, when properly analyzed, the Tennessee cases are now in accord with this view. In this, counsel are in error. Whatever the doctrine may be elsewhere, it is clear that in this state a section boss or track foreman is a vice principal, and for his negligence while acting officially for the master the master is answerable. This has been too long settled even to need statement, much less citation of cases. The only question is whether the negligence was personal or official. Lawson, who was killed, was one of a gang of track hands. He was a subordinate under Nave, the track foreman. Lawson was working with other hands on the track,

under the control and orders of Nave, who that day and for some days previous had been running a trolley car with flat car attached, carrying tools and materials over the road, depositing the latter about a quarter of a mile beyond where the deceased was working. Nave was controlling the cars, and was in charge of the motor, acting as conductor and motorman. He had the right to order deceased on or off the cars. Evidence believed by the jury (and that is taken as conclusive here, after verdict and judgment) shows that he commanded deceased, who was a subforeman, to take four or five men, catch the cars as they would pass, and go to their destination, and unload. It was upgrade, and he would not stop. This deceased had done on several trips. On the one in question, and while the cars conducted by Nave were going at the rate of three or four miles an hour, he attempted, in obedience to order before given, to get onto the front platform, caught on an iron rod or hand railing about the platform, slipped, and was swung around in front of the car. He held on for some distance, somewhere from 15 to 45 feet, and then fell on the track, was run over and killed, both cars passing over his body, and some car length beyond. There is evidence tending to show that Nave could have stopped the cars from the time he swung round until he fell. Of course, there is evidence to the contrary; but here, after verdict, the case must be put upon the strongest evidence, and upon this it must be determined whether there was any evidence to sustain the verdict. We are of opinion that there is evidence to sustain it. The danger of the effort to get on was not, at most, very great, and it cannot be said as a matter of law that it was so glaring as would prevent recovery. The question was one for a jury, as well as its effect (if not the proximate cause of the death), in mitigation of damages. The charge was full and fair on both points, and there is no reversible error either in the fact or amount of the verdict.

This leaves for determination the question as to whether the negligence of the foreman was official, in contradistinction to personal, and we are of opinion that it was. It was Nave's duty to control the cars. At least it appears to have been assigned to him, for he had been for some time doing it, and there is no evidence that any other conductor or motorman ever did this during that work, and it was also his duty to order the men on and off of the cars. What he did or omitted to do, therefore, if negligent, was the master's negligence. He was running by there without stopping before or after deceased caught the car, having given orders to board them while in motion. The jury had the right to find this was negligence, and that it was official.

The charge of the judge is complained of that he did not instruct the jury that, upon the facts, it would only have been in the capacity of a fellow servant that Nave was

acting, and that the court's charge omitted to distinguish between personal and official negligence, in a paragraph quoted in the brief. Waiving the question as to whether the charge could be looked to at all, it not appearing to have been signed, it is sufficient to say that it would have been error to have given the instruction asked; and as to objection to the paragraph quoted, as supposed error, the omission is supplied in another paragraph of the charge, in which the judge refers to the "superior" as necessary to be one "standing in the place of the master." *Railroad Co. v. Spence*, 93 Tenn. 173, 23 S. W. 211. But this is wholly immaterial. In this case, upon the facts, the track foreman was a vice principal; and whether the court went into such distinction as to personal or official negligence (when he referred only to negligence) is not important. It could not be reversible error in a case in which the distinction was not called for. Judgment affirmed.

### KNOX v. SOUTHERN RY. CO.

(Supreme Court of Tennessee. Oct. 15, 1898.)  
INJURY TO EMPLOYE—FELLOW SERVANT—NEG-  
LIGENCE.

1. A boss over the wiper in an engine house, whose duty it is to give the wipers their orders to clean the locomotives, and to see when they are ready to be moved out, to open the doors of the engine house, give the signal for moving the locomotives, and give orders for the men to adjust the turntable, is not a vice principal, so as to make the employer liable for his failure to see that the wiper was out from under a locomotive before giving the signal for it to leave the engine house.

2. Where a wiper, who was working up among the rods and beams under a locomotive when it was ordered out of the engine house, was crushed by the centerpiece of the turntable as the locomotive passed over it, the boss over the wipers cannot be held negligent, it not appearing that it was his duty to look under a locomotive, before ordering it out, to see if a wiper was there, and the engineer having, as usual, before starting, rung the bell as a warning, and the engine, after being started, having been stopped before the turntable was reached, without any outcry or any attempt to get out being made by the wiper.

Appeal from circuit court, Knox county;  
Joseph W. Sneed, Judge.

Action by Mollie Knox against the Southern Railway Company. Judgment for defendant. Plaintiff appeals. Affirmed.

N. N. Osborne, W. H. Shaver, and Carnack, Sansom & Carnack, for appellant. Journalman, Welcker & Hudson, for appellee.

**WILKES, J.** This is an action for personal injuries resulting in the death of the husband of plaintiff. Upon the trial, the plaintiff introduced her evidence, and the defendant demurred to the same. There was joinder in the demurrer, and, on hearing, the court sustained it, and dismissed the suit at plaintiff's cost, and she has appealed.

The judgment upon the demurrer recites

that, if there was negligence of a third person causing the death, it was that of a fellow servant, for which the principal is not liable. It appears that the deceased was an old man, and was employed as a hostler or engine wiper. His duty was to wipe off the underside of the engines as they stood in their stalls in the engine house, over a pit dug out for this purpose. He was so engaged just previous to the accident. The proof shows that a wiper can get into the pit under the engine while it stands in its stall, and wipe off the underpart of the engine. In order to reach some of the higher parts, it is necessary for him to climb up among the underworks of the engine. There were a number of stalls in the roundhouse, and a number of wipers employed, some to wipe the outside, and some "underwipers," to clean under the engines. The deceased was one of the latter. Over the wipers was a boss. The other wipers work under his direction. It was his duty to give the men their orders, look after the engines, and see when they are ready to be moved out of the roundhouse. It was his duty to see if there was anything on the track, open the doors of the engine house, and give signals for the engines to move out, and to give orders for the men to adjust the turntables. This injury occurred at night. The deceased had been wiping the underside of an engine. Another engine was standing near, on an adjoining track, also being wiped. The deceased had a lantern lighted with him under his engine. It was found after the killing, in the pit, sitting on the ground. Deceased had been doing this work for 14 months, working in the night, and sleeping in the daytime. There was a turntable just outside the doors of the engine house, on which each engine went in entering and leaving the house, so as to get the proper direction or track. It appears that this engine was moved out, the doors of the room were open, the bell rung, the engineer got upon his engine, and the boss wiper ordered the men out to the turntable to adjust it. This was turned in the proper position, and the steam was applied, and engine moved out to the table. It stopped some seconds before it reached the turntable, until the table could be adjusted. When the engine proceeded to back off the table, the end at which it went off was depressed, and the other end tilted up somewhat; and just at this time, while the pilot of the engine was passing near the center of the turntable, cries of distress were heard. The engine passed off, and deceased was discovered about the center bolt or pin of the turntable, between the rails of the track. His legs were broken, and the body badly mangled. He died soon afterwards from his injuries.

The first question is whether the "boss wiper," as he is called in this case, was a superior servant to the deceased, in the sense that he stood as a vice principal, representing



the master, at the time and in the matter of this accident. The boss wiper was evidently the foreman of the gang of wipers, and directed them when to work and what to do. It does not appear that he had any power to employ or discharge them. He had certain duties of his own to perform, which may be termed of a higher grade or dignity than that of an ordinary wiper; such as opening the doors, giving the signal for the moving of the engines, ordering the hands to go to and adjust the turntable. It does not follow because a servant is a "foreman" that he is a vice principal, so as to make the latter responsible for his negligence; but he must so far stand in the place of the master as to be charged in the particular matter with the performance of a duty towards the inferior servant which, under the law, the master owes the servant. *Allen v. Goodwin*, 92 Tenn. 387, 21 S. W. 760, and cases there cited. We do not think that the boss wiper, in discharge of his duty, stands in the place and stead of the master as to the wipers, but as their fellow servant, albeit he is their foreman, and directs them when and where to work.

But, even if he be considered as a vice principal, we cannot see in what respect he was negligent upon this occasion. It is not shown that it was one of his duties to look under the engines, and ascertain whether a wiper may be under it, before he gives the signal for it to leave the engine house. The wiper is presumed to know something of the movements of the engine himself, and to be on the lookout for its starting. In addition, the engineer rings the bell before starting, as a warning; and this was shown to have been done. In addition, in this instance the boss had ordered the wipers out to the turntable; and, if in the line of his duty, the deceased should have gone then. Instead of this, he was evidently up among the rods and beams, on the underside of the engine, when it started; and, though it stopped before it reached the turntable, the deceased made no effort to leave his place of danger, and made no outcry. The unavoidable inference is that he must have been asleep, or, if awake, reckless in his conduct in remaining where he was until he was crushed by the centerpiece of the turntable in passing over it. We do not see how upon any hypothesis the railroad could be held liable for such accident; and the circuit judge was correct in sustaining the demurrer and dismissing the suit, and his judgment is affirmed, with costs.

#### ARMSTRONG v. STATE.

(Supreme Court of Tennessee. Oct. 19, 1898.)

##### VERIFICATION—PLEA IN ABATEMENT.

The verification of a plea in abatement, "The defendant makes oath that the statements in the above plea are true," is sufficient, without addition of the words, "in substance and in fact."

Appeal from circuit court, Hamilton county; Floyd Estell, Judge.

Albert Armstrong was convicted of larceny, and appeals. Reversed.

Clift & Cummings, for appellant. G. W. Pickle, Atty. Gen., for the State.

CALDWELL, J. Albert Armstrong was indicted for the larceny of a watch. The person arrested under that indictment filed a plea of misnomer in abatement. This plea was stricken out because, in the opinion of the court, not sufficiently verified. The defendant refused to plead further, and thereupon the court directed a plea of not guilty to be entered. Upon the issue thus formed the defendant was tried, convicted, and sentenced to serve four years in the penitentiary. Motions for a new trial and in arrest of judgment were then successively made and overruled. The defendant appealed in error to this court, and here insists that his plea was improperly stricken out. The verification of the plea was in these words: "The defendant makes oath that the statements in the above plea are true." This the trial court ruled to be fatally defective, because not followed by the additional clause, "in substance and in fact." In this ruling the court below was in error. The affidavit was sufficient as made, and the addition of the other words could have made it no better. The statute prescribes no particular form of verification. Its language is: "No plea in abatement shall be received in any court, unless its truth is verified by the oath of the party or otherwise." Code, § 2901; Mill. & V. Code, § 3611; Shannon's Code, § 4622. If the defendant makes oath, as in this case, that the statements in his plea are true, "its truth is verified by the oath of the party," and that is all the statute requires. If he swears the plea is true, the truth of the plea is verified by his oath; and the use of the words, "in substance and in fact," add nothing to its legal effect. Judge Caruthers, than whom no better pleader under the Code has been known, gives, as a proper and sufficient form of verification of a plea in abatement, the following: "The defendant makes oath that the above plea is true." Caruth. Lawsuit (Ed. 1866) § 185. In Martin's edition of the same work (section 83) the clause, "in substance and in fact," is added. The latter form is the one given by Chitty (2 Chit. Pl. 445), and is in rather general use. 1 Enc. Pl. & Prac. 29; 1 Enc. Forms, 26, 27, and citations. This form is undoubtedly good, yet it is not the only one that is good. The requirement is that the affidavit as to the truth of the plea must be positive, and leave nothing to be collected by inference. *Bank v. Jones*, 1 Swan, 391; *Wrompelmier v. Moses*, 3 Bart. 470. In the Bank Case the statement was that the affiant "is informed and believes that the above plea is true in substance and matter of fact." The court said the affidavit was insufficient, because made on information and

belief, rather than upon knowledge; that the affidavit must be positive, stating "that the plea is true in substance and fact,"—not meaning by the latter, however, to prescribe in exact form, but only to say what was requisite as contradistinguished from a verification on information and belief. 1 Swan, 392. In *Wrompelmel's Case* the affidavit was that the "facts stated in the plea are true, to the best of his knowledge, information, and belief." The court said the verification would have been good if it had stopped with the statement that the "facts stated in the plea are true," but that it was rendered uncertain and insufficient by the qualifying words added. The verification in the present case is positive, absolute, and unqualified, and, being so, it is entirely sufficient. Reverse and remand.

# NASHVILLE, C. & ST. L. R. CO. v. GANN.

(Supreme Court of Tennessee. Oct. 15, 1898.)

## FELLOW SERVANT—SECTION BOSS AND SECTION HANDS—ASSUMPTION OF RISK.

1. A section boss, in operating the brake on a hand car, is a fellow servant of section hands under him, who, under his orders, are traveling with him on the car; so that the railroad company is not liable for his negligence in losing hold of the brake.

2. A section boss, in not providing a proper brake for the hand car for those under him, occupies the position of the master.

3. Employés who operate a hand car knowing of the defective condition of the brake assume the risk.

Appeal from circuit court, Marion county; Floyd Estell, Judge.

Action by G. W. Gann against the Nashville, Chattanooga & St. Louis Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

W. D. Spears, for appellant. W. T. Murray and B. E. Tatum, for respondent.

**WILKES, J.** This is an action for personal injuries, tried by the court and jury, and resulting in a verdict and judgment for plaintiff for \$1,250. The defendant railroad has appealed and assigned errors.

The first error assigned is to the admission of certain statements made by Cox immediately after the accident occurred, as to the cause of it and how it happened. It is insisted they were not part of the *res gestæ*, and were therefore inadmissible. We need not pass upon this assignment, as the statements made by Cox would not change the result of the case, or place it in any different light than if they had been rejected.

It is next insisted that the negligence which caused the accident in this case was the personal negligence of Cox, and not official negligence, and that the court not only failed to make the proper distinction between the two classes of cases, but refused to charge a request which would have pointed out the difference. It appears that Cox was a section

boss, and Gann was a section hand under him; that Cox had authority and control over Gann; that he was subject to his orders; that Cox had the right to employ and discharge at will, and had complete control of the section, and hands upon it. It appears that Cox one evening ordered the section hands to get on a hand car to go to a point on the road known as "Ramsey's Bottom," to measure up a lot of old iron. Cox, as was his custom, took a position at the brake for the purpose of holding it and guiding the movements of the car. Gann and the other hands under direction of Cox operated the propelling lever which drove the car. The accident occurred on a steep downgrade, and the car was running at about 15 miles an hour. The brake was a peculiar one, and appears to have been of Cox's own invention. The main insistence is that Cox negligently applied, or failed to apply, this brake in such a manner as to suddenly check the car. It appears that it acted upon a principle the reverse of the ordinary brake, and that it was necessary to hold it off or it would apply itself automatically, and immediately stop the car unless held off. The sudden checking of the car, in consequence of Cox's letting the brake loose, forced the lever down on the plaintiff's knee, and drove the leg bone down into the ankle, permanently injuring the plaintiff. He fell from the car, and it was at once stopped, and Cox went back to where he was lying, and, according to the proof of two witnesses (though contradicted by Cox himself), stated that he did not go to do it; that his coat was about to get caught in the wheel, and he reached back for it with his left hand, and that threw him around so that the brake handle came out from under his right arm, and the brake went on. This is the statement to which objection was made. There is nothing in it prejudicial to the defendant in this case, upon its theory.

It is insisted that Cox, in operating this brake, was a fellow servant with Gann and the other hands, not filling the place of the master, but, for the time being, in the work and doing the service of a servant. The court charged the jury, in substance, that, under the facts as thus stated, Cox and Gann were not fellow servants, and the defendant would be liable for Cox's negligence. He was requested to charge, in substance, the reverse of this proposition, and declined. It has been held in this state that a section boss and his subordinates occupy the relation of master and servant as to each other. It is evident, however, that a man may occupy the position of a master or vice principal in some respects and in the doing of some acts, and that of a fellow servant in other respects and in doing other acts. If a superior undertakes to do the work of a fellow servant, and puts himself in the place to do the work of a fellow servant, he becomes one as to that particular work, and his negligence in such case is that of a fellow servant, and not that of a vice prin-

cipal. An individual may act in a dual capacity; not, it is true, at the same moment and in the same act, but he may, while generally acting as vice principal, and standing in the place of a master, lay aside that character and authority, and occupy for the time being the place and do the work of a fellow servant; and, while thus engaged in the particular act, he is, in the eye of the law, a fellow servant, and the principal is not responsible for his negligence. This distinction is clearly pointed out in the case of *Railroad Co. v. Bolton*, 99 Tenn. 277, 41 S. W. 442, and the cases there cited. See, also, *Allen v. Goodwin*, 92 Tenn. 385, 21 S. W. 760. The distinction is plainly and forcibly stated in *Stockmeyer v. Reed*, 55 Fed. 259, as follows: "The question is not one of rank. If the superintendent was acting at the time in the capacity of a fellow servant, and his negligence caused the injury, the master is not liable. Notwithstanding his superior power, such superintendent is still a servant; and, in respect to such acts and work as properly belong to a servant to do, he is, while performing them, discharging the duties of a servant." See the same case on appeal, 20 C. C. A. 381, 74 Fed. 186. The same distinction is held in *Arkansas (Railway Co. v. Torrey)*, 58 Ark. 217, 24 S. W. 244, and cases there cited; so, likewise, in *Indiana (Nail v. Railway Co.)*, 129 Ind. 264, 28 N. E. 183, 611; *Taylor v. Railroad Co.*, 22 N. E. 876. New York, Pennsylvania, Michigan, and other states hold the same doctrine. *Hankins v. Railroad Co.*, 142 N. Y. 416, 37 N. E. 466; *Ross v. Walker*, 139 Pa. St. 42, 21 Atl. 157, 159; *Harrison v. Railroad Co.*, 79 Mich. 409, 44 N. W. 1034. And the same doctrine is held in *North Dakota*, *Minnesota*, *Georgia*, *Oregon*, *Virginia*, *Vermont*, *Kansas*, *California*, *Massachusetts*, *West Virginia*, *Illinois*, *South Carolina*, *Rhode Island*, and other states. The states of *Ohio* and *Missouri* may be said not to recognize the distinction clearly and fully. And *Texas*, under an act of the legislature of that state defining the relation, seems to be undecided, if not antagonistic to the view. *Railway Co. v. Reed*, 88 Tex. 439, 31 S. W. 1058; *Sweeney v. Railway Co.*, 84 Tex. 433, 19 S. W. 555. See the subject elaborately discussed in 47 Cent. Law J., Aug. 12, 1898, p. 130 et seq. See, also, *Bailey, Pers. Inj.* §§ 1834, 1972, 2154, 2176, 2535, relating to master and servant.

The court was asked to charge that if plaintiff was one of a gang of laborers at work on the defendant's road, and if the gang was under Cox as foreman, and if Cox had charge of the brake, and the injury was brought about through the negligence of Cox in letting the brake loose and suddenly stopping the car, or throwing it on and suddenly stopping the car, the negligence would be the personal negligence of Cox, as distinguished from his official negligence, and defendant would not be liable; that, in order to charge the defendant, Cox must so far stand in the place of the master as to be charged,

in the particular matter, with a duty towards the defendant which, under the law, the master owed to him, and his negligence in such case could not be such an obligation. This was refused, and was, we think, error. We think the case is almost identical with that of *Railroad Co. v. Bolton*, 99 Tenn. 276, 41 S. W. 442, and with that of *Railroad Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843. See, also, *Railroad Co. v. Charles*, 162 U. S. 359, 16 Sup. Ct. 848; *Martin v. Railroad Co.*, 166 U. S. 403, 17 Sup. Ct. 608. There is a conflict in the evidence as to whether this brake was in good and safe condition; and this is material, because, even if Cox was doing the work of a fellow servant in handling the brake, and for his negligence in so doing the company would not be liable, still, if he failed to provide safe and proper appliances, he would in that matter be doing the work of his principal, and for his negligence in not providing safe appliances the company would be responsible, as was held in *Railroad v. Northington*, 91 Tenn. 56, 17 S. W. 890.

The proof tends to show that the brake was somewhat worn, so that it did not work as it would if in perfect condition, and that, in consequence of this wearing, Cox was required to hold it off with his hands all the time; otherwise, it would automatically close upon the wheels, and immediately stop the car. The court charged the jury that "if the brake was not the kind ordinarily used in the management of hand cars, and was not reasonably safe, and the plaintiff knew its condition, and continued in the employment of defendant knowing just what this brake was,—that it was defective and not reasonably safe,—he could not recover." The proof leaves no doubt but that Gann knew the condition of the brake, whether it was safe or defective; so that we cannot affirm the judgment upon the ground that the brake was defective, or was so found by the jury. If they did so find, they must also have found that plaintiff had full knowledge of its condition.

It is urged upon us that this view of the law is inconsistent with the holding of this court in *Railroad v. Northington*, 91 Tenn. 56, 17 S. W. 890 et seq. We do not so regard it. In the *Northington* Case the section boss was recognized as the superior, as he is in this case. His negligence in the *Northington* Case was that of a vice principal, and was official. In this case it was that of a fellow servant, and was personal. In the *Northington* Case the section boss caused the gang to push before them a truck or push car containing two dump beds or boxes. In moving from one place to another. Instead of furnishing these dump beds with proper appliances to fasten them together, and thus to make it safe to push them over the track, there was no way to fasten them. To remedy this omission, the foreman stood upon the boxes with a foot in each, thus attempting to supply the place of proper fasten-

ings and couplings which it was his official duty to provide. In addition he was directing the movements of the car, and saw that the dump box was slipping, but calculated that it would not strike the platform, and took the risk of its doing so, without giving any warning to the crew. He was negligent, therefore, in not providing, in the first instance, safe and proper appliances, and, next, in requiring the car to be run on after he saw the risk and danger, and without notifying the crew of such danger. There was no evidence in that case that the foreman was in the habit of thus substituting his feet for a coupling appliance to hold the cars together, or that the crew was aware of such practice, in which event they might be held to have assumed the risk, if they did not object (as was charged in the present case). He was also negligent, while guiding and directing the movements of the car, in not stopping when he saw the danger, and in not notifying his crew of such danger; and in both these negligent acts he was clearly in the line of his official duty as vice principal. But in the case at bar, if the brake was defective, it had been so for some time, and the fact was well known to plaintiff. The section boss was giving no directions, and was not controlling the movements of the crew, but was manipulating the brake personally, which was a servant's place; and the accident was due to the unintentional negligent act of the foreman thus engaged, in allowing the brake to escape his control. We are of opinion there is error in the judgment of the court below, and it is reversed, and cause remanded for a new trial. Appellee will pay costs of appeal.

#### REEVES et al. v. ALLEN.

(Supreme Court of Tennessee. Oct. 22, 1898.)

LEVY, SALE AND CONVEYANCE—PROPERTY INCLUDED—STREET AS BOUNDARY.

Where the description in a levy and sale and conveyance thereunder calls for 60 feet front on M. street, and running back 140 feet, the 140 feet begin at the margin of the street, though the debtor's rights to the middle of the street are also included.

Appeal from chancery court, Rhea county; T. M. McConnell, Chancellor.

Suit by J. S. Reeves & Co. against W. G. Allen. From a decree of the court of chancery appeals reversing a decree for defendant, appeal is taken. Modified.

V. C. Allen, for appellant. Burkett, Miller & Mansfield, for appellees.

WILKES, J. This is an ejectment bill. The complainants hold under an execution sale and sheriff's deed, and the only question is where the beginning corner of the lot is, —whether in the center of Market street or at its eastern margin at the point of junction with Broyles street. Defendant concedes that complainants can hold according to their

sheriff's deed, and disclaims all that portion of the lot embraced in its calls, but contends that the beginning corner is the center of Market street, and not the eastern margin, and hence the line running with Broyles street will stop about 56½ feet short of where complainants claim to, the defendant owning the lot to the east of this point. The chancellor held with defendant's contention, and dismissed complainants' bill. The court of chancery appeals reversed the chancellor, and held that the line must start at the east boundary of Market street, and run eastwardly with Broyles street 140 feet; thus taking about 47½ feet of the lot claimed by defendant, but stopping short some 9 feet of Skillern's line, to which complainants claimed. It is assigned as error that the line should start at the center or middle of Market street, and not at its eastern margin. The levy and the sheriff's deed describe the lot as follows: "One house and lot situated on the northeast corner of Broyles and Market streets in Dayton, 8th district, Rhea county, Tennessee, fronting west 60 feet on Market street, bounded on the south 140 feet by Broyles street, on the east by Allen, and on the north by Hodges." If the line starts at the center of Market street, complainants will have of their 140 feet depth, 47½ feet of street to the east boundary of the same, and 92½ feet of lot not occupied by the street. The court of chancery appeals report that to extend this line to the Skillern line would make it 149 feet from the east margin of Market street, and to this extent of 9 feet they refuse the relief prayed, and from this there is no appeal. The court of chancery appeals recognizes the general rule that a deed which calls for a highway or street carries title to the middle line or center of the street, where the grantor owns to center. But when the intent appears to be to convey only to the edge or margin of the street, such intent will control. Accordingly, a deed calling for a side of the street does not carry title to the middle. Railroad Co. v. Bingham, 87 Tenn. 522, 11 S. W. 705; Spaine v. Railroad Co., 1 Shannon, 181; 3 Washb. Real Prop. 635, and note. We think the proper rule is that when, in a conveyance, a lot is described as fronting so many feet upon a given street, and running back a specified distance to another street, the measurement will begin at the margin of the street or line up to which the grantee may occupy, and it will run back the distance to the margin or line of the next street, but the conveyance will be held, nevertheless, to cover the space on each street from the margin to the center, and to carry with it the grantor's right to the street subject to the public easement. In other words, while the measurement only begins at the margin of the street, and extends to the margin of the other, the conveyance will carry all the grantor's interest in each highway or street to its middle line, if the grantor owns to such middle line. So, in a

levy and sale and conveyance thereunder, when the description calls for 60 feet front on Market street and running back 140 feet, the 140 feet must be measured commencing at the margin of the street, though, as in case of a deed, it carries also the debtor's rights to the center of the street. Am. & Eng. Enc. Law (2d Ed.) p. 814, and note; *Kohler v. Kleppinger* (Pa. 1886) 5 Atl. 750. We are of opinion, therefore, that complainants are entitled to recover 140 feet from the margin of Market street, and the defendant's rights in the street in front of the lot pass with it, in the absence of words showing a contrary intent, and writ of possession will issue accordingly. The costs will be divided equally, and to this extent the decree of the court of chancery appeals is modified.

Defendant insists that in any event complainants cannot go beyond the fence which he claims marks the dividing line between that portion of his lot sold by the sheriff and that part retained by him, on the idea that the fence is a natural boundary called for in the levy and sheriff's deed. Waiving the question whether a fence can be treated as a natural object, the levy and sheriff's deed do not call for it, but simply for Allen's lot. The fact that the line as herein laid out runs through a portion of defendant's house cannot change the holding. If the house was there when the levy was made, it passed with it and the sheriff's deed. If it has been placed there since by defendant, it was at his own risk. As modified, the decree of the court of chancery appeals is affirmed.

#### CHATTANOOGA COTTON-OIL CO. v. SHAMBLIN.

(Supreme Court of Tennessee. Oct. 1, 1898.)

##### NEGLIGENCE—PLEADING.

A cause of action is not stated by a complaint merely alleging that on a certain day defendant "wrongfully and negligently killed" plaintiff's intestate.

Appeal from circuit court, Hamilton county.

Action by G. W. Shamblin, administrator of David L. Shamblin, deceased, against the Chattanooga Cotton-Oil Company. Judgment for plaintiff. Defendant appeals. Reversed.

Pritchard & Sizer, for appellant. Cooke, Swaney & Cooke and Richmond, Chambers & Head, for appellee.

BEARD, J. This action was instituted to recover damages for personal injuries received by the intestate of the defendant in error, while engaged in the service of the plaintiff in error, from the effect of which, it is alleged, he subsequently died. Upon an issue raised by the plea of not guilty, the case was heard, the trial resulting in a verdict in favor of the plaintiff below for \$5,000. The record is before us on assignments of error to the action of the lower court. The declaration filed in the cause is in words and fig-

ures following, viz.: "The plaintiff, G. W. Shamblin, administrator of the estate of David L. Shamblin, deceased, sues the defendant, Chattanooga Cotton-Oil Company, which is in court by summons, for twenty-five thousand dollars (\$25,000) damages, for that heretofore, to wit, on the — day of January, 1896, the defendant wrongfully and negligently killed David L. Shamblin, who left next of kin as follows: A father, G. W. Shamblin; mother, Sarah J. Shamblin; four brothers, John, Joe, Julius, and G. B. Shamblin; four sisters, Maggie, Mary, Annie, and Lucy Shamblin,—for whose use plaintiff brings this suit,—to their damages as aforesaid. Plaintiff herewith exhibits his letters of administration, and demands a jury to try the cause." To this declaration a demurrer was filed, raising the objection that it did not allege a cause of action against the defendant, in that it failed to state any facts or circumstances to put the defendant on notice of the negligence which was complained of, and which the company was required to defend. "Pleading," says Mr. Chitty, "is the statement in a logical and legal form of the facts which constitute the plaintiff's cause of action or the defendant's ground of defense. It is the formal mode of alleging that in the record which would be the support of the action, or the defense of the party in evidence." Continuing, this author adopts and embodies in his text the statement of Mr. Justice Buller that "one of the first principles of pleading" is "that there is only occasion to state facts, which must be done for the purpose of informing the court, whose duty it is to declare the law arising upon those facts, and of apprising the opposite party of what is meant to be proved, in order to give him an opportunity to answer or traverse it." 1 Chit. Pl. \*213. Again, under the caption of the "Modes of Stating Facts," he emphasizes it as the "principal rule" of pleading that the facts "must be set forth with certainty, by which term is signified a clear and distinct statement of the facts which constitute the cause of action or ground of defense, so that they may be understood by the party who is to answer them; by the jury, who are to ascertain the truth of the allegations; and by the court, who are [?] to give judgment." Id. \*233. The absolute necessity of this rule and for its enforcement has been recognized by many courts. In *McCune v. Gas Co.*, 30 Conn. 521, the plaintiff, in his declaration, alleged that the defendant company was organized to make and sell illuminating gas, with its pipes laid in the streets of the city for the purpose of enabling it to convey gas to its customers: that plaintiff's rooms were supplied with pipes and fixtures, which were connected with the mains of the defendant corporation, and that for a period of time it had supplied him, and that he still desired to continue the use of its gas, and was willing to pay for the same, and that it was the duty of the defendant to supply him, but that in wanton

disregard of his duty it declined to do so. With regard to this declaration the court said: "No contract for the supply of gas for an indefinite period is alleged to have been made by the defendant, nor, in fact, any contract at all. The entire foundation of the plaintiff's claim, as it is set out in his declaration, rests upon the supposed legal duty or obligation, independent of any contract, to continue the supply. But no facts are stated from which such duty or obligation arises, and the allegation of a duty or liability is of no avail, and will not help the declaration, unless the facts necessary to raise it are stated. It is but the statement of a legal inference, never traversable, and of no avail in pleadings." Subsequently the same court, in an action for the recovery of damages for a personal injury resulting in death, reannounced this as an essential rule to good pleading. *Hewison v. City of New Haven*, 34 Conn. 130. In *Railroad Co. v. Wilson*, 31 Ohio St. 557, and *Morrison v. Insurance Co.*, 69 Tex. 359, 6 S. W. 605, this rule is recognized and applied. In *Navigation Co. v. Dandridge*, 8 Gill & J. 248, in arresting a judgment rendered upon a declaration, full in every other respect, which failed to allege a consideration for the defendant's promise, the court said: "The object of all pleadings is that the parties litigant may be mutually apprised of the matters in controversy between them. The declaration should substantially present the facts necessary to constitute the plaintiff's right of action, that the defendant, being thereby forewarned of the nature of the proof to be preferred against him, may, if necessary, be prepared to contradict, explain, or avoid it." *Madden v. Railway Co.*, 35 S. C. 381, 14 S. E. 712, was an action to recover for personal injuries. With regard to the pleadings in that case it was said by the court that: "Negligence being a mixed question of law and fact, it is not sufficient to allege in general terms that an injury has been sustained by reason of the negligence of the defendant, but the plaintiff must go on, and allege the facts constituting such negligence." In *Conley v. Railroad Co.*, 109 N. C. 692, 14 S. E. 303, it was held that a complaint averring that "the plaintiff was by the wrongful act, neglect, and default of the defendant slain and killed," without more, was bad pleading; and in *Railroad Co. v. Harwood*, 90 Ill. 425, there was the same holding as to the averment of the declaration that a railway company "carelessly, etc., managed its engine and cars," so as to inflict injury, unsupported as it was by any statement showing in what the carelessness, etc., consisted; while in *Railroad Co. v. Whittington*, 30 Grat. 805, it was ruled on demurrer that a declaration alleging generally, without stating specific acts, that the plaintiff was injured in consequence of the negligence of the defendant in operating its road and cars, etc., was too general. In *Waldhler v. Railroad Co.*, 71 Mo. 514, a petition by an employe seeking a recovery for an injury,

and alleging, without stating specific facts, that the injury was the result of the negligence of the railroad company in using defective machinery and in running and managing its cars, was held fatally defective for uncertainty; and the same rule was applied to an answer to a complaint in *Harrison v. Railroad Co.*, 74 Mo. 364. In *Searle v. Railroad Co.*, 32 W. Va. 370, 9 S. E. 248, the rule requiring certainty in the statement of the facts constituting the cause of action is recognized as a correct one, but, as it had been modified by statute in that state, less fullness of detail was required than in other states, where there was no such statutory modification.

The cases that have been here collected were determined in states some of which adhere in a general way to the requirements of common-law pleading, while in others the code practice prevailed. With respect to the latter, Mr. Lawson, in his *Rights, Remedies & Practice* (volume 7, § 3462), on the authority of many cited cases, says that "it is a *sine qua non* under code pleading that the complaint or petition must contain a statement of the facts constituting the cause of action. It is the ultimate facts which must be stated, not the evidence of facts, or prohibitive facts, or the legal conclusions based on the facts." The rule of the common law, as has been seen, was not less strict. Under both systems this declaration is fatally defective. It must be conceded that some of the courts of this country at times, and other courts possibly all the time, have permitted plaintiffs to maintain actions for personal torts upon a simple statement that they were the result of the negligence of the defendants, but we think a majority of the courts and the best-considered cases recognize it as a requirement of good pleading that the facts constituting the negligence shall be set out, and especially in such a case as the present. As is well stated in the very valuable *Encyclopedia of Pleading & Practice* (volume 5, p. 861), it is necessary that "all the circumstances essential to support an action for death by wrongful act must be alleged or appear in substance on the face of the declaration or complaint." Coming now to this state, we find that Shannon's Code, § 4602, provides that "all pleadings shall state only material facts without argument or inference, as briefly as is consistent with presenting the matter in issue in an intelligible form." In construing the sections of the Code on the general subject of pleading, including that just quoted, in *Evans v. Thompson*, 12 Helsk. 536, this court said: "These wise and wholesome provisions are based on the sound principle that the rights of litigants are not to be sacrificed to mere technical verbiage, \* \* \* but are to be ascertained by the courts upon the statement of material facts in an intelligible form," etc. In *Cherry v. Hardin*, 4 Helsk. 202, this court had occasion to deal with section 4438 of

Shannon's Code (section 2747 of the old Code), which is in these words: "All wrongs and injuries to the property and person \* \* \* may be redressed by an action on the facts of the case," and construed it to mean that "matter, without multiplicity of words, is all that is required in notifying the adversary of which he is to answer or defend." We are entirely satisfied that the declaration in question does not meet the requirements of these sections as they were construed in these cases. It is insisted, though, that it is good under the authority of *Railroad Co. v. Pratt*, 85 Tenn. 9, 1 S. W. 618, and *Coal Co. v. Daniel* (Tenn. Sup.) 42 S. W. 1062. This is error. Neither of these cases involved a question of good pleading. In the first, the declaration set out the time and place of the injury, as well as the circumstances under which it occurred, and then alleged that the defendant "wrongfully and negligently ran its engines and cars \* \* \* upon the plaintiff." Under this declaration, evidence was admitted, over the objection of the defendant, tending to show that it was negligent in failing to observe the statutory precautions. It was insisted here, as in the court below, that this was error, as the declaration stated only a case of common-law negligence. This was the sole question in that case, and this court, speaking through the present chief justice, only re-announced the oft-repeated doctrine that our statutes prescribing the duties of railroads in order to avoid accidents were declaratory of the common law, and it was therefore held that this evidence was competent. No objection was made in either court to the declaration on the ground of insufficiency or vagueness, and none was considered. In the second, the question was, can a plaintiff, in his declaration, set out certain definite acts of negligence, and allege them as the occasion of his injury, and recover upon evidence of other and independent negligent acts? and this court, through Justice McAllister, said he could not. To this point was the argument of the opinion directed, and to it the references and the statements are to be confined. After a careful examination of the authorities, and especially our own statutes and decisions, we are satisfied that the circuit judge was in error in overruling the demurrer to the declaration in this case. This conclusion renders it unnecessary for us to consider other assignments of error. The judgment is therefore reversed, and the cause is dismissed.

#### BARNES et al. v. BLACK DIAMOND COAL CO.

(Supreme Court of Tennessee. Oct. 13, 1898.)  
SEVERABLE CONTRACT—INSTALLMENTS OF RENT—  
BY-LAWS—STATUTE OF FRAUDS.

1. The statute of frauds, to be availed of as a defense, must be pleaded.

2. A by-law of a corporation requiring a con-

tract for more than three months to be approved by the board of directors does not affect one who, without knowledge thereof, makes a lease to the corporation.

3. Though a tenant breaches the contract, and abandons the premises, action for installments of rent due can be brought without bar to recovery for subsequent installments as they accrue, under Shannon's Code, § 4620, providing that successive actions may be brought on same contract when, after former action, a new cause of action arises.

Appeal from chancery court, Hamilton county; T. M. McConnell, Chancellor.

Suit by Barnes Bros. against the Black Diamond Coal Company. Decree for defendant was reversed by the court of chancery appeals, and defendant appeals. Affirmed.

F. S. Yager and Washburn, Pickle & Turner, for appellant. White & Martin, for appellees.

**WILKES, J.** This is a suit for rents, brought by Barnes Bros. against the coal company, for the months of March, April, May, June, July, and August, 1896, claimed under a lease contract. The chancellor refused any relief. The court of chancery appeals reversed the chancellor, and gave judgment for the amount claimed. The defendant coal company has appealed and assigned errors.

The court of chancery appeals find as a fact that the defendant leased the coal yard from the complainants for a term commencing April 1, 1895, and ending September 1, 1896, at a monthly rental of \$30 per month. It is objected that the contract is voidable, under the statute of frauds. The court of chancery appeals report as a fact that the contract as a whole was both oral and in writing, and the terms are set out in letters between the parties. In addition, the statute of frauds was not pleaded, and this is fatal to it as a defense. *Citty v. Manufacturing Co.*, 93 Tenn. 276, 24 S. W. 121.

It is next said a contract under a by-law of the corporation could not be made for a longer time than three months without the approval of the board of directors. The court of chancery appeals find as a fact that complainants had no knowledge of such by-law. In such case, being a third person or stranger to the corporation, complainants would not be affected by its by-laws. *Thomp. Priv. Corp.* §§ 940, 942; *State v. Overton*, 24 N. J. Law, 440; *Bank v. Smith*, 19 Johns. 115, 124. The contract in this case was made by the president of the corporation. It appears that the letter heads used in the correspondence about the lease contain this clause: "No contract is binding with the Black Diamond Coal Company until approved by the president." This appears to have been all the notice complainants had on this feature of the case.

It is next said the matter is *res judicata*. It appears that, previous to the present suit, complainants brought an action for the rents

of December, 1893, and January and February, 1896, and recovered \$90, or at the rate of \$30 per month for the three months. The rents previous to December, 1893, were paid. It is insisted this is a bar to any further action for the breach of this contract. The argument is that the contract is entire for the term, even although the rental is so much per month, and, being an entire contract, there can be but one breach and one recovery therefor. If the contract is an entirety, and not divisible, it must follow, under the authorities, that there can be but one breach and one recovery. *Tarbox v. Hartenstein*, 4 Baxt. 78; *Railroad Co. v. Staub*, 7 Lea, 397. A single cause of action cannot be split in order that separate suits may be brought for the various parts of what really constitutes but one demand. 1 Enc. Pl. & Prac. pp. 148, 153. Taking judgment by mistake for a less sum than due will not justify the plaintiff in recovering the residue in another action. *Saddler v. Apple*, 9 Humph. 342; 1 Enc. Pl. & Prac. 150, note; *Thomason v. Rice*, 1 Shannon, 70. As to when a contract is entire, and when it is divisible, is a question upon which there is a great confusion among the cases. It is said: "Whether a contract is entire or separable into several independent contracts depends upon the intention of the parties, to be ascertained from the language employed and the subject-matter of the contract." 1 Enc. Pl. & Prac. pp. 150, 152, note 1; *Pollak v. Association*, 128 U. S. 446, 9 Sup. Ct. 119; *Shinn v. Bodine*, 100 Am. Dec. 560; *Huyett & Smith Mfg. Co. v. Chicago Edison Co.* (Ill. Sup.) 59 Am. St. Rep. 278, 47 N. E. 384, and cases there cited. And again: "Common sense must be applied to each case, rather than any technical rules of construction." *Leonard v. Dyer*, 26 Conn. 172. The general test rule to determine whether a contract is divisible or entire is stated by Mr. Parsons thus: "If there are many parts of the contract, and some have been broken, and others not yet, as if money was to be paid on the 1st of every month for two years, and one year has expired, and nothing has been paid, the creditor may bring his action for one or more of all the sums due, and recover accordingly, and may, when the others fall due and are unpaid, sue for them." 3 Pars. Cont. (5th Ed.) 188, 189. To the same effect, see *Huyett & Smith Mfg. Co. v. Chicago Edison Co.* (Ill. Sup.) 59 Am. St. Rep., note on page 279 (s. c. 47 N. E. 384), where the authorities are cited and fully collated.

The distinction between the two classes of contracts is plainly stated in *Coleman v. Hudson*, 2 Sneed, 465, as follows: "In the former [entire contracts] the consideration is entire on both sides. It does not, either by its terms or the implied intention of the parties, contemplate or admit of apportionment upon a partial failure on either side; and the complete fulfillment of the contract by either is required as a condition precedent to the fulfillment of any part of the con-

tract by the other. A severable contract is a contract the consideration of which, by its terms, is susceptible of division and apportionment. There is in such cases no entirety of consideration on either side, constituting a condition of the agreement; and neither party can claim more than an equivalent for the actual consideration on his part. [Citing authorities.] There is another class of cases, noticed in some of the books, of a mixed nature, partaking of the character both of entire and severable contracts, and which may be considered as entire or severable, according to the circumstances of the particular cases. Story, Cont. § 24." It was held in that case that a contract to deliver, for a price named therein, from 100 to 150 head of beef cattle from the 1st of February to the last of July, in lots of 20 or more monthly, and all the hogs that are fed with the cattle, at the market price, was divisible into several contracts as respects the remedy, for a breach of either of which a separate action would lie. As illustrating the rule, it is held that, when a promissory note is payable in installments, an action may be maintained for each installment when it becomes due, and the statute of limitations begins to run from that time. *Bush v. Stowell*, 10 Am. Rep. 694. See, also, *Badger v. Titcomb*, 26 Am. Dec. 611-613; *Lorillard v. Clyde* (N. Y. App.) 25 N. E. 292. See, also, *Coleman v. Hudson*, 2 Sneed, 463. Installments of rent are subject to the same rule as installments of money due, and an action may be brought as each installment falls due. 1 Enc. Pl. & Prac. 155, note 3; *Steinkuhl v. Hardin* (Jackson, 1875) 1 King's Dig. p. 561. The cases, it appears, however, are uniform in holding that contracts for personal service must be treated as entire, and not divisible; and hence there can be but one breach and one recovery upon default, no matter if the wages are payable by installments or at stated periods. See the cases collated in *Huyett & Smith Mfg. Co. v. Chicago Edison Co.* (Ill. Sup.) 59 Am. St. Rep. 290 (s. c. 47 N. E. 384). And in accord with this holding are our cases of *Hughes v. Cannon*, 1 Sneed, 622, *Tarbox v. Hartenstein*, 4 Baxt. 78, and *Railroad Co. v. Staub*, 7 Lea, 397. Whether this distinction arises out of the nature of the contract, or is based on some other ground, it is well recognized and enforced in cases where the holding would evidently be different if it were not a contract for personal services; and, whether based on sound reasons or not, we must recognize contracts for personal services as entireties. But, in regard to rentals, there is, perhaps, no more common form of contract than a rental by the year, payable monthly; and it cannot on any sound reason be held that if the tenant breaches the contract, and abandons the premises, a suit for the first month's rent would bar a recovery for subsequent months as they accrue.

We are of opinion, further, that the stat-



ute, Shannon's Code, § 4620, is applicable to this case. It provides that "successive actions may be maintained on the same contract or transaction whenever after the former action a new cause of action arises therefrom." A new cause of action arises and becomes enforceable with every successive installment. It is not meant that a complainant can unnecessarily vex the defendant with successive small suits, for in such cases injunction will lie to prevent multiplicity of suits; and accordingly it is a well-established rule that, when an action is brought to collect installments, it should include all then due, and that those then due constitute together but one cause of action, and some of the cases go to the extent that a recovery in one suit will bar a second action to recover other similar claims or installments that were due when the first was brought. 1 Enc. Pl. & Prac. p. 155, notes 2 and 3, and cases cited. We are of opinion that there is no error in the decree of the court of chancery appeals, and it is affirmed, with costs.

**STATE ex rel. BURGESS, Collector, v. KANSAS CITY, ST. J. & C. B. R. CO.**

(Supreme Court of Missouri, Division No. 2.  
Oct. 17, 1898.)

**COUNTIES—TAXATION—ROAD TAXES.**

Road taxes are county taxes, within Const. art. 10, § 11, which provides that for county purposes the annual rate on property in counties having \$6,000,000 or less shall not exceed 50 cents on the \$100 valuation; and this, though Rev. St. 1889, c. 140, art. 3, provides that townships may be organized for road purposes, and levy road taxes not exceeding 40 cents on the \$100.

Appeal from circuit court, Platte county; William S. Herndon, Judge.

Action by the state, on the relation of J. J. Burgess, collector, against the Kansas City, St. Joseph & Council Bluffs Railroad Company. There was a judgment for defendant, and plaintiff appeals. Affirmed.

John W. Coots, for appellant. Spencer & Mosman, for respondent.

GANTT, P. J. The only question raised by this appeal is the constitutionality of certain road taxes levied in Lee and Waldron townships, in Platte county. Upon the trial it appeared that said townships had each organized under article 3, c. 140, Rev. St. Mo. 1889, and the litigated taxes were levied for the year 1894, under the provisions of said article. It was further shown that the aggregate assessed valuation of Platte county for said year was less than \$6,000,000; that the county court had levied a tax for county purposes of 50 cents on the \$100 valuation, upon all the taxable property in said county, including the railroad property of defendant; that Lee and Waldron townships had each levied a road tax of 10 cents on each \$100 valuation of the tax-

able property in said townships, which said tax was in addition to the tax for county purposes levied by the county court as aforesaid; that the aggregate thus levied by the county court and the townships was 60 cents on the \$100 valuation in said two townships. It further appeared that the defendant railroad company had paid 50 cents on each \$100 valuation of its property in said townships, but declined and refused to pay the additional 10 cents so levied by said townships, because it was in excess of the rate limited by section 11 of article 10 of the constitution of Missouri, and consequently void. The circuit court sustained this contention of the defendant, and the plaintiff appeals.

Little scope is left for discussion. Plaintiff seeks to avoid the position of defendant by insisting that the road taxes in question were not levies for "county purposes." He insists it is for a strictly municipal purpose, and therefore not within the prohibition of section 11, art. 10, Const. In *State v. Missouri Ry. Co.*, 123 Mo. 72, 27 S. W. 367, it was conceded by counsel for the relator that townships in counties not under township organization were mere geographical subdivisions of the county, and in no sense corporations, but they insisted that townships under township organization were municipal corporations, and a different principle must govern; but this court held that the constitution made no distinction between counties that might adopt township organization and those that remained under original county organization, as to the rate of taxation that should be allowed in each for government purposes, saying: "A mere change of the mode of administering county governments does not and cannot change the purpose for which taxes are raised to conduct the government, and, as the purpose remains the same in doing so, the limitations must be the same in each. This must be so, or the framers of our constitution have wrought in vain to limit the expense of county government, and their whole legislation on this subject may be set at naught; for, to defeat it entirely, it will only be necessary for all the counties of the state to adopt township organization, and the legislature may then authorize them, in addition to taxes allowed by the constitution for county purposes, to levy township taxes ad libitum. A construction of the constitution which would thus authorize the defeat of one of its main purposes cannot be entertained for a moment." That case must control this. If with the increased powers conferred upon townships under township organization the inhibition of the constitution remained, a fortiori it must stand under this road law, which merely imposes upon the road township the duty theretofore devolved upon the county court in respect to public roads in such township. The constitution is not to be so easily evaded. If plaintiff's contention prevail, all that need be done in the several counties is to organize the whole

county into "townships for road purposes," and all limitation as to levies for road taxes would instantly vanish. At the time of the adoption of the constitution, "road taxes" were recognized as "county taxes." The obvious purpose of the constitution was to protect the taxpayer from excessive taxation. The mere calling of these road taxes "township taxes" in no way changes their character or the purpose for which they are levied. They clearly fall within the meaning and prohibition of section 11, art. 10, Const. State v. Hannibal & St. J. R. Co., 101 Mo. 130, 13 S. W. 506. The circuit court properly held that the excess over the 50 cents levy was void, and its judgment is affirmed.

SHERWOOD and BURGESS, JJ., concur.

WHITE OAK GROVE BENEV. SOC. v.  
MURRAY et al.

(Supreme Court of Missouri, Division No. 2.  
Oct. 17, 1898.)

CORPORATIONS—VENDOR AND PURCHASER—ESTOPPEL.

1. Certain persons who were taking steps to organize a corporation bought land, and caused it to be deeded to such contemplated corporation, and paid the price thereof. The corporation was subsequently organized. Held, that the vendor was estopped to question its corporate character and authority to take the land.

2. The rule that a conveyance without a grantee capable of receiving the grant is void does not apply to equitable rights of parties growing out of such a conveyance.

Appeal from circuit court, Clay county; El. J. Broadbush, Judge.

Action by the White Oak Grove Benevolent Society against Anthony Murray and others. From a decree for plaintiff, defendants appeal. Affirmed.

D. C. Allen, for appellants. Dougherty & Dougherty, for respondent.

GANTT, P. J. From a final judgment overruling a demurrer to the petition this appeal is prosecuted. The petition, omitting caption, is in these words: "Plaintiff states: That it is a corporation duly organized under and by virtue of the laws of the state of Missouri, and that on the 12th day of April, 1889, defendants Anthony Murray and Roxa Murray (or Roxanna Murray), his wife, executed, under their hands and seals, and delivered to plaintiff, a deed of general warranty, conveying a certain tract of land in Clay county, Missouri, to wit: All of that part of the north end of the west half of the northeast fourth of section number thirty-two (32), in township number fifty-one (51), in range number thirty-two (32), included in the following boundary, viz: Beginning twenty-eight poles due south of the northwest corner of said northeast fourth of [said] section; thence east thirty-two and twenty-eight one-hundredths poles;

thence south six poles, to the center of a creek; thence up said creek, in the center thereof, south, seventy-one and one-half degrees west, seven (7) poles, to a hickory tree twelve inches in diameter (in quarter-section line); thence, on said quarter-section line, twelve and sixty-five one-hundredths (12.65) poles, to the point of beginning,—containing two and one-fourth acres, more or less. That said deed was for a valuable consideration, to wit, one hundred dollars, which consideration plaintiff there and there paid to defendants Anthony Murray and Roxa Murray. Plaintiff states that it is a corporation organized under and by virtue of article 10 of chapter 42 of the Revised Statutes of Missouri for 1889, and the principal object of its organization was and is to raise money by subscription, gift, bequest, initiation fees, and dues, which shall constitute a fund out of which to provide for the funeral expenses and decent burial of the members of the society and their families; that it has erected and owns a wooden building on the tract of land above described, which is used as a meeting place for the corporation, its members and officers, and is sometimes rented to the school district in which it is situated for school purposes; that said land and building are in the possession, and are now the sole and exclusive property, of plaintiff, and no other person or body of persons has or have any right to use or enjoy the same except by the consent or permission of plaintiff. Plaintiff further states that, at the time the deed made by said Anthony Murray and wife was executed and delivered, plaintiff was not a corporate body organized according to the forms of law, although such organization was intended to be consummated; and on December 7, 1891, such organization was effected according to law, and on February 10, 1892, a certificate to that effect was issued by the secretary of state of the state of Missouri; and, although plaintiff did not complete its organization until the date above named, it was composed of the same persons, had the same name, and the same objects in view, at the date of the deed from the said Anthony Murray and wife, as it had at the time of the completion of its corporate organization. Plaintiff states that the defendant United Sons and Daughters of Peace, No. 1, is a corporation organized under the laws of Missouri. Plaintiff further states that, owing to the fact that the said deed was dated and executed and delivered prior to the date of the incorporation of plaintiff, a proper title, such as was intended to be conveyed by defendants Murray and plaintiff to the above-described premises, does not pass to plaintiff, and that, in order to make said deed pass a good title to plaintiff, it should be dated of some date subsequent to the date of the completion of plaintiff's corporate organization, as aforesaid. Plaintiff states that said conveyance was so as aforesaid incorrectly made on account of the mistake of plaintiff's incor-

porators and defendants as to the requirements of the corporation laws of the state of Missouri, and said deed did not, consequently, convey the title to said premises to plaintiff according to the mutual intent of the contracting parties; and that plaintiff has requested and demanded of defendants Anthony and Roxa Murray that they execute and deliver to it a correct and proper deed of said premises, but defendants have ever refused and neglected to comply with said request and demand. Plaintiff further states that defendants the United Sons and Daughters of Peace, No. 1, is an organization composed of women and men who live in the vicinity of the foregoing described property; and said organization and defendants William Murray, Rachel Murray, his wife, Anthony Murray and Roxa Murray, his wife, Edward Hickman, and other persons associated with them, whose names plaintiff cannot now recall, are attempting to deprive plaintiff of the entire and exclusive possession and occupation of said premises, although they have been forbidden by plaintiff to come upon said premises or in any manner use or occupy the same without its permission; but, nevertheless, said defendants have attempted by force to enter plaintiff's premises, and threaten to do so whenever they so desire to do. Plaintiff states that it has no adequate remedy at law. Wherefore plaintiff prays for a decree of this court directing and compelling defendants Anthony Murray and Roxa Murray, his wife, to execute and deliver a new and reformed deed, which shall be dated as of a date subsequent to February 10, 1892, and that defendants the United Sons and Daughters of Peace, No. 1, William Murray and Rachel Murray, his wife, Anthony Murray and Roxa Murray, his wife, Edward Hickman, and all persons associated with them in said attempts, be forever restrained and enjoined from using, occupying, or possessing said premises in opposition to plaintiff's rights, and in interfering or attempting to interfere or obstruct in any manner the peaceable and exclusive possession, occupation, and enjoyment of said premises by plaintiff and its assigns, and for such other and further relief in the premises as may be just and right." To the petition, appellants filed their demurrer, November 4, 1895, basing the same on the following causes of demurrer, to wit: "(1) Because the said petition does not state facts sufficient to constitute a cause of action against defendants; (2) because the allegations of said petition are inconsistent and contradictory." The demurrer was heard and overruled by the circuit court during its February term, 1896, namely, on March 5, 1896; and the appellants abiding by their demurrer, and refusing to answer over, on March 5, 1896, the court rendered its decree, directing defendants Anthony Murray and Roxa Murray, his wife, to make, execute, and deliver to plaintiff a good and sufficient deed to the lands describ-

ed in the petition; and, in default, it was decreed that the said conveyance be deemed as dated after the final incorporation of plaintiff, and a decree forever enjoining defendants and each of them interfering with or molesting plaintiff in its peaceable exercise of ownership in and over said lands.

Defendant invokes the well-settled common-law doctrine that at law there can be no such thing as a conveyance without a person, either natural or artificial, capable of receiving a grant,—a doctrine fully recognized by the adjudications of this court. 2 Bl Comm. (Chit. Ed.) 296; 3 Washb. Real Prop (5th Ed.) 282; *Arthur v. Weston*, 22 Mo. 378; *Thomas v. Wyatt*, 25 Mo. 24-26; *Douthitt v. Stinson*, 63 Mo. 268. But it has long been established in this state that "these decisions refer entirely to the transfer of the legal estate, and do not touch the equitable rights of the parties growing out of the transaction." *Arthur v. Weston*, 22 Mo. 378; *Reinhard v. Mining Co.*, 107 Mo. 616, 18 S. W. 17. It has also been held in a number of well-considered cases that where a grantor deals with the members of a corporation by their corporate name, receives their money as of said corporation, and undertakes to convey land to said company in its corporate name, said grantor will be forever afterwards estopped from denying the validity of the corporation, or its power to receive a grant. The principle of these cases commends them to our sense of right and justice. Having received the consideration, the grantor is in no position to question the corporate capacity of the company, whatever power the state may have. *Broadwell v. Merritt*, 87 Mo. 99; *Ragan v. McElroy*, 98 Mo. 350, 11 S. W. 735; *Reinhard v. Mining Co.*, 107 Mo. 616, 18 S. W. 17; *Smith v. Sheeley*, 12 Wall. 358. At the time this company was organized with the view to its incorporation, which was subsequently effected, the laws of this state authorized an incorporation for the purposes named in its articles. In that respect this case differs radically from *Douthitt v. Stinson*, 63 Mo. 268. In that case there was neither an act of the legislature nor a general statute permitting the incorporation of the "Town of Lancaster and the Lancaster Seminary." Moreover, that was a simple action of ejectment, in which the legal title alone was involved.

Learned counsel, however, insists that the petition in this case shows that the deed was made prior to any organization whose object was to incorporate. We think this is a hypercritical view of the petition. We think that, perhaps, the petition might have been made a little more specific; but, read as a whole, it charges that the defendants made the deed to this organization by its corporate name; that it was then composed of the same persons who were taking steps for incorporation, and who afterwards formed the legal body; and that they paid defendant their money for the deed, and received it for

that purpose. The circuit court correctly ruled that, in equity and good conscience, defendants could not repudiate their deed while enjoying the purchase money; that, having recognized plaintiff as a corporation for the purpose of obtaining the money of its members, they were estopped, after its receipt and retention, to question its corporate character, and properly issued a perpetual injunction against all interference and intermeddling with plaintiff's rights to the land. The decree is affirmed.

SHERWOOD and BURGESS, JJ., concur.

### KASH et al. v. COLEMAN et al.

(Supreme Court of Missouri, Division No. 2.  
Oct. 17, 1898.)

WITNESS—COMPETENCY—TRANSACTIONS WITH DECEASED—PARTITION—PLEADING—EVIDENCE.

1. Testimony of a conversation with one since deceased, admitted on a trial below, is not rendered incompetent on appeal because, by the death of the mother of the witness, he became a necessary party to the appeal.

2. In a suit for partition of land as belonging to the ancestors, one of the heirs alleged that a part of it did not belong to the ancestors, for, although they held the legal title, she was the equitable owner. She averred that they purchased the land and paid for part of it with her means, and made a parol partition, set off her share, and promised to convey it to her, but neglected to do so. *Held* to charge a parol partition, and not a resulting trust.

3. The holders of the legal title to land always admitted that their sister was entitled to a share of it. They obtained her signature to another conveyance on their express promise to secure to her her share, and marked it off, and put up a stone corner; and her son and tenants, for her, cultivated her portion so marked off, and she built fences and planted a hedge on it. *Held* to establish parol partition.

Error to circuit court, Bates county; Phineas H. Holcomb, Special Judge.

Bill by Ella Kash and others against C. P. Coleman and others. There was a judgment for defendant Lucy Strode, and plaintiffs bring error. Affirmed.

Thos. J. Smith, for plaintiffs in error. John S. Francisco, for defendant in error.

GANTT, P. J. The writ of error in this case seeks to reverse a judgment of the circuit court on an issue made by the answer of Mrs. Lucy Strode, one of the tenants in common of a large tract of land in Bates county, which was being partitioned among the heirs of N. B. and E. W. Coleman. Mrs. Strode made no opposition to the partition, save as to a tract of 31 acres off of the east end of the N.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  of section 32, township 41, range 29, of which she averred she was the sole equitable owner, but of which said N. B. and E. W. Coleman had the legal title at the time of their respective deaths; that Mrs. Strode was the owner of  $\frac{31}{80}$  of said 80-acre tract by reason of the fact that said N. B. and E. W. Coleman paid for it with her money, and at all times recognized

and admitted that they were her trustees; that in their lifetime they measured off and set apart to her said 31 acres, to indicate where her line ran. The circuit court found the allegations of her answer to be true, and decreed title to her in said tract, and proceeded to partition the remainder of the lands described. From so much of the decree as awarded this tract to Mrs. Strode, plaintiffs prosecute this writ of error. Mrs. Strode has since died, and her heirs have been substituted in her stead, and have waived service, and appear by their counsel.

1. No objections whatever were taken to testimony on the trial, but it is now urged that the evidence of Thomas Strode, a son of Mrs. Strode, should now be rejected, because by his mother's death since the judgment in her favor he has become a party to the record, and as he testified to conversations and admissions of E. W. and N. B. Coleman, who were dead at the time of the trial, his incapacity should relate back, and exclude his otherwise competent testimony. No rule of appellate procedure is more intrenched by reason and authority than that which restricts the court of errors to the record as made in the trial court. It is so manifestly just that it has received alike the commendation of the judicial and legislative departments. The competency of evidence or of the witness must be determined by his relation to the case at the time his evidence is offered. If by the rules of law the evidence is competent, then it must be admitted and considered, and no subsequent incapacity or incompetency resulting from some subsequent change of relationship is permitted to destroy the legality of the evidence when taken. Judgments and decrees would rest upon too uncertain foundations if the doctrine contended for should prevail. It results that the evidence of Thomas Strode must be considered in determining the sufficiency of the evidence to sustain the decree of the circuit court.

2. After a careful examination of the record in conjunction with the briefs of counsel, it seems that the principal point of attack is that Mrs. Strode in her answer relied upon a resulting trust, whereas her proofs made out a contract of purchase and a partition in parts of the 80 acres known as the "Ray Land," and consequently the pleadings would not support her judgment. It will be observed that the suit was for the partition of the whole of this 80 acres as the lands of E. W. and N. B. Coleman. Such was the averment in the petition. Mrs. Strode denied that 31 acres of said 80 was the property of her said brothers, and alleged that she was the equitable owner of said 31 acres, and that her brothers held the legal or paper title in trust for her. She then proceeded to show by specific averments how she acquired her title, to wit, that her said brothers purchased said 80 for themselves and Mrs. Strode, and paid for the 31 acres with her means in their possession. She then proceeds to allege that they made

a parol partition by admeasuring and setting off to her her 31 acres, and promised to convey the same, but neglected to do so. Construing this answer as a whole, we think it sufficiently charges a parol partition fully executed in the lifetime of the Coleman brothers and Mrs. Strode, and the learning invoked as to the essentials of resulting and express trusts is inapplicable to the case alleged and proven. The evidence was not contradicted that the Coleman brothers always admitted that their sister was entitled to a share in the land; that they obtained her deed to Bellew upon the express agreement that they would secure to her her share in the Ray land. That they did mark off to her the 31 acres, and put up a stone corner, and that her son and tenants, for her, did cultivate this 31 acres, are too clear for dispute. Having been placed in actual possession, cultivated and rented it as her sole property, and having built fences and planted a hedge on it, her equity to this land does not depend upon loose, uncertain, and unsatisfactory verbal statements, but was made out, we think, by positive and consistent evidence of an actual partition and division of this 80 acres in pursuance of an equally well established right thereto growing out of the sale of her shares in other lands held by her and her brothers. The judgment of the circuit court is clearly for the right party, and is affirmed.

SHERWOOD and BURGESS, JJ., concur.

STATE ex rel. TROLL, Sheriff, v. BROWN, Auditor, et al.

(Supreme Court of Missouri, Division No. 2.  
Oct. 17, 1898.)

**SHERIFFS — FEES — ATTENDANCE ON CRIMINAL COURTS—CERTIFICATE OF JUDGE.**

1. Though a statute requires a sheriff to attend certain criminal courts, he cannot recover fees therefor, in the absence of statutory provision.

2. Fees for attending criminal courts are not allowed by Rev. St. 1889, § 4989, as amended by Acts 1891, p. 145, § 10, as the section, though providing that sheriffs shall be allowed for their services fees in all cases as thereafter specified, in one clause of which there is a provision for two dollars per day "for attending each court," clearly has reference to civil courts, proceedings therein, and processes issued therefrom and returnable thereto.

3. Certificates of judges of criminal courts that certain fees are due the sheriff for attendance thereon, being without authority, have no binding force.

Appeal from St. Louis circuit court; James B. Withrow, Judge.

Mandamus proceedings on the relation of Henry Troll, sheriff of the city of St. Louis, against Joseph Brown, auditor of said city, and said city. Judgment for relator. Defendant Brown appeals. Reversed.

Chas. Claflin Allen, for appellant. F. A. Wind, for respondent.

BURGESS, J. This is a proceeding by mandamus, begun by the sheriff of the city of St. Louis in the circuit court of that city against the city auditor, to compel him to issue to said sheriff warrants on the city treasurer for the amount of certain accounts claimed by said sheriff to be due him for attendance upon the criminal courts and court of criminal correction in said city. The petition charges that it was made the duty of the sheriff to attend upon said courts, both by the General Statutes (section 3267, Rev. St. 1889), which required him to attend all courts, and the law applicable to city of St. Louis (sections 3, 4, art. 20, p. 2158, Append. Rev. St. 1889), which specifically required him to attend the criminal courts and courts of criminal correction; and, further, that by law (section 4989, Rev. St. 1889) he is entitled to compensation for attendance of himself and two deputies. It is further charged that the account of sheriff had been audited and allowed by the judges of the respective courts, and it is claimed that the act of the court is binding on the city auditor. The amount of demand is not controverted, but the defense is that section 4989 refers to costs in civil cases only; that there is no provision for compensation to sheriff for attendance upon court in criminal cases, and therefore none can be allowed. The case was tried upon the following agreed statement of facts: "In the above-entitled cause it is hereby stipulated and agreed that the petition for an alternative writ, the alternative writ and return thereto, heretofore filed by Joseph Brown, auditor, etc., may all be amended by interlineation by adding the name of the city of St. Louis as a party defendant wherever it may be necessary, so that this proceeding shall stand as if the petition was originally filed against the defendant Brown, as auditor of the city of St. Louis, and as if the alternative writ had been issued and directed to both, and as if the return had been filed on behalf of both. It is further stipulated and agreed that upon the hearing hereof it shall stand admitted that the petitioner is the duly elected, qualified, and acting sheriff in and for the city of St. Louis, as alleged in the petition, and that the term of division No. 1 of the St. Louis criminal court for the July term, 1895, thereof, lasted for eighty-four days, but that the said division of said court was in session for only — days during said term, and that two deputies of petitioner attended said court while it was in actual session on said — days; that petitioner prepared his account against the city of St. Louis therefor, and submitted the same to the judge of the said court, and that the judge of said court examined said account, and allowed and certified to the same; and that it was thereupon submitted by petitioner to defendant Brown, as auditor, and that petitioner requested said defendant to allow the same, and to draw his warrant therefor upon the city treasurer, and that said defendant

Brown refused to allow or to draw any warrant for the said services. And also that the term of division No. 2 of the St. Louis criminal court for the July term, 1895, thereof, lasted for 84 days, but that the said division of said court was in session for only ——— days during said term, and that two deputies of petitioner attended said court while it was in actual session on said ——— days, and that petitioner prepared his account against the city of St. Louis therefor, and that said account was submitted to the judge of said court, who examined, allowed, and certified the same, and that petitioner thereupon submitted it to defendant Brown, as auditor, and requested said defendant to allow the same, and to draw his warrant for the amount thereof upon the city treasurer, and that said defendant Brown declined to allow said account, or to draw any warrant therefor. Also that two deputies of this petitioner attended upon the St. Louis court of criminal correction 79 days from June 30, 1895, to October 1, 1895, and that petitioner made out his account for said services against the city of St. Louis, and submitted the same to the judge of said court, who examined, allowed, and certified the same, and that petitioner thereupon submitted the said account to defendant Brown, as auditor, and requested him to allow the same, and to draw his warrant for the amount thereof upon the city treasurer, and that said Brown refused so to do. Also that there was at all of the above times a sufficient sum of money in the hands of the treasurer of the city of St. Louis with which to pay the said amounts upon warrants of the city auditor, had the same been drawn, the said amounts having been theretofore appropriated for said purpose by the municipal assembly of the city of St. Louis. Also that petitioner cannot receive any pay from the city treasurer except upon the presentation of warrants by defendant Brown. Also that petitioner, Henry Troll, did not in person attend upon division No. 1 or division No. 2 of said St. Louis criminal court, nor did he attend in person upon the St. Louis court of criminal correction during the times above stated, his only attendance being through his said deputies." The trial resulted in a finding of the issues joined in favor of the plaintiff and the awarding of a peremptory writ of mandamus against the defendants. After an unsuccessful motion for a new trial, defendant Brown appealed.

It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and, being solely of statutory right, statutes allowing the same must be strictly construed. *State v. Wofford*, 116 Mo. 220, 22 S. W. 496; *Shed v. Railroad Co.*, 67 Mo. 687; *Gammon v. Lafayette Co.*, 76 Mo. 675. In the case last cited it is said: "The right of a public officer to fees is derived from the statute. He is entitled to no fees for services

he may perform as such officer, unless the statute gives it. When the statute fails to provide a fee for service he is required to perform as a public officer, he has no claim upon the state for compensation for such service." *Williams v. Chariton Co.*, 85 Mo. 645. The question, then, is, by what statute is plaintiff entitled to the fees claimed? It is true that by section 3267, and section 4, art. 20, p. 2158, Append. Rev. St. 1889, the sheriff of the city of St. Louis is required to attend the criminal courts and court of criminal correction of said city, but no fee is allowed him by these statutes for such service, in the absence of which the presumption must be indulged that the service was gratuitous. *Throop*, Pub. Off. 446; *State v. Brewer*, 59 Ala. 130; *White v. Levant*, 78 Me. 568, 7 Atl. 539; *Perry v. Cheboygan*, 55 Mich. 250, 21 N. W. 333; *Wortham v. Grayson County Court*, 13 Bush, 53. But plaintiff insists that the fees of sheriff for such service are fixed by section 4989, Rev. St. 1889. Acts 1891, p. 145, § 10. This, however, seems to be a misapprehension of the meaning of that section of the statute. While it provides that sheriffs shall be allowed for their services fees in all cases as thereafter specified, in one clause of which it is provided that "for attending each court, and for each deputy actually employed in attendance upon such court, \$2.00 per day each, the number of such deputies not to exceed two," a casual reading will show that it clearly has reference to civil courts, proceedings therein, processes issued therefrom, and returnable thereto. It is entirely separated and disconnected from the following section, which has special reference to proceedings of courts in criminal cases. It is only by the most liberal construction of section 10, p. 145, Acts 1891, that it can be held to embrace the fees of the sheriff for his attendance upon the criminal courts and the court of criminal correction in the city of St. Louis, and to give it such a construction would be doing violence to the rule of construction before announced in such cases. This is the only statute to which our attention has been called that allows a sheriff a fee for his attendance upon courts, and this, we think, has no reference to the attendance of the sheriff of the city of St. Louis upon either the criminal courts or the court of criminal correction of that city. If the sheriff was not entitled by statute to the fees claimed, the certificates of the judges of the criminal courts or of the court of criminal correction could create such right in him. Nothing short of statutory enactment could do so. These certificates were, therefore, without authority, and of no binding force upon the city. The judgment is reversed, and the proceedings dismissed.

GANTT, P. J., and SHERWOOD, J., concur.

**BENDER v. ZIMMERMAN.**

(Supreme Court of Missouri, Division No. 2.  
Oct. 17, 1898.)

**APPELLATE JURISDICTION—TRANSFER TO COURT OF APPEALS.**

Appeal by defendant from judgment for \$164 for wrongful conveyance of land, in violation of an agreement to convey to plaintiff, not being within the provisions of Const. art. 6, § 12, giving the supreme court jurisdiction, will be transferred to the court of appeals.

Appeal from circuit court, Buchanan county; A. M. Woodson, Judge.

Action by John C. Bender against Eugene C. Zimmerman. Judgment for plaintiff. Defendant appeals. Transferred to Kansas City court of appeals.

C. V. Hickman and E. C. Zimmerman, for appellant. M. G. & Jas. Moran, for respondent.

**GANTT, P. J.** This is an appeal from a decree by the circuit court of Buchanan county. The petition alleged a conveyance of certain lands by deed absolute with a defeasance back to secure the payment of \$100 and the costs in a certain suit. It avers the payment of said \$100 and said costs by plaintiff, a demand for reconveyance and a refusal, a subsequent sale by defendant to an innocent purchaser, and concludes with a prayer for \$2,000, the value of the land wrongfully conveyed by defendant, and the purchase price converted by him. The answer is a general denial. It then admits the conveyance, and charges certain taxes were delinquent for which said lands were sold to one Irvin, and by Irvin deeded to defendant, whereby plaintiff's title was extinguished. Also pleads statute of limitation. Reply put in issue new matter, and pleaded that defendant fraudulently had Irvin bid in the land for defendant. The circuit court found for plaintiff, allowed defendant certain taxes and interest, and decreed a balance due plaintiff of \$164.54. Defendant appeals.

This court is without jurisdiction of this appeal. The facts alleged and the record disclose that it is not a case within the provisions of section 12 of article 6 of the constitution, giving this court jurisdiction. It is ordered certified to the Kansas City court of appeals.

**SHERWOOD and BURGESS, JJ., concur.**

**HALL et al. v. HARRIS et al.**

(Supreme Court of Missouri, Division No. 2.  
Oct. 17, 1898.)

**CHANCERY CASE—VERDICT—INSTRUCTIONS—SUBMISSION OF ISSUE—STATUTE OF FRAUDS.**

1. The verdict in a chancery case being merely advisory, error cannot be predicated on its being against the law and evidence.

2. Error cannot be predicated on instructions

to the jury in a chancery case, decree of the court not being dependent on their correctness.

3. Submission of issue to jury in chancery case being discretionary with the court, error cannot be predicated thereon, or on the form of the issue.

4. Where defendant's intestate induced plaintiff to become his housekeeper, and take care of him, by promise to convey, in consideration thereof, certain land, full performance by plaintiff takes the agreement out of the statute of frauds, so that it may be enforced, testator having died without making conveyance.

Appeal from circuit court, Macon county: Andrew Ellison, Judge.

Suit by Sarah J. Hall and her husband against Elizabeth J. Harris and another. Decree for plaintiffs. Defendants appeal. Affirmed.

R. S. Matthews, Otho F. Matthews, and L. A. Thompson, for appellants. Dysart & Mitchell, for respondents.

**GANTT, P. J.** This is an appeal from a decree of the Macon circuit court enforcing the specific performance of a contract made by David B. Harris in his lifetime with his daughter, Mrs. Sarah Jane Hall, to convey to her 20 acres of land in Macon county, described as the W.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section No. 12, township 57, range 13, in consideration of services rendered by Mrs. Hall to her father in nursing and waiting upon him at intervals from 1885 to 1894. A jury was impaneled to try "the single issue whether, in the lifetime of David B. Harris, he contracted to sell and convey said 20 acres of land to the plaintiff Sarah J. Hall for services rendered and to be rendered by her, and whether she had performed said services and performed the conditions on her part," which issue the said jury found in favor of the plaintiffs. The verdict of the jury was approved by the chancellor, and a decree rendered enforcing said contract against defendants, who are the devisees of said David B. Harris. In due time the following motion for new trial was filed, heard, and overruled: "Sarah J. Hall and Edwin Hall, Her Husband, Plaintiffs, vs. Elizabeth J. Harris and Lewis G. Harris, Defendants. Now comes the defendants in the above-entitled cause, and moves the court to grant a new trial for the following reasons: (1) The court erred in permitting any evidence on the part of the plaintiffs on their petition over objections of the defendants. (2) The court erred in admitting improper evidence on the part of the plaintiffs over the objection of defendants. (3) The court erred in submitting the case to be tried by a jury. (4) The court erred in not submitting definite issues to be tried by the jury. (5) The court erred in his instructions given on the part of the plaintiffs. (6) The verdict is against the law governing the case. (7) The verdict is against the evidence in the case. (8) The verdict is against the weight of evidence in the case. For these causes the plaintiffs ask that a new trial be granted in the above-entitled case."

Respondents insist that no case is made for review, because the motion for new trial makes no complaint whatever of the finding of facts by the circuit court, or the sufficiency of the evidence on which the decree is founded, but is confined entirely to the action of the jury. The essential underlying principle of appellate procedure is that it revises and corrects the proceedings of an inferior or subordinate court or tribunal in a cause or matter already heard and acted upon, and among the well-established rules of appellate practice in civil cases is that which asserts that only those errors to which the attention of the court of original jurisdiction was called on a motion for new trial or rehearing will be reviewed by the appellate court unless such errors appear upon the record proper. *Ross v. Railroad Co.*, 141 Mo. 390, 38 S. W. 926, and 42 S. W. 957; *Haynes v. Town of Trenton*, 108 Mo. 123, 18 S. W. 1003. This rule is emphasized in Missouri by statutory enactment. Section 2302, Rev. St. 1889, expressly provides that no exceptions shall be taken in an appeal or writ of error to any proceedings in the circuit court except such as shall have been expressly decided by such court. With these guides before us, let us determine what there is to review. The sixth, seventh, and eighth grounds of the motion assail the verdict of the jury. If the verdict in this case constituted the basis of the decree, these objections might avail, but the verdict of a jury in a chancery case under our practice is merely advisory. It is not binding upon the chancellor. He may approve or reject it. It cannot, in the nature of things, be essential to his decree, and, not being, it is immaterial whether the verdict was against the law of the case, or the evidence submitted to the jury, or the weight of the evidence. *Bevin v. Powell*, 83 Mo. 365; *Gay v. Ihm*, 69 Mo. 584; *Hickey v. Drake*, 47 Mo. 369; *Burt v. Rynex*, 48 Mo. 309; *Snell v. Harrison*, 83 Mo. 651; *Cox v. Cox*, 91 Mo. 71, 3 S. W. 586; *Robinson v. Dryden*, 118 Mo. 534, 24 S. W. 448. No more effective is the assignment that the court erred in its instructions to the jury. Its final decree may be entirely correct, notwithstanding those instructions, and, as the decree is in no sense dependent upon their correctness, no error can be predicated upon them, and it becomes unnecessary to examine them critically. *Hunter v. Miller*, 86 Mo. 148; *Moore v. Wingate*, 53 Mo. 398.

No objection was made to the action of the court in submitting the issue to a jury, nor to the form of the issues, and for that reason alone these assignments might be ignored; but, as it was entirely discretionary with the court, there was no error in its action in this regard.

As to the objection that the court erred in admitting improper evidence, it is sufficient to say that in the very full brief of counsel for appellants not a single item of incompetent evidence is noted. The whole burden of the brief is as to the insufficiency of the evidence

collectively to sustain the averments of the petition.

We are, then, brought to the remaining ground, to wit, that the court erred in admitting any testimony whatever under the petition. The material averments of the petition are: "That about the month of June, and long prior thereto, the plaintiffs were living to themselves in a house of their own, when the said David B. Harris, being then in feeble health, requested plaintiffs to break up housekeeping, and move to his home, where he resided, in Macon county, so that the plaintiffs could wait upon, and watch over and attend to, him, which request the plaintiffs complied with, and they remained with him, and waited upon him, and attended to his wants, until the time of his death, which occurred on the 8th day of April, 1894. That the said removal was made and the said services rendered under contract and agreement by and between the plaintiffs and the said David B. Harris, as follows, to wit: 'That in consideration of the said removal and of the said services the said David B. Harris promised, agreed, and contracted with the plaintiffs to give, transfer, and convey unto the plaintiff Sarah J. Hall the real estate hereinbefore described, to wit, the west half of the northwest quarter of the northwest quarter of section twelve (12), township fifty-seven (57), range thirteen (18), containing twenty (20) acres more or less, situate and being in the county of Macon, and state of Missouri.' That the plaintiffs relied upon the said contract, and promise of the said deceased, David B. Harris, and they have duly kept and performed the same on their part, but the said David B. Harris died without specifically performing the said contract on his part, and without conveying said property to the said Sarah J. Hall, or otherwise vesting the title in her. Wherefore the plaintiffs pray for the specific performance of the said contract, and that the said real estate, herein described, be decreed and adjudged to be the property of the said plaintiff Sarah J. Hall, and that the title thereto be divested out of the said defendants, and vested in the said Sarah J. Hall; and for all other proper and general relief." It would seem that little doubt can exist that the petition states a clear equity. Contracts of this character have often been specifically enforced by courts of equity. A full performance by plaintiff takes the case entirely out of the statute of frauds. *Gupton v. Gupton*, 47 Mo. 37; *Koch v. Hebel*, 82 Mo. App. 103; *Sharkey v. McDermott*, 91 Mo. 647, 4 S. W. 107; *West v. Bundy*, 78 Mo. 407; *Healey v. Simpson*, 113 Mo. 340, 20 S. W. 881. The devisees hold by the voluntary gift of Mr. Harris with full notice of Mrs. Hall's claims, and no obstacle exists why she may not have a specific performance against them as fully as against her father, who devised them the land. Both the jury and the trial court found the issue for plaintiff. As already said, the circuit court was not asked to



review its own finding of facts, and its decree was not challenged upon the ground of insufficiency of proofs to sustain it. Justice to that court and to litigants demand that we should firmly adhere to the rule that in these matters of exception the trial court should have an opportunity to correct its own errors, and save litigants needless expense of appealing. Having considered the record very carefully, we feel constrained to affirm the decree of the circuit court; and it is so ordered.

SHERWOOD and BURGESS, JJ., concur.

### FRANK v. CITY OF ST. LOUIS.

(Supreme Court of Missouri, Division No. 2.

Oct. 17, 1898.)

#### ORDINANCES—FEES FOR SERVICES—DISCRETION OF MAYOR.

A city ordinance providing that, when a physician is called on by the coroner to conduct a post mortem examination, the mayor shall be authorized to allow such physician a fee not to exceed \$25, gives the mayor a discretion, which having been exercised by refusal of allowance is conclusive.

Appeal from St. Louis circuit court.

Action by Charles A. Frank against the city of St. Louis. Judgment for defendant. Plaintiff appeals. Affirmed.

Leverett Bell, for appellant. B. Schnurmacher and Chas. Claffin Allen, for respondent.

BURGESS, J. This is an action by plaintiff, who is a physician and surgeon, against the city of St. Louis, to recover the sum of \$1,590 as compensation for services rendered by him in his professional capacity in holding a large number of post mortem examinations on dead bodies of persons in said city, at the request of its coroner, John N. Frank. The material allegations of the petition are as follows: "The plaintiff states that the defendant is, and has been since the year 1822, a municipal corporation existing under the law of Missouri, and that the plaintiff during the year 1894 and prior thereto was and is a physician and surgeon engaged in the practice of said profession in the city of St. Louis. That during the times hereinafter mentioned John N. Frank was the coroner of the city of St. Louis, duly elected to that position, and holding and exercising the duties of the office. That during all of said times there was and is in force an ordinance of the city of St. Louis, numbered 17,188, entitled 'An ordinance in revision of the ordinances of the city of St. Louis, and to establish new ordinance provisions for the government of said city,' approved April 7, 1893, and that by section 100 of said ordinance it was and is provided that 'when a physician or surgeon shall be called on by the coroner to conduct a post mortem examination the mayor shall be authorized to allow such physician or surgeon a fee not exceeding twenty-five dollars, which shall be

paid out of the treasury in the usual manner.' That during said year the plaintiff was called on by the coroner aforesaid to conduct 159 post mortem examinations in the city of St. Louis on the following bodies and dates, to wit: \* \* \*. That the plaintiff duly conducted said post mortem examinations in a creditable and satisfactory manner, and expended his time and knowledge therein, and that his services in the matters aforesaid were worth the sum of ten dollars for each post mortem examination so made by him as aforesaid. That the facts that said post mortem examinations were made by the plaintiff, and that plaintiff was called on to make the same by the coroner of the city of St. Louis, and that the value of plaintiff's services in each case was ten dollars, and that he was entitled to have the same of the defendant, were duly certified to the mayor of the city of St. Louis by the coroner of said city, and the mayor without cause refused to allow the plaintiff any compensation for his services in the premises, and thereupon the city of St. Louis became obligated to pay the plaintiff the sum of \$1,590 by reason of the matters aforesaid, which, although often demanded, remains wholly due and unpaid, and for which, with interest and costs, plaintiff prays judgment." Defendant demurred to the petition upon the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was sustained, and, plaintiff declining to plead further, judgment was rendered in favor of defendant for costs. Plaintiff appealed.

It is claimed by plaintiff that the ordinance of the city of St. Louis providing that when a physician or surgeon shall be called upon by the coroner to conduct a post mortem examination the mayor shall be authorized to allow him a fee, not exceeding \$25, which shall be paid out of the treasury in the usual manner, creates an indebtedness against the city in favor of the physician or surgeon so employed, and, in the event of the refusal by the mayor without cause to allow such physician and surgeon any compensation, the same may be recovered in an action for the value of the services rendered, within the limit named. This position seems to us to be untenable. While the ordinance provides that the mayor shall be authorized to allow any physician or surgeon who shall be called upon by the coroner to conduct a post mortem examination a fee not exceeding \$25, to be paid out of the treasury, the petition avers that the mayor did act upon plaintiff's claim, and refused to allow anything. The only fair interpretation to be placed upon the ordinance would seem to make the allowance of some amount by the mayor for the services rendered a condition precedent to their payment or recovery by suit against the city. It was for him to determine whether plaintiff was entitled to the compensation claimed or not, or any part thereof, and in so doing he acted judicially, and his action cannot be reviewed in this proceeding.

*State v. Flad*, 108 Mo. 614, 18 S. W. 1128. Had the mayor refused to act, he might have been compelled to do so by mandamus, but, it being discretionary with him as to whether or not plaintiff should be allowed compensation against the city for the services sued for, and having exercised that discretion, and refused to allow any compensation, mandamus will not lie. *Brem v. County Court*, 9 Ark. 240. The case is analogous to that of *State v. Marshall*, 82 Mo. 484, in which it is held that the allowance of fees to a coroner for an inquest on a dead body is, under Rev. St. 1879, § 5157, subject to the discretion of the county court. That section and the ordinance are substantially the same. The judgment is affirmed.

GANTT, P. J., and SHERWOOD, J., concur.

### HILLMAN et al. v. ALLEN et al.

(Supreme Court of Missouri, Division No. 2.  
Oct. 17, 1898.)

#### STATUTE OF FRAUDS—EXPRESS TRUST.

1. The statute of frauds is available under answer merely denying the agreement set up in the petition.

2. The agreement made at time of a conveyance of land that the grantee should pay off incumbrances thereon, and should reconvey on the grantor repaying him the money so advanced, creates an express trust, which Rev. St. 1889, § 5184, declares shall be in writing.

Appeal from circuit court, Harrison county; P. C. Stepp, Judge.

Action by T. P. Hillman and others against Isaac N. Allen and others. Judgment for defendants. Plaintiffs appeal. Affirmed.

D. J. Heaston and Sallee & Goodman, for appellants. J. C. Wilson and McCullough, Peery & Lyons, for respondents.

GANTT, P. J. This is an appeal from a judgment in favor of defendants. Upon a ruling of the circuit court rejecting certain evidence tendered by the plaintiffs, the plaintiffs took a nonsuit, with leave to move to set aside. In due time they moved the court to set aside the nonsuit, and, the court declining to do so, appealed to this court.

The plaintiffs are heirs at law of Stephen C. Allen, and the defendant Isaac N. Allen is a son of Stephen Allen, and the other defendants are minors and heirs at law of Stephen Allen, deceased. The petition alleges: "That prior to the 5th day of March, 1887, said Stephen C. Allen was the owner in fee simple and in possession of the following described real estate, to wit: The west half of lot seven (7) in block three (3), and sixty feet off the east end of lot seven (7) in block seven (7), all in first official survey of the city of Bethany, in Harrison county, state of Missouri. That on said 5th day of March, 1887, said Stephen C. Allen, deceased, and the defendant Isaac N. Allen, made an agreement by which said S. C. Allen was to convey said lots

to Isaac N. Allen, and said Isaac N. Allen was to pay off an incumbrance of about four hundred dollars that was against said lots, and, when said Stephen C. Allen paid him back the amount he paid out on said indebtedness, said Isaac N. Allen was to convey said lots back to said Stephen C. Allen. Thereupon, and in pursuance of said agreement, and not otherwise, said Stephen C. Allen conveyed said lots to said Isaac N. Allen, by a warranty deed, for the expressed consideration of \$850, but in fact no further or other consideration was paid or passed between said parties, but it was the understanding and agreement that said deed and conveyance was to be and operate only as a mortgage to secure said Isaac N. Allen for the amount he should pay out to release said land from liens and incumbrances then against it. That on the 11th day of April, 1889, and for a long time prior thereto, said Stephen C. Allen was the owner in fee simple and in possession of lot one (1) in block two (2) in the first survey of said city of Bethany, and at that date there was an incumbrance against it of about sixty-five dollars. That on said 11th day of April, 1889, said Isaac N. Allen, by overpersuasion and misrepresentation, induced said Stephen C. Allen to convey to him said lot one (1), upon the express understanding and agreement that said Isaac N. Allen was to pay off and redeem said lot from said incumbrance, and to hold said lot as security for the amount so paid out until said Stephen C. Allen should pay the amount so advanced back to him, said Isaac. Plaintiffs further state that on the 23d day of December, 1889, said Isaac N. Allen sold and conveyed the west half of lot seven (7) in block three (3) to F. T. Harvey, for the sum of eleven hundred dollars, and thereby said Isaac N. Allen received and realized an amount of money several hundred dollars in excess of all that he ever paid out or advanced on all of said lots and for all he paid out and advanced or incurred on account of said S. C. Allen; and plaintiffs therefore aver that said Isaac N. Allen, under his said agreements and contracts with said Stephen C. Allen, has no other or further claims against said lot one (1), block two (2), and said part of lot seven (7), block seven (7)." The prayer of the petition is: "That said Isaac N. Allen be declared a trustee holding said lots for the benefit of the heirs aforesaid of said Stephen C. Allen, deceased; and that he be required to make an accounting of the amount of money paid out by him on account of Stephen C. Allen, deceased, that would be justly charged against said real estate, and all sums of money realized by him from sale of any part of said lots, and from rents and profits thereof; and that said lots \* \* \* be ordered to be sold, and the proceeds resulting therefrom be ordered to be divided among the heirs of said Stephen C. Allen, deceased, according to their respective rights as hereinbefore stated." The answer of the defendants denied the contract or

agreement set up in plaintiffs' petition, and pleaded affirmatively that he took the property from his father by purchase, and that he paid him full and fair value for the same, and alleged with particularity the amounts so paid him. The contention of appellants upon this appeal is that the court committed reversible error in excluding parol evidence of the alleged agreement made between the defendant Isaac N. Allen and his father, Stephen C. Allen. It is admitted by counsel for plaintiffs in their statement and brief, substantially, that this is a suit to declare and enforce a trust, which, it is claimed, was established and created by a parol agreement between the defendant Isaac N. Allen and his father. As above indicated, the sole error relied upon by appellants upon this appeal is the exclusion of the evidence of the parol agreement between Isaac N. Allen and his father.

1. It may as well be noted that plaintiffs dismissed their action as to lot 1 in block 2. The answer denies the agreement set up in the petition, and the statute of frauds is available without special pleading. *Boyd v. Paul*, 125 Mo. 9, 28 S. W. 171; *Devore v. Devore*, 138 Mo. 181, 39 S. W. 68; *Hackett v. Watts*, 138 Mo. 502, 40 S. W. 113; *Wildbahn v. Robidoux*, 11 Mo. 680; *Springer v. Kleinsorge*, 83 Mo. 152; *Hurt v. Ford*, 142 Mo. 283, 44 S. W. 228.

2. "All declarations or creations of trust or confidence of any lands, tenements, or hereditaments shall be manifested and proved by some writing signed by the party who is or shall be enabled to declare such trusts or by his last will, in writing, or else they shall be void, and all grants and assignments of any trust or confidence shall be in writing, signed by the party granting or assigning the same, or by his or her last will, in writing, or else they shall be void." Rev. St. 1889, § 5184. By the next section (5185) it is provided that resulting trusts, or such as arise by implication of law, are not affected by the foregoing statute. That a resulting trust may be established by parol evidence no longer admits of doubt in this state. *Kennedy v. Kennedy*, 57 Mo. 73; *Johnson v. Quarles*, 46 Mo. 423; *Ringo v. Richardson*, 53 Mo. 385; *Phillip v. Penn*, 91 Mo. 38, 3 S. W. 386. But such evidence must be clear, cogent, and fully satisfying the chancellor. The essential inquiry that arises upon this record is whether the trust sought to be proved and enforced is an express trust or an implied resulting trust. If express, there can be no resulting trust, and parol evidence is not admissible to prove that an absolute conveyance was made upon an express trust not declared in the writing itself. *Green v. Cates*, 73 Mo. 115; *Kingsbury v. Burnside*, 58 Ill. 311; *Stevenson v. Crapnell*, 114 Ill. 19, 28 N. E. 379. The character of the alleged trust in this case must be ascertained from the petition and the evidence offered in support thereof. The averment is susceptible of but one construction, to wit, the deed was made upon an express

agreement upon the part of Isaac N. Allen to pay off the incumbrance of \$400, and, upon this sum being refunded to him, to reconvey lot No. 7. The question propounded was as follows: "Q. Mr. Johnson, I'll ask you to tell the court if you know of an agreement between Isaac N. Allen and his father, Stephen C. Allen, at the time this deed was made from Stephen C. Allen to Isaac N. Allen, on the 5th of March, 1887, by the terms of which Isaac Allen was to reconvey the property to Mr. Allen upon his repaying to Isaac the money that Isaac was to advance to pay off those certain mortgages and a judgment lien against these lots. Don't answer until they object." "Defense: I'll ask you if you know whether that agreement was in writing, or simply verbal?" "Admitted that it was only verbal." "A. No, sir; I don't know of any written agreement. (Objection sustained.)" It is nowhere averred that the father was indebted to the son, or that the deed was made to the son to secure an indebtedness from the father to the son. By dismissing the count as to lot No. 1, plaintiffs withdraw all charges of fraud and misrepresentation, so that we have the plain allegation that the father conveyed said real estate by deed absolute to his son, without qualification or limitation of any kind in the deed, and contemporaneously imposed upon the son the express parol trust to sell the lot as trustee for his father, pay off the liens, and refund the balance. If these averments and this testimony do not charge and attempt to establish an express trust of lands, then it would be difficult, indeed, to define an express trust, within the meaning of the statute. As the parol evidence offered was in plain contravention of the statute, the court properly excluded it. *Price v. Kane*, 112 Mo. 419, 20 S. W. 609; *Bobb v. Bobb*, 89 Mo. 412, 4 S. W. 511; *Weiss v. Heitkamp*, 127 Mo. 23, 29 S. W. 709; 1 *Beach*, Mod. Eq. Jur. § 234; *Rogers v. Ramey*, 137 Mo. 598, 39 S. W. 66. A like conclusion has been reached in other jurisdictions. See, specially, *Gee v. Thrailkill*, 45 Kan. 173, 25 Pac. 588; *Wolford v. Farnham*, 44 Minn. 159, 46 N. W. 295; *Biggins v. Biggins*, 133 Ill. 211, 24 N. E. 516; *Champlin v. Champlin*, 136 Ill. 309, 26 N. E. 526. The judgment is affirmed.

SHERWOOD and BURGESS, JJ., concur.

AYLWARD et al. v. BRIGGS et al.  
(Supreme Court of Missouri, Division No. 2.  
Oct. 17, 1898.)

WILLS—UNDUE INFLUENCE—EVIDENCE.

1. The mere fact that a son to whom his father willed practically all his property had lived with and taken care of his parents in their old age is not evidence of undue influence.

2. A son who lived with and took care of his parents in their old age, and to whom his father willed practically all his property, to the exclusion of daughters, has not the burden of proving absence of undue influence.

3. Contestants of a will which gave practically all testator's property to his son, to the exclusion of his daughters, should not be allowed to ask the beneficiary whether he did not consider it unjust.

Appeal from circuit court, Scotland county; Benjamin E. Turner, Judge.

Proceeding by Edna Aylward and another against William P. Briggs and others. Judgment for plaintiffs. Defendants appeal. Reversed.

Smoot, Mudd & Wagner, for appellants. J. M. Jayne, for respondents.

GANTT, P. J. This is a proceeding to set aside the last will and testament of James Briggs deceased, late of Scotland county. An issue of devisavit vel non was framed and submitted to a jury at the February term, 1896, of the Scotland circuit court, and a verdict rendered declaring the writing propounded was not the last will and testament of said James Briggs. The facts, so far as they are deemed necessary to be stated, are that James Briggs, in his early life, was apprenticed to a carpenter to learn his trade, and served until he was 21 years old. He worked at his trade, but also developed a strong desire for a liberal education, and soon after he came West, he was teaching school, and continued to be a great reader until his death, at the age of 80 years. He came to Scotland county in 1848, and resided there until his death, with the exception of three years spent in seeking gold in California, from 1850 to 1853. He was married, and three children were born to him, one son and two daughters. His wife died two years prior to his own demise. He owned a farm of 550 acres in Scotland county, estimated to be worth \$16,000, subject to a mortgage of \$800 and a general indebtedness of about \$1,200 more. In 1886 he executed the will in contest. He devised 200 acres of his land to his wife for her life, and gave her all his household goods. He gave all the remainder of his property, real and personal, to his son, William P. Briggs, and charged him with the payment of \$20 to each of his three grandchildren, Edna, Mary F., and Emma Aylward, when they respectively reached their majority, and \$50 to his daughter Mrs. Harriett A. Critz. After the death of her father, Mrs. Critz settled with her brother, William P. Briggs, and accepted \$500 in full of her claims to a share in the estate. The plaintiffs in this case are the children of the deceased daughter, Mrs. Aylward, and the defendants, the son, William P., and the other daughter, Mrs. Critz. James Briggs died in 1892, some six years after the execution of his will. The will was attested by John W. Barnes, the cashier of the Scotland County National Bank of Memphis, and W. A. Cox, a merchant of Memphis. It was admitted to probate in December, 1892. This action was commenced in August, 1895. The petition alleges that the testator was of un-

sound mind and incapable of executing a will, and that the will was procured by the undue influence of William P. Briggs, the principal devisee. It appears from the evidence that the testator was violently opposed to the marriage of each of his daughters, and after their marriage refused to be reconciled to them. It seems that, though they lived in the same neighborhood, he never visited either of them in their own homes; and when they came to his house to visit their mother, who was greatly afflicted with a cancer in her old age, he would leave home, or go into another part of the house, and refuse to see them. His son, William P. Briggs, left home about 1877, to seek his fortune in California. In 1879 the testator wrote him, and urged him to come home and take care of his father and mother, pay the debts, and he should have the farm. William P., in response to this letter, came home, took charge of the farm, which was in a dilapidated condition, remodeled the house, built a new barn, and cribs and other farm houses, rebuilt the fences, cleared the land, and put the worn-out land in clover. He married, and he and his wife cared for the two old people until they died,—the mother in 1890, and his father in 1892. The testimony without contradiction establishes that they were attentive and affectionate, and did all that was possible to render the old people comfortable. The testator's wife was an invalid, and the son took her to two different sanitariums for treatment, and paid all the expenses, amounting to several hundred dollars. The evidence also established that James Briggs was a very poor farmer. His taste led him in a different direction. He was a man of strong political views, and was a local leader in his party. When his son returned, he turned over the farm to him to manage. When it was necessary to obtain money to carry out their plans, he would execute the necessary papers, but he left the practical management entirely to his son. The will was drawn by an attorney in Memphis. The son was not present at the time. After it was signed and attested, it was left with the cashier of the bank in Memphis, to be delivered to his executors after his death. The formal proofs of the execution, attestation, and the soundness of the testator's mind were made by the two subscribing witnesses, and were clear and satisfactory.

On the part of the plaintiffs the evidence tended to prove the unnatural feeling of the testator towards his daughters and their children, in refusing to visit them or speak to them when visiting at his house. The testimony of his daughter was that, as far back as she could remember, he was afflicted with a constant pain in his head, of which he complained, and of an unnatural discharge from his nose, and that on one occasion he acted so strangely the family were alarmed, and sent for a neighbor, one Ingersall, to come and stay with them. His conduct was peculiar.

and the family could not understand it. Ingersall testified, also, that he went to the testator's house that night; that William P. came after him, and said his father was crazy. When he reached the house, the testator looked wild, and declined to speak to him, although they were very friendly and old neighbors. He got down on his hands and knees, and jumped and leaped around, and made a peculiar noise, described by the witness as a "whoo! whoo!" This witness and others testified that, when his son was dangerously sick on one occasion, the testator left home, and remained away a week, because his daughters had come to nurse their brother. He would waylay the doctor, and inquire about the boy, and get others to go to the house and inquire. He hid himself in the corn until his daughter passed him. Other witnesses testified that he talked at random at times, so much so they considered him childish; others, that as he grew older he became more and more enfeebled in his mind, but they would not go so far as to call him insane. Several old men, who had known him many years, testified that, in their opinion, his memory and mind had so failed that he did not have sufficient mental capacity to comprehend and know the extent and character of his property, and the claims of those dependent upon his bounty. George Roberts testified that he had lived in the neighborhood of the testator, had often met him and conversed with him at testator's home. Witness married one of testator's pupils. He removed from the neighborhood, and remained several years. After his return, in 1883, he met testator, shook hands with him, and told him who he was. Testator could not remember him; said no such person had ever resided in the neighborhood; and, when told that witness' wife went to school to him, he could not remember her. He considered testator cranky. Defendants, in rebuttal, offered considerable testimony showing that testator was a man of exceedingly strong will power, and of sufficient mind and memory to transact business, and to know the nature and extent of his property and all his children and grandchildren, and to dispose of his property by will.

At the close of plaintiffs' case, the defendants and proponents offered two instructions. The first was a peremptory declaration that, under the law and the evidence, the jury must find the paper writing propounded was the last will and testament of James Briggs; and the second declared that there was no evidence of undue influence, and the finding on that issue must be for defendants. Before proceeding to the discussion of other propositions in the case, these two points should, logically, be disposed of. The demurrer to the evidence asserts that there was no substantial evidence which would have authorized the jury to find that James Briggs was not of sound mind and disposing memory when he executed his will, in 1886. Unless

the jury utterly discredited the subscribing witnesses and other business men who testified, it must be conceded there was ample evidence to sustain the will. On the other hand, if the jury believed the witnesses for the contestants, they would have found that the testator was an old man, much enfeebled by old age and a chronic disease in his head; that, since the marriage of his two daughters, he had acted in a very unnatural manner towards them, without any reason other than they had married against his will, there being no evidence that their husbands were not worthy men and reputable citizens; that at times the old gentleman was positively insane, so much so as to require his wife to call in a neighbor for protection. The jury could also have found that his memory had become so treacherous that he did not know his near neighbors or recall their names; that when his son, his favorite child, was dangerously ill, he had left his home, and remained at a neighbor's for more than a week, at the most critical period of his sickness, merely because his daughters, moved by affection for their brother, had returned home to nurse him. The jury could have accepted the opinion of those who testified that, in their opinion, from a long acquaintance and social intercourse with the old gentleman, he had become so enfeebled in mind that he no longer knew the character and extent of his property, and was not competent to dispose of it among those who would naturally be the object of his charity. Having all these circumstances before them, they might, in connection therewith, have considered the will itself, and have concluded that the testator, in ignoring the claims of the three orphan girls, his grandchildren, who were wholly without means, and bestowing a farm well worth from \$16,000 to \$18,000 upon his son, strongly corroborated the opinion of the witnesses that his will was the product of an unsound and unhealthy mind. We are of the opinion that there was evidence upon which to submit that issue to the jury, and that, under proper instructions, it was their province to determine the fact. Of course, if the testator was otherwise found to have testamentary capacity, the inequalities of his will constituted no ground for setting it aside. If of sound mind, he had a perfect right to discriminate in favor of his son, and against his other children and grandchildren, and their poverty would not affect the case; and it was not the province of the jury to hold him incompetent because he did not dispose of his property as they would have done, or as his disappointed children feel he should have distributed it. *McFadin v. Catron*, 120 Mo. 252, 25 S. W. 506; *Farmer v. Farmer*, 129 Mo. 530, 31 S. W. 926; *McFadin v. Catron*, 138 Mo. 197, 38 S. W. 932, and 39 S. W. 771.

2. We are thus brought to the refusal of the instruction declaring there was no evidence of undue influence. Upon this point, we think, the learned circuit court erred.

After a patient reading of the whole record, we cannot find the most remote evidence that W. P. Briggs ever endeavored to influence his father to make him his principal devisee. On the contrary, the will seems to have been made in pursuance of a long-cherished desire on the father's part to recompense the son for returning from California, and taking upon himself the support of his feeble old father and afflicted mother. This was the father's proposition when he urged the son to return. Unless we are to say that the kindly offices of a son to his old and oftentimes helpless parents create a presumption of undue influence, merely because the parent sees fit to reward the performance of such duties, then this record is barren of any testimony showing undue influence. We have often held otherwise. *Maddox v. Maddox*, 114 Mo. 53, 21 S. W. 496; *Berberet v. Berberet*, 131 Mo. 360, 33 S. W. 61; *McFaddin v. Catron*, 135 Mo. 197, 38 S. W. 932, and 39 S. W. 771. It becomes unnecessary to further discuss the objections to the various other instructions given and refused on the question of undue influence. None of them should have been given. Several of them are glaringly incorrect, notably those imposing upon the son the burden of establishing that the will was voluntary, and without the undue influence of the son, and requiring him to account for the inequality in the legacies. The instructions given by the court of its own motion were sufficient and correct declarations, save those on undue influence. In their stead, the court should have instructed there was no evidence to support that allegation in the petition.

3. The question propounded to the defendant inquiring if he did not think the provisions of the will unjust was highly improper, and should not have been permitted. For the errors noted, the judgment is reversed, and the cause remanded.

SHERWOOD and BURGESS, JJ., concur.

# SAN ANTONIO & A. P. RY. CO. v. GURLEY.

(Supreme Court of Texas. Nov. 3, 1898.)

## APPEAL—REVIEW—ESTOPPEL—EQUITY.

1. Error in holding that a deed was in escrow, and did not pass title, not being fundamental, will not be considered by the supreme court unless assigned in the court of civil appeals.

2. Where a railroad company went into possession under a deed given in consideration of an agreement to erect a switch and execute a written agreement to maintain it, and, in an action to evict it for failure to build the switch and execute the agreement, pleaded title under the deed, and sought equitable relief, it was precluded from pleading limitations to a count for damages for failure to perform the consideration and erect the switch.

Error to court of civil appeals of Third supreme judicial district.

47 S.W.—33

Trespass to try title by E. J. Gurley against the San Antonio & Aransas Pass Railway Company. A judgment for plaintiff was modified by the court of civil appeals (44 S. W. 865), and defendant brings error. Affirmed.

John C. Townes, A. W. Houston, and W. S. Baker, for plaintiff in error. Jones & Sleeper, for defendant in error.

BROWN, J. E. J. Gurley instituted this suit to recover of the plaintiff in error certain land described in plaintiff's petition, and, by amendment made more than four years after the institution of the original suit, claimed damages from the railway company on the failure to perform the contract entered into as a part of the consideration of the sale of the land by the plaintiff to it. Upon the trial the court gave judgment for the plaintiff for \$1,200 damages, and for the defendant, the railway company, for the land in controversy. The court of civil appeals affirmed the judgment of the district court.

The case was tried before the district judge, who filed the following conclusions of fact: "(1) I find that E. J. Gurley, the plaintiff, conveyed the land in controversy by warranty deed to the San Antonio & Aransas Pass Railway Company, the defendant, November 1, 1889, in consideration of \$988 cash, which was then paid to plaintiff, as expressed in the deed; and (for the consideration, not expressed in the deed) the further promise of the defendant, by its agent, to execute and deliver a written contract to plaintiff to construct a switch across plaintiff's land, adjacent to the land in controversy, and maintain said switch as plaintiff's, free of charge for switching. I find that this deed was placed in the possession of A. M. French, the local agent of the plaintiff, with the verbal agreement between A. M. French and the plaintiff that the deed was to be held in escrow by French, and not to be delivered to the defendant, until it executed and delivered to plaintiff said written contract, signed by the defendant, to build said switch, and maintain it, free of switching charges, as aforesaid. I find that defendant agreed to put plaintiff's switch in when it built its own switches, but that plaintiff consented that it might be deferred until the line was built to his land, ten or fifteen miles below Waco. I find that on or about January 1, 1890, after the agreement was made, defendant's line was built to plaintiff's land; and that plaintiff urged defendant's agents to put his switch in; and that defendant's agents promised to do so, when they could get material, etc., to build it with; and that defendant did not put plaintiff's switch in until a few days after plaintiff filed this suit, to wit, on the 16th day of May, 1892; and that defendant has not delivered said written contract to plaintiff to construct and maintain said switch free of extra charge for switching, but that the same was to be

so constructed. I further find that at the time the switch was built, to wit, about May 16, 1892, a few days after the filing of plaintiff's suit, plaintiff's agent was consulted by defendant as to the location desired for said switch on plaintiff's land; and that plaintiff's agent directed defendant where to locate it, though plaintiff did not know defendant had put in the switch, until after it was in, but his agent, Rhea, knew about it; and that plaintiff was satisfied with its construction; and that, immediately after it was built, plaintiff acquiesced therein, and went into possession of it, and has been using and enjoying it ever since; and that the defendant has maintained it, free of charge to plaintiff for switching, ever since about May 16, 1892. And I further find that no objection was made by plaintiff at any time to the construction of the side tracks and switches across the land sued for. I find that plaintiff has never paid, nor offered to pay, back to the defendant, the \$988 cash paid plaintiff November 1, 1889, on the land sued for by plaintiff, nor offered to return nor pay defendant for the switch, worth \$412, constructed by defendant over plaintiff's land, about May 16, 1892, nor any part thereof. (2) I find that between the dates of January 1, 1890, the time when defendant should have put in said switch, and the 16th day of May, 1892, the time when defendant did put in said switch, plaintiff, because of defendant's delay in putting in said switch, was damaged, by having to move 400 cars of wood from the place where defendant delivered it to the place where it would have been delivered by defendant (in plaintiff's wood yard) if it had put in said switch, and that the cost to plaintiff for moving said wood was \$3 per car, aggregating \$1,200 damages; and I find that the \$1,200 loss was sustained by plaintiff and caused by defendant's failure to put in said switch prior to the 16th day of May, 1892, the time when plaintiff filed his original petition in this cause; and I find that said damages were not pleaded by plaintiff until the 16th day of September, 1896, by plaintiff's first supplemental petition. I further find that the defendant has paid taxes on the land in controversy since its purchase in 1889, and has made improvements thereon worth \$1,640."

The plaintiff in error assigns in this court that the district court erred in holding that the delivery of the deed from Gurley to the agent of the railroad company, to be by him held until the grantee should perform the verbal agreement made at the time, did not have the effect of passing absolute title to the railroad company. This was not assigned in the court of civil appeals, but is claimed to be fundamental error, and therefore urged in this court. We do not regard this as a fundamental error, any more than would be any other mistake of the trial court in its judgment of the law upon any given state of facts; and, not having been assigned in

the court of civil appeals, it is not considered by us.

The original petition was filed by Gurley against the railroad company in the district court of McLennan county, on the 17th day of May, 1892, as an action of trespass to try title to recover certain lands in the city of Waco, described in the petition. The original answer of the defendant does not appear in the record, and we do not know what its nature was. On the 14th day of September, 1896, the defendant railroad company filed its first amended original answer, in which it sets up the purchase of the land from Gurley for the sum of \$988 cash, which was paid, and alleges that the deed from Gurley to it was duly delivered at the time. The plea set up the verbal agreement by which the defendant bound itself to put in the switch for the plaintiff, and alleged that it had complied with the terms of that contract. Among other things, the amended answer in substance averred that the railroad company had in all respects complied with its contract made with the plaintiff, Gurley, but says that, if it is mistaken in this, it prays the court to require it to comply therewith, so as to protect the plaintiff's rights, and to quiet its title to the lands in controversy, and "for such other and further relief in law and equity as it may be entitled to." Gurley filed a supplemental petition on the 16th day of September, 1896, in which he set up the facts in detail, and, among other things, averred that the plaintiff had failed to comply with its agreement in this: that it had not delivered to him the written contract binding it to maintain the switch, and that it had wholly failed to construct the switch until about the 16th day of May, 1892, whereas it should have been completed by January 1st, 1890; that between said dates he had been compelled to pay about \$1,800 for moving wood, shipped upon the defendant's road to his woodyard, which he would not have been required to pay if the switch had been constructed according to the contract; and he prayed for a recovery of the damages caused by the defendant's failure.

The plaintiff in error contends that Gurley's claim for damages was barred by the statutes of limitation, because it accrued more than four years prior to the filing of the supplemental petition. The written contract to maintain the switch was an essential part of the consideration for the conveyance, and performance by defendant was not complete until it was delivered. The plaintiff in error, having failed to perform its contract in full, could not invoke the equity powers of the court for the enforcement of the contract in its favor, and at the same time refuse to do equity by placing the plaintiff in as good condition as he would have been if it had performed its agreement at the proper time. The deed could not be given effect by a court of equity so long as the defendant refused to pay the consideration, or to perform the

acts constituting such consideration, or to do that which would be equivalent to performance; and we are of the opinion that, where the failure to perform occasioned damages to the grantor, such damages would be regarded by a court of equity in the same light as if they were a part of the purchase money, and the court could require the payment of such damages as condition to granting relief. *Helmke v. Railway Co.* (Sup. Ct.) 21 N. Y. Supp. 345. In the case cited, the landowner had made an agreement to convey to the railroad company certain lands for right of way purposes, upon condition the railroad company should erect a fence on each side of the land. The company took possession of the lands, and operated its road, but failed for several years to build a fence. It finally erected the fence, and demanded a conveyance from the landowner, which he refused to make except upon a payment to him of \$250 damages, sustained because the fence had not been built in the time agreed upon. The railroad company sued for the enforcement of the contract to convey. The court held that the plaintiff was not entitled to the performance of that contract until it paid the damages which accrued by reason of its failure to build the fence according to the agreement, and decreed that the landowner should convey upon the payment by the company of the damages assessed by the court. We think that this decision is in accord with the rule established by our courts; that the grantee, in any executory contract for the sale of land, cannot plead limitation against the claim for the purchase money, and at the same time enforce the contract for conveyance. *Estes v. Browning*, 11 Tex. 237; *White v. Cole*, 87 Tex. 500, 29 S. W. 759. He who seeks the interposition of a court of equity must himself do equity; and in this case nothing short of the payment of the damages caused by the failure to perform the contract would meet the requirements of equity and justice. We find no error in the judgment of the court of civil appeals, and the judgment of the district court, as reformed by the court of civil appeals, is affirmed.

TEMPLE NAT. BANK et al. v. WARNER.  
(Supreme Court of Texas. Nov. 3, 1898.)

DEEDS—MORTGAGES—EVIDENCE—RENTAL VALUE.

1. On an issue whether an instrument was intended as a mortgage or a conditional deed, evidence is admissible that the property was worth, at the execution of the deed, nearly double the consideration named in the deed.

2. In an action to have a deed declared a mortgage, and the mortgage set aside for fraud of the grantee, evidence of the value of the property conveyed at the time of the trial is inadmissible, standing by itself, on an issue as to the rental value of the property which intervenor had occupied as a subsequent mortgagee of the grantee.

Error of court of civil appeals of Third supreme judicial district.

Action by W. W. Warner against H. C. Merrick to have a deed declared a mortgage and to cancel the lien of the mortgage. The Temple National Bank and another intervened. A judgment for plaintiff was affirmed by the court of civil appeals (44 S. W. 1025), and interveners bring error. Reversed.

Harris & Saunders, for plaintiffs in error.  
A. M. Monteith, for defendant in error.

DENMAN, J. July 6, 1889, Warner executed to Merrick an instrument in the form of an absolute deed, conveying two lots in Temple, Tex., for a consideration of \$1,700, recited as paid, and placed him in possession, and, at the same time, Merrick executed an instrument to Warner, purporting to give him the privilege of repurchasing the property within two years upon the payment of \$1,700, which instrument was duly recorded same day. August 1, 1889, Merrick executed his notes to the Temple Building & Investment Company, amounting to \$1,235.16, and secured them by trust deed on said property. August 7, 1889, Merrick executed to the Temple National Bank, through one of its officers, a note for \$700, in consideration of past indebtedness, and secured it by trust deed upon said lots and delivering possession of same. This suit was brought by Warner against Merrick to have said deed declared a mortgage to secure \$1,700, agreed to be paid by him for one-half interest in a saloon business, and to cancel the lien of such mortgage, on the ground that Merrick fraudulently misrepresented to him the value of the stock of goods in such business to be \$3,400, and that there were no debts against same, when in truth it was of little value, and was much involved, necessitating his paying out large sums, amounting to more than the \$1,700, in order to save the property, and for recovery of possession of the property and rents. Merrick answered, contesting Warner's claim. The bank and the building and investment company each intervened, asking a foreclosure of its lien, secured as aforesaid. By supplemental petition, Warner sought to recover the property and rents from interveners. During the trial Merrick withdrew his defense, and virtually confessed that Warner was entitled to judgment against him. The cause then proceeded between Warner and interveners, two of the principal issues between them being (1) whether the instrument from Warner to Merrick was in fact intended as a mortgage or a conditional deed, and (2) what was the rental value of the property.

On the trial, plaintiff, after showing the value of the property at the date of the instrument, was permitted by the court to show its greatly increased value at the time of the trial, over the objection of the interveners to the effect that the evidence was irrelevant, and did not tend to prove the issue as to whether the instrument was intended as a deed or mortgage, but was calculated to mis-



lead the jury and prejudice their minds against interveners. Judgment was rendered (1) in favor of Warner against Merrick and interveners for title and possession of the land, and against the bank for \$1,950, rents, and all costs; (2) in favor of the bank against Merrick for the amount of its claim and costs; and (3) against the building and investment company that it take nothing. Both interveners having appealed to the court of civil appeals, assigning that the court below erred in admitting said testimony, and the court of civil appeals having affirmed the judgment, they have brought the case to this court by writ of error, complaining of the admission of said testimony.

It is clear that it was competent for Warner to testify, as he did, that at the time of the execution of the instruments, in 1889, the property was really worth \$3,000, as that tended to show the improbability of his having sold it for \$1,700, as recited in the deed. It is equally clear that the fact that it was worth at the time of the trial, in 1893, according to the testimony objected to, probably as much as \$6,500, did not shed any light upon the issue as to whether the parties at the time the instrument was executed intended thereby merely to secure money or conditionally sell the land, but was calculated to prejudice interveners' cause by showing that the transaction had turned out profitably to the grantee. In fact, it does not seem to be controverted that the evidence was both irrelevant and prejudicial upon the issue of mortgage or conditional sale. It is, however, sought to justify its admission upon the issue above stated, of the rental value of the property down to the time of the trial, and this is the ground upon which the court of civil appeals concluded it was admissible. No authority has been cited nor have we been able to find one upon the point. We are of opinion that upon principle the position cannot be maintained. Proof of value would not of itself have supported a verdict for rent, and such proof is not in this case shown to be a circumstance tending to establish any other fact bearing upon such issue. We do not think that from the evidence of value any reasonable inference or presumption as to the rents can be drawn or arises. For the error above noticed the judgment will be reversed, and the cause remanded, only as between Warner and the bank. Such error is not cause for reversal as to the Temple Building & Investment Company, for it was in no event entitled to judgment, for the reason that, as found by the jury and court of civil appeals, it did not own the rotes it sued upon at the time its plea of intervention was filed, July 21, 1893, but had previously transferred them to the bank, and did not reacquire them until after the filing of said plea, and there is nothing in the record to show that they were involved in this suit prior to said plea. Merrick makes no complaint of the judgment against him.

## HOLLOWAY SEED CO. v. CITY NAT. BANK.

(Supreme Court of Texas. Oct. 20, 1898.)

On rehearing. Modified.

For former opinion, see 47 S. W. 95.

GAINES, C. J. In disposing of this case upon the writ of error, we reversed the judgment of the district court, because it awarded a recovery for the value of the goods found to be in possession of the plaintiff in error at the time of the service of the writ of garnishment. We also remanded the cause in order to give the defendant in error an opportunity to plead and prove the facts that would entitle it to a money judgment. The defendant in error now comes, and waives the right conceded to it by a remand of the cause, and moves the court to render such judgment as ought to have been rendered in the trial court; that is to say, "a decree requiring the garnishee to deliver up to the sheriff or any constable presenting an execution in favor of the plaintiff against the defendant" the goods, "or so much of them as may be necessary to satisfy such execution." Rev. St. 1895, art. 240. We see no good reason why the motion should not be granted. Accordingly, our former judgment is modified so that so much thereof as reverses the judgment of the trial court shall stand, and so much as remands the cause is set aside; and judgment is here rendered in accordance with the article of the Revised Statutes just cited.

## HINES v. MORSE et al

(Supreme Court of Texas. Oct. 25, 1898.)

MANDAMUS—SUPREME COURT—JURISDICTION—WRIT OF ERROR—REFUSAL—REHEARING.

1. Under Const. art. 5, § 3, providing that the supreme court and the justices thereof may issue writs of mandamus, the judges of the supreme court have authority to issue such writs in vacation.

2. Rev. St. art. 977, relating to rehearings, does not apply to a refusal to grant a writ of error by the supreme court.

Olive Hines petitions for a writ of mandamus against Charles S. Morse, clerk of the supreme court, to which the Missouri, Kansas & Texas Railway Company of Texas appears, challenging the jurisdiction of the judges of the supreme court to grant a writ of mandamus in vacation. Writ issued.

Lovejoy, Sampson & Malevinsky and Hogg & Robertson, for applicant Hines. Fiset & Miller, for Missouri, K. & T. Ry. Co. of Texas.

GAINES, C. J. This proceeding was a petition addressed to the chief justice and associate justices of the supreme court for a writ of mandamus to compel the clerk of that court to transmit to the clerk of the court of civil appeals for the First supreme judicial district a

certified copy of the order of the supreme court refusing a writ of error in the case of the Missouri, Kansas & Texas Railway Company against Olive Hines. The matter under consideration was heard and determined during the last vacation, but the preparation of the opinion was postponed until the beginning of the present term, so that all the judges of the court might confer and agree upon it when prepared. The case of the Missouri, Kansas & Texas Railway Company against Hines, before mentioned, was brought to the supreme court upon an application for a writ of error during its last term. The application was refused near the end of the term, and after the adjournment, but within 15 days from the order refusing the writ, the applicant railroad company filed a motion for a rehearing. Thereupon the defendant in the application demanded of the clerk that he should transmit to the court of civil appeals at Galveston a certified copy of the order of refusal and all file papers sent up from that court. The clerk, acting upon what had been the uniform practice in the supreme court, declined to comply with the demand until the motion for a rehearing should be overruled. The petition for the writ of mandamus alleged these facts, and the Missouri, Kansas & Texas Railway Company, having been made a party defendant, appeared, and pleaded to our jurisdiction as judges in vacation to hear and determine the matter, and also excepted to the petition for insufficiency. The case was ably presented on both sides by oral argument, and resolved itself into these two questions: First, have the judges of the supreme court, during vacation, the power to grant a writ of mandamus in any case? and second, is the applicant for a writ of error, whose application has been refused by the supreme court, entitled of right to file a motion for a rehearing?

1. Section 3 of article 5 of our constitution, which provides for the organization of the supreme court, and defines the powers and jurisdiction which are conferred upon it, and which may be conferred by the legislature, contains this provision: " \* \* \* The supreme court and the justices thereof shall have power to issue writs of habeas corpus as may be prescribed by law, and under such regulations as may be prescribed by law the said court and the justices thereof may issue the writs of mandamus, procedendo, certiorari, and such other writs as may be necessary to enforce its jurisdiction. \* \* \* " Upon the construction of this provision the determination of the first question must depend. Courts, the terms of which are fixed by law, have no power to sit save during term time, unless, for special reasons, authority to hold a special session, or to hear and determine some special class or classes of cases during their ordinary vacation, be conferred upon them. This latter authority is not infrequently given to courts or to the judge or judges thereof, and, when a consti-

tution or a statute confers the power, no reason is seen why the authority cannot be exercised. If the latter part of the provision under consideration had read, "And under such regulations as may be prescribed by law the said court \* \* \* may issue the writs of mandamus, procedendo, certiorari, and such other writs as may be necessary to enforce its jurisdiction," it is clear that there would have been no power to issue the writ in this case except in term time. The constitution limits the sessions of the supreme court to a specified term of nine months, and fixes the place where it must sit, and does not specially provide for the exercise of its jurisdiction at any other time or place. It follows that it can act at no other time or place. But the provision in question confers the same jurisdiction, with respect to the writs therein specified, upon the justices of the supreme court, which are conferred upon the court itself, and neither directly nor indirectly limits the time or fixes the place at which they are to act. In the exercise of the jurisdiction thereby conferred they may act, as justices of the supreme court, and not as the court itself, either in term time or vacation. The power, however, is limited to the grant of such process as may be necessary to enforce the jurisdiction of the court. The provision, in our opinion, is a wise one. It may be necessary to issue a writ to enforce the jurisdiction of the court in vacation as well as in term time, and for this reason, doubtless, the power was conferred upon the justices of the court. The present case serves to illustrate the point. Here the clerk, being without a decision of the supreme court to guide him, and pursuing the usual practice of the court, cautiously declined to transmit to the court of civil appeals a certificate necessary to a prompt enforcement of a judgment of that court; and, although the relator felt aggrieved by this course, she would have been without remedy but for the power conferred upon us, as justices of the court, to hear and determine in vacation the case made by her petition.

2. This brings us to the discussion of the second question. The provisions of the Revised Statutes with reference to motion for a rehearing in the supreme court are found in chapter 9 of title 27, and are as follows:

"Art. 977. Any party desiring a rehearing of any matter determined by said court may, within fifteen days after the date of entry of the judgment or decision of the court, file with the clerk of said court his motion in writing for a rehearing thereof, in which motion the grounds relied upon for the rehearing shall be distinctly specified, and the name and residence of the counsel of the opposing party, if known, and if not known, then the name and residence of the opposing party as shown in the record; provided, that should the court adjourn within less time than fifteen days after the rendition of the judgment it may make such rules and regulations in ref-

erence to the filing of the motion as to it may seem best for the promotion of the interest of all the parties concerned.

"Art. 978. Upon the filing of such motion with the clerk of said court, he shall make a certified copy of such motion and transmit the same by mail to the sheriff or any constable of the county in which the attorney, or opposing party, as the case may be, is alleged in said motion to reside, together with a precept commanding him to deliver the copy of the motion to the person named in such precept.

"Art. 979. Upon the receipt of such precept and copy of motion by the officer it shall be his duty to deliver the copy of the motion to the person named in said precept, if found in his county, and to return said precept to the court, by mail, stating thereon at what time and to whom he delivered the copy of the motion, or that the party named in the precept is not to be found in his county, as the case may be.

"Art. 980. Service of said motion on any one of several parties or their attorneys to a cause, shall be sufficient service on all.

"Art. 981. At any time, after five days from the return of such precept served, it shall be lawful for said supreme court to hear and determine such motion for rehearing, and not sooner."

If it had been the purpose of the legislature to make every ruling of the supreme court subject to review by a motion for a rehearing, the language could hardly have been more comprehensive; yet when we look to all the provisions relating to that procedure, and to the reason and spirit of the enactment, we are constrained to hold it was not the purpose to give a party whose application for a writ of error has been refused the right to have a reconsideration of the matter by simply filing a motion for that purpose. That some limitation is to be placed upon the terms "a rehearing of any matter determined by said court" is obvious. A motion for a rehearing itself, when either granted or overruled, is a matter determined by the court; so that, if the meaning of the words are not to be restricted, the procedure might be continued indefinitely. It is absurd to attribute a purpose to the legislature to give such a right. Again, if the words are to be taken in their broad literal sense, every motion made during the progress of the cause would be subject to a review, and, under the provisions of the last four articles quoted, to a consequent delay of several weeks. Clearly, this was not intended, nor has it ever been the practice in this court. Besides, the provisions of articles 978-981, above quoted, show that article 977 was not intended to apply to the action of the court upon an application for a writ of error. The latter proceeding is purely *ex parte*. The defendant in the application is neither entitled to notice nor to be heard upon the question whether the application shall be granted or refused.

If granted, the case is set down for submission, and he is notified of the fact, and of the day of submission. It is unreasonable to presume that it was the purpose of the legislature that the defendant in an application should have notice of a motion for a rehearing of the application, when he is not entitled to notice of the filing of the motion itself. The two are obviously inconsistent. And yet the language of article 978 is just as broad as article 977. It makes no exception. Whenever a motion is filed, notice must be given. It is clear, either article 977 was not intended to embrace the determination of an application for a writ of error, or that article 978 was not intended to apply to every motion. Again, if the statute gives the right to move for a rehearing upon the refusal of a petition for a writ of error, it clearly gives the right when one is granted. That there is no reason for such a motion in the latter case appears by the fact that when an application is granted the defendant in error is given notice, and has the right to appear, and present his case by brief and oral argument. When, as is the usual practice in all of our appellate courts, a case is disposed of in a written opinion, a motion for a rehearing is a serviceable proceeding. Counsel, knowing the grounds upon which the case has been decided, may be able to point to some mistake into which the court has fallen as to the contents of the record, or some error of law. But it is rare that anything is written in the supreme court upon refusing a writ of error, and then only to state in the briefest terms the grounds upon which the court has acted. We fail to see the propriety of asking a rehearing when the grounds of the court's decision are not disclosed by an opinion, and when the party asking it is in no better position to point out error, after the matter has been determined, than he was before the ruling was made. He can urge nothing in the motion which might not have been, and ought not have been, urged in the petition for the writ of error. In framing the act to reorganize the supreme court under the amendments to the judiciary article of the constitution, the legislature pursued the method of amending certain articles of the Revised Statutes and of adding others, leaving many of the previous provisions relating to that court unchanged. Among the latter are the articles under consideration. They were originally passed in 1874, when no such procedure as an application for a writ of error as now provided for was known to our law. Since the organization of the supreme court under the recent amendments to the constitution, many motions for a rehearing of applications have been filed, and have been acted on by the court. Some have been granted. This was within the power of the court, since it had control of its judgments until the end of the term. It has, of its own motion, set aside orders refusing applications long after they had been entered, and granted the writ of

error. Nevertheless, we are clearly of the opinion that article 977 does not apply to the proceeding, and that an applicant for the writ of error, whose application has been refused, has not the right to file a motion for a rehearing, and thereby suspend the action of the clerk in certifying the order of refusal to the court of civil appeals. For the reasons given, our conclusion was that the writ of mandamus should issue as prayed for, and it was so ordered. This opinion will be filed and recorded among the opinions of the court.

### SCHARFF v. WHITAKER et al.

(Supreme Court of Texas. Oct. 27, 1898.)

VENDOR'S LIEN—FORECLOSURE—PARTIES—ESTOPPEL.

A lienholder stating that his lien had been paid, and thereby inducing a senior lienholder to accept vendor's lien notes for a release of his lien, becomes a party to the vendor's lien in its inception by virtue of estoppel, and may be made a party to a suit to foreclose the lien.

Error to court of civil appeals of Fourth supreme judicial district.

Action by Morris Scharff against H. M. Whitaker and others. Judgment for plaintiff, and defendant Whitaker appealed to the court of civil appeals, which reversed the judgment (46 S. W. 263), and plaintiff brings error. Reversed.

Frost, Neblett & Blanding, for plaintiff in error. H. C. & Cone Johnson, for defendants in error.

DENMAN, J. This suit was brought in the district court of Limestone county by Morris Scharff, as indorsee of three vendor's lien notes, executed by the Big Sandy Lumber Company to Clark, to recover judgment against said company as maker and various other persons as indorsers and guarantors, and to foreclose the vendor's lien reserved in said notes, and the deed from Clark to the company, upon various pieces of property conveyed as the consideration for their execution. In addition to the above, Scharff sought, by virtue of an estoppel, to subject to the lien of said notes whatever title H. M. Whitaker held to a portion of said property. The facts stated in his petition as constituting the estoppel are too voluminous to be set out here. They are in effect: That the notes sued on were to be executed by the Big Sandy Lumber Company for the purpose of taking up and satisfying a prior claim held by Allen & Oliver against a former owner of the property, and secured by trust deed thereon; that Allen & Oliver refused to accept them as such, unless the adverse claim of Whitaker was first settled; that thereupon Whitaker, knowing that they were to take such notes thus secured in lieu of their prior claim, stated to Allen & Oliver that his claim had been settled by the Big

Sandy Lumber Company, and they then, relying upon such statement, agreed to accept the notes; that thereupon the notes were executed and indorsed by Clark to Allen & Oliver, who, relying upon the facts above stated, accepted them, and released their said claim, and afterwards indorsed them to plaintiff. To this petition Whitaker filed the following exception: "There is a misjoinder of parties and a misjoinder of causes of action in this cause, in that the plaintiff seeks, as against the Big Sandy Lumber Company, to foreclose a lien upon certain property of said company, whereas this defendant is an adverse claimant, and plaintiff seeks to divest him of title to said property, and defendant, being a stranger to said lien, cannot be made a party for the purpose of trying his adverse claim in this suit, all of which facts appear from plaintiff's first amended petition filed herein; wherefore defendant says that he is not a proper party to this suit, and that there is a misjoinder of parties and causes of action, of which he prays the judgment of the court, and that he be dismissed with his costs." The trial court overruled the exception, and finally rendered judgment in favor of Scharff against the defendants liable on the notes, and against them and Whitaker foreclosing the lien. Whitaker having appealed, the court of civil appeals held that the trial court erred in overruling said exception, reversed the judgment in so far as it was against Whitaker, and dismissed the cause as to him, but affirmed the judgment of the trial court in all other respects. 46 S. W. 263. From this judgment Scharff has brought the cause to this court, assigning as error the action of the court of civil appeals in reversing and dismissing the cause as to Whitaker.

By virtue of the estoppel, Whitaker subjected his property to the lien of the notes as fully and as effectually as if he had executed an agreement that it should be so, and he thereby became a party to the lien in its inception. *Nichols-Steuart v. Crosby*, 87 Tex. 443, 29 S. W. 380. His title did not pass by the estoppel to the Big Sandy Lumber Company, nor to the holder of the notes, but was merely subjected to the lien, leaving in him the right to pay off the notes and retain his property, and, as incidental thereto, the right to compel the application of the other property included in the deed before his could be sold. The holder of the notes had the right to make his suit as broad as his claim and lien, and, for that purpose, to include therein all the parties and titles liable thereon or subject thereto, whether by contract or estoppel. *Lindsley v. Parks* (Tex. Civ. App. 43 S. W. 277). We are therefore of opinion that the court of civil appeals erred in holding that Whitaker was not a proper party. We have examined the various other assignments made by Whitaker in that court, and are of opinion that none of them are well taken. It results that its judgment, in so far as it set

aside that of the trial court and dismissed the cause as to Whitaker, must be set aside, and that of the district court affirmed.

### McGHEE v. ROMATKA.

(Supreme Court of Texas. Nov. 3, 1898.)

#### WRIT OF ERROR—APPLICATION FOR REHEARING.

Under Rev. St. 1895, art. 1029, authorizing the issuance of a mandate on a decision of the court of civil appeals if no writ of error or motion for rehearing be filed within 30 days, and article 1030, permitting a motion for rehearing to be filed within 15 days, a motion filed after 15 days is too late; and hence the supreme court has no jurisdiction to grant a writ of error where such motion was so filed, under Rev. St. 1895, art. 942, requiring the petition for a writ of error to be filed within a stated time after denial of the motion for rehearing, and Sup. Ct. Rule 1 (31 S. W. v.), requiring a motion for rehearing to be made and overruled in the court of civil appeals before application for a writ of error can be made.

Application for writ of error to court of civil appeals of Third supreme judicial district.

Action by Jinks McGhee against Joseph Romatka. A judgment for defendant was affirmed by the court of civil appeals (44 S. W. 700), a petition for rehearing overruled (47 S. W. 282), and plaintiff petitions for a writ of error. Dismissed.

Scarborough & Scarborough, for applicant.

GAINES, C. J. This is an application for a writ of error. The judgment of the court of civil appeals which is sought to be revised was rendered on the 20th day of March, 1898, and the motion for a rehearing was not filed until the 3d day of May next thereafter. No action was taken upon the motion at the term at which it was filed, nor did the court set aside its judgment of its own motion. The motion was, however, overruled during the present term of the court of civil appeals. Article 1029 of the Revised Statutes of 1895 relates to the procedure in the courts of civil appeals, and provides that, "if no writ of error be sued out or motion for rehearing be filed within thirty days after the conclusion or decision of the court has been entered in any court of civil appeals, the clerk of the court shall, upon application of either party and the payment of all costs, issue a mandate upon said judgment; and in any cause reversed by said courts the appellant shall be entitled to an execution against the appellee for costs occasioned by such appeal, including costs for the transcript, said costs to be taxed by the clerk of the said court." Article 1030 of the same title provides, also, that a motion for a rehearing may be filed within 15 days from the rendition of the judgment. The court of civil appeals has power over its judgments at any time during the term at which they are rendered, and may, without a motion from any party, reform or set them aside. Consequently it may consider a mo-

tion for a rehearing filed after the time has elapsed which is allowed by law for the filing of such motions. But a motion for a rehearing, filed after 15 days from the rendition of the judgment, does not suspend the judgment nor the issuance of the mandate. The judgment remains in full force and effect, and, if the court adjourn for the term without setting it aside, it becomes a finality, and the court loses control over it. It has no power to vacate it at a subsequent term, and any action in relation thereto is a nullity. This case, therefore, stands just as if no motion for a rehearing had been filed, and no action had been taken by the court after the judgment was rendered until the present term. The rules require that a party desiring to apply to this court for a writ of error to a judgment of the court of civil appeals shall file a motion for a rehearing in that court, and article 942 of the Revised Statutes of 1895 provides, among other things, that the petition for the writ must be filed within 30 days from the overruling of the motion for a rehearing. This clearly implies that the motion must be filed within the time provided by law, and must be acted on by the court. More than 30 days had elapsed from the rendition of the judgment in this case before the motion for a rehearing was filed. Since the judgment was not suspended by filing the motion, the application comes too late, and we have no power to consider it. Had the motion been seasonably presented, the case would have been different. It would have suspended the judgment, and, unless the court had acted before the end of that term, it would have carried the matter over to this. The application is dismissed for want of jurisdiction.

### KELLOGG et al. v. McCABE.

(Supreme Court of Texas. Oct. 27, 1898.)

#### WITNESSES—CREDIBILITY—EVIDENCE—RELEVANCY.

A certain person gave material evidence for plaintiff, and testified that he had been elected to several public offices. On cross-examination plaintiff asked defendant's witness, who had testified concerning such person's reputation for truth, why it was that he had been repeatedly elected to office if his reputation was bad. *Held*, that the answer that the county was under the control of disreputable rascals when he was elected should be rejected as irrelevant and improper.

Certified question from court of civil appeals of Second supreme judicial district.

Action by E. A. Kellogg and others against M. L. McCabe. Judgment for defendant, and plaintiffs appealed to the court of civil appeals (38 S. W. 542), which certifies a certain question to the supreme court.

T. J. Wright, Johnson & Akin, and Walton & Hill, for appellants. Wm. H. Atwell, for appellee.

DENMAN, J. In this cause the court of civil appeals have certified to this court the

following statement and question: "J. K. Williams was an important and material witness for the plaintiffs, to establish the genuineness of the deed to their ancestor, under whom they claimed as heirs, which deed was attacked as a forgery by the defendant, and there was some evidence tending to prove the charge, though this evidence was all circumstantial. There are also circumstances shown in the record which, it is insisted, tend to connect the witness with the forgery. There are other witnesses, however, whose testimony tends to establish the genuineness of the deed. In his deposition taken by the plaintiffs, and read in evidence by them, the witness Williams testified, in answer to an interrogatory eliciting the same, as follows: 'My name is J. K. Williams. I am 72 years old, and reside at Austin, Travis county, Texas. I am a land agent, and have been in that business for 50 years in Texas; also am a surveyor and farmer. I have held different offices in Texas. In 1848 and 1849 I was deputy surveyor of Harrison county, and in December, 1849, I was elected county surveyor of Panola county, and held that office at Carthage, Texas, and was re-elected to that office at different times before the Confederate war, and in 1866 I was re-elected as county surveyor of Panola county, and served as such until 1868. In 1868 I was appointed as general assignee in bankruptcy by the U. S. judge, Thos. H. Duval, and G. W. Whitmore, registrar in bankruptcy, and was in that business in Tyler, Texas, in 1868, 1869, 1870, and 1871; and in 1872 I was elected mayor of the city of Marshall, and was also county surveyor of Harrison county at the same time, and held both offices until November, 1873, when I was elected presiding or county judge, which office also made me tax assessor, which offices I held two years; and I was then re-elected county surveyor of Harrison county time and again, until 1885. Of the plaintiffs I know only E. A. Kellogg. My power of attorney from the heirs of A. G. Kellogg gives me one-half of the lands, or one-half of the net amount of what we may realize out of it by suit, compromise, or sale of the same, and, of course, my interest depends on the termination of this suit. Yes; I received that old deed from L. C. Hooper, administrator of the estate of Richard Hooper, September 2, 1873. I kept that old deed in my possession until in 1893, when I turned it over to Smith & Tucker to file this suit, which was about 20 years.' After the deposition containing this history of his official career was filed in the suit, the defendant took several depositions of citizens residing in Harrison county touching his reputation for truth, and in cross-examination the plaintiffs propounded a question to about this effect: 'If you should answer that his reputation for truth is bad, then state why it was that the people of Harrison county repeatedly elected him to public offices between the years 1871 and 1882. Was it a custom in Harrison county to elect dis-

reputable men to the public offices?' To this cross-interrogatory the witness W. B. Parchman answered as follows: 'The only way to account for the fact that he was elected to and filled two small offices is that this county, up to 1880, was under the control of and run by "carpet baggers" and "scalawags," and negro politicians, and disreputable rascals generally. Williams was appointed mayor by the carpet baggers and scalawag element, but in 1880, when the white people got into control, they omitted the office of surveyor on their election tickets, and as Williams was a candidate for that place on the Republican ticket, there being no candidate on the Citizens' Party (white man's) ticket, he was elected. He has held no office since the Republican and negro element has been downed, except as above stated.' When this answer was offered in evidence the plaintiffs objected thereto, upon the ground that the same was 'irrelevant and improper testimony.' The objection was overruled and plaintiffs took their bill of exceptions, to which the district judge appended the following explanation: 'In taking the deposition of J. K. Williams, plaintiffs had proved by him all the various positions to which he had been elected by the people in Harrison county. (See statement of facts.) The evidence above set out was plaintiffs' own testimony brought out on cross-examination. When same was admitted, I instructed the jury to consider said testimony for no other purpose than as in rebuttal, in explanation of King Williams' testimony as to holding official positions. When I finished my charge I submitted it to plaintiffs' counsel, and asked them if they wished any further or additional instructions, and they answered, "No." The instruction to the jury on this evidence, referred to in the explanation, must have been oral, as there is no such written instruction found in the record. The evidence is conflicting as to the genuineness of the deed. Error is assigned to the court's action in overruling plaintiffs' objections to this evidence, and the decision of this case in this court turns upon the admissibility of this evidence. We therefore deem it advisable to certify to your honorable court the question whether or not, under the circumstances and for the purpose named, and with the oral instruction of the court, the evidence was relevant and properly admitted.'

The main issue seems to have been as to whether the deed was forged. Williams having been offered as a witness to establish the instrument, the additional issue was presented as to his credibility. Any circumstance which tended to prove the latter issue also bore upon the former. It may be difficult to maintain in its entirety the general rule laid down in Greenl. Ev. § 51a, that evidence "is admissible if it tends to prove the issue," in face of the fact that, under well-established rules of law, evidence must often be excluded which, if admitted, would reasonably influence a conclusion; but it is clear that the

proposition laid down in section 52, that all evidence must be excluded which is "incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute," must be correct. Whether any given evidence, when offered and objected to, is so "incapable," is a question of law, to be determined in each case by the court, and, unless it appears to the trained judicial mind that it is reasonably calculated to properly influence the jury in reaching a verdict, it should be excluded. Applying these principles to the case before us, we are unable to discover how a knowledge of the moral character or political methods of the persons who elected or appointed Williams to office could properly have influenced the jury in determining his credibility as a witness in this cause. We see no reasonable or logical connection between the political conditions outlined in the evidence as existing in Harrison county prior to 1880 and the issue of credibility to be determined on this trial. If, however, there was a doubt in the mind of the court, as there must often be, as to the admissibility of such testimony, its inflammatory character should solve the doubt in favor of its exclusion. We do not think the fact that the plaintiffs propounded the interrogatory is of any importance in determining the question before us, which goes to the legality of the evidence, and not to the manner of taking same. As answer to the question certified, we are of opinion that the evidence was not relevant, and was improperly admitted.

#### JOHN B. HOOD CAMP CONFEDERATE VETERANS v. DE CORDOVA.

(Supreme Court of Texas. Oct. 27, 1898.)

##### RIGHTS OF EXECUTION PURCHASER—NOTICE—PRIOR EQUITIES.

The title to certain land appeared by the records to be in the judgment debtor at the time the judgment was fixed as a lien on the land. The judgment creditor had no notice until the execution sale of the rights of plaintiff, who had advanced to the debtor the money to purchase the land, with the understanding that the profits of a resale should be divided between the parties after plaintiff should be reimbursed for his advance with interest. Prior to the fixing of the judgment lien the land had been conveyed to plaintiff by an unrecorded deed. *Held* that, though the unrecorded deed was void as against the execution purchaser, yet plaintiff's equity as cestui que trust is superior to the rights of the execution purchaser.

Certified questions from court of civil appeals of Third supreme judicial district.

Action by S. D. De Cordova against the John B. Hood Camp Confederate Veterans. From a judgment for plaintiff, defendant appealed to the court of civil appeals for the Third district, which certified questions to this court. Answered in favor of plaintiff.

D. W. Doom and D. H. Doom, for appellant. Ward & James, for appellee.

GAINES, C. J. The court of civil appeals for the Third supreme judicial district has certified for our determination the following question:

"The subject-matter of this suit is \$801.80, heretofore paid into the state treasury by John W. Maxcy. Judgment was rendered for the plaintiff, De Cordova, and the defendant, John B. Hood Camp Confederate Veterans, has appealed; and the court of civil appeals for the Third district desiring to certify a question to the supreme court for decision, the following statement is made explanatory of said question: (1) By agreement of the parties, the money in controversy was withdrawn from the state treasury, and deposited with the clerk of the district court of Travis county, in which court this suit originated. (2) On the 21st day of June, 1894, John W. Maxcy was in the employ of appellee, S. D. De Cordova, as a surveyor, and finding what he supposed to be 400.9 acres of vacant land in Harris county, he made application in his own name, and in due form, to purchase the same under the scrap act. In so doing he was acting for De Cordova, and made the application for the latter's benefit. He reported to De Cordova that he had found this vacant land, and had made application to purchase it for the benefit of De Cordova. De Cordova then agreed to furnish all the money to pay for the land, and pay all the expenses incurred in securing it; and when the land was sold De Cordova was to be refunded his money, with legal interest thereon, and the balance was to be divided between him and Maxcy; and, if the land was not patented, De Cordova, if the state would refund it, was to have his money back. De Cordova furnished the money to Maxcy, and on January 16, 1895, Maxcy paid to the state treasurer the sum of \$801.80 in full payment of the 400.9 acres of land, and the treasurer receipted Maxcy therefor; said payment being made and receipt issued in the name of John W. Maxcy for himself, and not as agent for any one. (3) On January 25, 1895, John W. Maxcy executed a deed conveying said 400.9 acres of land to S. D. De Cordova, which was, on the same day, duly acknowledged, and has been filed in the land office. (4) It was subsequently ascertained that the 400.9 acres of land referred to was in conflict with older surveys, and was not in fact vacant land; and on the 16th day of March, 1897, the commissioner of the general land office canceled the survey and sale of said 400.9 acres to John W. Maxcy, because the same was not vacant land, and authorized the treasurer to return the purchase money to the person entitled thereto, stating that the same was claimed by both parties to this suit. (5) On the 19th day of July, 1897, John W. Maxcy, for a recited consideration of \$1 and other valuable considerations, transferred and set over to appellee, S. D. De Cordova, the said sum of \$801.80, which had been deposited

with the treasurer, and paid to the state of Texas on account of the purchase price of said 400.9 acres of land; which transfer was duly acknowledged on same day. (6) It was shown that said 400.9 acres of land was, on the 4th day of August, 1896, sold under execution in favor of the John B. Hood Camp Confederate Veterans, and that S. D. De Cordova gave notice in writing at the time of the sale that the land in question was not the property of John W. Maxcy, the defendant in execution, and had never been his property, but was the property of said De Cordova, and was paid for with his money.

(7) Appellant offered in evidence, and the court below held to be irrelevant, and excluded, the following testimony: First. Certified copy of application of John W. Maxcy for the purchase of 400.9 acres of land in Harris county, Texas, with indorsements thereon showing the application made June 21, 1894, to the county surveyor of Harris county, filed in the general land office on the 29th day of October, 1894, in file No. 530, Harris Scrip, John W. Maxcy. Second. Certified copy of the field notes of the 400.9 acres of land, with indorsements thereon showing the survey of the land made September 16, 1894, and duly certified and recorded in the surveyor's office in Harris county, Texas, and filed in the general land office on the 29th day of October, 1894, in the same file with the application. Third. Certified copy of a map of the location of the said survey accompanying the said field notes, with indorsements thereon. Fourth. Certified copy of affidavit of S. D. De Cordova, with indorsements thereon, showing affidavit made on the 16th day of January, 1895, by S. D. De Cordova, and filed in the general land office in the same file with the said application and field notes, in which De Cordova makes affidavit that he is the owner of an 800-acre subdivision out of the John Brown League in Harris county, as shown on the sketch; that his deed called for 800 acres out of the northeast corner of the Brown survey, and that he made no claim whatsoever to any land lying to the east of the said 800 acres, and the sketch shows that the 400.9 acres in controversy lies to the east of the said 800 acres of land. Fifth. Evidence to show that on the 1st day of December, A. D. 1894, defendant recovered judgment against John W. Maxcy, Charles A. Newning, and Charity L. Newning for the sum of twenty-two hundred and four and  $\frac{9}{100}$  dollars, with interest thereon from that date at the rate of 8 per cent. per annum, and for costs, thirty-five and  $\frac{85}{100}$  dollars, in cause No. 11,090 (John B. Hood Camp Confederate Veterans vs. John W. Maxcy et al.) in the district court of Travis county, Texas; that thereafter, on, to wit, the 26th day of December, A. D. 1894, an abstract of said judgment was duly filed, recorded, and indexed in the county of Harris, in the state of Texas, where the said 400.9 acres of land

were situated; and that afterwards, by virtue of an execution duly issued on said judgment to Harris county, Texas, the said property was sold as the property of the said John W. Maxcy on, to wit, the 4th day of August, A. D. 1896, and purchased by said defendant and the firm of Jones & Garnett in the proportion of  $\frac{9}{10}$  to said defendant and  $\frac{1}{10}$  to the said Jones & Garnett, and conveyed by the sheriff of said Harris county by deed to defendant and said Jones & Garnett in the same proportion; and that the interest of the said Jones & Garnett had been conveyed to defendant; and that execution was issued on the said judgment within twelve months from the time the same was rendered, and that the said judgment lien remained in full force and effect until the said sale of said land under execution. Sixth. Evidence to show that at the time defendant's judgment lien was fixed by the recording and indexing of the said abstract of its said judgment in Harris county, Texas, and at the time the said money was paid into the state treasury, it had no notice, actual or constructive, of any claim of the said plaintiff to the said tract of land, or to the said money which had been paid into the state treasury. Seventh. Evidence to show that defendant did not have any notice, at the time of the purchase of said tract of land at execution sale by it, as aforesaid, of any claim of the said plaintiff to said tract of land, or to the said money which had been paid into the state treasury, such as that set up in plaintiff's original petition, or of any other interest of the said plaintiff therein.

"With this explanation, the court of civil appeals for the Third district, acting by its chief justice, certifies to the supreme court for decision the following material question presented by this appeal: Did the court below err in excluding the testimony referred to in the seventh paragraph of the foregoing statement? In other words, if the title to the 400.9 acres of land sought to be obtained by John W. Maxcy's application to purchase appeared by the record to be in said Maxcy at the time appellant fixed its judgment upon said land, and if appellant had no notice at that time of the rights of appellee, did it, by virtue of said lien, and the subsequent execution sale of the land, acquire title to the \$801.80 purchase money paid to the state for the land, superior to the title and claim of appellee? And if it had no notice of appellee's rights at the time it fixed its judgment lien upon the land, would notice subsequently given, and before the sale was made, affect appellant's rights?"

It is the well-settled law of this state that the purchaser at a sale of land under execution, to which the defendant in execution holds the legal title, in trust, however, for another, acquires no title, provided that at the time of his purchase he has notice of the trust; and the rule is not varied although



the judgment creditor may, without notice of the equity, have fixed a lien upon the land in any of the modes provided by statute. *Blankenship v. Douglas*, 26 Tex. 225; *Grace v. Wade*, 45 Tex. 522; *Frazer v. Thatcher*, 49 Tex. 26; *Senter v. Lambeth*, 59 Tex. 259; *Parker v. Coop*, 60 Tex. 111; *McKamey v. Thorp*, 61 Tex. 648. We presume, however, that this question was certified by reason of the fact that before the appellant acquired its lien by recording an abstract of its judgment, Maxcy, the trustee, had conveyed the land to the appellee by a deed which was not filed for record, and of which the appellant had no notice. Upon the question as presented, the decisions of this court seem to be in conflict. In *Blankenship v. Douglas*, above cited, the trustee, as in this case, had conveyed the land by deed to the cestui que trust before the lien was acquired. The deed was not recorded, and, while there was evidence tending to show that the judgment creditor had constructive notice of the claim of the cestui que trust when the judgment was rendered and the execution was levied, the fact was not indisputably proved. It was distinctly held, however, that even if the judgment creditor had no notice, and the cestui que trust could claim nothing under his deed, the latter could assert his equity against the purchaser at execution sale. On the other hand, *Calvert v. Roche*, 59 Tex. 463, seems to hold the contrary doctrine. The ground of the opinion appears to be that, since the deed conveyed the legal title to the cestui que trust, his equity was extinguished, and that, therefore, he could claim neither under the deed nor under his original right. The determination of the point was hardly necessary to a decision of the case, and the question seems not to have received any very serious consideration. This appears by the fact that, while *Blankenship v. Douglas* is cited in support of another proposition in the opinion, the ruling in that case upon the point under consideration seems to have escaped attention. In *Gaines v. Bank*, 64 Tex. 18, the doctrine seemingly announced in *Calvert v. Roche* is apparently recognized, but the point was not there decided. We are of opinion that *Blankenship v. Douglas* lays down the just and logical rule. The statute makes an unrecorded deed void as against such creditors as establish a lien by judicial procedure against the property of the grantor without actual or constructive notice of the grantee's right. A deed that is void as between two parties cannot be held effective as between them for any purpose. If void, it is as if it did not exist. The creditor cannot, in the one breath, claim that it passed no title to the grantee as to him, and in the next, when the grantee asserts an equity existing before the deed, maintain that the equity was extinguished by the void conveyance. We are therefore of the opinion that, even if the land had been vacant, and the sale by the state valid, the applicant would have ac-

quired no title by its purchase. And, on the other hand, we also think that if Maxcy had made the attempted purchase in his own right, and had paid his own money, the appellant would have acquired no title, either legal or equitable, to the fund, by its sale and purchase of the land under execution. We answer the question in the negative.

#### DOWDELL v. McBRIDE.

(Supreme Court of Texas. Nov. 3, 1898.)

##### MEDICAL EXAMINERS—CONSTITUTIONAL LAW.

Rev. St. 1895, art. 3778, requiring the members of the board of medical examiners to be graduates of a medical college recognized by the American Medical Association, which association is composed exclusively of allopathic physicians and recognizes no other school of medicine, is not repugnant to Const. art. 16, § 31, authorizing the legislature to prescribe the qualifications of physicians and surgeons, and providing that no preference shall be given to any school of medicine, since the saving clause only limits the power of prescribing qualifications and punishments.

Certified questions from court of civil appeals of Third supreme judicial district.

Action between Charles Dowdell and Joe McBride. From the judgment, the former appealed to the court of civil appeals, which certified questions.

W. H. Brown and Simmons & Crawford, for appellant. T. N. Graham, for appellee.

DENMAN, J. In this cause the court of civil appeals have certified to this court the question whether article 3778, Rev. St. 1895, which reads as follows: "Said board of medical examiners shall be composed of not less than three practicing physicians of known ability and who are graduates of some medical college recognized by the American Medical Association and who are residents of the district for which they are appointed,"—is in violation of article 16, § 31, Const. Tex., which reads as follows: "The legislature may pass laws prescribing the qualifications of practitioners of medicine in this state, and to punish persons for malpractice, but no preference shall ever be given by law to any schools of medicine,"—it being established as a fact on the trial that the "American Medical Association" is composed exclusively of graduates of the school of allopathy, and does not recognize any other school of medicine.

The first portion of the constitutional provision above quoted confers upon the legislature general power to pass laws (1) prescribing the qualifications of practitioners and (2) to punish persons for malpractice. Continuing the same sentence, the latter part of the provision subtracts from such otherwise general power, the word "but" being used in the sense of "except," by prohibiting the legislature in such laws from inserting any provision making a distinction in such qualifications or punishment on account of

the "school of medicine" to which any of such "practitioners" or "persons" may happen to belong. The first portion dealing solely with "qualifications of practitioners" and "punishment," and there being nothing in the context to indicate that the latter portion was intended to embrace any wider range of subjects, we must give it the effect, indicated by its situation and close connection with what precedes, of being merely a limitation upon the previous general power of prescribing "qualifications of practitioners" and "punishments." Therefore it should not be construed as intending to control the legislature in the entirely different matter of prescribing the qualifications of members of the "board of medical examiners" provided for in article 3778, above quoted. Soon after the adoption of the constitution, in 1876, the legislature, in enacting the law of which said article is a part, so construed the constitutional provision, and it is the duty of the courts to so far defer to such construction as to hold the act constitutional, unless it be clearly not. To show that the legislature so construed, and did not intend to violate, said constitutional provision, it clearly, in the light of the evidence in this case showing that only allopaths can become members of said "board of medical examiners," intended by said article 3778 to give a preference by law to that school in the organization of such board, but did not give such preference in prescribing the "qualifications of practitioners"; for it also provided, in article 3784, that "it shall be the duty of said board to examine thoroughly all applicants for certificates of qualification to practice medicine in any of its branches or departments, whether such applicants are furnished with medical diplomas or not, upon the following named subjects, to wit: Anatomy, physiology, pathological anatomy and pathology, surgery, obstetrics and chemistry; but no preference shall be given to any school of medicine." We understand the court of civil appeals, in passing upon this question in this cause prior to certifying same, to have expressed substantially the same view of the intention of the above provision. We answer that article 3778 is not in violation of said constitutional provision.

### COLLIER v. COUTS.

(Supreme Court of Texas. Nov. 3, 1898.)

ADVERSE POSSESSION—INTERRUPTION BY CIVIL WAR—TACKING.

Pasch. Dig. art. 4631, providing that all statutes of limitations should be suspended until one year after the close of the civil war, and art. 4631a, providing that the time during which the war existed should not be counted in the application of any statute of limitations, and Const. 1869, art. 12, § 43, providing that the statutes of limitations should be suspended from the act of secession until "the acceptance of this constitution by the United States," and Rev. St. 1895, art. 3366, declaring that the

laws of limitation were suspended during the Civil War, do not have the effect of tacking adverse possession before the war with that had after an abandonment during the war.

Error to court of civil appeals of Second supreme judicial district.

Suit in trespass to try title by Mrs. E. J. Collier against J. R. Coutts. From a judgment of the court of civil appeals (45 S. W. 485), affirming a judgment for defendant, the plaintiff brings error. Reversed.

Alexander & Fain and W. S. Essex, for plaintiff in error. Harry W. Kuteman, for defendant in error.

GAINES, C. J. We take the following statement of this case, together with the conclusions of fact of the court of civil appeals, from the opinion of that court:

"On June 27, 1894, the appellant brought this suit in trespass to try title to recover from J. R. Coutts, appellee, an undivided interest of  $11/24$  of the Azariah Brackene 290-acre survey, adjoining the city of Weatherford, Parker county. The plaintiff is a daughter of Azariah Brackene, to whose heirs the land was patented. She was born on July 12, 1834, her father dying in March, 1842. The trial judge held her entitled to recover unless defeated by the defendant's plea of the 10-years statute of limitation, upon which alone the appellee prevailed. Among other matters, the plaintiff seeks to avoid the defense of limitation on the ground of coverture. It appears that she married D. D. Collier on April 14, 1859, and that this marriage terminated with his death on March 5, 1893. In connection with his plea, the defendant offered the following instruments: (1) A certified copy of the unconditional headright certificate to A. Brackene, dated November 21, 1848, to 640 acres of land. (2) A transfer by W. T. J. Brackene to John McMillan, dated November 16, 1849, transferring 290 acres of this certificate. The transfer itself purports to be the act of William T. J. Brackene, but the certificate of acknowledgment describes William Brackene as the grantor, and as acting in the capacity of administrator of the estate of A. Brackene, deceased. (3) A certified copy of a transfer dated December 16, 1854, from John McMillan to Jesse R. Wright, of 290 acres of the land called for by the unconditional certificate. (4) A transfer of the certificate from Jesse R. Wright to John Matlock, dated December 8, 1855, and a certified copy of the transfer of the same certificate from John Matlock to Joshua Barker, dated December 11, 1857. (5) A certified copy of the field notes of the survey of 290 acres of land, made for the heirs of A. Brackene by Llewellyn Murphy, surveyor of Parker county, describing the survey in controversy, dated December 21, 1852, and filed in the general land office July 26, 1858. (6) The original patent, dated December 22, 1860, from the state to the heirs of A. Brackene, to the land in controversy. With this claim of

Joshua Barker the defendant connects himself by a deed from the sheriff of Parker county, dated April 8, and duly recorded April 9, 1868, resting upon an execution levied upon the land in controversy on March 18, 1868, which issued upon a valid judgment in favor of one A. C. Crane against Joshua Barker; it appearing that the appellee became the purchaser at the sheriff's sale had by virtue of this levy and execution.

"With reference to the character and the extent of the possession relied upon by the appellee in support of his defense of ten years' limitation, the evidence justifies the following conclusions of fact, imported by the verdict of the jury under the charge of the court: Joshua Barker built a house upon the survey, in which he lived continuously from 1857 or 1858 until 1862. This occupancy by him seems to have been under his claim to the entire survey, except as to a tract of about four acres owned or claimed by one A. J. Ball from about 1859, inferentially in privity with Barker. West of this Ball tract was a field of some 15 acres, controlled by Barker. From 1862 until April 8, 1868, when Coutts purchased, the property was vacant. As soon as Coutts purchased it, in 1868, he claimed the entire tract, less, perhaps, the small quantity held by Ball. Coutts did not himself live upon the land, but his tenant occupied a house, which was within the 15-acre field, from the date of Coutts' purchase until about the year 1879, when it seemed that the property was divided into town lots. This tenancy, as indicated, began immediately upon the purchase by Coutts, and the field, though perhaps not cultivated during the first year of the occupancy, was cultivated from about 1870 until 1879, during which time, as also above indicated, Coutts claimed the land outside of the 15-acre field."

Article 3343 of the Revised Statutes of 1895 provides that "any person who has the right of action for the recovery of any land, tenements or hereditaments against another, having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued and not afterward." Article 3348 defines peaceable possession as being "such as is continuous and not interrupted by adverse suit to recover the estate." When the possession has not been continuous,—that is, when there has been a break in the occupancy,—the possession preceding the break does not in any manner affect the title. Since the plaintiff in error had attained her majority and was unmarried at the time Joshua Barker took possession, an unbroken possession by him and those claiming in privity with him for the statutory period would have defeated her title. On the other hand, since the first possession was abandoned, and she was a married woman at the time the land was again adversely occupied and held, it is clear that limitation would not have begun

to run against her until the death of her husband, in 1893, unless the laws which suspended the operation of the statute of limitations during the time the possession was abandoned had the effect to make the two possessions, in legal contemplation, continuous. The trial court and the court of civil appeals both held that such was the operation of these laws. In so holding, we think they were in error. Doubtless, the lawmaking power, under certain limitations, might have provided that a possession in fact abandoned during the continuance of the war or until a certain time after its termination should be deemed continuous for the purposes of the statute of limitations. In other words, it might have provided that the statute should continue to run notwithstanding a break in the possession occurring during the designated period. But, in our opinion, it was the purpose neither of the legislatures nor of the constitutional conventions which made the several provisions for suspending the operation of the statute of limitations during the war, to give to such provisions so wide a scope. The first act was passed in 1862, and related only to contracts for the payment of money. Pasch. Dig. art. 4630. But a more comprehensive provision was enacted in 1863. In so far as it affects the question under consideration, it reads as follows: "All statutes of limitations on all civil rights of action of every kind, whether real or personal, are hereby suspended until one year after the close of the war between the Confederate States and the United States." Id. art. 4631. The constitutional convention of 1866 passed an ordinance in the following words: "In all civil actions, the time between the 2nd day of March, 1861, and the 2nd day of September, 1866, shall not be computed in the application of any statute of limitations." Id. art. 4631a. Section 43 of article 12 of the constitution of 1869 reads as follows: "The statutes of limitation of civil suits were suspended by the so-called act of secession of the 28th of January, 1861, and shall be considered as suspended within this state, until the acceptance of this constitution by the United States congress." The following is the provision of the Revised Statutes upon the same subject: "The laws of limitation of civil suits in this state shall be considered as suspended during the late Civil War, commencing on the 28th day of January, 1861, and ending on the thirtieth day of March, 1870; but nothing herein shall be held to revive any cause of action heretofore barred." Rev. St. 1895, art. 3366. All the provisions quoted, as we think, have in view substantially the same end. The purpose is perhaps more clearly expressed in the ordinance of the convention of 1866, which provides that the designated time "shall not be computed in the application of any statute of limitation." All the other provisions declare that the statute shall be "suspended." A provision declaring that a certain time shall not be computed, in effect suspends the

statute for that time. So, also, a provision which declares the statute shall be suspended for a certain period is equivalent to saying that it shall not be computed for that period. *Ragsdale v. Barnes*, 68 Tex. 504, 5 S. W. 68, presented a question analogous to that under consideration. The appellant in that case was an infant before and during the time the statute was suspended by the constitution of 1869, but married during that period after adverse possession had been taken. To avoid the plea of limitation, it was contended that, because the statute was suspended at the time of her marriage, the marriage did not set the statute in operation against her. In disposing of the question the court say: "The object of the provision of the constitution of 1869 was merely to prevent the suspended period from being taken into account in the computation of the time required by the statute to bar an action, and was not to restore a disability that had already been removed." It seems to us that the contention in that case, as in this, is based upon the theory that the effect of a provision suspending a statute of limitation is for the purposes of the law of limitation to obliterate the period of suspension, and that in applying the statute, such period should be treated as if it had never existed. We held against the contention in that case, and must so hold in this. The provisions in question were intended for the relief of those against whom limitation might be pleaded, and not for the benefit of those who might plead the statute.

The question came before the supreme court of North Carolina in the case of *Malloy v. Bruden*, 86 N. C. 251, and it was held that the two possessions could not be tacked. In their opinion the court say: "It is not denied that the actual possession of the guardian, after having continued from 1857 to 1863, was then interrupted and abandoned during the years 1864 and 1865, no one occupying the land, throughout the whole of those two years, in any way that could possibly put the owner to bringing a possessory action for it; and according to all the authorities this hiatus, occurring in the actual occupation of the land, put a stop to the statute then running against the owner. *Ang. Lim.* 413. *Howdfast v. Shepard*, 28 N. C. 361. At all times there is a presumption in favor of the true owner, and he is deemed by law to have possession co-extensive with his title, unless actually ousted by the personal occupation of another; and so, too, whenever that occupation by another ceases, the title again draws to it the possession, and the seisin of the owner is restored; and a subsequent entrance, even by the same wrongdoer and under the same claim of title, constitutes a new disseisin, from the date of which the statute takes a fresh start. The fact that such an interruption occurred during the interval between 1861 and 1870, when the statute of limitations was suspended, cannot affect the case. In contemplation of law, it was a fact

accomplished that in 1864 and 1865 the owner made entry upon the land, and thereby destroyed the effect of all prior adverse possession; and, as a thing done, it must be attended with all the consequences as if done at any other time. We take it that it would hardly be disputed that the acknowledgment of a debt as still subsisting, made in 1865 by a bond debtor, could be given in evidence against him in an action brought upon the bond in 1870, and thereby repel the presumption of payment; and, if so, why not the fact that, by entry, the owner of the land had broken that continuity of possession upon which the bar of the statute depended?" The determination of the previous question also determines the question of the admissibility of the sheriff's deed, which purported to convey the land in controversy as the property of Joshua Barker, to the defendant in error. Since Barker was out of possession when that sale was made, and his prior possession cannot be tacked to the possession of Courts, evidence of the sale was wholly immaterial. It should have been excluded. For the error in holding that the possession of defendant in error could be tacked to that of Barker, the judgment of the court of civil appeals and that of the district court are reversed, and the cause remanded.

#### CITY OF WACO, to Use of OCKANDER, v. CHAMBERLAIN et al.

(Supreme Court of Texas. Oct. 27, 1898.)

#### STREET IMPROVEMENTS—VALIDITY OF CONTRACTS —SUFFICIENCY OF NOTICE—LIABILITY OF ABUTTING OWNERS.

1. Under a city charter authorizing the city council to improve streets by vote of two-thirds of its members, and on consent of a majority of abutting property owners, and an ordinance requiring street improvements over a certain cost to be let to the lowest bidder, unless the council otherwise order, and requiring the mayor "and proper committee" to advertise for proposals, and on reception thereof to let the work to the lowest bidder, the city council may let contracts for street improvements without advertising for bids, the ordinance applying only to the mayor and committee.

2. The authority of the council under such provisions to so let a contract is not lost by first proceeding to advertise for bids.

3. A resolution for paving "F. street between the north line of M. avenue and the north line of K. avenue" is sufficiently certain to give notice of the intended improvement to abutters.

4. A charter authorizing the council to improve streets, and assess a stated portion of the cost against abutters, does not require a resolution for paving a street to specify the kind of pavement to be used.

5. By resolution stipulating that the contractor was to look to the city for one-third, and to the abutters for two-thirds, of the cost, and that the award was irrespective of bids therefor, a city awarded a street-improvement contract, and in the contract stipulated that the city should pay one-third, and the balance should be paid by the abutters, the contractor being subrogated to the city's rights against them. *Held*, that the abutters and their prop-

erty were liable to the city for such improvement, under a city charter making abutters and their property liable for two-thirds of the cost of the street improvement.

Error to court of civil appeals of Third supreme judicial district.

Action by the city of Waco, for use of A. Ockander, against R. P. Chamberlain and others. A judgment for defendants was affirmed by the court of civil appeals (45 S. W. 191), and plaintiff brings error. Reversed.

Clark & Bollinger, for plaintiff in error. A. C. Prendergast, for defendants in error.

BROWN, J. The city of Waco, for the use and benefit of A. Ockander, instituted this suit against R. P. Chamberlain and Jessie C. Chamberlain, to recover of them the sum of \$791.50, their proportionate part of the cost of paving Fourth street, in the city of Waco, between the north line of Marlboro avenue and the north line of Kentucky avenue, and to foreclose the lien of the city upon certain property situated on said street, and described in the plaintiff's petition. The defendants answered by general denial, and the case was tried before the judge of the district court of McLennan county without a jury, who rendered judgment for the defendants, which judgment was affirmed by the court of civil appeals.

The trial judge filed conclusions of fact, of which we copy the following, as material to the question presented in this court: "(5) I find that on March 4, 1894, the following petition was presented to the city council: 'Waco, Texas, March 14, 1894. To the Honorable Mayor and City Council of Waco—Gentlemen: We, the undersigned, would respectfully represent unto your honorable body that we are a majority of the resident property owners of land abutting on North Fourth street, from the north line of Marlboro avenue to the north line of Kentucky avenue; and we would respectfully petition your honorable body to grade, pave, and otherwise improve said North Fourth street at point above named, and our consent thereto is hereby given, the city council to be the judges of the material and manner of work; and we agree to pay our pro rata of the cost, in accordance with the city charter and ordinances governing same. [Signed] R. P. Chamberlain. Jessie C. Chamberlain. A. Ockander.' Indorsed on back as follows: 'Mrs. Chamberlain et al. Petition to pave North Fourth street. Filed Mch. 14, '94. We recommend that the within petition be granted, provided that the contractors who do the work will only hold the city responsible for one-third of the cost of the grading and paving of said street, and will look to the abutting property owner for the remainder. [Signed] W. A. Poag. R. H. Harrison. S. E. Watters. Adopted, J. F. Herbert, Act. Mayor.' (6) That the following action was taken by the city council on said petition: 'June 14th, 1894. The petition of Mrs. Chamberlain, asking that

North Fourth street be graded and paved, was referred to street committee.' Minute Book F, p. 577. 'June 21st, 1894. The street committee recommended that the petition of R. P. Chamberlain et al., to pave North Fourth street, be granted, provided that the contractors who do the work will only hold the city responsible for one-third of the cost of the grading and paving of said street, and will look to the abutting property owners for the remainder. The recommendation was adopted, and the mayor instructed to advertise for bids.' Minute Book F, p. 563, of the Records of the City of Waco. (7) 'July 12th, 1894. The street committee recommended that the bid of A. Ockander, at thirty-three and three-fourth cents per square yard, for paving North Fourth street, be accepted. The recommendation was adopted by the following vote: Ayes: Poag, Tibbs, Lacey, Gillespie, Woodward, Watters, O'Brien, and Deaton.' Minute Book F, p. 598, Records of the City of Waco. (8) 'Sept. 6th, 1894. Ald. Lacey offered the following resolution: "Be it resolved by the city council of the city of Waco, that whereas a majority of the resident owners of property abutting on North Fourth street, from the north line of Marlboro avenue to the north line of Kentucky avenue, have, by petition, requested and consented to the grading and paving and improving of said portion of said street, such improvement is deemed by the city council to be to the public interest and benefit, said petition is now here accordingly granted; and, the mayor having been authorized to advertise for bids for such work, and the bid of A. Ockander being the lowest and best bid, and irrespective of such bid, said Ockander shall be awarded the contract; and, having been accepted by the city council, said Ockander is now here awarded the contract for said improvement, the work to be done in accordance with said bid and the specifications for said work, and the mayor is ordered to enter into written contract with said Ockander for such work, in accordance herewith. It is expressly stipulated and understood that the said Ockander is to look to the city for only one-third of the cost of said improvement, the city's pro rata under the charter; that the amount of contractor's bond shall be five hundred dollars." The resolution was adopted by the following vote: Ayes: Tibbs, Lacey, Woodward, Harrison, Watters, O'Brien, Deaton, Herbert. No: Gillespie.' Minute Book F, p. 636, Records of the City of Waco. (9) That the mayor entered into the following contract with said Ockander to do said work." The contract copied by the court recites the steps taken by the property owners and the council up to the making of the contract, and concludes as follows: "And the city of Waco, party of the first part, agrees and binds itself, upon the completion of said work in accordance with the terms thereof, and upon the acceptance of the same by the city council of the city of Waco, to pay to said Ock-

under therefor the sum of thirty-three and three-fourths cents per square yard for street intersections, and the sum of thirty-three and three-fourths cents per square yard for all the square yards of street so constructed and accepted, on balance of street on said points above named. The other two-thirds of the cost of said work to be paid by the property holders to said Ockander, who is subrogated to all the rights the city might have against said property holders, provided it paid contractor for the work. Witness our hands, and the seal of the city, this September 7th, 1894. The City of Waco, by C. C. McCulloch, Mayor. A. Ockander." "(10) That Ockander did the work according to contract, and that thereafter the following report was made to the city council." The estimate of the engineer, set out in the conclusions of the court, showed the whole cost of the work to be \$1,314 and the portion to be paid by R. P. and Jessie Chamberlain, \$791.59. "(12) I find that on July 18, 1895, the city council passed an ordinance levying special taxes on the several lots and parcels of land in said city fronting or abutting on either side of that part of the street so paved, for the purpose of paying for two-thirds of the cost of paving and improving said part of said street, in which it levied and assessed \$37.50 against J. I. Naman for 75 feet fronting thereon, and against A. Ockander \$37.50 for 75 feet fronting thereon, and against Mrs. R. P. Chamberlain and Jessie C. Chamberlain \$360.66 for 721½ feet fronting on one side thereof, and the sum of \$433.25 for 97½ feet fronting on the other side thereof, and declaring the said special taxes so levied and assessed to be a legal claim and demand against the owners of said lots and parcels of land, and a lien on said lots and land, and due and payable on the 1st day of August, which ordinance was duly registered in county clerk's office of McLennan county, as required by the charter of the city of Waco. (13) I find that defendants Chamberlain owned all the land fronting on both sides of said street (1,337 feet), except 75 feet owned by plaintiff Ockander, and 75 feet owned by Naman. (14) I find that plaintiff, Ockander, had no contract with defendants Chamberlain for paving said street, and that defendants never agreed to pay Ockander anything therefor, nor consented that he should pave said street and look to them for payment for two-thirds, or any part, of the cost of such paving."

The judge of the district court before whom this case was tried filed his conclusions of law, in which he gave his reasons for entering judgment for the defendants, which conclusions of law were approved and adopted by the court of civil appeals. 45 S. W. 191. The judgment entered by the district court is based upon the conclusion that the city council did not comply with the provisions of the charter of the city of Waco so as to create a liability on the part of the defendants, nor to fix a lien upon their property for the cost of paving the street in front of it. It is also held that, from

the ordinances and contract in evidence it appears that the city did not intend to create any liability to it on the part of the defendants, and that they had entered into no contract with Ockander, and, therefore, there was no cause of action shown against them. If the city had no claim against the defendants on account of the work done, then this suit cannot be maintained, for the reason that, if they became directly liable to the contractor, the city has no cause of action either in its own behalf or for the use of the contractor. It is therefore unnecessary for us to discuss the question of direct liability on the part of the defendants to Ockander. It is not contended that the contractor failed in any manner to comply with the terms of his contract, nor that the city failed to comply with the law so as to fix a lien upon the property, if defendants were liable for the assessment made. The question presented for our consideration is, did the city pursue the requirements of its charter with such substantial accuracy as to render the defendants liable for the assessment made by the city? And, if so, the judgment of the district court was erroneously entered; otherwise, it must be affirmed. The provisions of the charter of the city of Waco which bear upon the question presented are as follows: Section 21: "That the city council shall have exclusive control and power over the streets, alleys and public grounds and highways of the city and to abate and remove encroachments or obstructions thereto. \* \* \* The city council shall be invested with full power and authority upon the consent of a majority of the resident owners on both sides of any street, avenue or highway, or such portion thereof as may be proposed to be improved, to grade, pave, repair, or otherwise improve any avenue, street, alley, or other highway or any portion thereof within the limits of said city whenever by a vote of two-thirds of the aldermen elected they may deem such improvement for the public interest, two-thirds of the cost of which grading, paving or repairing shall be done at the cost and charge of the owners of the lot or lots, or block fronting upon the alley, avenue, street, or other highway so improved; and to make provision for the payment of the two-thirds of the cost and expenses of such improvements and the cost of collecting the same, the city council shall have full power to assess, levy and collect a tax upon the lot or lots or block or blocks fronting on said alley, avenue, street, or other highway, which tax, when so levied and assessed, shall be a valid charge against the owner or owners of such lot or lots or block or blocks as well as a lien and incumbrance upon the property itself, which amount may be collected and the said lien enforced in any court of competent jurisdiction: provided that the city alone shall pay for the improving of the intersections of the streets from block to block across the street either way." Sp. Laws 1889, p. 155. Section 21D of the charter to be found in the Special Laws of 1891, on page

28, requires that, upon the completion of the work of grading, etc., and the acceptance of such work by the city, the city council shall, by ordinance, assess against each lot or parcel of land fronting on the street, and against the owners of such lots, their proper share of the expense of such improvements, which shall constitute a legal claim and demand against the owner or owners, and that a copy of such ordinance, duly certified by the city secretary under the seal of the city, may be filed for record in the office of the county clerk of McLennan county, accompanied with the description of the lots sought to be charged, and the amount assessed against each lot, which ordinance shall be recorded in the registry book of mortgages of lands, and shall from that date constitute a lien upon such lots, which lien may be enforced in any court of competent jurisdiction. This requirement was complied with, and no question arises under its provision.

In the conclusions of fact filed by the district judge, we find the following: "All contracts for work to be done on any street, alley, bridge, or other public places of the city, amounting to over \$250, shall be let to the lowest and best bidder, unless the council otherwise order; and, when work to such an amount is to be done, the mayor shall advertise for a reasonable time in some daily newspaper of the city for proposals to do the same, which proposals, when received, shall be opened and examined by the mayor and proper committee, which shall award the contract to the lowest and best bidder, reserving the right to reject any and all bids." We do not find this provision embraced in the charter of the city of Waco, and presume that it is an ordinance, or a part of an ordinance, of the city. The charter of the city of Waco does not require that advertisement shall be made and bids received in letting contracts for the improvement of the streets of the city, but leaves such details to the city council. The ordinance copied does not prescribe a rule by which the city council shall make such contracts, but was intended to, and by its terms does, apply alone to the action of "the mayor and the proper committee" when the council had made no order to the contrary, and the former should be charged with the duty of contracting for that class of work. If, however, the ordinance be given the force and effect of a provision of the charter, the city council, by its terms, might have ordered the contract to be made without advertisement for bids; and, having this power over the subject, the council could disregard whatever had preceded, and make the contract in such manner as it might deem proper. The fact that an advertisement had been made, which was either irregular or void, would not prevent the council from doing what it could have done in the first place. *Brown v. Christie*, 27 Tex. 73; *Nolan Co. v. State*, 83 Tex. 182, 17 S. W. 823; *Flewelling v. Proetzel*, 80 Tex. 196, 15 S. W. 1043. In the case of *Flewelling v. Proetzel*, cited

above, Judge Gaines, speaking for the court, said: "The successive steps directed to be taken preliminary to ordering the work to be done, the manner of letting the contract, and the mode of constructing the improvements, when provided for in the law, are intended for the protection of the property owner, and are his safeguards against the exercise of arbitrary power. Each act required to be done is essential to the exercise of the jurisdiction, and each act must be rigidly performed. The courts cannot say that the omission of some requirement is unimportant, or that an act different from that directed is substantially as good." Whatever the legislature has commanded to be done by the city council in such matters cannot be dispensed with by the courts; neither can the courts require the corporation to do that which the legislature has not commanded. It matters not whether the proceedings of the council prior to the passage of the resolution of September 6, 1894, be valid or not; if the council had begun with that resolution, the assessment upon the property would be valid. This court has never held that every act of a city council must be expressed by ordinance or resolution; and we do not intend to intimate that the proceedings prior to the resolution of September 6th were irregular or invalid, but they are unimportant.

It is urged on behalf of the defendants and held by the trial court that the resolution of September 6, 1894, is void, because it does not sufficiently describe the work to be done and the material to be used. The resolution describes the place where the paving was to be done as "Fourth street, between the north line of Marlboro avenue and the north line of Kentucky avenue," which is sufficiently certain to give notice to all of the property owners on each side of that street within those limits that the council had determined to pave the street in front of their property. The charter does not require that the council, in determining upon such work, shall specify in the resolution the material to be used in the pavement or other improvement on the streets. If the charter had so specified, it would be necessary for the council to follow that direction strictly, in order to bind the property owners; but, the legislature having failed to make any such provision, the courts cannot ingraft it upon the charter, and thus destroy the rights of the contractor because the council has not done that which the law did not command. The legislature saw fit, in enacting the charter of that city, to direct that, after the work was completed, an ordinance should be passed giving the particulars as to the amount assessed upon each property owner and upon each parcel of land fronting upon the said street; and whether it be good or bad policy to have this description made and filed in the clerk's office after, instead of before, the completion of the work, it is nevertheless the law, made by the law-making power of the state, and furnishes the

rule by which the courts must be governed. The resolution was a substantial compliance with the charter, and constituted a valid basis for the subsequent proceedings.

It is strenuously urged by the defendants in error, and held by the trial court in its conclusions of law, that no liability ever arose on the part of the defendants, R. P. and Jessie Chamberlain, to the city of Waco for the work done upon the street. The proceedings of the council had the effect to create personal liability to the city, as well as a lien upon the abutting property, if not prevented by the following language, embodied in the resolution of September 6, 1894: "And the bid of A. Ockander being the lowest and best bid, and irrespective of such bid, said Ockander shall be awarded the contract; and, having been accepted by the city council, said Ockander is now here awarded the contract for said improvement. It is expressly stipulated and understood that the said Ockander is to look to the city for only one-third of the cost of said improvement, the city's pro rata under the charter." The contract entered into between the mayor and the contractor contains the following language: "The other two-thirds of the cost of said work to be paid by the property holders to said Ockander." In using the language, "irrespective of such bid, said Ockander shall be awarded the contract," we think that the council intended to exercise its power of awarding the contract without regard to the bid; but it did, at the same time, accept the bid as it was presented through the committee. This course would avoid any trouble that might arise from any supposed irregularities in the manner of presenting the bid to the council. This language had no reference whatever to the liability of the property owners. In providing that the contractor should look to the property owners for his pay for two-thirds of the work done, we are of the opinion that it was intended by the council to express that the contractor should take, in satisfaction of his claim for the work, whatever the city might be able to collect from the owners of the property, and of the property itself, as a precaution against liability if the claim could not be collected of the property owners nor enforced against the lots. If this was not the intent, and the property owners were to make their contracts with Ockander, and to account to him directly, why should the city have passed the ordinance by which two-thirds of the cost of the improvement was assessed against the property owners and the abutting property? That ordinance expressly declared the assessments to be claims against the owners and liens upon the property. The city had no authority to assess taxes and fix a lien to secure a contract made or to be made between Ockander and the property owners. The action of the city was just such as the law required if the cost was to be collected by the city, and paid to the contractor, and must be given its legal effect.

We conclude that the proceedings created a liability in favor of the city against each of the property owners, and a lien upon the property abutting upon the street within the limits described, and also that the city of Waco could maintain this suit for the use and benefit of the contractor, Ockander. The district court erred in entering judgment for the defendants upon the facts as found by it, and the court of civil appeals erred in affirming that judgment. It is therefore ordered that the judgments of the said district court and of the court of civil appeals be reversed, and that this court now proceed to render such judgment as the district court should have rendered. It is ordered that the city of Waco, for the use of A. Ockander, have and recover of the defendants, R. P. Chamberlain and Jessie Chamberlain, the sum of \$793.91, with interest at 6 per cent. per annum from the 18th day of July, 1895, and that the lien of the said sum be foreclosed upon the several lots of ground as shown in the ordinance adopted by the said city attached to plaintiff's petition; and it is further ordered that the clerk of the district court issue upon the judgment of this court an order of sale in accordance with law.

#### SCOTT v. STATE.

(Court of Criminal Appeals of Texas. Oct. 26, 1898.)

#### HOMICIDE—PROOF OF CORPUS DELICTI—WITNESSES—IMPEACHMENT.

1. On trial for manslaughter, evidence that defendant cut deceased with an ax in the breast; that deceased staggered, and leaned against a support, then walked away a short distance, and fell; that he was carried home, and a doctor at once sent for, who attended him; that he was in good health at the time he was cut, and died three days afterwards, never having gotten up from his bed,—was sufficient proof of the corpus delicti.

2. The impeachment of a witness by proof of his conviction of a felony does not authorize the introduction of the record of the examining trial for the purpose of supporting his testimony by showing that it was substantially the same as that given on the examining trial.

Appeal from district court, Milam county; W. G. Tallaferrero, Judge.

John Scott was convicted of manslaughter, and appeals. Affirmed.

W. W. Chambers and Henderson, Streetman & Freeman, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of manslaughter, and his punishment assessed at confinement in the penitentiary for a term of three years; hence this appeal.

The difficulty in which the homicide took place occurred over a game of cards. It appears that some time on the 24th of December, 1897, the deceased, Jim Beal, and "Will Ray, his brother," were at the house occupied by the defendant, John Scott, and one Lay, his brother-in-law. At the time, they were en-



gaged in a game of cards, and a difficulty arose about the game. Defendant accused deceased with taking one of the cards out of the deck. According to the state's evidence, the defendant called him a liar; whereupon deceased kicked defendant in the breast. The defendant at that time was sitting on the floor on his knees, and Beal was standing up in front of him. Defendant immediately got up, and went outdoors, and told deceased, Beal, to come out of his house. Beal went out, and was standing in front of the door, on the last step, or just off of the last step, when the defendant struck and cut him with an ax. He was standing still and doing nothing to the defendant at the time. The ax was procured by the defendant from the woodpile, which was near the corner of the house, and to the left of the door. It appears that defendant struck the deceased with the ax in the breast, just below the neck, inflicting "a big cut." When he was struck, deceased staggered a little, leaned against the house, and said, "Cousin John, what did you cut me with the ax for?" Defendant replied, "What did you kick me for?" and went off across the field, and left. This theory of the state was based on the testimony of two witnesses, Joe Beal and Will Ray. Lay and defendant testified on behalf of the appellant, differing with the state's witnesses as to the particulars of the difficulty. It appears from their testimony that the defendant accused deceased with tampering with the cards in the game, and the deceased called him a damn liar, to which defendant replied that he (deceased) was a liar, and that deceased kicked him in the face, on the cheek, and caused him great pain, and that his face was swollen from it for several days; that, when deceased kicked him, he left the room, without saying anything to the deceased, who followed him out, and, when he came out, he (deceased) picked up a stick  $2\frac{1}{2}$  feet long, and as large as a man's wrist, and raised it, and was in the attitude of striking the defendant; that, while deceased was advancing on defendant with the stick drawn back to strike him, he (defendant) picked up the ax, and, as he turned around, he struck the deceased with it; that he left the house to prevent the deceased from continuing the assault on him, and that he did not leave the house to get the ax or any weapon with which to attack deceased, and that he did not think deceased would follow him; that, when he saw deceased following him with the stick raised in his hand to strike, he picked up the ax, and struck him, because he was afraid that he would hurt him with the stick. The testimony of Will Ray varies a little from this, in that he states, after the parties got out of the house, defendant went to the woodpile, and picked up the ax; and, after he did this, the deceased picked up the stick, and had it drawn back to strike the defendant at the time defendant struck him with the ax. This witness also states that, after defendant cut

deceased, deceased asked him why he cut him, and defendant replied, "Why did you kick me?" and also made some remark about being afraid of the stick. He admitted, however, on cross-examination, that he did not say anything about defendant saying he was afraid of the stick in the examining court. There was also proof that the deceased was a dangerous man, and that defendant was a peaceable man.

We would further state the other facts in connection with the wound and death of the deceased, as a question is made on this by appellant. Witness Beal stated that deceased, after he was struck, walked off from the house a little piece, and fell; that he went to him, and picked him up, and they carried him to his house, where he died on the following Wednesday night. Dr. Langford, who lives at Baileyville, in this county, attended Jim Beal's wounds the day he was cut. The said cutting occurred at the house of the defendant and Martin Lay, about 12 o'clock in the daytime, Saturday, December 24th; and Jim Beal died at his own home, on the following Wednesday night. He was carried there immediately after he was cut, and was there confined to his bed until his death. He was in good health at the time he was cut by defendant.

Appellant insists that the corpus delicti is not sufficiently proven; that is, that it is not shown by a sufficient certainty of proof that the wound inflicted was a mortal wound, and that deceased's death was occasioned thereby. The proof here shows that defendant cut deceased with the ax, and that it made, according to the witness, "a big wound"; that appellant immediately staggered, and leaned against the house, then directly walked from the house a little piece, and fell. He is only shown to have uttered one exclamation after defendant struck him the blow, to wit, "What did you cut me with the ax for?" He had to be picked up and carried to his home, and a doctor was at once sent for, who attended him on the same day; he was in good health at the time he was cut by defendant; that he never got up from his bed; that he died at his home, on the following Wednesday, three days thereafter. No question appears to have been made as to this matter on the trial of the cause. No doubt, if the question had been raised during the progress of the trial, and not apparently conceded, the proof would have been full upon this point, but it by no means follows that the proof here exhibited is not complete, establishing to the satisfaction of the jury the fact that the deceased came to his death on account of said wound. In our opinion, there was no error in the refusal of the court to entertain a motion for a new trial on this ground. See *Thompson v. State* (Tex. Cr. App.) 42 S. W. 974.

Appellant reserved a bill of exceptions to the action of the court in refusing to allow him to introduce the record of the examining trial,

in order to show that defendant testified substantially before the examining court as he did in this case; the reason of appellant for interposing this testimony being that the state had attempted to impeach him by proving that he had formerly been in the penitentiary on a charge of felony, and it was insisted that this testimony of impeachment authorized appellant to prove what he had testified to at a former trial, in order to corroborate his testimony, and to show that he gave the same testimony at the examining trial. We know of no rule of law that would authorize a witness to be bolstered up by proof of his former statement when attacked by evidence of bad character. When so attacked, it is competent for him to meet the attack by proof of his good character; or it would have been competent in this case to have shown by appellant that he was not in fact guilty of the charge for which he was sent to the penitentiary. See *Tippett v. State* (Tex. Cr. App.) 33 S. W. 120. The rule is that where a witness has been introduced by a party, and on cross-examination statements are shown to have been made by him at variance with his testimony on the trial, then, to support the witness, it is competent to show that, shortly after the occurrence, he had made statements corresponding with and similar to the statement made by him on the trial; or where an effort has been made in impeachment of a witness, to show that his testimony given in chief has been recently fabricated, then it is competent to show former statements made by said witness corresponding with his testimony given on the trial, such statements being made before any motive to fabricate on his part. See *Williams v. State*, 24 Tex. App. 637, 7 S. W. 333; *Dicker v. State* (Tex. Cr. App.) 32 S. W. 541; *Campbell v. State*, Id. 774; *Gill v. State* (Tex. Cr. App.) 33 S. W. 190; *Jones v. State* (Tex. Cr. App.) 41 S. W. 638. As stated before, however, we know of no rule and no precedent that would authorize a witness impeached by proof of bad character to be supported by showing that he had made statements similar to the testimony given on the trial to other parties. The court did not err in excluding this testimony. There is no error in the record, and we fail to see any reason why we should disturb the verdict of the jury. The judgment is affirmed.

HURT, P. J., absent.

Ex parte CROFFORD.

Court of Criminal Appeals of Texas. Oct. 26, 1898.)

HABEAS CORPUS—FORMER JEOPARDY.

Habeas corpus cannot be resorted to for the purpose of discharging a prisoner on the ground of former jeopardy.

Appeal from district court, Montague county; D. E. Barrett, Judge.

Petition for writ of habeas corpus by Guy Crofford. From an order refusing the writ, he appeals. Affirmed.

J. M. Chambers, G. F. Thomas, and Ocle Speer, for relator. Mann Trice, for the State.

DAVIDSON, J. Relator was placed upon trial before a jury in the district court of Montague county on a charge of murder. The jury retired to consider their verdict on the 10th of August. On the morning of the 12th, in the absence of the defendant, the jury was brought into court, and discharged from further consideration of the case. It is shown by the judgment of the court that the court adjudicated the question as to the probability of their agreeing to a verdict. The defendant was not present, and was not consulted in regard to the discharge of the jury; in fact, he was in jail at the time. He resorted to the writ of habeas corpus for the purpose of seeking his discharge on the ground that he had been placed in jeopardy, and could not be tried again, and this was the only ground relied on by relator. The court, upon the hearing of the writ, remanded relator to custody, and this appeal is prosecuted therefrom.

This is not a novel question in Texas. Since the case of *Perry v. State*, 41 Tex. 488, the decisions have been uniform that the writ of habeas corpus cannot be resorted to for the purpose of discharging an applicant on a plea of former jeopardy. See, also, *Darrah v. Westerland*, 44 Tex. 388; *Ex parte Schwartz*, 2 Tex. App. 74; *Griffin v. State*, 5 Tex. App. 457. The judgment is affirmed.

HURT, P. J., absent.

IRON CITY NAT. BANK OF LLANO v. FIFTH NAT. BANK OF SAN ANTONIO.<sup>1</sup>

(Court of Civil Appeals of Texas. June 15, 1898.)

PRINCIPAL AND AGENT—RATIFICATION—ESTOPPEL—EVIDENCE—INSTRUCTIONS.

1. Actual knowledge by a principal of his agent's acts is essential to a ratification of the acts.

2. Whether mere silence of a principal, and failure to repudiate his agent's acts, within a reasonable time after knowledge thereof, amounts to a ratification, is a question of fact for the jury.

3. The cashier of plaintiff bank authorized defendant bank to apply plaintiff's deposit to his private indebtedness. Plaintiff had no knowledge of this until some time after it had ceased to have any business relations with defendant, and after it had severed its connection with its cashier, who had been indicted for the embezzlement of the funds in question. After learning of the act, plaintiff neglected to repudiate it. The cashier was insolvent, and plaintiff received no benefit from the transaction in question. Held, that there was not sufficient evidence of ratification to justify its submission to the jury.

<sup>1</sup> Writ of error granted by supreme court.

4. Defendant bank, upon being instructed by the cashier of plaintiff bank, applied the latter's deposit to the payment of the cashier's private debt, and sent him the note and collateral therefor. Plaintiff did not learn of this for several months, at which time the cashier, who was not then connected with plaintiff, was hopelessly insolvent, and the collateral, even if he still had it, was worthless. *Held*, that plaintiff was not estopped by a failure to repudiate the cashier's action after discovering it.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action by the Iron City National Bank of Llano against the Fifth National Bank of San Antonio. Judgment for defendant, and plaintiff appeals. Reversed.

Lauderdale & Linden and W. A. H. Miller, for appellant. Shook & Vander Hoeven and Upson, Bergstrom & Newton, for appellee.

JAMES, C. J. Appellant sued the Fifth National Bank of San Antonio to recover \$5,018.95 and interest, which sum was a credit upon defendant's books in favor of appellant, and was, by direction of appellant's cashier, Richardson, applied to the payment of an individual debt of said Richardson to appellee. The district court charged the jury that such use of appellant's funds was wrongful, and that plaintiff should recover unless they believed from the evidence that defendant immediately notified plaintiff of such application, and plaintiff did not, within a reasonable time after receiving notice of the fact, repudiate the action of Richardson in so applying said money, and notify the defendant thereof. In the same connection the jury was charged that notice to Richardson was not notice to plaintiff, and that it was necessary for full knowledge of the facts to have come to plaintiff through its authorized agents, other than Richardson. The jury found for the defendant, and judgment was so entered.

The testimony discloses the following state of facts: Appellant bank began, about May 4, 1894, making deposits with the Fifth National Bank and transacting business with it. A short time before this relation between the banks commenced, W. O. Richardson began negotiations to borrow \$10,000 from appellee, and it was loaned to him, he giving it one note for \$7,000 and another for \$3,000. This money was used by him to purchase 310 shares (a majority of the shares) of the capital stock of appellant's bank, whereupon he became its cashier. Seventy of these shares he deposited with appellee as collateral for said two notes. Shortly afterwards, on May 11th, Richardson wrote the following letter: "Mr. H. O. Engelke, Cashier, San Antonio, Texas—Dear Sir: Please charge the account of the Iron City National Bank note of W. O. Richardson, \$3,000.00, also note of W. O. Richardson, \$7,000.00, when due, and oblige, yours truly, W. O. Richardson, Cashier." Engelke was appellee's cashier, and it appears that he did not so pay off these notes upon receipt of the letter, because the amount the Llano

bank then had to its credit was not sufficient to pay both the notes. Soon afterwards, however, Richardson procured to be sent appellee from the Hanover National Bank of New York the sum of \$5,000, which was credited on the larger note; and appellee then applied the Llano bank's deposit, to the extent of \$5,018.65, to satisfy the balance due on Richardson's said notes, stamped them "Paid," and returned them, with the collateral then on hand (30 shares, the other 40 having been sent to the Hanover National Bank by Richardson's direction), to Richardson. There were some other deposits made by appellant, after this, with appellee, but they were all soon checked out. It appears that, at the time the notes and stock were returned to Richardson, Engelke wrote a letter to W. O. Richardson, cashier, giving notice that appellee had so charged the bank's account, and at the end of the month sent plaintiff a monthly statement showing all the transactions during the month, which included the following charges:

May 25. Note .....	\$3,000 00
May 25. Credit on note.....	2,000 00
Interest .....	18 65
	<hr/> \$5,018 65

It appears that Richardson, in connection with the entry of these items in plaintiff's books, caused plaintiff's books to be falsified, by making it appear therein that the Fifth National Bank had remitted to the Missouri National Bank of Kansas City in favor of appellant the sum of \$5,000. Defendant rendered another statement in June, for the month of June, showing the balance in plaintiff's favor on May 31st, which was afterwards checked out. The said two statements were found in the vault of the bank in the proper place for their keeping, and had written in pencil upon them, in the handwriting of appellant's bookkeeper, "O. K.," and some figuring in which the balances were figured up. The duty of the bookkeeper was shown to have been to look over such statements to see if they corresponded with plaintiff's books, and it was not his duty to examine the items. This was the duty of Richardson, the cashier. Richardson was shown to have been invested with the powers ordinarily incident to such office, had charge of plaintiff's business and correspondence, and got and opened plaintiff's mail. He, by a resolution of the directors, had no power to loan or use the bank's money in any way, unless authorized to do so by the finance committee, composed of certain directors. The evidence shows that Richardson did not have authority to use the credit in question to pay the debt in question; it also fails to show that the directors of plaintiff's bank, or any of its agents or officers outside of Richardson, had actual knowledge of the act in question until about seven months afterwards, when a bank examiner investigated the affairs of the bank, and discovered it. (There was, however, ample evidence to justify a finding that, by the exercise of proper care on the part of the directors,

the fact would have become known to them soon after its occurrence, and that they were negligent in not knowing of it soon after its occurrence.) Richardson was insolvent at the time he obtained the loan, and so remained. His shares of stock during April, May, and June, according to one witness, and presumably all the time from the other testimony, were in the hands of his creditors as collateral. He had no other property. The bank stock had no real value, from the fact that from May, 1894, on, its assets were at no time as much as its liabilities. (It seems, however, that the reports of the bank's business and condition, drawn with reference to the books and bank values, indicated a surplus, and, by aid of these, the stock was considered to have a value, and to some extent was at times available.) Richardson resigned his position in the bank in December, 1894, and was in July, 1895, indicted by the federal grand jury for embezzlement of this fund. He has not been tried, and is a fugitive from justice. The above are substantially the undisputed material facts.

Richardson had no apparent or ostensible authority, although in giving the direction he assumed to act in the capacity of cashier of appellant, to use appellant's deposit to pay his personal debt. The transaction, in its very nature, put appellee upon inquiry concerning his authorization to so apply appellant's funds in its hands; and, in following Richardson's direction without inquiry, appellee took the risk of his not having authority to so use the fund; and, as Richardson had no such authority, appellee then and there became liable to appellant for the conversion, and, as the court charged the jury, had prima facie the right to recover in this case. The only escape from such responsibility would be in a ratification by appellant of the act, or in estoppel by its conduct to now question Richardson's authority.

Upon each of these issues the court, in our opinion, gave erroneous instructions. As to ratification, the evidence fails to show that the directors or agents of appellant (outside of Richardson) had knowledge of this transaction until about the beginning of 1895. The evidence is that they had no such knowledge until then. Knowledge—not the existence of circumstances which would, by the exercise of due care, result in knowledge—is essential to the ratification of an act. If knowledge is shown, the fact of ratification may be inferred from subsequent acts of the principal. *Meachem, Ag.* §§ 128, 129. "Assent may in some cases be presumed from acquiescence after notice. But it is a principle too clear for doubt or question, and of universal recognition, that there can be no binding ratification without knowledge." *Reese v. Medlock*, 27 Tex. 124. See, also, *Ethridge v. Price*, 73 Tex. 601, 11 S. W. 1039. The court, upon ratification, charged that if defendant immediately notified plaintiff of the act of its cashier, and plaintiff did not

within a reasonable time thereafter repudiate it, to find for defendant. This charge is not correct, unless mere silence on the part of a principal for an unreasonable time after knowledge of an unauthorized act of its agent amounts to ratification of this act as a matter of law. There was no express ratification here, and that relied on was an implied ratification. The very fact that it was a matter to be implied, there being no act in this case amounting per se to a ratification, would make it an issue that only the jury should decide, and then only in a case where the facts and circumstances in connection with such silence are such as would admit of a reasonable inference that the silence or inaction meant a ratification. Silence simply in itself is ordinarily no evidence of anything; but the conditions under which it occurs, and accompanying it, may show it to be a ratification. We commend the expression of Mr. Justice Collard in *Meyer v. Smith* (Tex. Civ. App.) 21 S. W. 997: "Mere delay in repudiating will not, in our opinion, have the effect of ratifying. It would be evidence, along with other facts, from which, if it should be unreasonable, the jury might infer that there was a ratification. The court should not instruct the jury to find a ratification in case of unreasonable delay after notice of the facts, but he should leave the jury free to act upon such fact, and to determine from all the facts whether a ratification should be inferred." We are not speaking now of an estoppel by conduct which proceeds upon other principles, and which we shall discuss hereafter. The rule is so obviously sound, particularly in a jurisdiction where inferences of fact are committed to the jury, that we deem citation of authorities on the subject unnecessary. The instruction that silence alone, for an unreasonable time, was in law a ratification, was erroneous.

In this connection we shall express our further conclusion that it would have been erroneous, upon the evidence in this record, for the court to submit the issue of ratification in any form. The rule that there must be facts or circumstances which would reasonably admit of a finding to authorize a submission of an issue undoubtedly prevails upon a question of ratification, as in respect to any other issue. If there are no circumstances tending to indicate a fact, or if all the circumstances tend to the contrary, the issue should not be submitted. The facts bearing upon this issue are as follows: The bank is not shown to have had a knowledge of the transaction in question until at least seven months after it happened. Long before that time it had ceased to have any business relations with defendant. Richardson had also terminated his connection with appellant, and appellant, it appears, had nothing in common with either Richardson or appellee. Appellant neither received nor retained any benefits from the transaction. Richardson was hopelessly involved, his stock was disposed of to

his creditors, and it was practically valueless. At the time of appellant's discovery of the facts of this transaction, an examiner was investigating its affairs, and this led to an indictment of Richardson for the embezzlement of the very funds in question. Not a single act of appellant's directors is shown, outside of mere silence, which serves to give any indication, or affords any basis for a reasonable supposition, that they at any time approved or assented to the appropriation by Richardson of this fund. And when we consider that the directors were acting in a trust capacity for others, and every interest and consideration actuating them would naturally disincline them to approve the misappropriation, we think we may safely say that there is not found in this record any matter of fact which would, upon any fair or reasonable theory, serve to resolve the mere silence of appellants into a ratification.

As to the defense of estoppel: Appellant is not shown by the evidence to have received any benefits from the transaction in question, and in its very nature it was one which did not admit of any benefits to appellant, and therefore this familiar form of ratification, or, more properly speaking, estoppel, is not a factor in the case. It might have become the duty of appellant, under certain circumstances, to expressly repudiate the action of its cashier, and notify appellee; but we conceive that no such duty would arise unless the conditions were such that defendant might have become prejudiced in some manner by plaintiff's not so doing. Such defense would be governed by principles of estoppel, and cannot be of any avail to defendant, unless, through plaintiff's inaction, it appears to have been led to suffer some change of condition, or to become prejudiced in respect to some right or remedy. The facts here clearly show otherwise. When defendant paid Richardson's notes with plaintiff's deposit, it sent the notes and the collateral stock to Richardson. It certainly was not led to part with the notes or the collateral by any act of appellant. Several months passed before plaintiff's officers knew of the matter. At that time, and in fact at all times, Richardson was hopelessly insolvent, and there is no evidence which makes it even probable that the stock which defendant had redelivered to him could at any time have been retrieved, or its value, in whole or in part. On the contrary, the testimony, if it does not directly show that Richardson kept all of his stock disposed of to his creditors, certainly indicates it, and the evidence does not admit reasonably of the conclusion that in his embarrassed condition he kept in his possession, or undisposed of, the stock which defendant had returned to him, so that it could have been reached in any manner. How, then, can it be said that plaintiff's failure to repudiate and give timely notice thereof to defendant has been the occasion of any loss to defendant, or has resulted in placing defendant in such a position as to

make it inequitable for plaintiff to now question Richardson's authority to apply the money as was done? Defendant would and could have been no better off, so far as the evidence discloses, had plaintiff done all it contends should have been done in the way of repudiation. The case was submitted to the jury on the charge that if, after plaintiff had knowledge of the facts, it did not, in a reasonable time thereafter, repudiate the act, and notify defendant thereof, it was estopped. We cannot in this case assent to the correctness of the instructions upon either the subject of ratification or of estoppel. We are of opinion, also, that the judgment is not warranted by the evidence; and it is therefore reversed, and the cause remanded.

#### HARDEMAN COUNTY v. FOARD COUNTY.<sup>1</sup>

(Court of Civil Appeals of Texas. Nov. 5, 1898.)

##### COUNTIES CREATED OUT OF OTHER—BACK TAXES.

Rev. St. 1895, arts. 5239-5243, provide that, where a new county is created out of a part of any one or more organized counties, the tax collector of the new county may collect "the unpaid assessments, both on person and property, in that portion of the county included within the limits of the new county." Hold that, in an action by the parent county against a new county to recover for its portion of indebtedness accrued prior to the creation of the new county, the latter was entitled to a credit for back taxes collected by the parent county in the territory of the new county after the latter's organization, since the transfer of the right to collect carried the right to the taxes collected.

On motion for rehearing. Granted, and opinion modified.

For former opinion, see 47 S. W. 30.

STEPHENS, J. The fourth ground of appellee's motion for rehearing, complaining of the judgment of this court in so far as it denied Foard county a credit of \$550.56 for back taxes collected by Hardeman county after the creation of Foard county, seems to be well taken. Articles 5239 to 5243 of the Revised Statutes (Acts 1895, p. 107), which were overlooked on the original hearing (47 S. W. 30), make provision, where a new county is created out of a part of any one or more organized counties, for the collection by the tax collector of the new county of "the unpaid assessments, both on person and property, in that portion of the county included within the limits of the new county." No distinction is made in these articles between delinquent and other taxes, but the collector of the new county is expressly authorized to collect "the unpaid assessments," which language is certainly broad enough to cover back taxes. The collector of the old county, upon the organization of the new, ceases to have authority to collect taxes in the excised territory. Since the law thus

<sup>1</sup> Writ of error denied by supreme court.

transfers the authority to collect from the officer of the old to that of the new county, it follows that the right to the taxes is also transferred from the old to the new county. This ground of appellee's motion for rehearing is therefore sustained, and the judgment of the district court, in so far as it allowed this credit, instead of being reversed, is affirmed. In other respects the motion is overruled.

McCONNICO et al. v. THOMPSON et al.  
(Court of Civil Appeals of Texas. Nov. 5, 1898.)

TRESPASS TO TRY TITLE—STALE DEMANDS—ADVERSE POSSESSION—ACCRUAL OF CAUSE OF ACTION—COVERTURE.

1. Where a petition in trespass to try title alleges simply ownership and possession on a day certain, and that defendants forcibly entered and ejected plaintiffs therefrom, and does not show whether legal or equitable title will be relied on, a plea of stale demand is not demurrable.

2. Where a wife died, seized of land, leaving a husband and children, although the children had no right to possession of the land during the father's life estate, as tenants in common with him they could recover as against strangers having no title as to the entire estate; and hence the statute of limitations ran against them from their mother's death.

3. Under Rev. St. 1895, art. 3366, suspending the laws of limitation in civil suits from January 23, 1861, to March 30, 1870, the burden to establish coverture at time the suspension ceased, so as to prevent the statute from beginning to run, is on the one pleading coverture.

Appeal from district court, Tarrant county; by Dunklin, Judge.

Action by Lavinia McConnico and others against Mrs. J. B. Thompson and others. There was a judgment for defendants, and plaintiffs appeal. Affirmed.

Frost, Neblett & Blanding, for appellants. Robt. G. Johnson, Capps & Cantey, Humphreys & McLean, and W. R. Sawyers, for appellees.

HUNTER, J. This is an action of trespass to try title, brought by appellants, in the district court of Tarrant county, against appellees, on the 21st day of February, 1896. The defense was not guilty, and the five and ten years' statutes of limitation, and stale demand. The replication was coverture. The court directed a verdict for the defendants, and judgment was rendered accordingly. The land was the community property of Thomas I. Smith and wife, Louise. They acquired it as a locative interest under a land certificate issued to J. M. Shreve. Smith died in 1848, leaving Louise, his widow, and one child, a son, W. T. Smith. The widow married C. M. Winkler, in 1848, and died in November, 1862. The land was patented in October, 1870, to Hamilton, assignee of Shreve, who had previously conveyed the same to the heirs of Thomas I. Smith, to wit, in 1852. Mrs. Winkler left, surviving her, besides her husband,

aforesaid, three daughters, Lavinia, Mary, and Kate, issue of her marriage with Winkler. Winkler died in 1882. Lavinia was married to A. D. McConnico in 1870, but the record fails to show in what month or day of the month. Mary was married to S. R. Frost in January, 1872. Both were minors, under the age of 21 years, when they were married, and both are still living with their said husbands. Kate was also married while a minor, in November, 1872; but her husband having died in November, 1875, and she never having married again, appellants admit that she is barred by limitation. The appellees and those under whom they claim title have had and held peaceable, continuous, and adverse possession of the north half of the land since the 1st day of January, 1852, and of the south half since February 8, 1856, using and cultivating the same, and paying all taxes thereon, holding the same under deeds duly registered, and claiming full title there-against the world.

The first and second assignments of error complain of the court's action in overruling the appellants' demurrers to appellees' plea of stale demand, which we overrule, because the petition did not disclose on its face that the title of the plaintiffs was not an equitable title, such as would be subject to the plea; it being the formal petition usual in our real actions, alleging simply ownership and possession on a day certain, and that on that day the defendants forcibly entered the premises, and ejected the plaintiffs therefrom. The allegation of ownership in such case is sustained by evidence of either a legal or equitable title, but the form of the petition does not indicate to the defendants which kind of title will be relied upon on the trial, and hence it was proper to plead stale demand as well as the statutes of limitation. The plea was in proper form, and therefore said assignments are overruled.

The court below directed a verdict for defendants, and this peremptory action of the court is assigned as error. But we think the evidence clearly and indisputably showed that the appellants' right of action was barred both by the five and by the ten years' statutes of limitation, the legal question in the case being when limitation began to run against them. The facts as above indicated show that the defendants had been in adverse possession of all the land since February, 1858. This suit was filed in 1896. The statute, we will concede, did not run against Thomas I. Smith, nor against his widow and heirs down to the date of her death; but the widow died in November, 1862, leaving Judge Winkler as survivor, and the three daughters, appellants herein. It did not begin to run against her surviving husband or children at the date of her death, because our statute provides that the "laws of limitation of civil suits in this state shall be considered as suspended during the late Civil War, commencing on the 28th day of January, 1861, and

ending on the 30th day of March, 1870." Rev. St. 1896, art. 3366. At the date of her death, her husband inherited from her, under our statute, a life estate in one-third of this land, and her children, the appellants, the fee-simple title to the whole of it; but they had no right to the possession of the one-third life estate cast upon their father, as against him, until his death, and he did not die until 1882; but, as tenants in common with him, they did have the right to sue and recover in their own names the entire premises, as against strangers or trespassers, having no title, in which character we must view the appellees, for the purposes of this suit. *Watrous' Heirs v. McGrew*, 16 Tex. 506, and cases following.

But it may be insisted that on the 30th day of March, 1870, when the suspension of the statute ceased and terminated, the appellants were married women (for the disability of minority is not pleaded), and that, therefore, the statute did not begin to run against them, and, having remained married up to the time of filing the suit, they are not barred. Upon the issue of coverture raised by appellants' replication, the burden was upon them to prove that coverture existed on the day the suspension of the statutes terminated; and we think appellants failed to produce any evidence tending to establish the fact so pleaded by them. As to Mrs. Kate Morris, it is admitted that she was barred. As to Mrs. Mary Frost, the evidence is undisputed that she was never married until January, 1872; and therefore it began to run against her, unless her minority would save her, and that was not pleaded, and hence cannot be relied upon, and would not have availed her anything had it been pleaded. It remains, then, for us to determine whether Mrs. Lavinia McConnico was married on the 30th day of March, 1870. The evidence contained in the record shows only that she was "married in 1870." This is no evidence that she was married prior to March 30, 1870; and, unless she so proved, limitation began to run against her on that day, and, of course, she is barred also. The court therefore did not err in directing a verdict for the defendants. The judgment is therefore affirmed.

#### WACO ARTESIAN WATER CO. v. CAUBLE.

(Court of Civil Appeals of Texas. Oct. 26, 1898.)

CONTRACT FOR WATER FOR CATTLE—BREACH—MEASURE OF DAMAGES—REDUCTION OF LOSS—EVIDENCE—INSTRUCTIONS—PROVINCE OF JURY—HARMLESS ERROR.

1. The measure of damages for breach of a contract to furnish artesian water for cattle is compensation for injury directly resulting to the cattle.

2. The owner of cattle, on failure of a water company to furnish them with water as per contract, constructed a fence way to the river, so as to supply the cattle with water. Held, that

he was entitled to compensation for the expense so incurred, if he used reasonable care, under the circumstances, in so supplying them.

3. The question of what care and means are to be used to supply water to a drove of cattle, on failure of a water company to do so as per contract, is for the jury.

4. The owner of cattle, on failure of a water company to supply them with water as per agreement, is not bound to inquire whether another water company can supply water in time to prevent injury to the cattle, unless he knows such facts as would have put a prudent man on such inquiry.

5. Even if the owner of cattle, on failure of a water company to supply them with water as per agreement, was bound to inquire whether another water company could have supplied the water in time to prevent injury to the cattle, it does not preclude him from any recovery whatever for the breach of the water company's contract.

6. The court is not bound to separate and charge that which is not erroneous from a requested instruction which contains error.

7. A charge defining "ordinary care" as such as would be exercised by a person of ordinary prudence, situated under the same or similar circumstances as those surrounding plaintiff at the time of the alleged injury to his cattle, is not erroneous because it refers to plaintiff alone, although plaintiff, at the time of the injury, was represented by an agent, where no request was made to have the omission supplied.

8. The exclusion of evidence that a person ought to have known something which the person testified he did know is immaterial.

9. In an action for damages for breach of a contract to supply cattle with artesian water, knowledge of the owner of the cattle that there was another system of waterworks in the same town does not imply knowledge of such facts as would require him to obtain water therefrom in order to prevent injury to his cattle from such breach.

Error from district court, McLennan county; Samuel R. Scott, Judge.

Action by C. M. Cauble against the Waco Artesian Water Company for damages for breach of a contract to furnish plaintiff with water for his cattle. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

The plaintiff in error makes a correct statement of this case, as follows: "On September 1, 1896, C. M. Cauble filed this suit against Wm. B. Hord for \$2,124.30 damages to 262 head of his cattle, alleging: That Hord was engaged in supplying water for pay to persons residing in Waco and McLennan counties, and that his feeding pens were supplied with pipes, troughs, etc., and connected with Hord's mains. That he placed 262 head of cattle in said pens in Waco, to feed and fatten them for market, and about February 1, 1896, made a contract with Hord to furnish water for said cattle, at 4 cents per head per month, until they were fattened, say till July 1, 1896. That Hord knew what the water was to be used for, and the damage which would result from failure to furnish same. That he complied with, and was able and willing to comply with, his contract, and Hord complied with the contract until May 19, 1896, when he, without notice to him, cut the water off, and kept it cut off until the evening of May 22, 1896, and

failed and refused to furnish water for said time, and thereby he was left wholly without water for his cattle. That said pens were near the Brazos river, and he thereupon built fences into the river, and in this way had access to the river water for his cattle. That the water furnished by Hord was artesian, and the river water was brackish and inferior thereto. His cattle were thriving and fattening, and on full feed, and had become habituated to the artesian, and would not drink the river, water until nearly famished, and then would drink irregularly and too freely thereof. That there was no other place or means to water said cattle so as to keep them alive, except to water them at the Brazos river, on said river water. That, by reason of said cattle being forced on a change of water, they were thrown off their feed, became sick and affected with scours, lost flesh, and it took a month longer feeding to get them back in their condition. The expense of feeding was \$30 per day, making \$900 damages in feed; cost of time, material, and labor to fence to Brazos river, \$100; loss of flesh on 100 head, \$168.15; decrease in market price on them, \$168.15; loss of flesh on the other 153 head, \$394; decrease in market price, \$394; total damage, \$2,124.30,—for which amount he prays judgment, with 6% interest. On October 26, 1897, Cauble amended, making Waco Artesian Water Company, a corporation, defendant, and alleged that Hord sold the system of waterworks in Waco to it, and assumed payment of all damage Hord had caused him, and prayed judgment against it. On November 15, 1897, said water company answered: (1) General denial. (2) Special exception to each item of damage, because the same is too remote and speculative. (3) Special exception to the item of \$50 per day, aggregating \$900, for feeding the cattle for one month, because such item is too remote and speculative, and is not and cannot be plaintiff's measure of damages against it. (4) Special exception to the item of \$100 for time, material, and labor for building a fence to the Brazos river to let the cattle water there, because such damage cannot be set up against it, and it is not liable therefor. (5) Special exception to item \$168.15 for loss of flesh, etc., because here would be a double recovery, and such damage is too remote and uncertain and speculative. (6) Special exception to the \$394 item for the same reasons as the \$168.15 item. (7) General denial. (8) Special answer that about May 19, 1896, its boilers, used and operated in pumping its water, became in a dangerous condition, and broken down, and as soon as this was discovered it and Hord notified Cauble and informed him it would be impossible to furnish him any more water, and gave this notice in time for him to have made other arrangements, where he could have supplied his cattle with the same kind of water they were furnishing him, and if

his cattle were injured by drinking the Brazos river water, and if any damage resulted to him, he was guilty of contributory negligence in so watering them, and is not liable therefor; that as soon as it could repair said boilers, which was done in a very few days, it furnished him water free during all the balance of the time to fatten his cattle. On November 17, 1897, the court sustained the water company's special exceptions, and gave Cauble leave to file a trial amendment, which he did at once, and pleaded that said 262 head of cattle, 'by reason of the breach of said contract, and failing and refusing to furnish plaintiff water, were damaged in the sum of \$3 per head; that is to say, at the time said water was shut off, said cattle were worth the average sum of \$32 per head, and, by reason of the damage caused by said breach, they were lessened in value \$3 per head.' The water company renewed and again presented all its exceptions to the pleadings as amended. The court overruled all of them, to which it excepted. Hord never having been served, the suit was dismissed as to him, and tried before a jury, and, on their verdict, judgment rendered for Cauble for \$680 and costs. The water company filed a motion for a new trial, which was denied. It sued out a writ of error and made supersedeas bond."

We find the facts as follows: The contract as alleged was substantially proved, and that Hord had sold the water plant to said water company, and in the purchase it assumed all liability Hord incurred, and, if Hord was liable to him, then said water company was so liable. That on May 18, 1896, Cauble had 262 head of cattle in his pens in Waco, fattening them for market, and said water company (or Hord) was furnishing water for them under said contract. Cauble did not personally stay in Waco and attend to these cattle, but stayed at his home in Hill county. He left his agent and manager, Mr. Stiff, at Waco, who stayed there and managed his cattle business, and attended to the feeding and watering of these cattle, and attended to everything about them. That on said date his cattle were on full feed, being fed on cottonseed meal and hulls, were doing well, and had become accustomed to the use of the artesian water furnished by said water company. That, after the cattle had been thus fed and watered, to deprive them of water for any considerable length of time, or change water on them, would cause them to have the scours, throw them off their feed, and injure and damage them. That about May 18, 1896, the water company's furnaces and boilers got out of fix, and in a dangerous condition, and it thereupon stopped the pumping of water, on elevated points in the city of Waco where these pens were, for about three days, and until it could make the necessary repairs, when it again pumped water into Cauble's pens, and thereafter furnished him water for the balance of the season he fed these cattle.



That the water was thus cut off for three days. That the Bell Water Company furnished artesian water, the same water the other company was furnishing, to anybody who applied, but charged six cents per head per month, instead of four cents, as charged by the other company. That the connection could have been made with the Bell Water Company's mains within  $2\frac{1}{2}$  hours at any time. That for the next season Cauble disconnected his pipes from the artesian water company's mains, and made this connection with the Bell Water Company's mains, and that this was done within  $2\frac{1}{2}$  hours' time. The proof showed that the Brazos river water was kind of brackish, and different from the artesian water. Cauble also showed by several expert witnesses, and by himself and his agent, Stiff, as experts, that the damage to cattle of this kind, in their condition, by being deprived of water for the length of time that these were deprived of it, and being changed to a different character of water, such as was in this case, would be from three dollars to four dollars per head in the market price of the cattle. On cross-examination, these witnesses showed that they based their calculations and estimate of the injury by the length of time that it would take to feed the cattle, and the daily expense thereof, which would be  $12\frac{1}{2}$  cents per day, and that the time would be about 20 days; and the jury, in arriving at the amount of their verdict, estimated the injury at \$2.50 per head for the 262 head, which would be  $12\frac{1}{2}$  cents per day for feed for 20 days, making \$655, and they allowed Cauble \$25 damage for the material, time, and labor building the fence from his pens into the Brazos river to water them. The evidence on these points is sufficient to show \$655 and \$25 as special damage, making the total of \$680, which was the verdict of the jury. Cauble's agent incurred \$25 expense by fencing chute from the pens to the river, and the cattle were watered there for the time the company's machinery was being repaired. The water failed to be furnished by the company about 4 o'clock p. m., May 18, 1896, and it was about 2 o'clock p. m., May 20th, before the cattle could be got to the Brazos river. When the company's machinery broke down it did not notify Cauble or his agent of the fact, and they knew nothing of it until the water failed, and then Cauble's agent went down to the plant to see about it, and was told that they could do nothing for him. He commenced at once to construct chutes to the river. The Bell Water Company, in Waco, was established about eight years before the trial, and they have, and then had, a six-inch main on North Fifth street, in Waco, and had a water system pretty well all over Waco, and furnished to the public artesian water, the same that was furnished by defendant company. Cauble did afterwards connect his pipes with the Bell Water Company, and it required only about 2 or  $2\frac{1}{2}$  hours making the connection. A ditch

had to be cut about 16 feet long, and a joint pipe put in to make the connection, while the cost of fencing to the river from plaintiff's pens was \$25. The testimony was conflicting on the point, but, in view of the verdict, we find that neither plaintiff nor his agent knew that the Bell Water Company's main came up on North Fifth street, where the connection could be made for the small cost above stated. But both Cauble, the plaintiff below, and his agent, Stiff, knew the Bell Water Company was furnishing artesian water to the public in Waco, and they so testified. Neither plaintiff nor his agent in charge of the cattle applied to the Bell Water Company to be supplied with water on failure of defendant to furnish it. The Bell Water Company charged six cents per head per month for water for cattle, and plaintiff is procuring water from that company now. Defendant below has sued out a writ of error from the judgment rendered against him, and assigned errors.

A. C. Prendergast, for plaintiff in error.

COLLARD, J. (after stating the facts). Plaintiff in error in brief presents three assignments of error together, as follows: "(9) The court erred in refusing to give its special charge No. 1 to the jury." "(14) The court erred in the eighth paragraph of its charge as to the measure of damages for which defendant was liable in this case. "(15) The court erred in not setting aside the verdict of the jury, because the same was excessive, and does not find the correct measure of damages."

The contention, under these assignments by propositions, is that the court's charge did not give the correct measure of damages; that the requested refused charge did give the correct measure of damages, in limiting them to the difference between the contract price of water from defendant below and what he would have had to pay the Bell Water Company or anyone else, and no more,—thus limiting the damages to what was in contemplation of the parties. The requested charge was as follows: "When a defendant fails or refuses to carry out his contract, the plaintiff can recover damages. But it was the duty of the plaintiff to use ordinary and reasonable care and means to prevent an injury and the consequences of it. It was the plaintiff's own fault if he failed to use reasonable efforts, care, and diligence to protect himself from injury and loss, and when he failed, if he did, so to do, he will not be permitted to say that the loss that might have been thus avoided was caused by the wrong of the defendant; for it is against the policy of the law, as well as principles of justice, to permit a party to reap any advantage from his own negligence, if so, or want of ordinary care, or from his own and the negligence or wrong of the defendant, if so. Therefore, if you believe from the evidence that the defendant made the contract as set up by

plaintiff in his pleadings, and defendant failed and refused to comply with such contract, it was plaintiff's duty to use the diligence and care a reasonably prudent and careful man would use under the circumstances to protect himself from damages; and if you believe from the evidence, if he had done so, the damages claimed by him would not have resulted, then he cannot recover such damages. Also, if you believe, under the circumstances and facts of this case in evidence before you, that the plaintiff could, by using such care and prudence, procure from the Bell Water Company, or any one else, the same kind of water within such time as to have prevented any damage to his cattle, then the measure of damages would be the difference between the contract price of the water he was getting from defendant and what he would have had to pay said Bell Water Company or any one else, and no more."

The court's charge in full is as follows: "(1) This is a suit by the plaintiff against the defendant to recover damages for the alleged breach of a contract to furnish plaintiff water for his cattle, alleging his damages to be \$886. (2) Now, it is admitted by both plaintiff and defendant by their testimony that the plaintiff did, as alleged, have a contract with the defendant by which the defendant was to furnish plaintiff with water for the cattle he was feeding at the time; and it is further admitted by the defendant that they failed to furnish the plaintiff with water for the period of three or four days, as alleged in plaintiff's petition. (3) You are therefore charged that the only question remaining for your consideration is, was the plaintiff damaged thereby? and, if so, in what amount; and, in determining this issue, you will be guided by the following rules: (4) Upon the failure of the defendant to furnish plaintiff's cattle with water, it became the duty of plaintiff, or his representative in charge of said cattle, to use ordinary care and vigilance to provide said cattle with water such as would not injure his said cattle. (5) By ordinary 'care and vigilance,' as above defined, is meant such as would be exercised by a man of ordinary prudence, situated under the same or similar circumstances as those surrounding the plaintiff at the time of the alleged injury. (6) Therefore, if you find that the plaintiff or his representative in charge of said cattle did exercise that degree of care, as above defined, to provide his cattle with water such as above stated, and you further find that by the exercise of that degree of care, as above defined, the plaintiff could have procured such water, as above stated, for his cattle, and would have thereby avoided any damages resulting to said cattle by reason of not having water, then, and in that event, he would not be entitled to recover anything by way of damages to said cattle, and, if you so find, you will find for the defendant upon that issue. (7) But if you find that the plaintiff, when he found that his cat-

tle were not being supplied with water by defendant, did exercise that degree of care and vigilance that a person of ordinary prudence would have exercised under the same or similar circumstances, in providing said cattle with water, and that notwithstanding such degree of care and vigilance upon the part of plaintiff or his representative in charge of said cattle (if any) said cattle were injured by reason of failure to get water, or by the change of water, then, if you so find, the plaintiff would be entitled to recover, and, if you so find, you will so say. (8) Now, if you find for the plaintiff, in determining the amount of damages you will take into consideration the actual and necessary costs of getting to the water used, also the difference (if any) in the reasonable market price of the cattle in question, at the time they failed to get water from defendant, and the reasonable market price of the same cattle at the time they were again supplied with water by the defendant, and whatever the amount may be so ascertained the plaintiff would be entitled to recover, not to exceed \$886. (9) The burden rests upon the plaintiff to show by preponderance of testimony that he is entitled to recover, and, unless he has done so, you will find for the defendant. (10) You are the exclusive judges of the facts proven, the credibility of the witnesses, and the weight to be given to their testimony."

We note that there was no testimony showing a rise or fall in cattle in the markets.

The rule as to measure of damages for breach of contract is generally the direct pecuniary loss resulting from the failure to perform, or such damages as might fairly be considered to have been in contemplation of the parties at the time the agreement was entered into. Injury to plaintiff's cattle by the failure of defendant to furnish water, as stipulated in the contract, is the natural result of the breach, and compensation for such injury is the measure of damages. The water company knew the purpose of the contract was to supply plaintiff's cattle with artesian water, and they should be required to pay for the direct injury to the cattle for failure to comply with the contract. *De la Zerda v. Korn*, 25 Tex. Supp. 189; *Sedg. Meas. Dam.* § 112. But for an intervening principle, defendant would be bound to pay for all injury that would have resulted from the breach of the contract, if plaintiff had done nothing to prevent the full consequences of the breach. That principle is that he was bound to use ordinary care to prevent such consequences, so far as he could by reasonable effort and expense. *Railway Co. v. Anderson*, 85 Tex. 88, 19 S. W. 1025; *Suth. Dam.* 148-152; *Cooper v. City of Dallas*, 83 Tex. 242, 18 S. W. 565; *Railway Co. v. Adams*, 63 Tex. 207; *Fowler v. Waller*, 25 Tex. 702. To save himself, the plaintiff constructed a fence way to the river, so that his cattle could obtain water, and he would be entitled to compensation for the expense in-

curred in building the fence, if he used reasonable care, with the lights before him, in so supplying water for his cattle. What constitutes the care and means to be used under the circumstances is a question for the jury. *Cooper v. City of Dallas*, 83 Tex. 242, 18 S. W. 565. He is not bound to do any particular thing, especially if he were not advised that he could do it at reasonable cost. Plaintiff in error insists that plaintiff below could only recover the difference in the price he was paying it for water under the contract and the price he could have obtained the same kind of water for from the Bell Water Company; that is, \$5.24 for one month. This cannot be determined so arbitrarily. It was for the jury to say whether plaintiff used reasonable care, under the circumstances. He would not be held bound to take water from the Bell Water Company under any and all circumstances. He did not know that the company was so near his connections as it was, nor, of course, what it would cost to make connection with its mains. He would be held to use the care and diligence that a man of ordinary prudence would have used under the same circumstances. He may not have done the very thing, nor used the very means, that should have been used, as developed by subsequent information, and yet he was not necessarily in fault. We pass on the points made by brief of plaintiff in error. If the court's charge contains other errors as to the measure of damages, they are not insisted on, and we are not required to discuss them.

Plaintiff in error asked a charge, the refusal of which is assigned as error, that "plaintiff cannot rely on his ignorance and that of his agent, Stiff, if so, that they did not know the Bell Water Company had a water main on Fifth or any other street in Waco, with which he could have, in time to have prevented injury to his cattle, connected and procured water; but it was his duty and that of his agent, Stiff, to have used such diligence and inquiry as a reasonably prudent man would, under the circumstances, to have ascertained the facts, and if, by doing so, he or his agent, Stiff, could and would have so ascertained the facts, then he cannot recover." This charge is not the correct rule of law, as applied to the case. Plaintiff was not bound to inquire as to the facts, unless he knew such facts as would put a prudent man upon inquiry. This was ignored in the charge asked and refused. Besides, if he were bound to inquire, and failed to do so, he would not be precluded from any recovery whatever, as stated in the refused charge. There was error in the charge asked, and, though it may have been correct in other particulars, the court was not bound to separate the good from the bad, and charge that which is not erroneous.

There was no error in the court's definition of "ordinary care." The court defined it as such "as would be exercised by a man of

ordinary prudence, situated under the same or similar circumstances as those surrounding the plaintiff at the time of the alleged injury." Plaintiff in error contends that the charge is erroneous, because it applies to plaintiff only, and does not apply to his agent, Stiff. The omission should have been corrected by a special charge correct in itself. The same may be said of other similar omissions in the court's charge upon care.

It is insisted that the court erred in the charge in stating "that the only remaining question for your consideration is, was the plaintiff damaged thereby? and, if so, in what amount." The whole charge should be read in connection, and, if this is done, it will be seen that all the material issues were submitted. We find, therefore, no error in the remark objected to.

Plaintiff's petition was not subject to exceptions of defendant not sustained by the court. The court sustained all exceptions that were well taken.

We find no reversible error in excluding certain testimony of parties by which defendant proposed certain facts which would prove that plaintiff ought to have known that the Bell Water Company had a water system in Waco, and supplied customers with artesian water. Plaintiff and his agent, Stiff, admitted and testified that they knew the Bell Water Company furnished artesian water in Waco, and defendant's defense could not be strengthened by showing that they ought to have known the fact. That they ought to have known it was immaterial, when they testified that they did know it.

The knowledge of the fact that the Bell Water Company furnished artesian water was not knowledge that it was so convenient to plaintiff as to require him to get water from that company at its prices. If defendant had submitted a distinct issue, by special charge, as to whether plaintiff had knowledge of such facts as would put a prudent person upon inquiry as to convenience to him of the Bell Water Company, and its low prices, the court should have submitted that question, and he may have done so, upon the testimony of plaintiff himself and his agent that they knew of the Bell water-works system. There was no error in excluding the testimony. We find no reversible error in the case, and the judgment of the lower court is affirmed. Affirmed.

LINZ et al. v. ATCHISON.

(Court of Civil Appeals of Texas. Jan. 20, 1897.)

On motion for rehearing. Denied.

For former opinion, see 88 S. W. 640.

KEY, J. Appellants filed motions for rehearing, based substantially upon the points and authorities embraced in their original brief. The motions were overruled. In response to a request contained in the motion

of George Walabe & Co. and Simpson, Porter & Co. the court made the following additional findings of fact: "(a) That the attachment of Linz Bros. was levied on goods in controversy on the 28th November, 1891, while same were in the actual possession of the trustee, Atchison, and were taken into the possession of the sheriff; that on the next day, and while the goods were still held by the sheriff, under the Linz writ, these appellants caused their respective writs to be levied subject to the lien of the Linz writ in the manner prescribed by law for levy on goods in custodia legis; and that thereafter, on December 2d, the trustee, Atchison, filed his claimant's bond. (b) That in procuring the execution of, and in the acceptance of, the mortgage, J. T. and M. E. Sands were represented by O. C. Melton, who was a participant in the fraud of the grantor, J. T. Melton. (c) That, at the time of the execution of said mortgage, J. T., S. V. M. E., and C. E. Sands were minors, under the age of 21. (d) That, in fact, O. C. Melton, who acted as the agent of J. T. and M. E. Sands in the acceptance of said mortgage, had knowledge of and participated in the fraudulent intent of the grantor." Writ of error refused.

#### LAUCHEIMER et al. v. SAUNDERS.

(Court of Civil Appeals of Texas. Oct. 12, 1898.)

##### HOMESTEAD.

One cannot at the same time have an urban and a rural homestead.

Appeal from district court, Coryell county; J. S. Straughan, Judge.

Action by J. R. Saunders against M. H. Lauchheimer & Sons. Judgment for plaintiff. Defendants appeal. Reversed.

This is an injunction suit brought by appellee to restrain appellants from causing an execution sale of a tract of land claimed by appellee as part of his homestead. After hearing the testimony, the court, trying the case without a jury, perpetuated the preliminary injunction, and the defendants have appealed. The testimony is as follows:

"The plaintiff, J. R. Saunders, being sworn, testified that he is the head of a family, said family consisting of himself, an unmarried daughter, and three minor sons; that in the year 1859 he purchased the tract of land upon which his present residence is situated; that said tract of land consists of about nine acres; that said land is now platted on the town plat of Gatesville as block No. 61; that he has continued to reside on said block of land from the time of the purchase, in 1859, down to the present; that the improvements on said land, when he bought it, were similar in quality to those that are on it now, the chief difference being in the quality of improvements, the present improvements being more valuable than those that were on the

land when he bought it, but that when he bought this land there were on it a residence, cribs, horse and cow lots, garden, etc., as it has now; that it was fenced, as it is now, except that he has cut off, by a cross fence, one residence lot, on which he had a house built, and which is occupied by tenants, who worked his farm; that he and the owner of the lot immediately east of him opened up an alley between them for their own convenience; that where he now lives was the nucleus of the residence portion of the village of Gatesville; that there were several residences near him, two or three west of him, between him and the river, and three or four east of him, between him and the public square of Gatesville; that said land is bounded and abutted on the south by what is now Main street, but which was North street or a road, at the time of his purchase; that said land is bounded on the north by Stillhouse Branch, and that the north line of his fence is south of said Stillhouse Branch; that at the time, and two or three years before, he purchased this place, he was a merchant in the town of Gatesville, doing business in a rented house; that he has ever since pursued the business of merchandising; that he is now president of the City National Bank of Gatesville; that in 1859 the population of Gatesville was some 300 or 400 souls; that in December, 1868, he purchased the one hundred acres of land in controversy; that when he bought this 100 acres it was not all cleared and in cultivation, but that he has since had the balance of it cleared and put in cultivation; that it is bounded on the west by the Leon river, and on the south by Stillhouse Branch, which branch is now, and has been since the incorporation of the town of Gatesville, the corporation limit of said town in that direction; that the town of Gatesville was incorporated some time between the years 1870 and 1873; that said 100-acre farm is fenced off separate and apart from the block of land on which his residence is situated; that the south line of fence on said 100 acres is on the north bank of said Stillhouse Branch; that there is no house on said land now, but that at one time there was a tenant house on it; that, at the time of purchasing said 100 acres, he was doing a general merchandising business in a business house of his own; that said business house was on lot No. 5, in block 5, as platted on the plat of Gatesville, and that he has continued to do business in said house ever since he first occupied it until shortly before the levy herein; that he worked some on said farm in the years 1872 and 1873, but that his principal business at that time was merchandising; that he has always had said farm cultivated by tenants and hired labor; that he did not remember whether or not he favored the incorporation of the town of Gatesville at the time it was incorporated, but that he knew that he offered no objection or oppo-

sition to it; that he has always taken active interest in the affairs of the town, and has served several terms as alderman of same; that he has owned other farms in Coryell county, and that he received rents from them, just as he did from the 100 acres in controversy; that he never at any time lived on said 100 acres. The witness J. R. Saunders also testified that, two days before the levy of the writ herein, his bank and he had become insolvent, and that all of his property, save that used by him as his homestead, had been surrendered by him to his creditors. He further stated that the two tracts of land, containing 9 acres and 100 acres, respectively, had been claimed, occupied, and used as his homestead since they were, respectively, bought by him, and that he had never had any other homestead. He further testified that his land had never been cut up into lots or blocks, and that the mapping and platting of his 9 acres as block 61 was done without his knowledge or consent.

"D. A. Hammack, being sworn, testified: That Coryell county was organized, and Gatesville made the county seat of said county, in March, 1854. That at the time Gatesville was made the county seat of Coryell county the commissioners' court of said county had four streets surveyed and opened up,—one, North street, beginning at the public square, and running west to the Leon river; another beginning at the public square, and running east to the graveyard; another beginning at the public square, and running south to the Leon river; another beginning at the public square, and running north to Stillhouse Branch. That the survey of land on which the town of Gatesville is located originally belonged to one R. G. Grant. That said Grant cut up and sold to different parties, near to and adjoining the Saunders 9-acre block, lots of 1, 2, 3, etc., acres, as they wanted them, on which they built houses and made themselves homes, and that these houses were occupied in 1859, when J. R. Saunders bought said 9-acre block. That he is a surveyor by occupation, and that when the town of Gatesville was incorporated, some time between 1870 and 1873, he ran the north boundary line of said town. That he began said line on the Leon river, beginning at the mouth of Stillhouse Branch, and running up said branch, with its meanderings, to a point just north of S. B. Raby's residence, said point being just east of where the Cotton Belt Railway depot now stands. Witness was here shown a plat, which he identified as the plat of Gatesville, drafted by him for the city council of said town in about the year 1880; said plat showing Stillhouse Branch to be the north boundary line of Gatesville, and the Leon river to be the west boundary line of said town. Witness pointed out the J. R. Saunders residence lot as lot No. 61 on said plat, and stated that said lot is bounded on the south by Main street, as shown on said

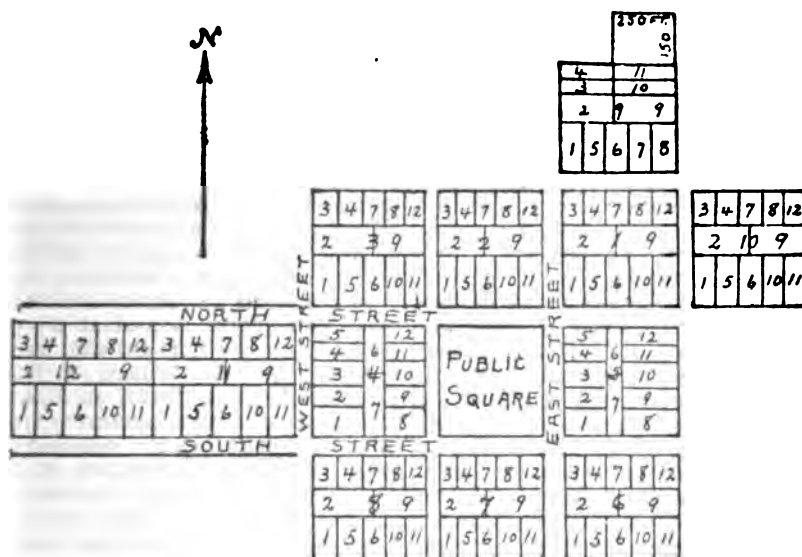
plat; and stated, further, that Main street on said plat was called 'North Street' when Gatesville was first established and when Saunders bought said land; that said lot is bounded on the north by Stillhouse Branch. He further pointed out and located the 100-acre farm as adjoining said plat on the north. Witness testified, further, that he knew the 100-acre farm in controversy; that J. R. Saunders had used it as a homestead, but that he had never lived on it or worked it himself, but had always rented it; that said Saunders had lived on the lot which is now platted as lot No. 61 in Gatesville ever since he bought it, in 1859; that said Saunders has been a merchant in the town of Gatesville since about the year 1856, and a banker since 1883.

"Plaintiff offered in evidence the minutes of the commissioners' court of Coryell county for the year 1854, showing the original plat of the town of Gatesville, a copy of which plat is attached to and made a part of this statement of facts. Said plat is designated as 'Plat of Gatesville in 1854.'

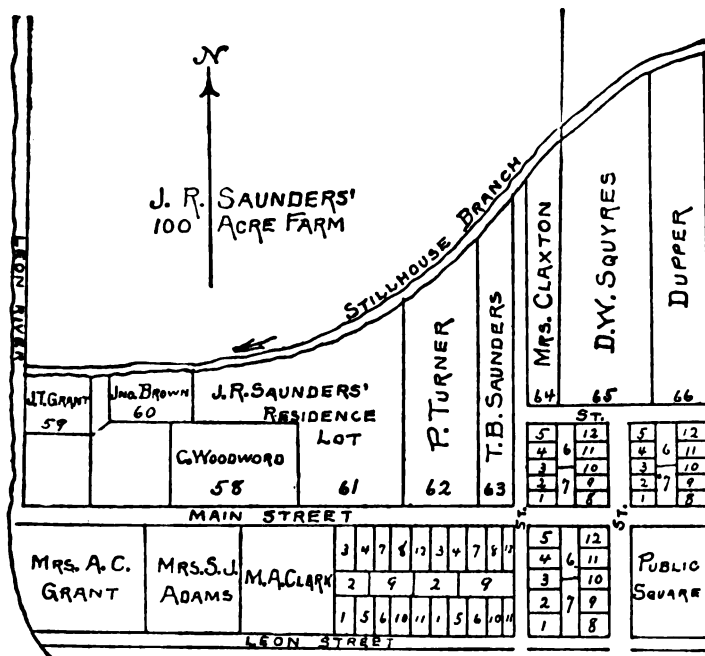
"Defendants offered in evidence the plat of Gatesville as it was in 1880 and as it is at present, a copy of which plat, from the public square west to the Leon river, the western boundary, and north to Stillhouse Branch, the northern boundary, of said town, is attached to, and made a part of, this statement of facts. Said plat is designated as 'Plat of Gatesville at Present.'

"Defendants offered in evidence the description of the Saunders residence lot in the deed to J. R. Saunders, which is as follows: 'All that certain lot or parcel of land lying and being situated in said county, beginning at a rock mound 11 chains 10 links from the public square in the town of Gatesville, on North street; thence W., along said street or road, 6 chains 50 links, to a rock mound; thence N., 5 chains 50 links, a rock mound; thence W., 4 chains 50 links, a stake; thence N., 3 chains 75 links, a stake in Stillhouse Branch; thence up said branch, with its meanderings, to a point due north from the place of beginning, a stake; thence S., to the place of beginning,—containing nine acres, more or less.' This deed recites a consideration of three hundred dollars.

"They next offered in evidence a portion of the description of the 100-acre farm in controversy in the deed to J. R. Saunders, which is as follows: 'One hundred acres, to be surveyed off the south side of the following tract of land bounded and abutted as follows: Lying and being in the county of Coryell, on the Leon river, adjoining the town of Gatesville on the north, being a part of the C. Cazenoba survey, beginning at a stake on the east bank of the Leon river at the mouth of Stillhouse Branch, near the town of Gatesville; thence up said branch, with its meanderings, to the S. W. corner of a survey in the name of B. W. Hammack.' "



PLAT OF GATESVILLE IN 1854.



T. F. Bryan, for appellants. Alexander & Atkinson and McDowell & Sadler, for appellee.

KEY, J. (after stating the facts). The trial court filed no conclusions of fact and law, but evidently must have held that the 9-acre tract upon which appellee resides was not in the town of Gatesville, but was part of appellee's rural homestead; because, if appellee resided in the town, his homestead could not embrace the 100 acres of land in

controversy, which is not in the town. No one can have an urban and a rural homestead at the same time.

Without commenting in detail upon the testimony, we have reached the conclusion that the judgment should not be permitted to stand upon the evidence contained in the record, and we reverse and remand the cause, in order that the facts may be more fully developed.

Upon another trial it is suggested that the following additional facts be shown: The

locality of appellee's residence and other buildings on the 9-acre block; whether or not the residence is on level, high, or low ground, in plain view or out of sight from the street in front of the court house, and whether or not said premises are easily accessible; the distance of the residence from the street running south of the block; whether or not the principal entrance is on said street; the exact distance from the residence to the public square; the locality in the town where the principal business houses are situated; whether or not the lots south and southeast of the 9-acre block, between Main and Leon streets, are improved and occupied, and the character of such occupancy,—whether for residence or business,—and that the same character of proof be made with reference to the lots lying north and northwest of the public square; the number of residences adjoining and their distances from the 9-acre block; the approximate number of houses within 300 yards of appellee's residence; the population of the entire town of Gatesville; and the comparative importance of Main street; whether or not it is one of the principal streets of the town,—is traveled much or little. Judgment reversed, and cause remanded.

#### UNION CENT. LIFE INS. CO. v. WILKES.

(Court of Civil Appeals of Texas. Nov. 2, 1898.)

INSURANCE POLICY—CONSTRUCTION—TERM POLICY  
—DEFAULT IN PREMIUMS—WAIVER.

1. A life policy provided that, on default in payment of premiums without surrender, it should become a paid-up term policy for a certain length of time, when the contract should cease. Insured defaulted, and six months thereafter executed a note for the premium due, providing that, if not paid at maturity, the policy should become void. It was not shown that the beneficiary executed the note. *Held*, that on default the policy became a term policy, and insured could not reinstate the original policy without the consent of the beneficiary.

2. Acceptance after maturity of payment of a premium note which provided that, if not paid at maturity, the policy should become forfeited, is a waiver of the right to a forfeiture.

Appeal from district court, McLennan county; M. Surratt, Judge.

Action by Sallie I. Wilkes against the Union Central Life Insurance Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

This suit was instituted March 20, 1897, by the appellee, Sallie I. Wilkes, against the appellant insurance company, on a life policy issued by the company December 26, 1889, for \$1,000, on the life of William H. Wilkes, the husband of plaintiff. Plaintiff alleges that the policy was issued in consideration of 10 annual payments of \$96.91 each, payable December 30th of each year after date of the policy; that the policy provides, among other things, "that in case of default for non-payment of premiums after three years, and no legal surrender having been made, as

above provided, and provided the insured has paid at maturity all notes given for premiums, then this policy shall, without surrender, become a paid-up term policy, without change of terms or conditions, except as to the payment of premiums and participation in profits, and continue in force for such time as one annual premium on this policy is contained in its reserve value, according to the American four per cent. table of mortality, at the end of which time this contract shall cease. In case the insured dies while said term policy is in force, the amount of foreborne premiums, with annual interest at six per cent., shall be deducted from the sum insured." It is then alleged that William H. Wilkes paid the first premium, \$96.91, on December 26, 1889, and four other successive annual premiums, of \$96.91 each, December 30, 1890, December 30, 1891, December 30, 1892, and December 30, 1893; that December 30, 1894, the reserve value, according to the American 4 per cent. table of mortality, was \$300.49; that the policy was not surrendered on that date, but became a paid-up term policy, without change of terms, except as to the payment of premiums and participation in profits for 3 years and 40 days from the 30th of December, 1894; that William H. Wilkes died in McLennan county, the 14th of August, 1896, within the time covered by the paid-up term policy, whereby the company became liable and bound to pay plaintiff \$1,000. Notice of death and other essentials are alleged. Prayer for \$1,000 and 6 per cent. thereon from November 4, 1896. February 28, 1898, defendant company answered by general demurrer and general denial, and specially that the consideration for the issuance of the policy was the payment of \$96.91 on or before the 30th of December, at noon in every year, during the term of 10 years from the date of the policy, and the payment, when due, of all notes given for premiums or parts of the same; that among other conditions of the policy were the following: That, if any premium or notes given for the premium, should not be paid at maturity, the policy should become null and void, and all payments made thereon and accrued surplus profits should be forfeited to the company. Defendant also set up the clause in the policy declared on by plaintiff, by which it might become a paid-up term policy, and then alleged that all premiums on the policy had been paid up to the 30th day of December, 1894, and all notes given for premiums, but that on that date the premium then due was not paid, and afterwards, to wit, on the — day of May, 1895, the insured, desiring to continue the policy in force, executed, and the company accepted, his note for the unpaid premium, reviving the policy, which note was given about the 25th day of July, 1895, but was dated back to December 30, 1894, due October 15, 1895, with 8 per cent. interest per annum, thus continuing the policy and extending the time of payment of the premium; that the

insured, in giving the note, did not desire to take advantage of the condition above set out in case of nonpayment of premiums after three years, but desired an extension of time in which to pay the portion of the premium which had not been paid, the other portion having been liquidated by dividends on the policy; that the insured executed the note to defendant, signed by himself and the plaintiff, signing by the insured on date December 30, 1894, for \$79.42, due on or before October 15, 1895, with interest at 8 per cent. per annum, and it was accepted by defendant as a compact extending the time of payment of the unpaid premium; that the note contained the following stipulation: "Said policy, including all conditions therein for surrender, or continuance as a paid-up term policy, shall, without notice to any party or parties interested therein, be null and void on the failure to pay this note at maturity;" that the note was not paid at maturity, and remains unpaid, whereby the policy became null and void; and that no further payments have ever been made or accepted on the policy, and the policy was canceled and became of no force after the maturity of the said note. November 5, 1897, plaintiff replied to the answer by plea of non est factum to the note; that she did not sign it, nor authorize W. H. Wilkes to sign the same for her; that the note was never presented to her for payment; that the note was without consideration, and void. This replication was sworn to by plaintiff. The trial was without a jury, and resulted in a judgment for plaintiff for the face value of the policy, less two annual premiums foreborne, with interest on the same, leaving balance due of \$53.10, and \$102.37 damages,—that is, 12 per cent. on the amount,—and the further sum of \$300, reasonable attorney's fees for prosecuting this suit, aggregating \$1,255.47, for which judgment was rendered. From this judgment, the defendant company has appealed.

We find the facts as follows: The policy declared on was introduced in evidence. It was issued on the date alleged and reads in part: "The Union Central Life Insurance Company, \* \* \* in consideration of the statement made in the application for this policy, \* \* \* and of the annual payment of the sum of \$96.91 at the home office of the company, on or before the 30th day of December at noon in every year, during the term of ten years from date hereof, and of the payment when due of any and all notes given for premiums, or parts of same, does insure the life of William H. Wilkes, \* \* \* in the amount of one thousand dollars, with participation in profits for the term of his natural life. Upon the death of the insured, the company agrees to pay said amount of insurance to Sallie I. Wilkes, his wife, \* \* \* within sixty days after receipt of notice and satisfactory proof of death; the balance of the year's premium, if any, and all indebtedness to the company, being first deducted. After three years' premium has been paid,

except in case of failure to pay at maturity a premium note, the company will, upon legal surrender of this contract, while in force, issue a paid-up nonparticipating life policy for the amount named in Table A on the following page. In case of default for nonpayment of premium after three years, and no legal surrender having been made as above provided, and provided the insured has paid at maturity all notes given for premium, then this policy shall, without surrender, become a paid-up term policy, without change of terms or conditions, except as to payment of premiums and participation in profits, and continue in force for such time as one annual premium on this policy is contained in its reserve value, according to the American four per cent. table of mortality, at the end of which time this contract shall cease. In case the insured dies while the said term policy is in force, the amount of forborne premiums, with annual interest at six per cent., shall be deducted from the sum insured." It also contains a condition that "all premiums or notes or interest upon said notes given the company for premiums shall be paid on or before the days on which they become due, at the company's office in the city of Cincinnati, or to the authorized agent, he producing a receipt therefor, signed by the president, vice president, or secretary." After this, other conditions are stipulated, and then the following clause: "Upon the violation of any of the foregoing conditions, this policy shall be null and void, without action on the part of the company or notice to the insured or beneficiary, and all payments made hereon and all secured surplus or profits shall be forfeited to the company, except as provided in the 5th paragraph" of the conditions, which provides, in certain cases, for the payment of the reserve value of the policy, which is not at issue in this suit. Then follow other conditions, one of which provides: "After three years from the date of this policy, it shall be incontestable for any cause, excepting the violation of the above conditions regarding the occupation of the insured, the intemperate use of intoxicating liquors, nonpayment of premium or of notes given for the same, and misstatement of age." If the plaintiff is correct in her claim that the policy became a paid-up term policy, the proof shows that it was a term policy for three years and forty days from the 30th day of December, 1894, and that the term policy had not expired at the death of the insured. The proof also shows, if the term policy existed, the amount due thereon, less the foreborne premiums unpaid at the death of the insured, would be \$53.10. The insured died August 14, 1896. Premiums were paid for the years 1889, 1890, 1891, 1892, and 1893. The premium due December 30, 1893, \$53.81, was paid in May, 1895. It was settled by note dated December 30, 1893, and matured in six months, and was paid, as stated, in May, 1895. The premium due December 30, 1894, was not



paid. The dividend on the policy was \$17.49, and in July, 1895, the company accepted a note for the balance, \$79.42, due December 30, 1894. The note was dated December 30, 1894, and was received by the company July 25, 1895, the time the renewal premium receipt should have been sent to the assured. The note was never paid. It was due October 15, 1895. No premium or any portion thereof was paid on the policy after payment of note for the premium for 1893. The note for premium is as follows: "\$79.42. Waco, Tex., Dec. 30, 1894. On or before Oct. 15/95 months after date, for value received, we jointly and severally promise to pay to the order of the Union Central Life Insurance Company seventy nine and  $\frac{4}{100}$  dollars, without discount or defalcation, at Waco State Bank, Waco, Tex., being the premium on policy No. 66,784 in said company, bearing date Dec. 30th, 1894. Said policy, including all conditions therein for surrender, or continuance as a paid-up term policy, shall, without notice to any party or parties interested therein, be null and void on the failure to pay this note at maturity, with interest at eight per cent. per annum, payable annually. In case this note is not paid at maturity, the full amount of premium shall be considered earned as premium during its currency, and the note payable without reviving the policy or any of its provisions. W. H. Wilkes (signature of person insured). S. I. Wilkes, per W. H. Wilkes (party for whose benefit Ins. is taken)." The age of the insured is stated in the policy to be 57 years at its date. The note dated December 30, 1893, was due in six months.

Boynton & Boynton, for appellant. M. C. H. Park, for appellee.

COLLARD, J. (after stating the facts). We believe the correct rule is that the beneficiary in a life policy becomes the owner of it from the time of its issuance, and that his interest is vested, and cannot be divested by the insured unless the original contract of insurance provides for such divestiture. *Splawn v. Chew*, 60 Tex. 534, and authorities cited; *Bank v. Hume*, 128 U. S. 206, 9 Sup. Ct. 41; *Irwin v. Insurance Co.* (Tex. Civ. App.) 39 S. W. 1093. We have considered the fact that the policy in this case frequently refers to notes given for premiums; but we do not believe that these provisions should be construed to authorize the insured to change the contract from a term policy after it once became such, the rule being, that in cases of doubt the contract should be construed most favorably for the beneficiary. *Goddard v. Insurance Co.*, 67 Tex. 71, 1 S. W. 906. "The language of the policy, being the language of the insurers, is to be construed most strongly against them, so as to give the insured the indemnity for which he has bargained." *Insurance Co. v. Gordon*, 68 Tex., 148, 3 S. W. 718.

The policy sued on plainly provides that in case of default for nonpayment of premium after three years, and no legal surrender having been made, the policy shall, without surrender, become a paid-up term policy, provided the insured has paid at maturity all notes given for premium. It is contended by appellee that on failure to pay the premium due December 30, 1894, the policy became a paid-up term policy, which could not be affected or changed by the insured by his note with its conditions, really executed in July, 1895, some months after the failure to pay the premium due December 30, 1894, the policy having been in force more than three years. We believe the contention of appellee is correct, and that the execution of the note for the unpaid premium due December 30, 1894, did not have the effect to continue the policy as originally written to become a paid-up policy, after payment of premiums for ten years. Mrs. Wilkes pleaded non est factum to the note given for the premium set up as a defense, and there was no effort to prove that she executed it, nor that it was executed by her authority. The company accepted payment of the note given for the premium due December 30, 1893, and thereby waived any right the contract may have secured to them by the failure to pay that note at maturity. The payment of that note after due, and the acceptance of payment by the company, were a satisfaction for the default in the payment of the note at maturity, and remitted the parties to their rights and obligations as fixed by failure to pay the premium due December 30, 1894; and it must be held that at that time the policy became a paid-up term policy. Defendant did not set up any rights by plea accruing by failure to pay the note for premium due December 30, 1893. We hold as to this, however, as above stated, that the company waived such defense by accepting payment of the note, though due before its payment. The age of the insured at date of policy is stated in the policy, and there was no testimony impeaching the statement, and it will be deemed proved as stated. Having decided every question raised by assignments of error adversely to appellant, the judgment of the lower court is affirmed.

#### SCHOELLKOPF v. CAMERON.

(Court of Civil Appeals of Texas. Nov. 2, 1898.)

##### BUSINESS HOMESTEAD—ABANDONMENT.

A shoemaker was elected county treasurer, and performed his official duties at the court house, but never entirely abandoned his trade as shoemaker, and intended to resume it, and occasionally occupied his shop to repair shoes. *Held*, that his election to office did not operate as an abandonment of his business, and a judgment that he had not abandoned his right of exemption in the shop was not unauthorized.

Appeal from district court, Coleman county; J. O. Woodward, Judge.

Action by G. H. Schoellkopf against W. M. Cameron. There was a judgment for defendant, and plaintiff appeals. Affirmed.

J. P. Ledbetter, for appellant.

FISHER, C. J. This is an action by the appellant in trespass to try title, to recover of Cameron the lot in controversy, situated in the town of Coleman. Judgment below was rendered in favor of appellee. The lot formerly belonged to one J. F. Cannady, who in 1894 sold the same to appellee, Cameron. Plaintiff claimed the same by virtue of title acquired at sale under execution issued on a judgment against Cannady. This judgment was recorded and abstracted in Coleman county on the 6th day of June, 1892. The execution sale under which plaintiff purchased was subsequent to the sale by Cannady to Cameron. The only controverted issue of fact in the case is whether the property, at the time Cannady sold to appellee, was subject to appellant's judgment lien; it being contended that subsequent to the recording and abstracting of the judgment, and also prior to that time, and up to the time that the sale was made to Cameron, the property was exempt, as the place of business at which Cannady carried on the business of making and repairing boots and shoes, etc. It appears that, in the fall of 1890, Cannady was elected county treasurer of Coleman county and was re-elected in the fall of 1892, he having served two full terms in that office, and that during that time a room was furnished him in the court house in which to perform his official duties. Prior to his election, he had been continuously engaged in the shoe business, and, for several years prior thereto, he was occupying the premises in question. He states in his evidence that he never entirely abandoned his occupation as a shoemaker, and that it was his intention to resume that business when his term of office expired; and there is evidence in the record which shows that, during his first term of office, he carried on his shoemaking business in the premises in question mostly by hired hands; and there is some evidence which tends to show that during his second term of office, up to the time that he sold to Cameron, he occasionally used and occupied the premises in question, for the purpose of repairing shoes. And unless the election to the office of county treasurer, ipso facto, operated as an abandonment of the business in which he was previously engaged, we must hold, from the testimony in the record, that the judgment on the facts is not wholly unauthorized, and there is some testimony upon which to support it, although it may not be of the most convincing character.

There are decisions to the effect that one engaged in the performance of his public duties as an officer is entitled to a place of business wherein he may perform those duties, and that the statute would exempt such a place where his official duties were performed

from forced sale; but there is no decision holding, in terms, that the election to an office and the performance of the duties required of the officer, of themselves, will necessarily operate as an abandonment of any previous business in which the officer may have been engaged. There is no inconsistency between the duties required of the county treasurer and the business carried on by a shoemaker. Of course, it is not intended by the law that one engaged in these different branches of service should be entitled to two different places which should be exempt; but, when so engaged in business in these two different ways, which of the two places where it is carried on shall be exempt is a question of fact for the jury. In this particular case, Cannady was performing his official duties in a room in the court house, set apart to him by the commissioners' court. It is clear that he asserted no claim to that room, and that he was occupying it really upon sufferance. There his official duties were performed; but, because he may have performed his official duties at that particular place, he could claim no exemption in that property, because it was removed from the reach of his creditors, independent of the question of exemption; and he had no right in it, nor did his creditors, except a naked occupancy, by consent of the commissioners' court. His official duties might well be performed there, and still his business as a shoemaker might continue upon the premises in controversy. A merchant who is elected to an office, the duties of which are not incompatible with his private business, does not necessarily have to retire from his mercantile pursuit, but he can well continue that business, and at the same time perform his official duties.

We have examined the assignments of errors criticizing the charge of the court, and those wherein it is contended that the court erred in refusing certain charges, and conclude that no reversible error is shown. The main charge of the court and those that were given at the instance of the appellant really presented all the issues that were proper to be submitted to the jury. We find no error in the record, and the judgment is affirmed. Affirmed.

#### MATTFIELD v. COTTON et al.

(Court of Civil Appeals of Texas. Nov. 2, 1898.)

DEEDS—EVIDENCE—IDEM SONANS—CONTINUANCE—SURPRISE.

1. A deed from Anton Metzger is not admissible to prove title in plaintiff, who claims through Anton Metzger, as the two names are not idem sonans.

2. Plaintiff, who claimed title under Anton Metzger, introduced a copy of a deed from Anton Metzger, which was ruled out. He then moved for a continuance to procure the original deed, and evidence to show that it was executed by Anton Metzger. Held, that the continuance was properly denied, as plaintiff should have known that the copy was inadmissible.

Appeal from district court, Runnels county; J. O. Woodward, Judge.

Action by B. Mattfield against T. M. Cotton and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Jenkins & McCartney, C. H. Willingham, and C. O. Harris, for appellant. Gulon & Truly, for appellees.

**FISHER, C. J.** This is an action of trespass to try title, brought by Mattfield against Cotton and others. The land was originally patented to Anton Metzger. Plaintiff, in designating title, offered in evidence a deed from Anton Metzger to one E. H. Stieling. Appellees objected to the admission of this deed on the ground of irrelevancy, mainly because it had no connection with the title that emanated from the sovereignty of the soil, they contending that "Metzger" and "Metzzer" were not idem sonans. The court sustained these objections, and excluded the deed, and its ruling in this respect is the main question presented in this case. No evidence was offered by the appellant tending to establish that this deed was really executed by Anton Metzger. There was an agreement between the parties that certified copies from the records of deeds might be used where the originals would be admissible, but in that agreement there was no waiver of any objections that might be urged to the introduction of the record evidence on account of immateriality or irrelevancy. When the court excluded the deed, appellant claimed that he was surprised by the ruling, and made a motion to continue the case, asserting therein that a mistake was evidently made by the officer in recording the original deed, and that the original deed could be procured, which would show that the conveyance was executed by Anton Metzger, the original grantee, and that that fact could be established by evidence, which motion was overruled, and judgment was entered in favor of the defendants. And thereafter a motion for a new trial was made, which was overruled, wherein the same grounds were urged as were set up in the motion for continuance. There are many authorities upon the question of idem sonans, many of which have been examined, and the conclusion reached that Metzger and Metzzer are two different names, not of the same sound; and, consequently, there was no error in the ruling of the court in excluding the deed; nor do we think that the court abused its discretion in declining to continue the case in order for the appellant to procure the original deed, or evidence tending to establish that it was really executed by Anton Metzger. The deed, the copy of which was offered in evidence and excluded, had been recorded in Runnels county several years prior to the trial; and, as a matter of law, the plaintiff must have known that Metzger and Metzzer were not the same names; and that, if he relied upon a title emanating from Metzger, he should have come prepared to establish that fact. The statement that he

made in the application for a continuance and also in the motion for a new trial clearly shows that he could have procured such testimony, if he had been diligent. In the nature of things, he must have known that the necessity thereof existed before the trial of the case, and that he was likely to be confronted on the trial with the very objection that was urged to the admission of this deed. There was nothing in the agreement of counsel authorizing the introduction of certified copies that was calculated to lull the diligence of the appellant, for the privilege was reserved in that agreement to urge the same character of objections to the admission of copies in evidence as was in fact urged upon the trial. We find no error in the ruling of the court; therefore we affirm the judgment of the court below. Judgment affirmed.

#### SANDERS v. BRITTON.

(Court of Civil Appeals of Texas. Nov. 2, 1898.)

##### SALES—WARRANTY—INSTRUCTIONS.

1. In order to constitute a breach of a warranty of the soundness of a mule, it is not necessary that the warrantor knew of its unsoundness at the time.

2. An instruction that a warrantor must have known that the property was not as represented, in order to constitute a breach, is not cured by another correct charge as to warranty.

On motion for rehearing. Granted, and judgment reversed.

For former opinion, see 45 S. W. 209.

**COLLARD, J.** Appellant contends, in his motion for a rehearing, that the court erred in charging the jury on the question of warranty by appellee of the soundness of the mule exchanged to appellant; that, to make him (appellee) liable on the warranty, he must have known that the mule was not sound at the time of sale. The court's charge is susceptible of this construction, which is the result, probably, of submitting the question of warranty in the same clause as the alleged false representations. On the latter question it is not contended that the charge is erroneous.

It was not necessary that appellee should have known that the mule was unsound at the time of sale, to create liability on the warranty, and in that respect the charge was erroneous. *Morris v. Parker* (Tex. Civ. App.) 38 S. W. 259; 2 Pars. Cont. (7th Ed.) 579, 580; 28 Am. & Eng. Enc. Law, 748, and note 1; 1 Pars. Cont. "Warranty," 573.

At the request of appellant, the court gave a correct charge on the warranty, but this did not expressly correct the error in the general charge, and the jury may have considered either. Because of the error in the general charge of the court, our judgment heretofore rendered in this case is set aside, and the judgment of the lower court is reversed, and the cause remanded. Motion granted. Judgment reversed and cause remanded.

## KERR COUNTY v. KITCHENS.

Court of Civil Appeals of Texas. Nov. 2, 1898.)

## VENDOR AND PURCHASER—CONTRACTS—CONSIDERATION.

A purchaser went into possession of land under a parol contract. It was afterwards agreed that the vendor should withhold his deed, and the purchaser should be released from the payment of interest until a question as to a conflict of surveys should be determined. *Held*, that the waiver by the purchaser of his right to at once demand the execution of the deed for so much of the land as was not in conflict was a sufficient consideration for the agreement.

On motion for rehearing. Granted. Judgment affirmed.

For former opinion, see 45 S. W. 152.

KEY, J. At the last term of this court, a judgment was entered reversing and remanding this cause. 45 S. W. 152. Appellee filed a motion for rehearing, which was continued to this term; and, after careful consideration, our conclusion is that this motion should be granted. Among other defenses, appellee pleaded the following: "For further answer and cross action, defendant shows the following, to wit: That plaintiff, being seised and possessed of subdivision No. 88 of Kerr county school lands in Brown county, Texas, parts of original surveys Nos. 277 and 278, did, on, to wit, June 3, 1884, through its duly-authorized agents, A. L. Pinson and A. McFarland, enter into an oral contract with defendant, by the terms of which it was stipulated and agreed that plaintiff would convey to defendant, by good and sufficient warranty title, all of such subdivision No. 88 not in conflict with older surveys; that as soon as the boundary lines of said subdivision were legally ascertained and established, and certain conflicts with said older surveys were fully and legally settled, plaintiff would convey to defendant all conflict lands in said subdivision which should prove to be the property of plaintiff; that defendant should take immediate possession under said contract to convey, and should pay for said lands the sum of \$2.50 per acre, as follows, to wit, \$25 cash in hand at the time of taking possession, as earnest to bind said contract, and to be applied to the discharge of interest and purchase money, as the same should become due and payable; that, for the purchase money, defendant should execute to plaintiff his negotiable promissory note, whenever plaintiff should make defendant a good and sufficient warranty title to said lands; that said note should become due and be payable ten years after the date thereof, and should bear interest at the rate of 10% per annum from date, payable annually in advance; that all payments of principal and interest on said note should be made to the treasurer of plaintiff county, at Kerrville, Texas. That it was especially stipulated that said purchase money should

bear no interest until said contract was fully consummated, and said deed of conveyance duly executed and delivered. That it was understood and agreed that the deed of conveyance should stipulate that a failure to pay said note, or the interest thereon, according to its tenor and effect, should entitle plaintiff, at its option, to treat said sale as rescinded, and recover said land and the improvements thereon, and forfeit to itself all moneys paid; that the vendor's lien should be expressly retained in said deed of conveyance on the lands therein described to secure the payment of said note and the interest thereon; that plaintiff should prepare said deed and note, and notify defendant thereof; that defendant should then execute and deliver said note and receive said deed. That plaintiff thereafter, with full knowledge of all the terms of said contract, agreed to and accepted the same, and promised to perform it in all things according to the terms and stipulations aforesaid. That defendant paid said \$25 cash, and took possession of said lands under and in accordance with said contract. That he has made permanent and valuable improvements thereon, and has continuously resided upon, cultivated, and improved said lands, and paid the taxes thereon, without objection from plaintiff, and upon the faith of said contract to convey. That defendant has at all times and now is ready and willing to do and perform all things by him agreed to be done and performed under said agreement, according to its tenor and effect. That afterwards plaintiff declined to make deed to any part of said subdivision until said boundary lines were established and said conflicts settled as aforesaid, but promised to make deed in accordance with said contract as soon as said conflicts were settled, encouraged defendant to continue his improvements, and assured him that said contract would be fully performed when said conflicts were settled, to which defendant assented, and upon which he relied, and continued to improve said lands; but that said boundary lines and conflicts have not been fully and legally settled, and the same, or some of them, are still in dispute, or, if settled, defendant has never [been] notified by plaintiff, or any other person, and does not believe such to be the fact. That plaintiff has never complied with its contract to convey, nor tendered conveyance. That plaintiff is able to make a good and sufficient warranty title to so much of said subdivision No. 88 as is not in conflict with said older survey; and that defendant is ready and willing to accept the same, and to comply with his contract as aforesaid. That the following described portion of said survey does not so conflict, and is all of the same not in conflict, viz.: Beginning at the W. corner of Jno. Plunkett sur., No. 45, as established by the district court of Brown county; thence N., 45 E., with the N. W. boundary

line of said Plunkett, 580 vrs., to an original boundary line of Kerr county school land; thence N., 45 W., with said Kerr county bdy. line, 86 vrs., to cor. from which a L. O. brs. N., 11 E., 45 vrs., do S., 49 E., 20 vrs.; thence N., 45 E., with said Kerr Co. bdy. line, 580 vrs., to st. md., for cor. in S. W. bdy. line of McAnally survey, No. 46; thence N., 45 W., with the S. W. boundary line of said McAnally, 526 vrs., to a stake for cor. in S. E. boundary line of Thos. J. Glass sur., No. 47; thence S., 45 W., with said line of the Glass, 1,616 vrs., to a cor. N., 45 W., of the N. corner of subdivision No. 20, Kerr county school land, — vrs., for the W. cor. of this survey; thence S., 45 E., passes said N. cor. of No. 20, and with the N. E. boundary line of said No. 20 and No. 21, 1,391 vrs., to E. corner of No. 21; thence N., 45 E., 150 vrs., to corner; thence S., 45 E., 82½ vrs., to cor.; thence N. W., with said Plunkett boundary line, 861½ vrs., to the place of beginning,—containing 233 acres.' Defendant now here tenders performance of all things by him agreed to be done and performed, fully and completely in all respects, according to the terms and stipulations of the contract aforesaid, and of this he is ready to verify. Wherefore he prays: (1) That he go hence without day, and recover his costs herein; and (2) in the alternative, if it shall appear that said boundary lines and conflicts are settled as aforesaid, for judgment that plaintiff perform said contract to convey fully and completely, according to its terms, tenor, and stipulations, and for such other and further relief, legal and equitable, as he may be entitled to in the premises."

The court, in its charge, submitted this defense to the jury, and the verdict shows that the jury found for appellee on this branch of the case. In deciding the case before, we were of the opinion that the supplemental contract pleaded by appellee, in which it was claimed that deed and notes were not to be executed, and he was released from the payment of interest until the question of conflict of surveys was settled, was not binding on Kerr county, because no consideration therefor was shown. We are now of the opinion that the position of appellee's counsel in their motion for a rehearing is correct, and that the waiver of appellee's right under the original contract to at once demand execution by Kerr county of a deed to so much of the land as was not in conflict was a sufficient consideration for the agreement referred to. After a careful reconsideration of the statement of facts, we find there is testimony to support all of the material averments in the pleading quoted above; and we therefore find conclusions of fact in accordance with the averments of said plea, and, applying the law to the facts thus found, we conclude that the judgment rendered by the court below was correct, and it will be affirmed. Motion granted. Judgment affirmed.

**ANDERSON et al. v. WACO STATE BANK.**  
(Court of Civil Appeals of Texas. Nov. 2, 1898.)

**APPEAL—AFFIRMANCE ON CERTIFICATE.**

Where an appellant has exercised due diligence to perfect his appeal in due time, and, failing, used reasonable dispatch in getting the record to the court on writ of error, a request to affirm on certificate should be denied.

Error from district court, McLennan county; Marshall Surratt, Judge.

Action by the Waco State Bank against Lucy Anderson and others. From a judgment for plaintiff, defendants bring error. Motion to affirm on certificate overruled.

W. S. Baker and Shapley P. Ross, for plaintiffs in error. A. C. Prendergast, for defendant in error.

**FISHER, C. J.** This is a motion to affirm the judgment of the court below on certificate. The appellants, in response, state facts which show that, while the record on appeal was not filed in this court within the time required by law, they exercised much diligence to have the record prepared and filed before the 90 days from the time of perfecting the appeal had expired. It further appears that after they ascertained that the record was filed too late in this court they used reasonable dispatch in getting the record to this court on writ of error. In other words, the facts shown in resisting the motion to affirm on certificate establish that the appellants acted in good faith in seeking to perfect their appeal, and exercised diligence to have the record on appeal, and also on writ of error, filed in this court, so that the objections urged to the judgment below could be considered and revised here. And we believe it to be a case in which the request to affirm on certificate should be denied, because the record is now on file here on writ of error, although such record was filed subsequent to the motion to affirm. Motion to affirm overruled.

**REILLY v. LEWIS et al.**

(Court of Civil Appeals of Texas. Nov. 2, 1898.)

**CONSTABLES—FAILURE TO LEVY—PLEADING—GENERAL DENIAL.**

A constable sued for failing to seize certain property under an order of sale and execution cannot show under a general denial that the property was in the possession of another officer, under another writ.

Appeal from Milam county court; W. M. McGregor, Judge.

Action by Pat Reilly against George Lewis and others. From a judgment for defendants, plaintiff appeals. Reversed.

W. A. Morrison, for appellant. E. A. Wallace and Henderson, Streetman & Freeman, for appellees.

**COLLARD, J.** This is an action by motion of appellant, Pat Reilly, against George Lewis, constable, in Milam county, and his official bondsmen, under article 2387 of the Revised Statutes of 1895. The motion shows that on the 24th day of April, 1896, Pat Reilly recovered judgment against R. Alexander and Will Edwards, a firm styled Alexander & Edwards, for \$805.90, foreclosing landlord's lien on certain personal property; that order of sale and execution issued by one writ, and was placed in the hands of the constable for execution; and that he failed and refused to return the same. Prayer for judgment against the constable and his bondsmen. Verdict and judgment for respondents, from which this appeal is taken.

The court submitted an issue as defense that the property ordered to be sold was in the possession of another officer, under another writ, prior to the time the constable should have seized the same. No such defense was alleged in response to the action. Such defense would have been "a confession and avoidance," and could not be made available, unless pleaded. It was error to submit the defense not pleaded. Matters merely denying plaintiff's case may be heard under the general denial, but not matters in avoidance. *Smothera v. Field*, 65 Tex. 435. Because of the error pointed out, the judgment of the lower court is reversed, and the cause remanded.

### PRUITT v. STATE.

(Court of Civil Appeals of Texas. Nov. 2, 1898.)

#### DEFECTIVE CITATION—CORRECTION.

In a suit brought against a tax collector and his sureties, the citation was dated June 7, 1895, and stated that the petition was filed September 5, 1896, when it was really filed September 5, 1893, and commanded the officer executing it to deliver to defendant "the accompanying copy of the aforesaid petition." The sheriff served the citation, and delivered the copy of the petition, on which the proper date of filing was indorsed. *Held*, that the copy of the petition was a part of the citation, and corrected the erroneous date therein.

Error from district court, Travis county; R. E. Brooks, Judge.

Action by the state against Ed. Pruitt and others. From a judgment by default in favor of plaintiff, defendant Pruitt brings error. Affirmed.

Perryman & Bullitt, for plaintiff in error. M. M. Crane and E. P. Hill, for defendant in error.

**KEY, J.** On the 5th day of September, 1893, the state instituted this suit against Granville B. Morris as principal, and Ed. Pruitt, J. G. Minter, and T. B. Smith as sureties, to recover the sum of \$548.45, alleged

to be due by Morris as tax collector of Liberty county. None of the defendants answered, and judgment by default was taken. Pruitt has brought the case to this court on writ of error, and presents but one ground for reversal, which is that the citation served upon him did not correctly state the date of the filing of the plaintiff's petition.

The suit was brought in the district court of Travis county. Pruitt lived in Liberty county. In the body of the citation it is stated that the petition was filed on the 5th day of September, 1895, when in truth it was filed the 5th day of September, 1893. The citation was dated the 7th day of June, 1895, and it commanded the officer executing it, among other things, to deliver to the said Ed. Pruitt "the accompanying certified copy of the aforementioned petition." The return of the sheriff shows that he executed the citation on the 10th day of June, 1895, "by delivering to the within-named defendant, Ed. Pruitt, in person, a true copy of this citation, and the accompanying certified copy of plaintiff's petition." It is contended on behalf of Pruitt that this citation, and the service thereof upon him, did not authorize the court to render judgment against him by default, because the citation did not correctly state the date of the filing of the petition, as required by statute. The date of the filing of the petition, September 5, 1893, is indorsed on the petition. A certified copy of the petition would include this indorsement, and, as the citation and return thereon made by the sheriff show that Pruitt was served with a certified copy of the petition, we think it is reasonable to presume that said copy disclosed the fact that the petition was filed September 5, 1893, thereby correcting the impossible date given in the body of the citation. We say impossible date, because at the time the citation was issued, June 7, 1895, it was impossible for the petition to have been filed September 5, 1896. In so far as the question under consideration is concerned, we think the certified copy of the petition should be regarded as part of the citation, and as correcting the date given in the body of the latter. The judgment is affirmed.

### GODAIR et al. v. TILLAR.

(Court of Civil Appeals of Texas. Nov. 5, 1898.)

#### CHATTEL MORTGAGES—POWER OF SALE IN MORTGAGOR—PRIORITIES—APPEAL.

1. A junior mortgage on cattle recited that it was subject to a prior mortgage and an agreement thereunder that mortgagor might use the proceeds of the sales of the mortgaged cattle, not to exceed \$2,500 per annum, to defray the expenses of running the ranch, but the remainder of the proceeds to be applied to the payment of the secured debt. *Held*, that the junior mortgagees who had subsequently sold the cattle under their mortgage, and appropriated the proceeds, could not avail themselves of the contention that the senior mortgagee had allowed mortgagor a very large dis-

cretion in selling the cattle covered by the mortgage and in the application of the proceeds of such sales, so as to warrant the conclusion by persons dealing with mortgagor that they had authority to sell the cattle without restriction.

2. The proposition that where the mortgagee of personal property consents that the mortgagor remain in possession with authority to handle and sell the property, the mortgagor becomes the agent of the mortgagee, so that a sale by him passes the title free from the lien of the mortgage, and the mortgagee must look to the mortgagor for the application of the proceeds of such sale, and not to the purchaser of the mortgaged property, is not applicable where a junior mortgagee, whose mortgage is expressly subject to the first mortgage, sells the mortgaged property, and appropriates the proceeds to his own use.

3. Where appellant's brief does not show the ground of objections to the admission or exclusion of evidence, the court will not search a voluminous record to find the particular objections urged.

Appeal from district court, Tarrant county; Irby Dunklin, Judge.

Action by J. T. W. Tillar against Godair, Harding & Co. From a judgment for plaintiff, defendants appeal. Affirmed.

The following are the calculations referred to in the opinion:

Value of the cattle, and amount of the proceeds thereof converted by the defendants: Baird, the railroad agent at Miami, Kopf, manager of the stock yards at Kansas City, Driver, the inspector at Midland, and Hunninger, the superintendent of the stock yards at East St. Louis, all say that all the cattle in the six shipments in question were in fine condition. Ben J. Tillar, an expert cattleman, testifies that the calves in question at Miami or Midland were reasonably worth \$6 to \$7.50 per head at the date of the shipments, and that the cows were worth from \$12 to \$15 per head, and that the steers were worth from \$20 to \$25 per head, and that all of said cattle were worth in Kansas City and East St. Louis the prices stipulated above, plus the freight of shipment of said cattle to Kansas City and East St. Louis.

11 cows at \$14 per head.....	\$ 154	} First shipment from Midland.
52 calves at \$6 per head.....	312	
200 cows at \$14 per head.....	2,800	} 2nd shipment from Midland.
67 steers at \$25 per head.....	1,675	

Total .....\$4,941

168 cows at \$14 per head.....	\$2,352	} First shipment from Miami.
167 calves at \$6 per head.....	1,002	
344 cows at \$14 per head.....	4,816	} 2nd shipment from Miami.
98 calves at \$6 per head.....	588	
51 cows at \$14 per head.....	714	} 3rd shipment from Miami.
32 calves at \$6 per head.....	192	

Total.....\$9,664

Total value of cattle in question.....	\$14,605
Plaintiff acknowledges receipt from the defendants in November, 1894, of.....	3,000

Leaving of the cattle received and disposed of by deft.....	\$11,605
Verdict and judgment is for.....	9,000

Balance.....\$ 2,605

Plaintiff had no way of finding out what said cattle in fact sold for, as it was 18 months after the disposition thereof before he discovered the fraud.

Matlock, Cowan & Burney, for appellants.  
Pruitt & Smith, for appellee.

STEPHENS, J. This suit was brought by the appellee, J. T. W. Tillar, as the holder of a first mortgage upon a stock of cattle belonging to J. L. Gray & Co., a firm composed of J. L. and George G. Gray, against the appellants, Godair, Harding & Co., for a conversion of the cattle, and, in the alternative, for a conversion of the proceeds arising from the sales thereof, which resulted in a verdict and judgment in favor of the appellee for the sum of \$9,000, from which this appeal is prosecuted. On the 28th day of January, 1892, J. L. Gray & Co. purchased from J. T. W. Tillar his cattle and ranch upon which they were located, known as the "Block Ranch," situated in Midland county, Tex., and in part payment therefor executed their four several promissory notes for \$13,450 each, payable to said Tillar on the 1st day of November, 1892, 1893, 1894, and 1895, the notes drawing interest at the rate of 10 per cent. per annum, and providing for 10 per cent. additional to cover attorney's fees, if sued upon. To secure the payment of these notes, Gray & Co. executed a chattel mortgage upon the cattle in the form of a deed of trust, naming J. A. Walker as trustee, which authorized him to sell the cattle in default of payment of the notes. The mortgage was duly recorded, and Gray & Co. remained in possession of the cattle, which were branded in the various brands described in the mortgage. As a part of the transaction, the following written agreement of the same date was entered into: "State of Texas, County of Mitchell. Witnesseth: As part of the contract of sale of this date, it is further agreed by and between J. T. W. Tillar, of Pulaski county, Arkansas, and J. L. Gray & Co., a firm composed of J. L. Gray and George G. Gray, of Midland county, Texas, that said J. L. Gray & Co. shall pay all taxes assessed against the Block Ranch for the year 1892; that said J. L. Gray & Co. may use the proceeds of the first cattle sold by them and mortgaged to said Tillar to defray expenses of running and maintaining said ranch, which amount shall not exceed the sum of two thousand five hundred dollars (\$2,500) per annum, and to pay freight and pasture of any of said cattle which they may deem best to be shipped to the Indian Territory, but the remainder of the proceeds of any and all sales that may be made from time to time shall be applied in payment of the several purchase notes. Witness our hands, this 28th day of January, 1892. Ben J. Tillar, Agent for J. T. W. Tillar. J. L. Gray & Co., by Geo. G. Gray." On the 10th day of November, 1893, the first two notes having been paid off, Gray & Co. executed another mortgage, in all respects similar to the first, to secure the two remaining notes and two other notes for \$550 each, due May 14, 1894, and 1895, on cattle branded as therein set out. These two mortgages covered all

the cattle running on the Block Ranch owned by J. L. Gray & Co., and their increase. All the notes were paid on or before maturity, except the one due November 1, 1895, for \$13.50, upon which several credits were entered, reducing the balance due thereon, principal, interest, and attorney's fees, at the date of the trial, January, 1898, to the sum of \$9,650. In March, 1894, Gray & Co. borrowed of Godair, Harding & Co., a live-stock commission company doing business in Chicago, St. Louis, and other places, the appellants herein, the sum of \$9,700, to secure the payment of which they executed a chattel mortgage upon a certain brand of cattle belonging to or in the name of one of the children of George G. Gray, of the estimated number of 500, though according to the evidence introduced by the appellee, and presumptively accepted by the jury, the number did not exceed 50 or 55 head; and a further and second mortgage upon the same cattle covered by the mortgages in favor of the appellee. Said mortgage recited and recognized the prior liens in favor of appellee, and also referred to the agreement above quoted as a part thereof, and contained, among others, the following stipulation: "All of said cattle as mentioned above are to be held in said pastures and ranches and fed by the mortgagors during the term of this mortgage, and at least three days before the maturity of the notes herein mentioned 2,000 of said cattle shall be shipped and consigned to Godair, Harding & Co., at National Stock Yards, Ill., and sold by it on commission in the usual and customary way, and out of the proceeds they shall pay themselves (Godair, Harding & Co.) the herein-mentioned indebtedness and a commission of 50 cents per head on the whole number of cattle mentioned herein." About the time of the execution of this mortgage most of the cattle, on account of the drouth then prevailing in that section, were moved from the Block Ranch, in Midland county, to Gray county, and during the fall of that year nearly all the cattle, both from Gray and Midland counties, were shipped to the order of Godair, Harding & Co., and sold on the market at Kansas City and East St. Louis, and the proceeds, including also a small shipment made in the year 1895 of the same brand of cattle in the name of one Crowley, were appropriated to the payment of the debt of Godair, Harding & Co., except the sum of \$2,000 remitted to appellee, and credited upon his debt. The remnant of cattle and other ranch property, which was of small value, was thereafter, in a settlement between the appellee and J. L. Gray & Co., disposed of, and likewise credited upon appellee's debt, leaving unpaid the sum of \$9,650, as stated above. The proof thus showed, as was, in effect, alleged by appellee, that the only available means left for the collection of this debt was a resort to the liability of Godair, Harding & Co. for a conversion of the first mortgage security. In submitting the issues

to the jury, the charge of the court referred to the sixth, seventh, eighth, ninth, tenth, and eleventh paragraphs of appellee's petition for a description of the cattle shipped, as well as for the dates of the several shipments, the places from and to which shipped, and the manner of the alleged shipments. Of these paragraphs, the sixth reads: "That said defendants, with intent to defraud plaintiff, unlawfully procured and caused said J. L. Gray & Co. and the members of said firm on, to wit, the 7th day of September, 1894, to ship out of Texas by rail, from the town of Miami, in Roberts county, Texas, which is the nearest shipping railway station to said Gray county, to defendants, at Kansas City, 169 head of cows and 167 head of calves, all of which were mortgaged to plaintiff as aforesaid; said calves being the increase of said cattle described in said two mortgages. Said cattle so shipped were received and handled at Kansas City for defendants by George R. Barse Live-Stock Commission Co., a corporation engaged in the live-stock commission business at said city, and are and were at said time the agents of the defendants. That said cows at said time were reasonably worth \$13 per head, and said calves were at said time worth \$6 per head. And defendants did then and there cause said cows and calves to be sold at said prices, disposed of, and slaughtered, and said defendants did then and there willfully and wrongfully appropriate to their own use and benefit the proceeds of the sale of said cattle, to wit, \$3,199.50, without the knowledge or consent of plaintiff." The other paragraphs were of like import, the seventh relating to a shipment on October 23, 1894, from Miami to Kansas City, of 344 cows, of the value of \$13 per head, and 98 calves, of the value of \$6 per head; the eighth relating to a like shipment on November 14, 1894, of 51 cows, of the value of \$13 per head, and 32 calves, of the value of \$5.50 per head; the ninth relating to a shipment on August 15, 1894, from Midland to East St. Louis, of 11 cows, alleged to be worth \$15 per head, and 32 calves, worth \$6 per head; and the tenth relating to a like shipment on November 16, 1894, of 200 cows, of the alleged value of \$15 per head. The petition, in connection with these paragraphs, further alleges: "That all of the above-described calves were the issue of the cattle described in plaintiff's said mortgages, and that the brands of the other above-described cattle so taken out of Texas and disposed of by defendants without the knowledge of plaintiff are wholly unknown to plaintiff, and that plaintiff is unable to give or ascertain said brands, by reason of the spoliations, mixing, confusing, and destruction of said brands and said cattle as aforesaid, and wrongful acts of defendants as aforesaid. That the defendants well knew, or could have ascertained, said brands and cattle when they had charge of said cattle as aforesaid, but mixed and confused said cattle with their own or other cattle at said time,



and then disposed of the same as aforesaid." The eleventh paragraph reads: "That thereafter said defendants illegally and willfully, and with intent to defraud plaintiff, caused and procured said Grays to ship in the name of their said agents, A. F. and H. E. Crowley, by rail, from the town of Midland, Texas, to defendants, at East St. Louis, on, to wit, the 20th day of September, 1895, 67 head of steer cattle, which were mortgaged to plaintiff as aforesaid, 61 branded thus: ☐ ☐ ☐ on left side, and 6 head branded thus: ☐ on left side and 2 on left hip. That all of said cattle at said time were of the market value of \$25 per head. Defendants did then cause the same to be sold for said price, destroyed, and slaughtered, and defendants did then and there appropriate and convert to their own use and benefit the proceeds of said sale, to wit, the sum of \$1,725, without the knowledge or consent of plaintiff." The petition (fourteenth paragraph) contained the further allegation that, if plaintiff was mistaken in his cause of action as alleged for the conversion of the cattle, the Grays were authorized to ship and sell said cattle for the sole purpose of paying off their said note to appellee, and charged Godair, Harding & Co. with conversion of the proceeds of the several sales aforesaid. It admitted a credit of \$3,000, paid to appellee by appellants in November, 1894.

The evidence tended to prove all these allegations, and the issues thus arising were given in charge to the jury. There was sufficient evidence also to warrant findings in favor of appellee on the several issues so submitted, and perforce of the verdict, therefore, we so find, both as to the liability of appellants and the amount thereof, substantially as alleged. True, the findings to a great extent are but deductions from unexplained circumstances, which it was presumptively within the power—as it was the duty—of appellants to explain, but their failure to offer any such explanation justified the inferences which in a general way appellee's evidence tended to establish. For instance, he proved the several shipments by Gray & Co. from Midland and Miami, and denied that he had authorized them; he proved the market value of the cattle; that they were sold on the market in Kansas City and East St. Louis by or for Godair, Harding & Co., and the proceeds of such sales applied to the debt of Godair, Harding & Co., without his knowledge or consent; that Gray & Co. made no shipments except to Godair, Harding & Co., and that whatever cattle thus shipped and sold were not covered by appellee's mortgages were the cattle above referred to, upon which Godair, Harding & Co. had a separate mortgage, and that all had been indiscriminately mixed and blended, so that it was impossible for appellee to estimate their relative number and value, or to otherwise distinguish the proceeds of the sales of the one from the other. Appellants did not attempt to do so, or to prove their

inability to do so. It was shown by the cattle inspector's testimony that the cattle shipped from Midland were in the brands covered by appellee's mortgages, but of those shipped from Miami, in Gray county, where there was no inspector, the brands could not be reproduced. Besides, the calves were not branded, and it was with these—that is, with the cattle in Gray county especially—that those upon which appellants had a separate mortgage appear to have been mixed and blended in the common shipments by Gray & Co. to the order of Godair, Harding & Co. As to the Crowley shipment, the evidence was conflicting. He was the agent of appellants at Midland, and was fully cognizant of the rights of appellee. He testified, however, that the 67 steers shipped by him, though covered by appellee's mortgage, he had purchased subsequently from Gray & Co., and denied that he was acting for appellants in this shipment; but appellee proved that he had made a contrary statement to his agent, Ben Tillar, to the effect that the shipment had been made for the benefit of Godair, Harding & Co., and the proceeds applied to their debt against Gray & Co., and Crowley did not quite deny having made such a statement. Appellee's mortgage covered these steers, and Godair, Harding & Co. got the proceeds of sale; whether as a credit upon their debt against Gray & Co. or for the credit of Crowley was for the jury to say, after weighing the conflicting statements of Crowley.

Appellants, in order to sustain one of their pleas, introduced evidence tending to show that the money borrowed of them by Gray & Co. had been borrowed for and used in the payment of ranch expenses and the expense of moving the cattle from Midland to Gray county, to which removal appellee had given his previous written consent. The court, in the fourth paragraph of the charge, submitted this defense to the jury, and the evidence warranted them in finding, if it did not require them to find, that the money had been in part so borrowed and expended: but they were also justified in finding, if not required to find, as further submitted in this charge, that appellee had not agreed with Gray & Co. to allow them to sell said cattle, and apply the proceeds to the payment of the expenses of driving the cattle to Gray county. They were further justified by the evidence in finding that the maximum limit of \$2,500 for current ranch expenses had been greatly exceeded, and may have allowed appellants, under this charge, a credit to that extent. (See calculation on pages 14 and 15 of appellee's brief.)

In support of still another plea, appellants introduced evidence tending to show that appellee had allowed Gray & Co. a very large discretion in the matter of selling cattle covered by the mortgages, and in the application of the proceeds of such sales; the contention being that the manner of conducting

the business on the part of Gray & Co. was such as to warrant the conclusion by persons dealing with them that they had authority to sell the cattle without restriction. In the sixth special charge given at the request of appellants this defense was submitted to the jury, but was not sustained by the verdict, and we are not prepared to disturb the finding in that respect as being without evidence to support it, though the evidence might have justified a contrary finding. However, we do not regard this feature of the verdict as material, because we are of opinion that the appellants were not in a position to avail themselves of the principle of estoppel thus litigated. The mortgage which they took expressly recognized the superiority of appellee's lien, and, while it purported to be made in furtherance of the provisions contained in the agreement quoted, it was nevertheless subject to the restriction therein contained that the proceeds of "any and all sales," beyond the amount necessary to defray the expenses of running and maintaining the ranch, not to exceed \$2,500 per annum, should be applied in payment of the notes secured by appellee's prior mortgages. As no shipments were made to the Indian Territory after appellants' mortgage was made, we ignore that part of the agreement. They could not, as the holders of a junior mortgage, be heard to insist upon the appropriation to their own debt of the entire proceeds of the cattle required to pay the debt secured by the prior or superior mortgages, when they had taken their own mortgage subject thereto. For the same reason we hold to be inapplicable the further proposition, to sustain which *Maier v. Freeman* (Cal.) 44 Pac. 357, is cited, that: "Where the mortgagee of personal property consents that the mortgagor remain in possession, with authority to handle, sell, and dispose of the property, the mortgagor becomes the agent of the mortgagee, and a sale by him passes the title free from the lien of the mortgagee, and the mortgagee must look to the mortgagor for the application of the proceeds of such sale, and not to the purchaser of the mortgaged property."

Several rulings made upon the admission and exclusion of evidence are complained of, but the brief fails to show any prejudicial error in these several rulings. Indeed, in almost every instance the brief fails to disclose, though very full in many other respects, the particular ground of objection urged to the admission or exclusion of the evidence. After carefully reading a brief of 136 printed pages, we do not feel called upon to search through a manuscript record of 379 pages, in order to find what particular objections were considered by the court in these several incidental rulings. *Johnson v. Crawl*, 55 Tex. 571, and subsequent cases.

The charge is also complained of, as well as the court's refusal to give about 20 special charges. The sixth special charge given

at the request of appellants went quite as far as, if not further than, they had any right to expect, and none of the other special charges set out in the brief should have been given. The main charge was substantially correct. It may be that, since the rule or principle of confusion of goods which it embodied is but a rule of evidence (*Holloway Seed Co. v. City Nat. Bank of Dallas* [Tex. Sup.] 47 S. W. 90), it should have been left out of the charge; but the pleading above quoted put the matter in issue, and it is not clear that this particular objection has been made to the charge, and, if it has, the evidence would seem to admit of but one finding on that issue. It is believed that the foregoing conclusions cover all the material issues raised by the 66 assignments of error, which are entirely too many to admit of discussion in detail. The judgment is therefore affirmed.

# MISSOURI PAC. RY. CO. v. WRIGHT.

## SAME v. SPELCE.

(Supreme Court of Arkansas. Oct. 15, 1898.)

### RAILROADS—OVERCHARGES—OPERATION—EVIDENCE.

In an action to enforce penalty for overcharges, on the issue whether defendant (M. P. Co.) operated a certain railroad, the only testimony was that of two employes of the I. M. Co., that they used blanks for bills of lading, etc., apparently prepared for use of defendant, but they did not state that the blanks were used when the overcharges were made; that, as far as they knew, they were furnished by the I. M. Co.; and that the passenger tickets and baggage checks appeared to have been prepared for the I. M. Co. They were employed and paid by the I. M. Co. One of them testified that he had received notice that the road would be operated by defendant, but he did not state when the notice was given. Defendant and the I. M. Co. were shown to be distinct corporations, and the road had been leased by a third company to the I. M. Co., and the blanks were printed by defendant and furnished the lessee as a matter of economy. *Held* insufficient to show that defendant operated the road either jointly or with others.

Appeals from circuit court, Franklin county; Jephtha H. Evans, Judge.

Action by Lula Wright, by her next friend, against the Missouri Pacific Railway Company and the Little Rock & Ft. Smith Railway Company, and by Thomas Spelce against the same defendants. There were judgments for defendant the Little Rock & Ft. Smith Railway Company and for plaintiffs against the Missouri Pacific Railway Company, and the Missouri Pacific Railway Company appeals. Reversed.

Oscar L. Miles and Dodge & Johnson, for appellant. D. B. Locke, for appellees.

BATTLE, J. Lula Wright, a minor, by her next friend, brought an action against the Missouri Pacific Railway Company and the Little Rock & Ft. Smith Railway Company

to recover a penalty for charging and receiving greater compensation for transporting her over their railway than is allowed by law. She alleged in her complaint that the defendants were corporations, and operated a railroad in the state of Arkansas, on which Alma and Dyer are stations, between which the distance was less than five miles; that on the 9th of January, 1891, while a passenger on their train, the defendants charged 20 cents for transporting her over their road from Alma to Dyer, and 20 cents for transporting her over the same road from Dyer to Alma, on her return; and that each of these charges was a violation of the law; and asked for a judgment against the defendants for the penalties allowed by the statute in such cases.

The Little Rock & Ft. Smith Railway Company answered, and denied that it operated a railroad in the state of Arkansas at any time since the 1st day of January, 1890; and the Missouri Pacific Railway Company denied that it ever at any time controlled or operated a railroad in this state; and each of them denied that it ever had charged plaintiff for transportation as alleged.

Plaintiff recovered judgment against the Missouri Pacific Railway Company for \$300, and the Little Rock & Ft. Smith Railway Company recovered judgment against plaintiff, and the Missouri Pacific Railway Company appealed.

Under the issues in this action it was necessary for plaintiff to prove that the Missouri Pacific Railway Company singly, or jointly with others, operated the railroad from Alma to Dyer at the time she was transported over the same, as alleged in her complaint. Unless this was shown, she was not entitled to the judgment recovered. To make this proof, she introduced two witnesses, who testified that they were employed in the operation of the railroad by which plaintiff was transported from Alma to Dyer, and that they used blanks for bills of lading, waybills, and accounts which appeared to have been prepared for the use of the Missouri Pacific Railway Company; but neither of them testified that such blanks were used at the time the overcharges were made. They further testified that, so far as they knew, the blanks were furnished by the St. Louis, Iron Mountain & Southern Railway Company, but they did not know who furnished many of them; and that the tickets for passengers and checks for baggage furnished to them to be used in the operation of the railroad appeared to have been prepared for the St. Louis, Iron Mountain & Southern Railway Company. Both of these witnesses testified that they were employed and paid by the St. Louis, Iron Mountain & Southern Railway Company, and were acting as its employés. One of them, E. R. Lee, testified that he received a notice that the road would be operated by the Missouri Pacific as a branch of the St. Louis, Iron Mountain & Southern Railway, but he did not state, and it was not shown, by whom the notice

was given. The Missouri Pacific Railway Company was in no way connected with a single fact by which plaintiff attempted to prove that it was concerned in the operation of the railroad from Alma to Dyer. The judgment against it is wholly unsupported by evidence, and should be reversed.

Thomas Spelce also brought an action against the Little Rock & Ft. Smith Railway Company and the Missouri Pacific Railway Company, to recover a penalty for charging and receiving greater compensation for transporting him over their railroad than is allowed by law. He made the same allegations in his complaint, except as to the person transported and illegally charged and the time it occurred, as were made by Lula Wright in her complaint, and asked for the same relief. The defendants made the same denials as in the first case, and the plaintiff recovered a judgment against the Missouri Pacific Railway Company for \$200, and the Little Rock & Ft. Smith Railway Company recovered the same judgment as it did in the first case, and the Missouri Pacific Railway Company appealed.

Spelce introduced the same evidence to show that the Missouri Pacific Railway Company was engaged in operating the road from Alma to Dyer at the time he was transported over the same as was adduced by Lula Wright for that purpose in the first case. Defendants proved that the Missouri Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railway Company were distinct corporations; and that the railroad by which Spelce was transported, as alleged in his complaint, was leased by the Little Rock & Ft. Smith Railway Company to the St. Louis, Iron Mountain & Southern Railway Company on January 1, 1890, and since that date it had been operated exclusively by the lessee; and that the blanks used in its operation were printed for the Missouri Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railway Company at their expense as a matter of economy, the cost of the printing of the blanks used by each company printed in that way being considerably less than it would have been had they been printed separately, on account of the quantity. As in the first case, the judgment recovered by Spelce is without evidence to support it.

The judgments in the two cases are therefore reversed; and a final judgment in each case, upon the merits, is rendered here in favor of the Missouri Pacific Railway Company, against the plaintiff.

#### INMAN v. STATE.

(Supreme Court of Arkansas. Oct. 15, 1898.)

CARNAL KNOWLEDGE OF INFANT—INDICTMENT—  
REPEAL OF STATUTE—DIVORCED  
WIFE—WITNESS.

1. An indictment for carnally knowing a female "under the age of puberty, to wit, of the age of fourteen years," charges the commission

of the offense on a female under the age of 16, within Sand. & H. Dig. § 1865, punishing carnal knowledge of a female under 16.

2. Mansf. Dig. § 1571 (Act Dec. 17, 1838), punishing carnal knowledge of a female under the age of puberty, is repealed by Sand. & H. Dig. § 1865 (Act April 1, 1893), punishing carnal knowledge of a female under 16 years of age, since the latter act covers the entire subject-matter of the former.

3. Sand. & H. Dig. § 2916, subd. 4, prohibiting husband and wife during existence of the marriage relation, and thereafter, from testifying against each other concerning any communications made to each other during marriage, does not prevent a divorced wife from testifying against her former husband as to facts which did not become known during marriage.

Appeal from circuit court, Lawrence county; Richard H. Powell, Judge.

George Inman was convicted of carnally abusing a female under the age of 16 years, and appeals. Affirmed.

P. H. Crenshaw, for appellant. E. B. Kinsworthy, Atty. Gen., for the State.

HUGHES, J. The appellant was indicted for and convicted of the crime of carnal abuse of a female under the age of 16 years, and appealed to this court. The indictment charges that the "said George Inman, on the 1st day of June, 1896, in the county, district, and state aforesaid, unlawfully and feloniously did make an assault on one Daisy Wise, a female child under the age of puberty, to wit, of the age of fourteen years, and her, the said Daisy Wise, unlawfully and feloniously did carnally know and abuse, against the peace and dignity of the state of Arkansas." Though the indictment is in a form not to be approved, it sufficiently charges the offense to have been committed upon a female under the age of 16 years, as it charges that it was committed upon a female child under the age of 14 years. But it is contended that this indictment was framed under section 1571 of Mansfield's Digest, which was the act of December 17, 1838, which is digested in Mansfield's Digest as follows: "Sec. 1571. Every person convicted of carnally knowing or abusing unlawfully any female child under the age of puberty shall be imprisoned in the penitentiary for a period not less than five nor more than twenty one years." It is contended that this statute is still in force, and was not repealed by the act of April 1, 1893, which is as follows (as found in Sandels & Hill's Digest): "Sec. 1865. Every person convicted of carnally knowing or abusing unlawfully any female person, under the age of sixteen years, shall be imprisoned in the penitentiary for a period not less than five nor more than twenty one years." It appears that the latter act covers the entire subject-matter of the former, making the act committed the same offense, and affixing the same punishment, using the same language, except that the "age of sixteen years" is substituted for the "age of puberty." The rule

of construction is that where a later act of the legislature covers the entire ground of the subject-matter of a former act, and it was evidently intended as a substitute for the former, the prior act will be repealed by the latter, though there may be no express words to that effect. *Pulaski Co. v. Downer*, 10 Ark. 589; *Blackwell v. State*, 45 Ark. 92, and cases; *Wood v. State*, 47 Ark. 488, 1 S. W. 709. There is no error in the judgment of the court that the act of 1893 (section 1865, Sand. & H. Dig.) repealed the act of 1838 (section 1571, Mansf. Dig.), and that it governs the case.

It is contended that there was error in permitting the divorced wife of the appellant to testify against him. The offense was committed before the marriage, which had been dissolved by a decree of divorce before the wife testified as a witness. She was not his wife when the offense was committed, and had been divorced when she testified. She did not testify to any facts or communications that came to her knowledge or which were received by her by virtue of or while the marriage relation existed. A divorced wife is incompetent to testify against her husband only as to such facts as come to her and such communications as are made to her by the husband while the marriage relation existed. As to facts that do not come to her knowledge while the marriage relation exists, she is a competent witness against her husband. *Toovey v. Baxter*, 59 Mo. App. 470; *French v. Ware*, 65 Vt. 344, 26 Atl. 1096; *People v. Marble*, 38 Mich. 117. Our statute (Sand. & H. Dig. § 2916, subd. 4) provides: "The following persons shall be incompetent to testify: \* \* \* Husband and wife for or against each other, or concerning any communication made by one to the other during the marriage, whether called as a witness while that relation subsists or afterwards, but either shall be allowed to testify for the other in regard to any business transacted by the one for the other in the capacity of agent." While the marriage relation exists, husband and wife are, under this statute, incompetent to testify for or against each other; and, after that relation ceases, they are incompetent to testify for or against each other as to such communications as were made by one to the other during the marital relation; but, as to such facts as did not come to them while that relation existed, they are competent witnesses for or against each other, after that relation ceases. *Woolley v. Turner*, 13 Ind. 253; 29 Am. & Eng. Enc. Law, 628; Sand. & H. Dig. § 2916, subd. 4. The wife can testify to any injury to her person either before or after marriage, and while the marriage relation exists. 1 Greenl. Ev. § 343. While we do not see why the prosecuting attorney drew the indictment as he did, we think it is clear from the evidence that the defendant was guilty. Finding no reversible error, the judgment is affirmed.

# TEXARKANA & FT. S. RY. CO. v. BULLINGTON.

(Supreme Court of Arkansas. Oct. 15, 1898.)

## RAILROADS—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.

Contributory negligence is available as a defense in an action against a railroad under Act April 8, 1891, making railroad companies liable for all damages resulting from neglect to keep a constant lookout for persons or property on the track, and placing on them the burden of showing that the duty has been performed.

Appeal from circuit court, Howard county; Will P. Feazell, Judge.

Action by Arabella Bullington, as administratrix of the estate of Enez Bullington, deceased, against the Texarkana & Ft. Smith Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

William T. Hudgins and Dodge & Johnson, for appellant. Scott & Jones, for appellee.

WOOD, J. This suit is by the widow, as administratrix, to recover damages for personal injury in the killing of one Enez Bullington. The cause was tried upon an erroneous theory, ignoring the doctrine of contributory negligence as announced by this court in *Railway Co. v. Johnson*, 64 Ark. 420, 42 S. W. 833; *Railway Co. v. Taylor*, 64 Ark. 364, 42 S. W. 831; *Railway Co. v. Leathers*, 62 Ark. 235, 35 S. W. 216; *Railway Co. v. Dingman*, 62 Ark. 250, 35 S. W. 219; *Johnson v. Stewart*, 62 Ark. 167, 34 S. W. 839; *Railway Co. v. Ross*, 61 Ark. 620, 33 S. W. 1054. It should be said, however, that the cause was tried before the decisions of this court, *supra*, construing the statute of April 8, 1891, with reference to contributory negligence under said statute. As the case must be reversed, and a new trial had, we will not undertake to discuss the various other questions presented. Reversed, and remanded for a new trial.

# BREWSTER et al. v. WESTERN UNION TEL. CO.

(Supreme Court of Arkansas. Oct. 15, 1898.)

## TELEGRAPH—DELAYING MESSAGES—MEASURE OF DAMAGE—EVIDENCE.

1. Where members of a firm telegraphed another member, who was their buyer, to close an option to purchase cattle at a certain price, and the telegraph company negligently delayed the message, so that it did not arrive until after the option expired, the damage sustained is the difference between the contract price and the market price at the place of purchase on the day on which the option expired, excluding speculative advances in price at later times.

2. Senders of a telegram had an option to purchase cattle at a certain price before a time stated, and the telegram was negligently delayed in transmission. There was no evidence of the market value of cattle on that day. The buyer who had secured the option testified to their value, but he had seen only a part of them, and there was no evidence of the value of

the others. The market price of cattle was, however, advancing, and continued to do so, but there was no evidence that the purchase would have been made had the telegram been delivered in time. The buyer and addressee of the telegram was a partner of the senders, and could have purchased without that authority from the firm, and he had reserved the right to refuse to take the cattle unless they were of a certain grade. Held not to show any damage beyond the cost of the telegram.

Appeal from circuit court, Jefferson county; John M. Elliott, Judge.

Action by A. Brewster and others against the Western Union Telegraph Company. There was a judgment for plaintiffs, from which they appeal. Affirmed.

The appellants, A. Brewster, W. Z. Tankersley, and J. M. Fain, were partners under the firm name of J. M. Fain & Co., and engaged in the business of buying and selling cattle. Brewster and Tankersley lived at Pine Bluff, Ark., while Fain made his home at Jennings, La. On the 8th day of May, 1895, Fain made, for said J. M. Fain & Co., an agreement with one T. D. Langley to purchase of said Langley 200 head of cattle, at \$12 per head, but this contract was subject to the approval of Brewster and Tankersley, the partners of Fain. It was agreed between Langley and Fain that Fain should communicate with his partners, and notify Langley if said contract was accepted, on or before noon of May 14, 1895, and that, if Langley was not notified of the acceptance within that time, said contract would be declared off. Fain at once wrote to Brewster and Tankersley, and informed them of the terms of the contract. They, on the 13th of May, delivered to the defendant company a message addressed to Fain at Jennings, La., directing and authorizing him to close the trade for the 200 head of cattle, and paid said company the sum of 75 cents for the transmission of said message. The company failed to deliver the telegram until 7 o'clock p. m. of the 14th of May, 1895. The time given for the acceptance of the contract expired before the telegram was delivered, and plaintiffs failed to get the cattle. Appellants brought this action against the telegraph company to recover damages of them for negligently failing to deliver said telegram in due time. On the trial in the circuit court the presiding judge directed the jury to return a verdict in favor of plaintiffs for only the price paid for the telegram. Plaintiffs appealed from the judgment rendered upon the verdict thus returned. The other facts appear in the opinion.

Bridges & Wooldridge, for appellants. Rose, Hemingway & Rose, for appellee.

RIDDICK, J. (after stating the facts). This is an action against a telegraph company to recover damages alleged to have been caused by negligence on the part of said company in transmitting and delivering a telegram. The plaintiffs claim that, by reason of the negligence of the defendant company

in the matter of delivering said telegram, they lost the right to purchase a certain 200 head of cattle from one Langley. It is conceded that the facts established make out a case of negligence against the telegraph company, and the only real controversy between the parties relates to the question of damages. The circuit judge, on motion of the defendant, instructed the jury that the plaintiffs, under the facts, could recover only the price paid for the telegram, and whether this was a correct ruling is the question we are asked to consider.

Now, the contract which plaintiffs claim to have made with Langley gave them an option to accept and purchase a lot of cattle owned by him at \$12 per head, this option to expire at noon on the 14th day of May, 1895. If the telegram had been received in due time, and plaintiffs had accepted the offered purchase, they would at that time have owned the cattle, and would have paid out the contract price thereof. The telegram was delivered on said day, but not until 7 o'clock p. m., some hours after the time allowed for the acceptance of the contract had expired; so plaintiffs lost the right to purchase the cattle, but retained the money they had agreed to pay for the same. It is manifest, therefore, that plaintiffs were not injured unless on the 14th day of May, at the time the telegram was delivered, the market value of cattle of the grade purchased was at that place greater than the contract price, or unless, on account of the scarcity of cattle or for some other reason, plaintiffs could not, by the use of due diligence, after the delivery of the telegram, have purchased the like number and grade of cattle for the contract price. The law requires that a party should exercise due diligence to avoid injury to himself, and the measure of damages in such a case is the difference between the contract price of the cattle and that which plaintiffs would have been compelled to pay at the same place in order, by due diligence, after delivery of the telegram or notice of the failure to deliver it, to purchase the same number and grade of cattle. It is a matter of no moment that some days subsequent to the delivery of the telegram there was a rise in the market value of cattle, and that, if plaintiffs had purchased cattle at the contract price, they might have obtained profits from such rise in value; for the law does not permit the recovery of such uncertain and speculative damages. *Squire v. Telegraph Co.*, 98 Mass. 232; *True v. Telegraph Co.*, 60 Me. 9; *Hibbard v. Telegraph Co.*, 33 Wis. 538; *Telegraph Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 441; *Telegraph Co. v. Fellner*, 58 Ark. 29, 22 S. W. 917.

Applying the rule above stated to the facts of this case, it will be seen that plaintiffs did not prove more damages than they recovered; for they did not show what the market value of the cattle was on the 14th day of May, the time when their right of action was complete, but undertook to establish the value

thereof on the 16th day of May and afterwards. We need not discuss this question at length, for the evidence bearing on that point was subject to another defect, still more radical. No witness had seen the 200 head of cattle that Langley agreed to sell at \$12 per head or knew what their market value was. Fain, the only witness who testified concerning that matter, said that he saw about 50 head of the cattle. "I saw enough of the cattle," he says, "to close the trade, provided all the cattle came up, which they did or would have done." But this statement that the cattle "did or would have come up" to the grade required is pure guesswork on the part of the witness, for he had not seen them. Having seen only a fourth of the cattle, he could not tell what the market value of the 200 head was, either on the 14th of May or at any other time, and could not show that plaintiffs were injured by failing to purchase said cattle at the price named in the contract.

Not only is it true that the evidence fails to show that the market value of these cattle on the 14th day of May exceeded their contract price, but the conduct of plaintiff Fain indicates that he even was doubtful as to that matter. Plaintiffs do not, as we understand, claim that there was any sudden rise in the value of cattle between the time the telegram should have been delivered and the time when it was delivered, for those two periods were separated only by a short interval. They claim that they had secured on the 8th day of May the right to purchase these cattle, on or before noon of May 14th, at \$12 per head, and that this was a valuable right; that the value of cattle commenced to advance about the 1st day of May, and continued to rise for several months; and that these cattle on the 14th of May, at the time the option to purchase expired, were worth much more than the contract price. But Fain was a member of the firm, and it is not denied that he had the authority to purchase cattle without consulting his absent partners. Indeed, he seems to have done most of the buying for the firm. This being so, it seems reasonable to believe that, if he had been fully convinced that the market value of the cattle was much greater than the contract price, he would not have suffered the option to expire, but would have closed the trade, although he had not received the telegram. Yet he declined to assume the responsibility and accept the offered sale. This indicates that he did not feel sure that the cattle were at that time worth more than the price named, but desired to purchase with a view to future profits. It indicates that he was not certain, at the time he permitted the option to expire, that there would be a profit in such purchase, and desired his partners to share the responsibility of making it. Afterwards, when the price of cattle rose, he saw the loss his firm had sustained by not making the purchase, and sued the telegraph company to recover damages. But

it was not within the meaning of the contract made with the defendant company that it should, in any event, be liable for such uncertain and speculative damages, and they cannot be recovered.

Again, it is not certain that plaintiffs would have purchased the cattle even had the telegram been delivered in due time. This is not a case where a plaintiff has telegraphed his agent to go into the market and purchase a certain number of cattle, and afterwards the price of cattle rises, and, by reason of a delay in delivering such message, the agent is compelled to pay a greater price than he would have paid had the message been promptly delivered. The purchase which plaintiffs say they lost here was the purchase of a certain lot of cattle. The contract with Langley giving them an option to purchase such cattle was not in writing, and nothing had been paid on it, and it is apparent from the evidence that it amounted only to an agreement that Langley would sell a certain 200 head of cattle owned by him, at \$12 per head, and that plaintiffs would take the cattle at that price, if the absent partners approved the purchase and if the cattle came up to a certain grade and standard. In other words, Langley did not agree absolutely to sell 200 head of cattle of a certain grade, but only that he would sell a certain 200 head of cattle owned by him, with an option on the part of Fain to reject the offer if his partners failed to approve, or if the cattle did not come up to a certain grade. The evidence shows that the other partners approved the purchase, but it does not show that the cattle offered by Langley came up to the grade required. It is possible that plaintiffs could have established this fact by the testimony of Langley, or of some other witness who knew the condition of the cattle, but they did not do so. Fain, as he states, "saw enough of the cattle to close the trade, provided all the cattle came up." We understand from this that one of the conditions of the contract was that the cattle should come up to a certain grade, and that, before closing the trade and paying the purchase money, he would have ascertained that fact by an inspection of the cattle. He made no such inspection, but asks a judgment against the defendant company upon the bare supposition entertained by him that such cattle would have come up to the grade required, and that he would have accepted the offered sale had the telegram been delivered in due time. As he had seen only a small portion of the cattle, he not only could not know that the cattle would have come up to the grade required, but he could not even know that Langley owned such cattle. The allegation that plaintiffs would have purchased the cattle had the telegram been delivered in time rests, therefore, upon conjecture, and is not made sufficiently certain by the proof to sustain a judgment for damages. *Telegraph Co. v. Fellner*, 58 Ark. 20, 22 S. W. 917; *Telegraph*

*Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 441. For the reasons stated we conclude that the judgment of the circuit court is right, and the same is affirmed.

#### JEFFERSON COUNTY v. COOK.

(Supreme Court of Arkansas. Oct. 22, 1898.)

##### CORONER'S INQUEST.

Under Sand. & H. Dig. §§ 751-764, providing that where any person is found dead, or where a person dies under unknown circumstances indicating foul play, notice shall be given to the coroner, who shall immediately hold an inquest, and arrest the guilty person, unless it appear to be a case of excusable homicide, it is the duty of the coroner to hold an inquest where a person was killed during a quarrel and in the presence of witnesses.

Appeal from circuit court, Jefferson county; John M. Elliott, Judge.

Action by N. L. Cook against Jefferson county. From a judgment for plaintiff, defendant appeals. Affirmed.

On the trial plaintiff testified as follows: "About January 26, 1896, I was notified that a man named John Brown had been killed at the Atkins place by being shot by one William Barrett, the two being engaged in a quarrel. The information also was that it was definitely known that Barrett did the killing, and that there were several persons present when the shot was fired." This was all the testimony taken, and uncontradicted.

S. C. Martin, for appellant. W. P. & A. B. Grace, for appellee.

BATTLE, J. (after stating the facts). Was the coroner of Jefferson county authorized or required by law to hold an inquest over the dead body of John Brown? If he was, the judgment of the circuit court should be affirmed; if not, it should be reversed.

The decision of this question depends upon the statute, which reads as follows:

"If the dead body of any person be found and the circumstances of death be unknown. Information shall immediately be given to the coroner of the county, and if any person die and the circumstances of his death indicate that he has been foully dealt with, the information shall forthwith be furnished to the coroner."

This statute provides that information shall be given to the coroner in only two classes of cases, and they are:

First, "if the dead body of any person be found and the circumstances of the death be unknown;" and,

Second, "if any person die and the circumstances of his death indicate that he has been foully dealt with."

The object of the statute, doubtless, was to prevent the accumulation of unnecessary costs, and at the same time prevent persons criminally liable for the death of any one, escaping punishment. Hence it provides that

where the circumstances of the death are unknown, or if a person die, and the circumstances of his death, being known, "indicate that he has been foully dealt with," information shall be given to the coroner. In both of these classes of cases the statutes make it the duty of the coroner, upon the receipt of such information, to hold an inquest; and, if it be found by the inquisition that the death of the deceased was caused by the act, abetment, procurement or command, or counsel of any person, it is made the duty of the coroner to cause the arrest of every such person, if not already under arrest, "unless it appears by the inquisition to be a case of excusable homicide." Sand. & H. Dig. §§ 751-764. The duties of the coroner, upon the receipt of the information that shall be given him, as defined by the statute, clearly indicate that the object in requiring the information to be given is to prevent the escape of the guilty. Consequently it is the duty of the coroner to hold an inquest over the body of a deceased person, upon the receipt of information of the circumstances of his death which indicate that some one might be criminally liable; for, the killing being known, the presumption is that the slayer is guilty of a crime, in the absence of circumstances that justify or excuse the homicide. Sand. & H. Dig. § 1643.

We therefore think the judgment in this case should be affirmed; and it is so ordered.

#### H. C. POLLMAN & BROS. COAL & SPRINKLING CO. v. CITY OF ST. LOUIS.

(Supreme Court of Missouri, Division No. 2,  
Oct 17, 1898.)

#### COMPROMISE—UNLIQUIDATED CLAIM—ACCEPTANCE UNDER PROTEST.

1. Plaintiff's claim is an unliquidated one, so as to be the subject of compromise, though the dispute is only as to whether damages to fire and sprinkling plugs was caused by it, where it did street sprinkling for defendant city under a contract that it should receive a certain amount therefor, but that from such sum there should be deducted any damages to the fire and sprinkling plugs caused by it.

2. Acceptance of a sum tendered on the express condition that it be received and receipted for in full of an unliquidated claim is not affected by the fact that at the time of such acceptance and the giving of such receipt a written protest is filed, stating that the balance claimed will be insisted on.

Appeal from St. Louis circuit court.

Action by H. C. Pollman & Bros. Coal & Sprinkling Company against the city of St. Louis. Judgment for defendant. Plaintiff appeals. Affirmed.

Lubke & Muench, for appellant. B. Schnurmacher and Chas. Clafin Allen, for respondent.

GANTT, P. J. This cause is here upon appeal from a judgment in favor of defendant on a demurrer to plaintiff's reply. Plaintiff

was one of the street-sprinkling contractors for the year 1893. It procured five contracts for sprinkling five districts of the city, beginning March 15 and ending December 1, 1893. Each of said districts embraced certain streets and public places of the city, and each contract provided for the payment of a certain lump sum to plaintiff for the work to be done. Payments were to be made upon monthly certificates or estimates, covering 90 per cent. of the amount of work done during the month, the remaining 10 per cent. to be certified in favor of plaintiff upon the full completion of each contract to the satisfaction of the street commissioner. One of the provisions of the contract was to the effect that the contractor should exercise great care in operating the fire and sprinkling plugs, out of which he was permitted to obtain water free of charge, and that all repairs of damages or injuries done by the contractor or his employés to such plugs should be made by the water commissioner of the city, said commissioner to report the cost thereof to the street commissioner, and the latter to deduct the amount from any moneys due the contractor under the contract. Payments were made to plaintiff from time to time until the close of the sprinkling season. At that time the street commissioner made out estimates of the total amount of work done under each of the said contracts, and, after deducting therefrom payments theretofore made on account, and in each instance a certain sum for repairs to fire and water plugs, forwarded said estimates and statement to the president of the board of public improvements, who approved the same, and forwarded them to the city auditor, who in turn allowed the same. Thereafter, on December 22, 1893, plaintiff received and accepted from said auditor warrants upon the city treasurer for the amounts thus allowed, which warrants he presented for payment, and on December 23, 1893, received the amounts called for in each, and in each instance signed a receipt in full payment and satisfaction of the account, and of all claims against the city. All of the foregoing matters appear in the petition and answer in the case. Plaintiff thereupon filed a reply to the answer, in which plaintiff substantially admits all of the foregoing facts, but denies that the amounts charged against it for repairs to fire and sprinkling plugs were properly charged, because plaintiff avers that no damage or injury was done to them by any of its employés, and that whatever repairs were made were in consequence of the usual and ordinary wear and tear of the plugs, or for injuries inflicted by parties other than plaintiff. The reply admits that plaintiff received the amounts tendered by defendant, and that plaintiff executed receipts in full, as averred in the answer; but set forth that on receiving said several amounts, and on signing and delivering said several receipts, plaintiff protested against the deductions, denying



liability therefor, and asserting in the protest that it signed said receipts only because they were "forced" on plaintiff by the city, and because plaintiff "could not help itself, and needed said money." To this reply defendant demurred generally on the ground that the same did not contain matter sufficient to overcome the effect of plaintiff's act in receiving the money tendered it, with the condition annexed thereto that the same was in full discharge of all of plaintiff's claims, or to overcome the effect of plaintiff's releases. The demurrer was sustained, and judgment thereupon entered in favor of defendant upon the pleadings, from which judgment plaintiff has appealed.

Plaintiff's contention is that it is entitled to recover in this action the amounts withheld for repairs to plugs, notwithstanding the foregoing facts, on the well-established proposition of law that, where a debt is undisputed and certain, payment of a less amount than the whole will not bar an action for the recovery of the balance. Defendant acquiesces in this proposition fully, but contends that it has no application to the case at bar. On the contrary, defendant claims that in December, 1893, a controversy did arise and exist between the parties as to the proper meaning of their contracts, and as to the amounts due and payable thereunder; and that, the tenders to plaintiff having been conditional, and plaintiff having accepted the same, and having executed the releases referred to in the answer, plaintiff should not now be permitted to maintain suit to recover the alleged balance.

1. It is well-settled law that the payment of a part of a debt or of liquidated damages is not a satisfaction of the whole debt, even when the creditor receives the part for the whole, and receipts for the whole demand. *Riley v. Kershaw*, 52 Mo. 224; *Willis v. Gammill*, 67 Mo. 730; *Tucker v. Bartle*, 85 Mo. 114. But this doctrine has no application in cases of fair and well-understood compromises of unliquidated or disputed demands faithfully carried out, nor in those cases in which a new consideration enters into the stipulations for the release of the whole debt by paying a portion only; as, for instance, if a part be paid before the whole is due or could be demanded, or if the payment of a part be more beneficial in any way to the creditor than that prescribed by the contract. *Riley v. Kershaw*, 52 Mo. 224; *Tanner v. Merrill* (Mich.) 65 N. W. 664; *Ostrander v. Scott*, 161 Ill. 339, 43 N. E. 1089. Defendant readily concedes the foregoing propositions, but insists that this case is not affected by them. The learned city counselor maintains, first, that a controversy arose out of the contracts of plaintiff with the city as to certain set-offs for injuries to the fire and water plugs; that the city claimed that plaintiff's servants had wrought the injury, and, this being true, the city was authorized by the contract to have the injuries repaired, and

the cost deducted from the contract price; and, having made such claim and deduction, and tendered plaintiff the contract price, less these deductions, in full satisfaction, and not otherwise, plaintiff was bound either to reject the tender as made or accept it in full, and, having accepted it, is estopped to complain now that it was insufficient. Plaintiff insists there was no dispute, but merely the claim of a set-off; and, secondly, that it received the tender under written protest. The assumption of plaintiff that there was not and could not be a disputed claim, because the amount of plaintiff's claim was fixed by contract, is not tenable. The amount due the plaintiff was as much in dispute by virtue of the claim made by the city for repairs to the fire and water plugs as if the plaintiff had failed in some essential of its contract. Its claim cannot be held as liquidated when the balance due it was fairly in dispute as to the amount of set-off the city claimed. While we should consider it evident upon sound principles that the claim of plaintiff was unliquidated by reason of the claim of the offset, we are also fortified by eminent authority in so ruling. Thus, in *Ostrander v. Scott*, 161 Ill. 339, 43 N. E. 1089, it was said: "It is claimed that the account of the plaintiff was liquidated because its items were not disputed. But, if there was a controversy over a set-off, and the balance due the plaintiff was fairly in dispute, the claim could not be treated as liquidated." In *Tanner v. Merrill*, 65 N. W. 664, the supreme court of Michigan, in a matter very similar to the case at bar, said: "Upon the undisputed facts the claim of the plaintiff as made was not liquidated. It was not even admitted, but, on the contrary, was denied, because the defendant claimed that it had been partially paid by a valid offset. While the controversy was over the offset, it is plain that the amount due plaintiff was in dispute." In view, then, of the contract, the claim made by defendant, and the written protest of plaintiff, we hold that there was a dispute as to the amount due plaintiff.

We are then brought to consider the effect of plaintiff's action in receiving the city in full payment for its work, and releasing it from all claims and demands whatsoever that might arise out of said contracts. It is not charged that any fraud was perpetrated in obtaining plaintiff's signature to said receipts. With a full knowledge of all the facts, and after the respective claims of each party had been fully discussed, the defendant tendered the several amounts on each of said contracts in full payment and satisfaction of plaintiff's claims, and plaintiff so accepted them, and released defendant. This court, in *Adams v. Helm*, 55 Mo. 468, held that, when a tender was made in settlement of a disputed claim, it was the duty of the party to whom it was made "either to refuse it or accept it on the terms as made"; that "she had no right to accept the tender, and prescribe the terms of her acceptance." In *Perkins v. Headley*, 49

Mo. App. 556, the St. Louis court of appeals said: "But if there is a controversy between the creditor and his debtor as to the amount which is due, and if the debtor tenders the amount which he claims to be due, but tenders it on condition that the creditor accept it in discharge of his whole demand, and the creditor does accept it, that will be an accord and satisfaction as a conclusion of law; the principle being that one who accepts a conditional tender assents to the condition; he cannot take the money and reject the terms on which it is tendered." That the tender in the case at bar was upon the express condition that it was to be received and receipted for in full clearly appears from the pleadings, and it must be held that plaintiff accepted the same in full satisfaction of its several contracts. Such is to-day the great weight of authority. *Adams v. Helm*, 55 Mo. 488; *Ostrander v. Scott*, 161 Ill. 339, 43 N. E. 1069; *Tanner v. Merrill* (Mich.) 65 N. W. 664; *Fuller v. Kemp*, 138 N. Y. 231, 33 N. E. 1034. But plaintiff seeks to parry the effect of the foregoing rule by the fact that, although it received the amounts tendered, and receipted in full for all claims growing out of said contracts, it filed a written protest at the time of so doing, notifying the city it would insist upon the balance claimed. What effect in law is to be ascribed to these protests under these circumstances? We think the law is settled that where, as in this case, a debtor tenders a certain sum in full satisfaction of an unliquidated demand, and the creditor accepts and retains the money, his claim is satisfied, and no protest on his part will destroy the effect of his acceptance of the tender. *Fuller v. Kemp*, 138 N. Y. 231, 33 N. E. 1034; *McDaniels v. Lapham*, 21 Vt. 222; *McGlynn v. Billings*, 16 Vt. 329; *McDaniels v. Bank*, 29 Vt. 230; *Buel v. Buel*, 43 Conn. 455; *Potter v. Douglass*, 44 Conn. 541. Our conclusion is that the circuit court correctly sustained the demurrer to the reply, and the judgment is accordingly affirmed.

SHERWOOD and BURGESS, JJ., concur.

#### JUDSON et ux. v. MULLINAX.

(Supreme Court of Missouri, Division No. 2.  
Oct. 17, 1898.)

#### REFORMATION OF INSTRUMENTS—MISTAKE—EVIDENCE.

Plaintiff sold defendant a piece of land, a portion of which was described in the deed as "64 feet and 5 inches off the west side of lot 12." While the negotiations were pending, they made an examination of the land in a general way. There was a fence running through lot 12, and defendant asked plaintiff if that was the line, to which plaintiff replied that he supposed it was near it. Defendant said that he would have a survey made if he purchased. The description in the deed was the same as that contained in the deed received by plaintiff from the original owner of the whole tract. After the sale, it was discovered that a portion of the land conveyed to

defendant, in lot 12, was across the fence, and did not belong to plaintiff, who brought suit to reform the deed. There was no mistake made by the scrivener drawing the instrument. *Held*, that the evidence was insufficient to show any mistake that would warrant equity in reforming the instrument.

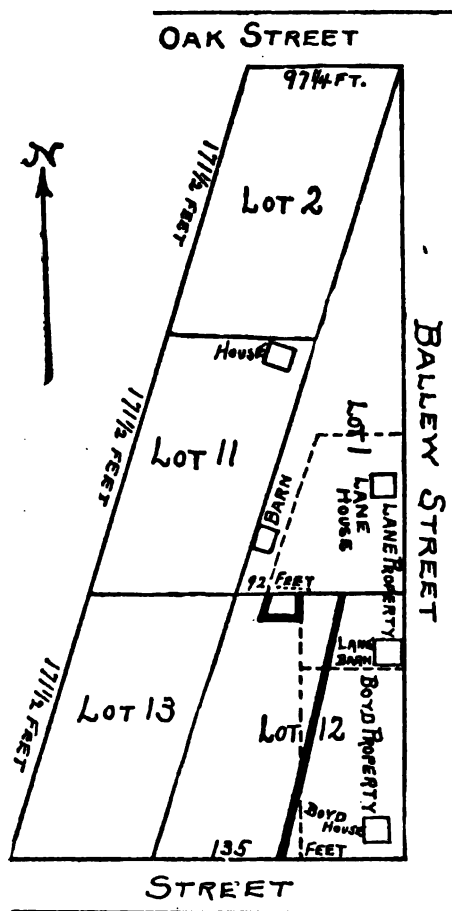
Appeal from circuit court, Mercer county; P. C. Stepp, Judge.

Suit by William W. Judson and wife against George T. Mullinax. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

H. J. Alley and H. G. Orton, for appellants. M. F. Robinson and Ira B. Hyde, for respondent.

GANTT, P. J. This is a suit in equity to reform a warranty deed executed by plaintiffs to defendant, on the 9th of August, 1894. The description of the land in the deed is in these words: "The following described lots, tracts, or parcels of land, lying, being, and situate in the county of Mercer and state of Missouri, to wit: All lots Nos. two (2) and eleven (11) in Clements' addition to the town of Princeton, and all that part of Clements' addition bounded as follows: Commencing at the southeast corner of said lot eleven (11), and running thence east seventeen (17) feet, and thence in a northerly direction to the northeast corner of said lot two (2), and thence in a southerly direction, along the last line of said lots (2) two and (11) eleven, to the place of beginning. Also all that part of said lot one (1) bounded as follows: Commencing at the north part of said lot one (1), and running south, along the east line of said lot one (1), two hundred and nineteen (219) feet and eight (8) inches; thence west, to the east line of the tract last described; thence in a northerly direction, to the place of beginning. Also, all that tract of land between said lot two (2) and Oak street, as now located. Also, lot thirteen (13), and sixty-four (64) feet and five (5) inches off the west side of lot twelve (12), in Clements' addition to the town of Princeton." Plaintiffs allege that in writing said deed the same was so drawn as to include and convey a part of said lot 12 not intended by the parties to said deed to be included in and conveyed thereby, in this: That the said deed purported to convey 64 feet and 5 inches off the west side of said lot 12, instead of "all that part of said lot twelve west of said post and board fence," which said post and board fence commenced at the south end of said lot 12 at a point 17 feet 5 inches east of the southwest corner, and runs thence northerly to the north line of said lot 12, and 34 feet east of the northwest corner of said lot. The accompanying plat A will more clearly indicate the lines of the several lots and tracts as set out in the deed. The red line through lot 12 shows the location of the east line of defendant's land according to the deed. The dotted line running north and south through

said lot 12 represents the fence which plaintiffs allege was intended to be the eastern line of the parcel conveyed.



The heavy lines are the red lines referred to in the opinion.

The circuit court made a finding of facts as follows: "(1) The court finds as facts proven in this case that, at the time of the purchase by defendant of the property from the plaintiff, the property the plaintiff claimed to own was inclosed in three inclosures by fences,—the inclosure on which was situated the house, the barnyard, and the pasture lot including lot thirteen and that part of lot twelve west of the post and board fence in controversy. And the court further finds that the part of lot twelve not in said pasture lot was inclosed and used at the time by other parties as a part of the Boyd and Lane property; and that on the land in controversy, east of said fence, was situate at the time an outhouse, a small privy, of the value of three dollars, belonging to the Boyd property; and that a part of the land in controversy, at the time, constituted a part of the garden and yard of the Lane property, and within thirty feet of the house thereon; and that the Boyd and Lane property, as then used and occupied, was separated from the

said pasture lot by the fence in controversy. (2) And the court further finds that the defendant made a personal inspection of the premises at the time of negotiating the purchase, and knew in a general way of the location of the fence separating the said pasture lot from the Boyd and Lane property, and did not at the time understand that he was buying any part of the Lane and Boyd property, as then the same was inclosed. (3) The court further finds as a fact that, at the time the trade was made, the defendant knew that the part of lot 12 east of the fence was inclosed and used by other parties, and that the plaintiff did not claim it as a part of the property sold to defendant, except that there was no agreement that said fence was to be taken as the exact line. (4) The court further finds that at the time of the completion of trade the defendant did not believe or understand that he had purchased any part of the land east of the fence in controversy. (5) The court finds that, during the pendency of the negotiations for the purchase of the property, the defendant was advised that the said fence was on or about the boundary line between the pasture field bought by him and the Lane and Boyd property, and that he so thought and understood until long after the completion of the trade. The court finds the facts to be that the defendant and plaintiff, while the negotiation for purchase and sale of said property was pending, went on a part of said property, and where they could see across the same, and in a general way examine it, and that the plaintiff informed the defendant that the property had never been surveyed, but that the fences (save on the west) were supposed to be about on the line, but that no fence on said property, or inclosing any part thereof, was fixed as a monument or boundary line of said property. "The court finds that plaintiff believed he owned 64 feet and 5 inches off the west side of lot 12, and intended to convey to defendant, and defendant believed he was buying said strip of 64 feet and 5 inches off the west side of said lot 12, and that the deed as written correctly described the land that plaintiff at the time believed he owned and intended to sell to defendant, except that he believed the fence was about the line." Upon the final hearing, the court dismissed the bill, and gave judgment for defendant, and, after unsuccessful motions for new trial and in arrest of judgment, plaintiff appealed to this court.

The evidence most clearly establishes that plaintiff's deed described the land just as Mrs. Thompson's deed to plaintiff described it. It conveyed exactly the amount of land which the plaintiff Judson thought he owned in lot 12. There was no evidence of any mistake in drawing the deed so far as the scrivener and defendant are concerned. The finding of the circuit court "that plaintiff believed he owned 64 feet and 5 inches off the west side of lot 12, and intended to convey

to defendant, and defendant believed he was buying said strip of 64 feet and 5 inches off the west side of said lot 12, and that the deed as written correctly described the land that plaintiff at the time believed he owned and intended to sell to defendant, except that he believed the fence was about the line," is almost conclusively shown by the testimony. The effort of plaintiff was to show that defendant understood he was only buying to the fence; but the evidence was that when Judson, the plaintiff, was showing defendant the property, they stood quite a distance from this rear portion of the lot, and defendant inquired of plaintiff if the fences were on the lines, and plaintiff replied: "I don't know. We have never taken a survey. I suppose they are something near it." To which defendant responded that, if he bought, he would see that the fences were on the line; that he would have a survey made, and, when there were new fences, they would be put on the line." There was no agreement that the fence should be the line. All the evidence is inconsistent with such a theory. Mrs. Thompson had owned all the land in the plat, and had conveyed the land in the deed by the same description to plaintiff, and all the subsequent deeds were limited by the description in the Judson deed. That a court of equity may correct mistakes in, and reform, written instruments, is familiar law; but that the mistake must first be shown by clear and cogent proof, fully satisfying the chancellor, is equally well-settled law. This has not been done in this case. *Sweet v. Owens*, 109 Mo. 1, 18 S. W. 928; *Bartlett v. Brown*, 121 Mo. 353, 25 S. W. 1108. Fully concurring in the judgment of the circuit court, it is affirmed.

SHERWOOD and BURGESS, JJ., concur.

USSERY et al. v. CRUSMAN et al.

ELLIOT v. CARNEY et al.

(Court of Chancery Appeals of Tennessee.

Feb. 11, 1898.)

PARTNERSHIP—SPECIAL PARTNERS—INSOLVENCY—  
SET-OFF—WILLS—CONSTRUCTION.

1. Under Mill. & V. Code, § 2404, providing that an affidavit shall be filed of one of the partners stating that the special partners have actually paid in, in cash, the sums specified in the deed creating the special partnership; and section 2406, providing that, if any false statement is made therein, all partners shall be deemed general,—where the affidavit and recorded articles stated that a special partner had put in \$65,000 cash, when in fact he had only contributed stock actually worth \$40,000, he is liable as a general partner as to third parties, and as a special partner as to the other member of the firm, the good faith of the partners being immaterial.

2. Where testator had entered into an attempted limited partnership which, by reason of noncompliance with Mill. & V. Code, §§ 2399-2422, became a general partnership as to creditors, and he, by will, directed that the amount invested should remain in the busi-

ness for the remainder of the term of said partnership, and that his executors should collect the profits, supervise the investment, and protect the interest of the estate, testator thereby continued the partnership, and made his estate liable to a general creditor on a firm note executed by the surviving partner after testator's death.

3. Under Mill. & V. Code, § 2420, providing that no special partner, in case of the firm's insolvency, shall be allowed to claim as a creditor until the claims of all the other creditors are satisfied, a debt from the firm to one who unsuccessfully attempted to become a special partner cannot be set off against an individual liability to contribute to firm debts as a general partner.

Appeal from chancery court, Montgomery county; C. W. Tyler, Chancellor.

Bills by Ussery and Gholson, executors, against J. J. Crusman and others, and by Thomas H. Elliot, administrator, against N. L. Carney, administrator, and others. There was a decree for complainants, and defendants appealed. Affirmed.

Burney & Bailey, for appellant N. L. Carney. Gholson & Lyle, for appellees.

WILSON, J. These two cases were heard together in the court below and before us. They raise the same questions of law, and, with one exception, present the same state of facts. The bills were filed to hold the estate of Bryce Stewart liable for the debt sued on, or such balance thereof as the assets of the firm of J. J. Crusman, under its general assignment, failed to pay. There was a demurrer to the bills by the administrator with the will annexed of Bryce Stewart; but for the present it is not necessary to state the grounds of the demurrer, nor to notice it, further than to say that it was overruled by the chancellor. The facts appearing in the record, proper to be stated to present the questions in the cases, are these: May 1, 1891, J. J. Crusman and Bryce Stewart entered into written articles of partnership to carry on a general grocery produce and whisky business in Clarksville, Tenn., under the firm name of J. J. Crusman. In the articles of partnership it was stated that Stewart was a limited partner, and that he had put into the partnership the sum of \$65,000 in cash, made up of the original capital and its increase under a previous limited partnership existing between them, and operated under the same firm name, and a limited partnership existing before that, composed of Crusman, E. M. Howard, and said Stewart. The partnership of May 1, 1891, was, under the articles, to continue for five years. It appears that September 15, 1893, J. J. Crusman, acting for the firm, executed its note to B. W. Ussery, due in six months, and, to secure the note, pledged, in writing, a lot of whisky then in the warehouse of the firm in Clarksville, Tenn. Bryce Stewart died, testate, January 13, 1894. In his will he named J. L. Glenn and F. P. Gracey as his executors. Glenn declined the trust. Gracey qualified, and there-

after died. After his death, defendant N. L. Carney was appointed administrator with the will annexed of Stewart, and was engaged in settling up the estate when these bills were filed. The will of Stewart contains the following clause: "The amount I have invested as a limited partner in the grocery house of J. J. Crusman I wish to remain in said business for the time said limited partnership, according to the articles thereof, has to run; and my executors will collect the yearly profits arising therefrom as any other debt due my estate, and they will give their supervision of said investment, and protect the interest of my estate therein, as I would do if living." Crusman carried on the business after the death of Stewart as it was conducted before, with the knowledge and assent of the representatives of Stewart. March 19, 1894, after the death of Stewart, in the preceding January, Crusman executed to B. W. Ussery another note for \$2,625, due in six months. This was in renewal of the note of September 15, 1893; and the latter note was surrendered and delivered up to Crusman. This renewal note contains no reference to the whisky pledged to secure the first note, although it was agreed and understood between Crusman and Ussery that the whisky was to continue pledged as a security for the renewal note. In December, 1895, Crusman, without the knowledge of Ussery or the representatives of Stewart, shipped this whisky to Cincinnati, and there pledged it as a collateral to secure certain loans of money. In December, 1895, Crusman, acting for himself and for what was known as the firm of J. J. Crusman, made a general assignment for the benefit of creditors; but the whisky which had been pledged to secure the note of Ussery was assigned, subject to the debts contracted in Cincinnati, Ohio. After the payment of the parties in Cincinnati, to whom the whisky had been pledged, only \$260.25 was realized which could be appropriated to the note of Ussery. B. W. Ussery died, and the complainants Ussery and Gholson were nominated in his will as his executors. Before Stewart's death, complainant Thomas H. Elliot loaned to J. J. Crusman or the firm of J. J. Crusman \$1,000, and took his note therefor. Crusman, October 30, 1895, after the death of Stewart, paid the interest and half of the principal of this \$1,000 note executed to Elliot, and gave a new note for the balance, and the original note was surrendered. The point in each of these bills is that they claim that Stewart, in May, 1891, did not put into the business or the firm of J. J. Crusman the sum of \$65,000 in cash, as the articles of limited partnership stated, but that, on the contrary, he put in nothing in cash, and that he only put in the stock of goods then on hand, of the actual value of about \$40,000. The bills also aver that the firm of J. J. Crusman was at that time in debt to the extent of \$20,000. And the contention of complainants is that Stewart's estate is liable to the creditors of the

firm to the extent of the difference between the actual value of the stock, etc., that was put in, and the sum of \$60,000, which the articles of limited partnership alleged had been put in by him. The defendant administrator of Stewart's estate demurred to the bills, on the following grounds: (1) The bills seek to recover on account of the alleged difference between the actual amount put in by Stewart in the partnership and the amount which the articles of partnership averred had been put in by him; and the insistence of this ground of demurrer is that, assuming this to be true, it does not create such a right of action as would survive against the representatives of Stewart. (2) The bills show that the indebtedness sued upon was contracted after the death of Stewart, and the provisions of Stewart's will do not bind his general estate. (3) Complainants cannot recover on the original notes executed before the death of Stewart, inasmuch as said notes were delivered up, and the debts evidenced by them paid by a new note, given after the death of Stewart, signed by J. J. Crusman. (4) The bills show that there was an attempt on the part of Stewart and J. J. Crusman to form a limited partnership, and, this being so, the remedy provided by statute of holding Stewart liable as a general partner is the only remedy that can be pursued by complainant. (5) The complainants do not in their wills show any facts that will entitle them to any relief against the said defendant. As before stated, these demurrers were overruled by the court; and from this action the administrator of Stewart prayed an appeal, which was disallowed until after the final decree. Carney, as administrator with the will annexed of Stewart, then answered both bills, and, in his answer, admitted the execution of both notes, but denied that, at the time they were executed, Crusman was acting for the firm of J. J. Crusman, and put in issue all the other material allegations of the bills. Upon the hearing, the chancellor rendered a decree in favor of complainant for the amount of the notes and interest, and also for the cost, and adjudged that the estate of Stewart was responsible for any balance of the decree that the assets of the firm of J. J. Crusman, under its general assignment, failed to pay.

From the decree of the chancellor, defendant Carney, administrator, etc., prayed an appeal to the supreme court, and has assigned the following errors: (1) The chancellor erred in overruling the defendant's demurrers. (2) The chancellor erred in finding that the limited partnership continued after the death of Stewart, and that Stewart did not put into the firm of J. J. Crusman \$65,000 or its equivalent. (3) The chancellor erred in holding that complainants have any right to recover anything from the estate of Stewart. (4) The chancellor erred in granting any relief to complainants against Carney, administrator. It is said in support of these assignments that these are either actions for notes given by the surviving

partner after the death of the special partner, or they are actions upon false representations made by the special partner in the contract of partnership, or in the advertisement thereof. It is insisted with respect to the first point that there can be no recovery, because a surviving partner in this state cannot renew a partnership note or give a note that will bind the estate of a deceased partner for a partnership debt. It is further insisted that the provision in Stewart's will does not render his general estate liable for the debts of the firm of J. J. Crusman, nor continue the partnership, but simply authorizes Crusman to continue the business with whatever capital should be in the firm at the time of Stewart's death. Counsel cite the cases, in support of this proposition, of *Burwell v. Cawood*, 2 How. 560, and *Stewart v. Robinson* (N. Y. App.) 22 N. E. 160. The general argument is made that these notes, given after Stewart's death, although they were given for the same amounts as the notes given prior to his death, are, nevertheless, new contracts. It is said that the first notes were given by the firm of J. J. Crusman and that, of course, the liability of Stewart on these notes depended upon the condition of affairs existing at the time the notes were executed; but that the notes given after his death were either the individual notes of Crusman, or, at most, that they could bind only the assets in his hands by virtue of Stewart's will. In short, the contention is that these were really new notes of new parties, and were not a mere continuation of former debts. It is also insisted that there is no authority whatever in the will of Stewart authorizing the surviving partner to execute new notes, even to bind the assets then in the partnership. Under the other aspect of the case, it is contended by appellant that if this is to be treated as an action based upon the ground that false representations were made by which the complainants were misled, and that in equity Stewart should be required to make good the amount which the article stated he put in, then it is really an action at law, the remedy being a legal one,—compensation. 1 Pom. Eq. Jur. is cited. And, independent of this consideration, it is said that, if it should be an equitable action, all equitable actions are not actions arising ex contractu. They cite *Swan v. Harrison*, 2 Cold. 534, 546; *Witters v. Foster*, 26 Fed. 737. In other words, the contention is that actions for false representations do not survive. They cite *Warren v. Furstenheim*, 35 Fed. 691; *Baker v. Dansbee*, 7 Helsk. 229. It is, moreover, said, with respect to the amount that was actually paid in by Stewart, that the only thing that can be considered is the value of the assets; that the debts cannot be taken into consideration, unless it is shown that they were paid out of these assets; and that there is no proof whatever on this point, whether these debts were paid by Stewart individually, or by Crusman individually, or were ever paid at all. It is, moreover, insisted that, if the complainants seek to recover

on the ground of fraud, they must show that they were actually defrauded; and it is insisted that there is no proof whatever to show that they were misled in any way. It is furthermore said that the fact that these articles were published does not show any notice to complainants, and that actual notice in cases of fraud is necessary. It is, furthermore, insisted that there is nothing in the record to show that complainants acted upon these statements in the articles of limited partnership which were made a matter of record. Moreover, it is contended that the articles of partnership show on their face that the contribution of the special partner was not money, but goods, and that the statement of their value was a mere matter of opinion.

The method of forming limited partnerships and the liability of limited partners is prescribed by our statutes. They will be found in Mill. & V. Code, §§ 2390-2421, and in Shannon's Code, §§ 3119-3141. Shannon's Code, § 3119, provides that limited partnerships may be formed upon the terms, and with the rights and powers, and subject to the conditions and liabilities, prescribed by subsequent sections of that chapter of the Code. But limited partnerships are prohibited in respect to the business of banking and insurance. Our statutes provide, in general terms, that the general partners only are authorized to transact the business as and for the partnership, and to bind the firm. They also provide that the persons desirous of forming such a partnership shall make and severally sign a deed or article of partnership, containing—First, the name under which such partnership is to be conducted; second, the general nature of the business to be transacted; third, the names of all the general and special partners inserted therein, distinguishing which are general and which are special partners, and their respective places of residence; fourth, the amount of capital which each partner has contributed to the common stock; and, fifth, the period at which such partnership is to commence and terminate. It is also provided that this deed of partnership shall be acknowledged or proved as deeds for land are required to be, and that it shall be registered in a separate book to be kept for such instruments. The statute also provides that, at the time of filing the original deed for registration, an affidavit of one or more of the partners shall also be filed in the same office, and registered therewith, stating that the sum specified in the deed to have been contributed by each of the special partners to the common stock has been actually and in good faith paid in cash. It is also provided in the statute that no limited partnership shall be deemed to have been formed until the deed of partnership has been made, proved, filed, and registered, and not until the affidavit required by the preceding section has been made, filed, and registered. Our statutes also provide that, if any false statement is made in the deed of partnership or affidavit, all the

persons interested in such partnership are liable, as general partners, for all its engagements. The statute also provides for the publication in some newspaper of the terms of the limited partnership. It is also provided that every renewal or continuance of such partnership, beyond the time originally fixed for its duration, shall be put into form, signed, proven, registered, and an affidavit of a general partner made, filed, and registered, as required for its original formation, and that every such partnership which is otherwise renewed or continued shall be deemed a general partnership. It is further provided that every alteration which is made in the name of the partners, in the nature of the business, or in the capital or shares thereof, or in any other matter, specified in the original deed of partnership, shall be deemed a dissolution of the partnership; and every such partnership, which is in any manner carried on after such alteration has been made, shall be deemed a general partnership, unless renewed as a special partnership, according to the provisions of the law. It is further provided that the business of these limited partnerships shall be conducted under a firm name in which the names of the general partners only are inserted without the additional word "company," or any other general term, and that, if the name of any special partner is used in the firm with his privy, he shall be deemed a general partner. It is also provided that no part of the sum which any special partner has contributed to the capital stock shall be withdrawn or paid to him in the shape of a loan, dividends, or profits, or otherwise, at any time during the continuance of the partnership; but that any partner may annually receive the lawful interest on the sum so contributed by him, or profits actually accrued, if the payment of such interest or profit does not reduce the original amount of his capital. It is also provided that if, by the payment of interest or profits to any special partner, the original capital has been reduced, the partner receiving the same is bound to restore the amount necessary to make good his share of the capital, without interest. It is also provided that a special partner may, from time to time, examine into the condition and progress of the partnership concern; that he may advise as to the management of the partnership; and that he may act as attorney in fact; but that he shall not transact any other business, nor be employed for that purpose, as agent or otherwise, without the express assent of all the general partners; and that if he interfere, contrary to the provisions of the law, he shall be deemed a general partner. It is further provided that every special partner who violates any of the provisions of the law, or who concurs in or assents to any such violation by the partnership or by any individual partner, shall be liable as a general partner. The statute also provides that, in case of the bankruptcy or insolvency of the partnership, no

special partner is under any circumstances to be allowed to claim as a creditor until the claims of all the other creditors of the partnership are satisfied. The statute also enacts that no dissolution of such partnership, by the acts of the partners, shall take place before the time specified in the deed of partnership or in the deed of renewal until a notice of such dissolution has been filed and registered in the register's office in which the deed of partnership is registered. The foregoing embrace the substantial provisions of our legislation regulating special or limited partnerships.

It appears in this case that the value of the assets contributed by Stewart to this partnership when it was renewed or continued, May 1, 1891, amounted to about \$40,000, instead of \$65,000, as was averred in the articles of partnership, and in the affidavit of the general partner, registered with the deed.

Under the facts of the case, three questions are presented, and their decision settles the case. We find as a fact that Bryce Stewart, May 1, 1891, when the last limited partnership was formed, did not put into it in cash the \$65,000 which the recorded articles and affidavit accompanying them averred had been contributed by him, nor was the previous stock of the firm and its increase of the cash value of \$65,000. This being so, under the terms of the statute and the law applicable to such partnerships operating thereunder, he became liable as a general partner to third parties dealing with the firm. This would be the case if it were conceded that, under the statute, the limited partner could contribute property instead of cash; and for the reason that, if property could be substituted for cash,—a matter that we do not and need not decide in this case,—the substituted property must have been of the cash value which the articles stated had been contributed by the special partner. The weight of the proof shows that the property and assets contributed by Stewart did not exceed in value \$40,000, when the articles stated that he had put into the partnership the sum of \$65,000. It follows that inasmuch as the recorded articles did not state the actual fact and truth in respect to the amount put in by Stewart, and that he put in a less sum than the articles recited, he became liable as a general partner. This holding is in accord with the current of authority, and carries out the plain intent of the statute, as we construe it. The general principle running through the cases is that the limited partnerships exist alone by virtue of some statute, and, unless the statutes authorizing them are fully complied with, they do not legally exist, and the parties to them stand under the law as general partners. Appeal of Jennings (N. Y. App.) 2 Lawy. Rep. Ann. 43, note, and cases cited (s. c. 16 Atl. 19); Van Horne v. Corcoran (Pa. Sup.) 18 Atl. 16, and cases cited. If the statutes are not followed, the good faith of the parties does not change the result. Authorities supra.

This settles the first question, and its settlement fixes the fact and law that Stewart was a general partner in this business as to outside parties. Nothing further appearing, the death of Stewart dissolved the partnership, and the power of the surviving partner was a power to wind up the business. We need not cite authorities in support of this proposition. As a general principle of law, it is not disputed. After the dissolution of a partnership by the death of one of the partners, the surviving partner has no power to bind the estate of the dead partner by the execution of a new note or obligation in the firm name. As a general rule of law, this is not disputed; but it is insisted, and we think correctly, that these general principles are not applicable to the facts of this case. Stewart, as between himself and Crusman, was a limited partner in the business. As to third parties and creditors, he was a general partner, and liable as such. This being so, the question arises: "Did he, by virtue of the provision of his will herein quoted, continue the partnership, and thereby make his estate liable to creditors as if he were a general partner?" The question is not altogether free from doubt. We are of opinion, however, that, on principle and sound reason, he did. A testator may continue to keep his capital invested in a business after his death, and he may make his general estate liable for the results of that business. In the case at bar, Stewart, as to the general public, was a general partner in the business conducted under the firm name of J. J. Crusman. This business, under the terms of his will, was to continue until the expiration of the articles of partnership. It follows, we think, that, as a matter of law, it continued just as if he were living, in so far as the rights of creditors are concerned.

These holdings settle all the main questions in the case. The statute covers the question of his right to set off a claim or debt due him from the firm. This will not be permitted to interfere with the rights of creditors. There is no error in the decree of the chancellor of which appellant can complain, and it will be affirmed, with costs. It appears that the case was developed, in the main, on the idea that creditors had the right to compel the estate of Stewart to make good the difference between the sum he actually put in the partnership and the \$65,000 the articles stated had been put in by him. This, however, is immaterial, as it appears that this sum is ample to pay all creditors after exhausting the assets of the firm under its general assignment. The decree is affirmed, and the cost will be paid by the appellant out of the assets in his hands to be administered. The cause is remanded for further proceedings in conformity to this opinion. The other judges concur.

Affirmed orally by supreme court, March 5, 1898.

# SAVAGE et al. v. CARNEY.

(Court of Chancery Appeals of Tennessee. Feb. 12, 1898.)

PARTNERSHIP—SPECIAL PARTNERS—INSOLVENCY—ASSETS—SET-OFF.

1. Where one who attempted to become a special partner became liable to third parties as a general partner for noncompliance with Mill. & V. Code, §§ 2399-2422, and he, by will, continued such partnership for the benefit of his estate, the relation of the estate to third parties is that of general partner, and the liability of the estate to creditors for firm debts is not an asset in the hands of assignees of the firm, under an assignment by the surviving general partner.

2. Where one who attempted to become a special partner, but was liable to creditors as a general partner, held the firm note for a debt, and was in turn indebted to the firm on a current account, he could not set off such note against the account, in a suit by the assignees of such firm in insolvency, under the statute postponing claims of special partners to all creditors in case of insolvency.

Appeal from chancery court, Montgomery county; C. W. Tyler, Chancellor.

Bill by Savage and Payne, assignees, against N. L. Carney, administrator. There was a decree adjusting the rights and liabilities of the parties, and complainants and defendant appealed. Affirmed.

H. N. Leech, for complainants. Burney & Bailey, for defendant.

WILSON, J. The bill in this case was filed by the complainants, as assignees under a general assignment of the firm of J. J. Crusman and J. J. Crusman, individually, to hold the estate of Bryce Stewart, deceased, liable for the benefit of creditors for the difference between the actual amount that said Bryce Stewart contributed to the capital stock of J. J. Crusman under the limited articles of partnership existing between said Stewart and said Crusman, and the amount that the articles and affidavit registered stated that he had contributed. It appears from the bill and proof that the articles of limited partnership were entered into May 1, 1891, between J. J. Crusman and Bryce Stewart, both residents of Clarksville, Montgomery county, for the purpose of conducting a general grocery, liquor, and produce business. The business of said partnership was to be conducted in the name of J. J. Crusman, who was the general partner. The articles of partnership and the affidavit, which were put to record, entered into May 1, 1891, stated that Bryce Stewart had put into the business the sum of \$65,000, and that this sum was made up of his contribution to a previous limited partnership existing between the parties and the increase thereon. The averment of the bill is, and the proof so shows, that the contribution of Bryce Stewart to the limited partnership, entered into on the date above stated, instead of being \$65,000, amounted to only about \$40,000. It is further averred in the bill, and the



proof so shows, that the partnership entered into May 1, 1891, was to continue for five years. Bryce Stewart died, testate, January 13, 1894. In his will he named J. L. Glenn and F. P. Gracey as his executors. Glenn declined the trust. Gracey qualified, and thereafter died. After his death, defendant, N. L. Carney, was appointed his administrator with the will annexed, and was engaged in settling up the estate when this bill was filed. The will of Stewart contains the following clause: "The amount I have invested as a limited partner in the grocery house of J. J. Crusman I wish to remain in said business for the time said limited partnership, according to the articles thereof, has to run; and my executors will collect the yearly profits arising therefrom as any other debt due my estate, and they will give their supervision of said investment, and protect the interest of my estate therein as I would do if living." Crusman, it appears, carried on the business after the death of Stewart as it was conducted before, with the knowledge and assent of the representatives of Stewart. In December, 1895, Crusman, acting for himself and for what was known as the firm of J. J. Crusman, made a general assignment, naming complainants as assignees. It appears that the assets of the firm will not pay the debts, and the purport of this bill is to hold the estate of Stewart liable for the debts which the assets in the hands of the assignees failed to pay. It appears from the bill and proof that the assets of the firm would fall far short of paying its indebtedness, and that the assets will not pay over 40 or 50 per cent. of the debts. Among the debts stated in the bill is a debt of \$3,610, due to the Bryce Stewart estate. This debt is evidenced by a note; and the complainants ask the direction of the court as to whether or not this debt and the account due the firm from the estate of Bryce Stewart can be properly set off one against the other. It is also averred and shown in the proof that there is an item of \$18,500 due to J. J. Crusman, and that, in addition to this, said Crusman claims the partnership is indebted to him on account of rent for a warehouse. It also appears that many of the debts of the firm were contracted subsequent to the death of Stewart, the limited partner. It also appears that some of the firm debts were contracted prior to his death, and among them a large debt due the First National Bank of Nashville, amounting to something over \$16,000, including interest. It is said in the bill that the complainants are in doubt as to whether the debts mentioned in the bill, and secured by the mortgages and otherwise, are entitled to prorate upon the whole of their debt in the unpledged assets of the firm of J. J. Crusman, or whether these debts will be entitled to share only to the extent remaining unpaid after exhausting the security. The complainants also desire the judgment of the court as to whether or not the difference between the amount represented to have been

paid in by Bryce Stewart and the amount that he actually contributed constitutes a debt against the estate of Bryce Stewart, and therefore an asset in their hands for the payment of debts, or whether, under the law, Bryce Stewart became a general partner, and whether or not his estate is bound for the payment of all of the debts of the firm of J. J. Crusman after exhausting the firm assets, and whether or not his estate is bound for three debts mentioned in the bill as due to the building and loan association and to the banks. In any event, complainants insist that the estate of Bryce Stewart is liable for the whole difference between the \$65,000 which the articles of limited partnership stated had been contributed by said Stewart, and the amount that he actually in fact contributed, and that his estate is also liable for all the debts of said firm, and that, as the representatives of the creditors, they have the right to recover from his estate for the benefit of creditors. The bill specifically prays for instructions on the following points: (1) Whether the accounts due the firm of J. J. Crusman from the estate of Bryce Stewart and the note of the firm to Bryce Stewart are proper subjects of set-off. (2) Also, to the account due by J. J. Crusman and his indebtedness against the firm. (3) Whether the debts due the building and loan association and the Clarksville National Bank, made defendants, are first debts against the firm, and entitled to prorate with the other debts in the assets of the firm, and upon what basis they shall be entitled to share with the other firm debts. (4) Whether or not J. J. Crusman and the estate of Bryce Stewart are entitled to share with the creditors of the firm on any indebtedness due to them by the firm. (5) Whether, after the firm debts, outside of the debts against the firm in favor of the members, are paid, the debt of J. J. Crusman constitutes a debt against any balance in the hands of complainants. (6) Whether Bryce Stewart was a general or special partner, and, in either case, what the liability of his estate is, if at all liable, for any particular debts of the firm, and whether liable to J. J. Crusman. (7) Whether the other debts, not including the bank and building and loan association debts, which are secured or partially so, shall be entitled to prorate with the other creditors in the unpledged funds, and how. (8) That the cause be referred to the master for a report on all debts due from the firm of J. J. Crusman, and also as to the assets in the hands of complainants, and the excess of debts over assets. (9) They pray, after the report asked for, that complainants be given a decree against defendant, Carney, administrator of Bryce Stewart, for such sum as said estate is bound for. Defendant, Carney, demurred to the bill, on the following grounds: (1) That the paper writing set out in the bill purporting to be a contract of limited partnership between Bryce Stewart and J. J. Crusman did not in fact create a limited partnership

at all; that it was not a renewal of a former limited partnership, and that said Crusman and Stewart were general partners, with all the rights and liabilities incident to such general partnership; that, if this be true (which the respondent, Carney, for the purposes of his demurrer insists is true), it follows that the assignees, who are the complainants in this suit, have no right to maintain a bill against the administrator to recover any alleged difference between the actual value of the assets put into the firm by Stewart and his representation of their value. (2) Whether the contract created a limited or a general partnership, the assignees in this case stand in the shoes of Crusman. He having made the assignment to them as a surviving partner, and he having been a party to said contract, and aware of the value of the assets at the time the contract was entered into, he could not at any time have sued the estate of Stewart for any supposed difference between the actual value and the stated value of the assets put into the business by Stewart; and this is especially true in view of the facts stated in the contract of limited partnership. (3) Whether it was in fact and law a limited or general partnership, these assignees cannot recover from the estate of Bryce Stewart the sums he had withdrawn from the partnership, which they designate in the bill as an account due the firm from the estate of Bryce Stewart. (4) That the court, at the suit of complainants, is to settle the question between J. J. Crusman and Bryce Stewart's estate, which they undertake to have settled by asking the court to determine for them whether the \$18,500 Crusman claims that the firm is indebted to him is a debt for which the firm is responsible. "Manifestly," says the demurrer, "Mr. Crusman's alleged claim is not good as against the creditors of the firm, and these assignees, the complainants, have nothing whatever to do with it." (5) It is not material to complainants whether the fourteenth clause of Mr. Stewart's will, quoted in the bill, authorized Mr. Crusman to continue to contract debts at the expense of the estate of said Stewart, and therefore that part of their bill cannot be maintained. (6) The complainants' bill submits the question to the court as to whether secured creditors or those secured in part can prorate upon the whole of their debts in the unpledged assets of the firm; "and," says the demurrer, "this question is so thoroughly settled in Tennessee, and so recently determined by the supreme court, that the complainants have no right to incur costs to have such questions settled." (7) That complainants cannot have a judgment against the administrator of Bryce Stewart's estate in any event, or upon any ground set out in the bill, nor can they have determined at their suit whether Bryce Stewart's estate is liable to the creditors of the firm, either those whose debts were created prior to the death of Stewart or those created subsequent thereto.

It seems that the case was brought up before the chancellor June 13, 1898, and in his decree it is said that all the questions raised by the demurrer have been eliminated by concessions made in the argument of counsel, except two, which are as follows: (1) Whether the complainants can recover from the estate of Bryce Stewart the alleged difference between the estimated value and the actual value of the capital invested by Stewart as a partner in the firm of J. J. Crusman. (2) Whether the complainants have the right to recover from Stewart's estate the amount shown by the partnership books to be due from that estate. The chancellor held that the complainants, as assignees, had no right to recover the alleged difference between the estimated value and the actual capital invested by Stewart in the partnership, and so decreed; and this resulted in his sustaining the demurrer to that part of the bill. The chancellor was of opinion, however, and so decreed, that the complainants had the right to recover according to the allegations of their bill, from Stewart's estate, the amount shown to be due by the partnership books; and the demurrer to that feature of the bill was overruled. From this decree both the complainants and the defendant prayed an appeal to the supreme court, but the same was disallowed until the final decree in this cause. Defendant, Carney, administrator with the will annexed, answered such parts of the bill as were material, left after the action on the demurrer. He insisted that the firm of J. J. Crusman was indebted to his testator in the sum of \$5,610, with interest; and he claimed that he had the right to share with the general creditors of the firm in the assets in the hands of complainants, as assignees, and that, if there was an indebtedness from the estate of his testator to the firm, it could be set off. He, however, denied that his testator was in any manner indebted to the firm. Proof was taken in the cause, and there was an agreed state of facts. In the agreed state of facts it is stated that the articles of partnership executed May 1, 1891, and to expire January 1, 1896, were executed May 1, 1891, and were to expire January 1, 1897; and that, while this article purports on its face to be a renewal of a former partnership, as a matter of fact the former articles expired, according to their terms, April 26, 1890; and that from April 26, 1890, to May 1, 1891, the business was conducted just as it had been before. It is further agreed that May 6, 1891, Bryce Stewart made his will, in which he made the provision touching his interest in the partnership, hereinbefore quoted. It is further agreed that Crusman continued to carry on the grocery business after Stewart's death just as he had done while Stewart was alive, with full knowledge on the part of the representatives and executors that he was carrying it on, until December, 1895, when he made a general assignment of all the partnership property to the complain-

ants, as assignees, for the benefit of the creditors of the firm. It is further agreed that the assets of the firm of J. J. Crusman in the hands of the complainants, as assignees, are not of value to pay exceeding 50 cents on the dollar of the debts. The chancellor heard the cause upon the pleadings and proof November 20, 1897, and he recites that, all questions between the parties being settled save two, the decree is confined to them.

One of the questions is whether the complainants, as assignees of the firm of J. J. Crusman, composed of J. J. Crusman and the late Bryce Stewart, can recover from the estate of Bryce Stewart the difference between the value of the assets put into said firm and the sum of \$65,000 which the articles stated had been put into the firm. Under the articles dated May 1, 1891, the chancellor was of opinion, and so decreed, that the complainants were not entitled to this relief, and that they could not recover said alleged difference. The second question is that the firm borrowed from Bryce Stewart, on June 29, 1893, \$5,610, evidenced by note now in the hands of defendant, Carney, as his administrator; and the said Carney claims the right to have a credit on this note by an account shown on the books of said firm against said Stewart for the sum of \$3,389, a portion of which is charged up against said Stewart on his account current at the date of his death, and some since his death. As to this question the court held and decreed that the offset could not be allowed. His honor found that \$505.56 of this \$3,389 account on the books in the name of Stewart was for goods purchased from the firm from February 1, 1894, to April 1, 1895, after the death of Stewart, in January, 1895, and that \$1,499.28 of said account was Stewart's part of a subscription made to a railroad company by the firm after his death, on November 1, 1894, and said amount was charged to his account on the books at the date of its payment. The chancellor held that the complainants, as assignees of the firm, have the right to recover of the estate of Stewart the whole of said account of \$3,389, less the sum of \$505.56 against Mrs. Stewart, and thereupon gave a decree against the defendant, N. L. Carney, as administrator, for said amount, together with interest from November 1, 1894; and it was ordered to be satisfied out of the estate of Stewart in the hands of said Carney to be administered. He held that the note held by Stewart against the firm was not entitled to be credited with any part of said account, and that the note was not entitled to share in the assets of the firm in the hands of the assignees, because the firm was shown to be insolvent. From this decree, both complainants and the defendant prayed and were granted an appeal to the supreme court, and have assigned errors. The error assigned by complainants is that the chancellor erred in denying the right of the assignees to recover the difference between the \$65,000 which it was averred in

the articles of limited partnership had been paid into the partnership by Stewart, and the actual amount which he in fact contributed to its capital. Carney, administrator, assigns error on the ground that he was not permitted to set off the note of Stewart against the firm in his hands against the account standing on the books of the firm against Stewart.

We have considered the general question controlling this case. In the cases of *Ussery v. Crusman and Elliot v. Carney*, 47 S. W. 567, and *Wathen v. Carney*, Id. 1115, we held that Bryce Stewart, by virtue of his failure to contribute in cash or its equivalent the \$65,000 which the articles of limited partnership averred had been contributed by him, became, under our statutes, a general partner, and therefore liable as such. We also held that, under the terms of his will, the business of the firm was continued, and that, as to third parties dealing with the firm, his estate was liable just as if he were living. We further held in those cases that, while Stewart was a limited partner as between himself and Crusman, he was a general partner as to third parties dealing with the concern, and that he was liable as such. We refer to our opinion in said cases and the authorities there cited. Under the principles announced in those cases, the estate of Stewart was liable to the creditors of the firm as if he were a general partner, and still living. The chancellor was correct in his holding that the administrator of Stewart was not entitled to set off the note in his hands due his testator from the firm against the account of the firm against his testator. This matter, as we think, is controlled by the statute. There is no error in this part of the decree of the chancellor, and it will be affirmed.

But the principles announced in the previous cases decided by us, above referred to, do not control the other question in this case in favor of the contention of the assignees. We were at first inclined to the opinion that they did, and that the chancellor was in error in ruling against them on the point in question now under consideration. But our holding is that Stewart was a general partner as to third parties dealing with the firm of J. J. Crusman, and that the terms of his will continued the partnership after his death. If correct in this, it follows that, as to the public, his partnership relation, or that of his estate, was that of a general partner after his death, his liability was that of a general partner, and the liability of his estate for the debts of the firm after his death did not pass to the assignees of the firm. The question of the liability of his estate at the suit of creditors of the firm is not before us in this case. The chancellor committed no error in ruling on this point. It results that his decree is affirmed. The costs of the appeal will be paid in equal parts by the appellant assignees and the appellant administrator with the will annexed. The cost below will

be paid as adjudged by the chancellor, and the cause is remanded for further proceedings accordingly. The other judges concur.

Affirmed orally by supreme court, March 1, 1898.

**FISHBACK v. COLUMBIA BLDG. ASS'N.<sup>1</sup>**  
(Court of Appeals of Kentucky. Oct. 29, 1898.)

**JUDICIAL SALES — ACTION TO SET ASIDE SALE AFTER EXCEPTIONS HAVE BEEN OVERRULED.**

One who has filed exceptions to a report of sale, which have been overruled, cannot thereafter maintain an action to have the sale set aside on other grounds, without alleging that he had no knowledge or information as to such grounds at the time he filed his exceptions.

Appeal from circuit court, Kenton county.

"Not to be officially reported."

Action by J. F. Fishback against the Columbia Building Association to set aside a commissioner's sale of real estate. Judgment for defendant, and plaintiff appeals. Affirmed.

D. A. Glenn, for appellant. H. J. Gausepohl, for appellee.

**WHITE, J.** In October, 1895, the appellee obtained a judgment in the Kenton circuit court decreeing a sale of certain real estate. In February, 1896, the property was sold under the decree, and appellee became the purchaser thereof, at the price of \$582.28, being the full amount of the judgment, interest, and costs. On the next day after the sale, a report was filed, and ordered to lie over for exceptions. Appellant filed exceptions to the report, alleging, as a reason why the sale should not be confirmed, gross inadequacy of price. The court overruled the exceptions, and confirmed the report, and deed was made to the purchaser. Afterwards, in November, 1896, the appellant filed his action in equity, seeking to have the sale set aside, for the alleged reason that, at the sale of the property, the appellee was guilty of fraud in preventing persons from bidding at the sale, and by reason of which appellee obtained the property at the price of \$582.28, when other parties would have bid \$1,000 for same. To this petition a demurrer was sustained, and an amendment was filed, stating in detail the alleged fraudulent acts in preventing bidding at the sale. The court sustained a demurrer to the petition as amended, and, appellant refusing to plead further, the petition was dismissed, and hence this appeal.

We are of opinion that the demurrer to the petition was properly sustained. While the alleged fraudulent acts of appellee were, if true, sufficient to set aside the sale, and no doubt, if made to appear in the exceptions, the court would have set the sale aside, yet a party cannot be permitted to raise partial objections to a report of sale, and other ob-

jections by petition, without the specific averment in the petition that, at the time he filed his exceptions to the confirmation, he had no knowledge or information as to the grounds therein alleged. This allegation does not appear in the petition, nor is this defect remedied by the amendment. There appears an allegation in the amendment that appellant did not know as to which of two states of facts was true; but it fails to allege that appellant did not know then all he alleged in his petition. If appellant knew, when he filed his exceptions, of these alleged fraudulent acts, he should have made that a part of his exceptions. For the reasons indicated, the judgment is affirmed.

**IGLEHART et al. v. ROWE et al.<sup>1</sup>**

(Court of Appeals of Kentucky. Oct. 29, 1898.)

**RELIGIOUS SOCIETIES — REVIEW OF ACTION BY COURTS — DIVISION OF CHURCH MEMBERS — RIGHT TO USE OF PROPERTY.**

1. The courts will not review the action of religious societies excluding members.

2. The trustees of a church having the title and possession of the church property and the possession of the church records, in an action by them to enjoin excluded members from trespassing on the church property the burden is on defendants to show that there is such a division of the church as to entitle each faction to the use of the church property.

3. Under the rules and usages of the denomination of General Baptists the exclusive power to admit and exclude members is in the local congregations, and the associations have no power to review their action.

Appeal from circuit court, Ohio county.

"Not to be officially reported."

Action by J. B. Iglehart and William Iglehart, trustees of Green River Union Baptist Church of Ohio County, against John P. Rowe and another, to enjoin them from trespassing upon church property. Judgment that each party be entitled to the use of the property one-half the time, and plaintiffs appeal. Reversed.

Noe & Massie, for appellants.

**WHITE, J.** The appellants, claiming to be the regular and duly-elected trustees of Green River Union Baptist Church of Ohio County, brought this action in the Ohio circuit court against appellees, John P. Rowe and Cicero Hinchee, seeking an injunction against appellees from trespassing upon the church building by forcibly using the same for services of religious worship. The answer denied that appellants were the trustees of the church, and pleaded at some length and in detail certain differences existing among the members, and certain attempted acts of the church to expel appellees from the congregation, and certain acts of the Green River Union Association reversing the action of the church; and pleading that appellees were members of the church, and had been se-

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

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lected trustees of the congregation, and as such had taken possession of the building, and claimed the right to do so. It may be stated here that the differences in the church do not in any way relate to doctrine, but arose over the selection of a pastor, and some association relations. Appellee Rowe objected to a certain person selected by the majority as pastor, and gave his reasons for his objections; these being some alleged immoral conduct of the pastor selected. For these accusations made against the person selected as pastor, appellee Rowe was tried, and expelled from membership, by the local church: It is claimed by appellees that this action of the church was reversed by the association. The appellants denied that the action of expulsion was ever reversed, or that the association had power to reverse their action. After much proof was taken, the chancellor, on hearing, adjudged that each party be entitled to the use of one-half of the church property,—that is to say, appellees from the 1st to the 15th of each month, and appellants from the 15th to the 30th of each month,—and from that judgment this appeal is prosecuted.

It is shown by the proof, and not denied, that the church lot was originally deeded by Benj. Dexter to the trustees of the church, many years ago, and that at that time appellants, J. B. Iglehart and Wm. Iglehart, were trustees of the church, and accepted the deed for the church; but this deed was never recorded, and is now lost. Under this deed the church was held and used for many years. After this controversy came up, but before this suit was brought, certain of the heirs of Benj. Dexter executed a deed to appellants in lieu of the old deed made by their father. It appears that, since the trespass was committed by appellees, appellee Hinchee has been excluded from membership for trespassing on the church property. It has been uniformly held that the courts cannot and will not supervise or review the action of any religious society as to whether in excluding members they acted wrongfully or justly. So the action of the Green River Union General Baptist Church in excluding appellees is not, and cannot be, before us. It appears to be a conceded fact that both appellees have been excluded from the church. It also appears that the legal title to the church property is in the appellants, as trustees of the church, and the church has so used and held it for many years. We are of opinion that appellants, as trustees of the church, were entitled to the possession of the church and its management and control for the purposes for which it was originally dedicated, and that appellees, so far as this record shows, were trespassers in entering the house, and removing and replacing the locks, and acted alone on their own responsibility; which acts were, in our opinion, without right, and further trespass should have been restrained by injunction. The proof shows

that there are in good standing over 230 members of this church, and this faction represented by appellees consists of 6 or 8 persons, 2 of whom—appellees—were excluded from membership on charges of immorality; 2 others excluded, cause not shown; and the names of the other 2 or 4 do not appear, nor does it appear whether they are members of the church or not. The title to the property is in appellants, and from the proof it appears they have the church records, and did have possession of the church property at the time of the trespass; and, if there was in fact a schism or division of the members of the church, as contemplated by the statute, so as to entitle each faction to the use of the church property, the appellees should have made such facts appear. We have laid this burden on appellees for the reason that the church organization, the title and records of the church, appear to be with appellants; and we think they are *prima facie* entitled to the whole use for the whole time. To rebut this *prima facie* case the appellees should make it appear that there really was a schism or division of the church, and not merely some excluded members claiming rights. There is no testimony in the whole record tending to show that appellants have ever used or attempted to use this church building for any purpose other than as contemplated in its dedication. Nor is it shown that appellees, or any other persons, were ever refused admission in the congregation when services were held. We are of opinion from the proof in this case of the rules and usages of the denomination of General Baptists that the exclusive power to admit and exclude members lies in the local congregations, and that the associations have no power to reverse or review the action of the local churches as to its members, nor to reinstate a member who has been excluded by any local church; wherefore, for the reasons indicated, the judgment is reversed, and cause remanded, with directions to make the temporary injunction perpetual, and to render judgment that appellants are entitled to the exclusive use of the church for the purpose for which it was dedicated, and for other proceedings consistent with this opinion.

#### ABBOTT v. COMMONWEALTH.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 22, 1898.)

CRIMINAL LAW—APPEAL—REVERSAL FOR WANT OF EVIDENCE OF GUILT.

1. On the trial of accused for the murder of his wife, alleged to have been committed by procuring for, and administering to, her strychnine, the evidence for the prosecution showed that accused had procured strychnine more than a year before the alleged poisoning, while that for accused showed that the deceased had taken strychnine with the avowed purpose of ending her life. *Held*, that there was no evi-

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

dence tending to show guilt, and that a conviction cannot stand.

2. A verdict of guilty must be set aside on appeal, where there is no evidence tending to show guilt.

Appeal from circuit court, Rowan county.

"Not to be officially reported."

Alexander Abbott was convicted of murder, and appeals. Reversed.

Osmond T. Byron and J. Taylor Young, for appellant. W. S. Taylor, for the Commonwealth.

BURNAM, J. Appellant was indicted in March, 1897, for the murder of his wife, which was alleged to have been committed by procuring for, and administering to, her strychnine. He was tried and convicted, and a judgment was rendered sentencing him to the penitentiary for life. Upon appeal to this court, the judgment was reversed, upon the ground that there was no proof showing him to be guilty of the crime for which he was indicted, and the case was sent back for a new trial. See *Abbott v. Com. (Ky.)* 42 S. W. 344. Upon the return of the case to the lower court defendant was, at the March term, 1898, again put upon trial, which resulted in a verdict of guilty and a judgment sentencing him to the penitentiary for life, and to reverse that judgment this appeal is prosecuted.

There is but little variation in the proof for the commonwealth on the first and second trials. No testimony was introduced by defendant, and, as that of the commonwealth is short, we quote it in full: The commonwealth introduced as a witness Henry Brown, who stated that on the morning that the deceased, Geneva Abbott, died, the defendant came over to witness' stable, and fed and curried his (Abbott's) horse, and returned home, a distance of from 200 to 300 yards from defendant's house, and that his wife went to Abbott's house, and found deceased lying on the bed on her face. That they turned her over, and that something of a greenish color was running out of her mouth, and that she was jerking. She said to them that they might think that she might regret what she had done, but she did not. She said to defendant, "Take good care of Sally and the children," and died. That they turned deceased over, and that she lived only a minute. She said to defendant, when he got there, "This is the first time I have straightened my toes since you left." Deceased came to witness' house the night before, and said to Mrs. Carey that she had taken strychnine. Felt no bad effects from it. That she had more, and would take it, if this dose does not prove fatal; and not to blame Alex. That immediately after deceased died her lips were discolored and looked black, and that just before she died she was in great pain. That her muscles contracted. And that when she came to witness' house she said that defendant was sorry for this, but could not help it now. Mrs. Laban T. Carey testified substantially to the same

facts as Henry Brown, and said, in addition, that when deceased said to defendant, "I have not straightened my toes since you left," defendant said, "Have you taken all that strychnine?" and she responded, "No, not all of it; there is the rest of it behind Sally's picture,"—and that witness looked behind the picture, and found about a half a teaspoonful in the bottle. Defendant then said to witness, "I will go for a doctor," and witness said, "She will be dead before you can get there." The commonwealth then introduced Mrs. Scott Utterback, who stated that she saw deceased a few days before she died; that deceased told her that her troubles were more than she could bear; that she had begged defendant to send Sally Phillips home, and he would not do it, and that she (Sally Phillips) was causing all the trouble; that she saw deceased a few minutes before she died, and that the skin on her face was black and the lips discolored; that she was at Clay Barbour's house the day deceased was buried; that defendant stayed there that day, and did not go where deceased lay a corpse, and did not attend the burial of his wife; that after deceased was dead she had dough on her hands, as if she had been getting breakfast; that defendant sat out in the yard a while, and then went away, and that she did not see him any more until she saw him at Clay Barbour's. William Smedley, constable of the county, testified for the commonwealth that on Thursday before deceased died the defendant told him that, if any warrant was issued for him, he could not arrest him. Defendant objected to this evidence, but the court overruled the objection, and he excepted. Plaintiff's counsel then asked the witness if defendant was in any other trouble, or if there were any other charges against him, and witness answered, "No." The commonwealth then introduced William Elliott, who stated that on the Thursday referred to defendant asked him what he thought of a man who had two women, and said, "I have two," and went towards Smedley's house. Defendant objected to all this witness' evidence, the court overruled his objection, and he excepted. Powell Wright, a witness for the commonwealth, said that about the 26th day of December, 1895, Clay Barbour left a clock and vial of liquid at his house, and that defendant came and got the clock and liquid; that defendant said "that strychnine was in the bottle." Defendant objected to this evidence, the court overruled the objection, and defendant excepted. William Morris, for the commonwealth, testified to substantially the same facts as did Wright, to which the defendant objected, the court overruled the objection, and he excepted. Laban T. Carey testified to substantially the same facts as did Henry Brown. Turner Crosthwait was introduced as a witness for the commonwealth, who stated that in September, 1895, he was in defendant's house, and deceased was not at home; that he saw defendant and Sally

Phillips lying across the bed; that Sally was a sister of defendant's wife, and was about 16 years old. Defendant objected to this testimony, but the court overruled his objection, and he excepted. Witness also stated that defendant left the corpse, and never returned, and did not attend the burial, and that he left the country with Sally Phillips the night of the day deceased was buried. Samuel Phillips testified for the commonwealth that he was the father of the deceased and Sally Phillips; that by his permission Sally went to live with defendant and deceased; that defendant and Sally left the country together on the night that deceased was buried, and were found in March, 1897, at Mt. Sterling, Ky.; that defendant was not at home on the day his wife lay a corpse, and did not attend her burial. The commonwealth then introduced Dr. Logan, who testified that he was a regular practicing physician; that jerking and contracting of the muscles just before death, and discoloration of the skin after death, were symptoms of poisoning.

As we read the record, there is no proof which supports the charge, which is the basis of the prosecution, "that defendant procured for, and administered strychnine to, the deceased." The only testimony as to the procurement of this drug by appellant is that of Powell Wright, who says that on the 26th day of December, 1895, appellant got a clock and a bottle of strychnine at his house, which had been left there for him by one Clay Barbour. This was more than a year before the death of his wife, and there is no proof that the defendant ever had any other strychnine in his possession. There is not a particle of evidence which tends to show that this drug was procured for his wife, or that it was administered to her. On the contrary, the evidence shows very plainly that the deceased voluntarily took strychnine for the avowed purpose of terminating her life. She told the witnesses Henry Brown, his wife, and Mrs. Carey on the night preceding her death (at Brown's house) that she had taken strychnine. Felt no bad effects from it. That she had more, and would take it "if that dose does not prove fatal." And she informed them, almost in the moment of dissolution, that they might think that she might be sorry for what she had done, but that she was not; and she said to defendant, in their presence, "Take good care of Sally and the children." Mrs. Utterback, another witness for the commonwealth, states that she saw deceased a few days before she died; that she told her that her troubles were more than she could bear; and that she (deceased) had begged defendant to send Sally Phillips home, but that he would not do it, and that she (Sally Phillips) was causing all the trouble.

The testimony undoubtedly does show that the defendant was carrying on an illicit liaison with his sister-in-law in his own house,

and that his brutal and criminal conduct in this connection had rendered his wife so unhappy and desperate that she was willing to take her own life to escape from her mortifying and degrading surroundings; but he cannot be tried or convicted under this indictment for his conduct in that connection, no matter how reprehensible it may have been. While this court will not reverse a criminal case where the only error complained of is that the proof was not sufficient to support the judgment, if there is any evidence which tends to establish the guilt of defendant of the offense charged in the indictment, yet it cannot uphold a verdict and judgment where not alone is there no evidence to convict the defendant of the offense with which he stands charged in the indictment, but where the proof on which the commonwealth relies to convict clearly shows that the death of the party whom he is accused of murdering was produced by her own voluntary act. The trial court erred in overruling the motion for a peremptory instruction to find the defendant not guilty. For the reasons indicated the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

#### BRYANT v. COMMONWEALTH.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 27, 1898.)

#### OBTAINING PROPERTY UNDER FALSE PRETENSES—INDICTMENT.

An indictment for obtaining property under false pretenses must allege that the person from whom the property was obtained would not have parted with it but for the alleged false pretenses.

Appeal from circuit court, Breathitt county.  
"To be officially reported."

Kenis Bryant was convicted of the offense of obtaining money and property under false pretenses, and appeals. Reversed.

J. J. C. Bach and R. A. Hurst, for appellant. W. S. Taylor and M. H. Thatcher, for the Commonwealth.

GUFFY, J. The appellant was indicted, tried, and convicted in the Breathitt circuit court upon an indictment charging him with the crime of obtaining money and property under false pretenses, and, his motion for a new trial having been overruled, he prosecutes this appeal. Several questions are raised which we deem unnecessary to decide, for the reason that the judgment must be reversed on account of error of the court below in overruling the demurrer to the indictment. The indictment reads as follows: "Breathitt Circuit Court. The Commonwealth of Kentucky against Kenis Bryant. Indictment. The grand jury of Breathitt county, in the name and by the authority of the com-

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

monwealth of Kentucky, accuse Kenis Bryant of the crime of obtaining money and property under false pretenses, committed as follows: The said defendant, Kenis Bryant, on the 9th day of June, 1898, in the county and circuit aforesaid, did, unlawfully, willfully, feloniously, falsely, and fraudulently, represent to Jake Terry that Dr. B. H. Oliver, of Lee county, owed him (\$110) one hundred and ten dollars on a note for purchase money on land, and that he would collect it soon; upon said representation procured from the said Terry one pair of shoes and one hat and other goods of the value of about \$4. The said statement that the said Oliver owed him \$110 on note was false, and known by said Bryant to be false at the time it was made, and was made for the false and fraudulent purpose of defrauding the said Terry. The said Oliver, at the time said statement was made by the deft., did not owe the said Bryant one cent or other sum on any note, and the deft. well knew that he did not,—contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the commonwealth of Kentucky.” It will be observed from the reading of the indictment that it nowhere alleges that Terry, the complaining witness, believed or relied upon the representations alleged to have been made by the appellant, nor that he would not have parted with the goods except for the representations so made by appellant. It appears from this record that appellant purchased \$3.90 worth of goods from Terry, and he paid \$2 of it within the time in which he agreed to pay the same, but that \$1.90 remained unpaid at the time of the finding of the indictment. But it is not necessary to consider or discuss the evidence introduced, because the indictment was fatally defective in failing to clearly and specifically allege that the party who parted with his goods or gave the credit relied upon the representations, and but for said statements would not have extended credit or parted with his goods, or similar allegations. The judgment of the court below is therefore reversed, and cause remanded, with directions to the court below to sustain the demurrer to the indictment, and for proceedings consistent herewith.

# FIDELITY & DEPOSIT CO. OF MARYLAND v. COMMONWEALTH.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 26, 1898.)

SHERIFFS—ADDITIONAL COUNTY LEVY BOND—COUNTY FISCAL COURT—RELEASE OF SURETY.

1. Under Ky. St. § 4134, which provides that the county court may require the sheriff to give an additional bond when it may deem the interest of the state or county demands, and that a surety in such bond is liable for any default of the sheriff during the term cov-

ered by it, whether the liability accrued before or after its execution, the county court may require the sheriff to give an additional county levy bond, and the surety therein will be liable for the county levy for the year, though collected before the execution of the bond. Nor is it necessary that the order of the county court should state that the bond is an additional one.

2. Act Oct. 17, 1892, creating a fiscal court in the several counties of the commonwealth, did not repeal Ky. St. § 1884, part of act of April 18, 1892, providing for the execution of a county levy bond by the sheriff.

3. The rule that one who, in taking a bond from a surety, conceals from him facts which increase his risk, is guilty of fraud, which will release the surety, does not apply to public officers.

Appeal from circuit court, Bracken county. “To be officially reported.”

Action by commonwealth of Kentucky, for use of Bracken county, against the Fidelity & Deposit Company of Maryland, on a sheriff's county levy bond. Judgment for plaintiff, and defendant appeals. Affirmed.

A. M. J. Cochran, for appellant. Thomas H. Hines, for the Commonwealth.

PAYNTER, J. At the November election in 1894, Thomas Sheehy was elected sheriff of Bracken county; and on the first Monday in January, 1895, he took the oath of office and executed the bond required by law. On June 6, 1895, Sheehy, as sheriff and collector of the county levy for the year 1895, executed a bond to faithfully perform his duties as such; and on this bond the appellant, Fidelity & Deposit Company of Maryland, was accepted as surety. It appearing that he was indebted to the county on account of his collection of the county levy for the year named, this action was brought on the bond. The appellant seeks to avoid its liability on the bond upon grounds as follows: (1) That the county court was not authorized to accept the bond which Sheehy executed with it as surety; (2) that he was sheriff of the county during the years 1893-94, and defaulted in the payment of certain sums to the county, and as the county judge knew this fact, and failed to notify it, his conduct was a fraud upon its rights, which invalidated the bond.

This bond was executed under section 1884, Ky. St. (Act April 18, 1892), which requires a sheriff or other officer who may collect the county levy, before he proceeds to do so, to execute a bond to the commonwealth of Kentucky, in the county court, in a sum equal to double the amount of taxes likely to come into his hands, for a faithful performance of his duty, and to pay over in due time to the proper party, as directed by the court, all moneys collected by him. It appears that some, if not all, of the money for which this action was brought, had been collected previous to the execution of this bond. It was, however, part of the county levy for the year 1895. Under the rulings of this court, previous to the enactment of the statute now in force, probably there could have been no re-

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.



covery on the bond which the appellant signed as surety. The general assembly seems to have desired to provide against such contingencies; so it incorporated in the revenue law of the state section 4134, Ky. St. (Act Nov. 11, 1892), which reads as follows: "The county court may require the sheriff to give an additional bond or bonds, with good surety, to be approved by the county court, whenever it may deem the interest of the state or county demands; and the sureties on all the bonds executed by the sheriff shall be jointly and severally liable for any default of the sheriff during the term in which said bond may be executed, whether the liability accrued before or after the execution of such bond or bonds." Under this section the county court has the power to require the sheriff to give an additional bond, with good surety, whenever it may deem the interest of the state or county requires it; and a surety in such bond is liable for any default of the sheriff during the term covered by it, whether the liability accrued before or after its execution. The failure of the order of the county court to state that the bond was an additional one is wholly immaterial. Sheehy had executed a bond for the faithful discharge of his duties as sheriff, and, in fact and law, this was an additional bond, and was to protect the county in case he, as collector of the county levy, collected and failed to pay it over on the order of the county court, and also embraces any sum or sums which he may have collected on that account for the year 1895, previous to the execution of the bond.

It is claimed that the act approved October 17, 1892, repealed so much of the act of April 18, 1892, as is embraced in section 1884, Ky. St., and therefore there was no law authorizing the execution of the bond upon which this action was brought. The act of October 17, 1892 (Acts 1891-93, p. 268), is an act "creating a fiscal court in the several counties of this commonwealth." It makes no reference whatever to the act of April 18, 1892; neither does it make any provision whatever for the execution, by the sheriff, of a bond for the collection of the county levy. We are of the opinion that it does not repeal that part of it which is section 1884, Ky. St. The bond required of a sheriff under section 4556, Ky. St., may be denominated his "official bond"; that under section 4133, his "revenue bond"; and that under section 1884, his "county levy bond."

To sustain the second proposition, counsel for appellant relies upon that principle of law which is to the effect, if a party taking a guaranty from a surety conceals from him facts which go to increase his risk, and suffers him to enter into a contract under false impressions as to the real state of facts, such concealment will amount to a fraud, because the party is bound to make the disclosure; and the omission to make it under such circumstances is equivalent to an af-

firmation that the facts do not exist. This principle of law is applicable to transactions between individuals, and between individuals and corporations, but does not apply to public officials. This is the effect of *Com. v. Tate*, 89 Ky. 587, 13 S. W. 113; *Wade v. City of Mt. Sterling (Ky.)* 33 S. W. 1113. The judgment is affirmed.

#### UNDERWOOD'S ADM'R et al. v. CARTWRIGHT.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 26, 1898.)

EXECUTORS AND ADMINISTRATORS—SALE OF LAND SUBJECT TO LIEN—IRREGULARITY IN DECREE—GROUND OF EXCEPTION TO SALE.

1. In an action to sell land to pay the debts of a decedent, it was error to adjudge a sale "subject" to a mortgage lien, but, the lienholder being a party, the sale should have been adjudged to satisfy the lien.

2. Where a judgment for the sale of land to satisfy a mortgage lien and to pay debts of the deceased owner failed to fix the terms and conditions of the sale, as required by Civ. Code, § 696, and the price was grossly inadequate, the sale should have been set aside on exceptions.

3. The fact that a former judgment for the sale of the land which was ignored by the court and the parties fixed the terms and conditions of the sale did not dispense with such provisions in the judgment under which the sale was made.

Appeal from circuit court, Warren county. "Not to be officially reported."

Action by Eugene Underwood's administrator to settle the estate of his intestate, and to sell lands to pay debts. Judgment confirming sale, at which H. B. Cartwright became the purchaser, and plaintiff and the widow of the intestate appeal. Reversed.

Mitchell & Du Bose, for appellants. Lewis McQuown, Sims & Covington, and McQuown & Rodes, for appellee.

HAZELRIGG, J. This suit was brought to settle the estate of Eugene Underwood; and, for the purpose of paying debts, it was alleged to be necessary to sell a quantity of real estate belonging to the deceased. The home tract, consisting of 518 acres, was incumbered with a mortgage for some \$10,000. It was valued by the master commissioner, and others acting with him to value it, at the sum of \$20,700, and its assessment for purposes of taxation was even higher than that. In 1894, a judgment was entered directing that the widow's dower be allotted to her out of this home tract; and accordingly she was given 250 acres thereof, including the dwelling house. The remainder of the tract, 268 acres, was adjudged, in October, 1894, to be sold subject to the lien of the mortgagor. This allotment was evidently made to the widow out of this tract, instead of out of other lands of the deceased, because of her belief, and that of all the par-

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

dies, perhaps, that the 268 acres would sell for enough to pay off the mortgage debt. It may be noticed here that, as the lienholder was a party to the suit, the sale should have been adjudged outright to satisfy this lien. Civ. Code, § 694.

No steps were taken to execute the judgment, however; and in March, 1896, the mortgagor was adjudged to have a superior lien on the whole tract, and the 268 acres were ordered "sold," as expressed in the judgment, "by master commissioner, and, for proceeds of said sale, he will take bonds payable to said trust company, to the extent of its said debt, interest, and costs; and, if said 268 acres should bring more than said debt, for the excess he will take bond payable to himself for the use of whomsoever the court may direct; but, if said 268 acres should fail to bring enough to pay the said debt due said trust company, the commissioner will sell so much of said 250 acres as will be necessary to pay said debt." Under this judgment, confessedly incomplete and defective, in not fixing the terms and conditions of the sale as required by law, the master sold the 518 acres at the price of \$11,543, to appellee, Cartwright, his bid being \$4,000 for the 268 acres and \$7,543 for the dower tract, with a few acres off. The last valuation of these tracts was \$5,360 for the 268 acres, and \$10,000 for the dower tract. Various exceptions were filed to the report of sale, but, on final hearing, they were overruled, the sale confirmed, and this appeal, by the widow and the administrator, W. T. Underwood, results.

The Code (section 696) provides that "every sale made under an order of court must be public, upon reasonable credits to be fixed by the court, not less, however, than three months for personal nor six months for real property; and shall be made after such notice of the time, place, and terms of sale as the order may direct; and unless the order direct otherwise, shall be at the door of the courthouse of the county," etc. The judgment of sale is, as we have seen, at least irregular and defective, and the price grossly inadequate. Under these circumstances, we think it should have been set aside on exceptions.

It is contended that the judgment of March, 1896, only purported to be a supplemental or modified judgment, and that the judgments of October, 1894, and of March, 1896, are at least, but one judgment, and, as the terms of sale are set out in the first judgment, the last one need not have done so. But we do not find that the terms and conditions of the sale of the 250 acres were in fact set out in the judgment of October, 1894; and, so far as that judgment applied to the 268 acres, the court and the parties seem to have ignored it entirely, doubtless because it ought never to have been rendered. In *Vanmeter v. Vanmeter's Assignee*, 88 Ky. 451, 11 S. W. 80, 289, it is said: "The terms and manner of sale being regulated by statute, the court should correct the error before confirmation,

if objections are interposed, and an injury results to the debtor. \* \* \* There may be such an irregularity in the proceedings, connected with the inadequacy of price, as will require the chancellor to interpose." We think the case at hand comes within the principles there laid down. The judgment of March, 1896, is only defective in omitting to comply with the provisions of the Code; and this omission may be supplied on a return of the case, by a judgment giving the necessary directions to the commissioner as to the time, place, and terms of sale. For the reasons given, the judgment confirming the sale is reversed, to the end that another sale may be ordered if still necessary, and other proceedings had in conformity with this opinion.

### SHIRLEY v. STEPHENSON.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 20, 1898.)

#### USURY—CHANGE OF PAYEE OF NOTE—PLEADING CONCLUSION.

1. The change of the payee in a note is not a payment of usury embraced therein, though the parties go through the form of passing checks.

2. The averment that the debt for which a note was given is the same debt for which a prior note was given, is not a mere conclusion.

Appeal from circuit court, Washington county.

"To be officially reported."

Action by Mrs. A. T. Stephenson against John W. Shirley to recover judgment on a promissory note to enforce a mortgage lien. Judgment for plaintiff, and defendant appeals. Reversed.

T. L. Edelen, W. E. Selecman, and John W. Lewis, for appellant. W. C. McChord and W. W. Stephenson, for appellee.

HAZELRIGG, J. To the suit of appellee, Mrs. A. T. Stephenson, on a promissory note for the sum of \$2,700, dated December 28, 1893, due in one year, and secured by a mortgage on his lands, the appellant answered that to the extent of \$1,553.33 thereof the note was without any consideration. It further develops, according to the averments of the answer, that in January, 1875, appellant borrowed from Dr. A. T. Stephenson, the husband of the appellee, Mrs. Stephenson, the sum of \$1,000, and in January, 1876, paid him on the note executed for the loan, \$100, and a like sum in January, 1877; also in January, 1878, \$80, and a like sum in January of the years 1879, 1880, and 1881. In November, 1881, he paid him the sum of \$68.85, when there was due on the note the sum of \$779.07. At the last-named date appellant borrowed of Dr. Stephenson the further sum of \$2,000, and executed to him his three notes therefor of

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

\$1,000 each; and it is averred that the sum of \$220.93, embraced in these notes, was for usurious interest. It is further averred that on the date—November, 1881—appellant conveyed his farm, the same was covered by appellant's mortgage, in Washington county, to Dr. Stephenson, who immediately reconveyed it to appellant, reciting in this reconveyance that the notes held by him represented the purchase price of the land, whereas the transfer of title was purely fictitious, and gotten up to afford a safeguard against any claim of usury. He further alleges that, being then in debt to Dr. Stephenson in the sum of \$2,779.07, he paid on the debt the sum of \$242 in December or November of each of the years from 1882 to 1889, inclusive, and on December 30, 1889, he paid the sum of \$503.77; that in December, 1890, he paid \$201.05, and in December of each of the years 1891 and 1892 the sum of \$200; and in December, 1893, the sum of \$225.50. He avers that by applying these payments first to the extinguishment of legal interest, and the residue to the satisfaction of the principal of the debt, there would be due on the debt on December 28, 1893, when he executed his note to the appellee, Mrs. Stephenson, the sum of \$1,146.67, and that the note sued on by appellee should have been for that sum only. The appellant then recites that during the lapse of time mentioned Dr. Stephenson had the notes changed and renewed in different forms; that in 1887 he caused appellant to execute his notes to his minor daughters, then single, and members of his family, but no money was passed, and the new notes represented the same old debt, the change in the payees being made for the purpose of defrauding appellant, and defeating any claim of usurious interest he might make. Appellant then proceeds further to aver that the notes and debt were again changed when the note sued on was executed in December, 1893, and then made payable to appellee, Mrs. A. T. Stephenson, wife of Dr. Stephenson; that he had no business transactions with Mrs. Stephenson, nor owed her any money; that the note executed to her as payee was the same old debt, which had long been standing between Dr. Stephenson and himself, and the change was made for the purpose of defrauding him out of the usurious interest paid thereon; and all these changes were made at the instigation of Dr. Stephenson for the purpose indicated. For reply, the appellee averred a want of knowledge or information on which to form a belief as to the existence of the various transactions alleged to have occurred between appellant and her husband, and she avers that the notes held by her husband on appellant were land notes, and so recited on their face; that these notes the appellant paid off with money borrowed by him from his daughters; and she denied that the alleged changes were made to avoid the plea of usury. She also denied that the debt of which the note sued

on is evidence was the same old debt which had been of long standing between appellant and her husband, and denied that appellant had no business transactions with her, or that he owed her no amount, or that the debt sued on was a renewal of the obligation to Dr. Stephenson, and made for the purpose indicated. She averred that the old transactions had no connection whatever with the new, and that she loaned to appellant the money for which the note was executed. As proof that she so loaned him the money, and as we view the pleading in support of her averment to that effect, she further set out that she paid appellant the money so loaned him, viz. \$2,767.25, by a check on the First National Bank of Harrodsburg, Ky., and which check was indorsed and collected by appellant; and she avers that on the same day he received the check, and had it placed to his credit at the bank on which it was drawn, he paid out the money to the three daughters in payment of the notes they held on him. And she filed with her pleading the check she alleged she had given appellant, and the three checks he had at the same time given her daughters. By his rejoinder the appellant again denies that the three notes originally held by Dr. Stephenson on him for \$1,000 each were for purchase money on land, or that they were ever paid off, save as set out in his answer. He denies that he borrowed \$3,000 from the three daughters, or any part thereof, and avers that the said transaction is fully set out in his answer. He denies that he borrowed of the appellee \$2,767.25, or any part of it. And, in explanation of the facts set up in the appellee's reply with respect to the checks, he says that it is true that on the day of the execution of the note to appellee he met the son of the appellee and of Dr. Stephenson, and the brother of the three daughters, and who was a practicing attorney at law, and as such had been managing this business for many years, and that at said Stephenson's instance, and, indeed, upon his threats of instituting suit, he did indorse his name across the back of a check which appeared to have been drawn by appellee, Mrs. Stephenson, though in fact it was not drawn by her; and under the same restraint he did sign his name to three checks, copies of which he supposes are on file; but he did this under restraint, being embarrassed with debts, and to prevent said attorney from instituting suit on the notes the attorney held on him in the name of the three sisters, and was then induced to sign the note sued on, and indorse the check of appellee, which the attorney then produced. He avers that this was only a scheme concocted by the attorney for the purpose of covering up the usury already set out in his answer; that this was but another continuation and renewal of the debt begun in 1875 with Dr. A. T. Stephenson. He denies that he collected the check which appeared to have been drawn by appellee, and

merely indorsed it, and delivered it back to the attorney who had brought it to him at the same time he delivered to him the three checks on file; that, if the check of appellee was ever placed to his credit, it was done by the attorney, and at the attorney's instance, and that appellant did not cause it to be placed to his credit. In an amended rejoinder he reiterates that he in fact borrowed no money from appellee, Mrs. Stephenson. He again denies that there is any consideration for the note sued on, except he admits he owes Dr. Stephenson the sum of \$1,146.67. He denies that he collected the check, which was apparently drawn in the name of appellee, or got any benefit therefrom, except to prevent a suit against him, as fully explained in his rejoinder; and prays as in his answer, etc. Demurrers were sustained to the original and amended rejoinders, and over the objection of appellant the motion for appellee to submit for judgment was sustained, and judgment rendered for the debt sued on, and for a sale of the land.

It is well settled that the mere change of the payee in a note, or even of a part of the obligors, is not a payment of the usury, if any is embraced in it; and that to the extent that usury is embraced in a debt, and so long as it may be traced, the new obligation made to a new payee, and given in discharge of the old indebtedness, is without consideration. *Fitzpatrick v. Apperson's Ex'rs*, 79 Ky. 272; *Kendall v. Crouch*, 88 Ky. 200, 11 S. W. 587. On these principles it is clear that, the debt being the same, the mere change in the name of the obligees of the notes executed by appellant first to Dr. A. T. Stephenson, then to his minor children, and lastly to his wife, does not operate as a novation or payment of any usury with which the notes at any stage of their existence may have been tainted. And this is true notwithstanding the daughters may have in fact gone through the form of furnishing the cash to appellant when their father's name was dropped as payee and theirs substituted, unless, indeed, the transaction was in good faith, and in fact a loan of money to the appellant. And so, if the name of the wife be merely substituted as payee in an old obligation, which represents the same old debt due to her husband, the usury in the old obligation must still be extracted, even if the form of passing checks be gone through with. That the debt sued on is the same old debt, which originated in 1875 and in 1881, is reiterated again and again by the appellant in his answer and in his subsequent pleadings. This averment is not a mere conclusion. A debt is as susceptible of identity as any other given quantity. It is a matter of fact whether a debt, as evidenced by a certain form of writing, is the same debt as may be evidenced by another form. And the averment on that behalf is as susceptible of proof as is the averment that the horse John rode to town is the same horse that he rode home. This

oft-repeated averment of the appellant that the debt sued on is the same that originated with Dr. Stephenson, and is still due him, is not necessarily refuted by the facts that certain papers, checks, and even cash, passed between the obligor and the new obligees. The question is, were these papers or checks passed in the course of a genuine and real transaction, or were they mere shadows and forms, lacking real substance? The averment on the part of appellee is that she in fact and in truth loaned appellant certain money, and to prove it she produces a check signed by him and indorsed by appellant. The appellant denies that she in fact loaned him a dollar, and avers that at the instance of appellee's attorney he did indorse a check, apparently signed by appellee, which he delivered back to appellee's attorney; and at the instance of the same attorney he did sign certain checks, and also delivered them to the attorney. Still no money passed, and the transaction was a mere form, meaning nothing to appellant. He did sign the note to the new obligee, Mrs. A. T. Stephenson, and still no money passed, and, so far as he was concerned, he avers "this was but another continuation and renewal of the debt begun in 1875 with Dr. A. T. Stephenson." It seems to us the answer presents an issue of fact which is not avoided by the statements of the reply. The issue remained, and, moreover, to whatever extent it may be supposed the reply avoided the averments of the answer, the rejoinder and amended rejoinder in turn made good the original plea of the appellant by attacking the genuineness of the avoiding facts, and averring them to be mere attempts to cover up the vice of the original transaction. The demurrers to the rejoinders should have been overruled, and opportunity given the appellant to make good the issues tendered by him. The judgment is reversed for proceedings consistent herewith.

# LOUISVILLE & N. R. CO. v. SCHMIDT et al.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 27, 1898.)

## APPEAL—AFFIRMANCE AS DELAY CASE—DAMAGES.

1. In determining whether a judgment should be affirmed as a delay case the court is confined to an examination of the record, and cannot consider the statement of counsel that he intends to take the case to the United States supreme court.

2. On the affirmance of a superseded judgment directing the payment of money into court, 10 per cent. damages will be awarded, the judgment being a personal one, upon which the court might order an execution to issue.

Appeal from circuit court, Jefferson county.  
"To be officially reported."

Action by A. L. Schmidt and others against the Louisville, Cincinnati & Lexington Rail-

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

way Company. Judgment ordering the Louisville & Nashville Railroad Company to pay money into court in satisfaction of a judgment against the defendant. The Louisville & Nashville Railroad Company appeals. Affirmed.

Helm & Bruce, for appellant. Simrall, Bodley & Doolan and Pirtle & Trabue, for appellees.

**DU RELLE, J.** The facts appearing in this record are fully stated in the opinions delivered by this court upon former appeals. Since the last opinion (44 S. W. 130), the circuit court, in obedience to the mandate of this court, has set aside its judgment, and, upon the affidavit which had, before the appeal, been filed as the basis for a rule, has awarded a rule against appellant company to show cause why it should not be compelled to pay into court the amount of the judgment rendered against the Louisville, Cincinnati & Lexington Railway Company. Appellees also asked an order referring the case to the commissioner, to ascertain the amount of net earnings made by the appellant's railroad, the Louisville, Cincinnati & Lexington Railway, on business coming to it from and over the Northern Division of the Cumberland & Ohio Railroad. To the rule awarded against it appellant responded that it was not a party to the suit; that there had been no time since the institution of the suit when appellant could, with propriety, have filed an answer setting up its defense against appellees' claim; that it was entitled to deduct from the amount of the judgment the amount of certain coupons held by it, without, however, stating to what bonds such coupons had been attached, or by whom they had been issued or executed; and averred knowledge on the part of the appellees of the sale to appellant by the Louisville, Cincinnati & Lexington Railway Company of all its property and rights, except its franchise, before the original institution of this suit. The affidavit filed prior to the last appeal, and an additional affidavit showing that the appellant company had received already credit for a part of the coupons set up in its response, were read upon the hearing of the rule and response. The circuit court made the rule absolute, and ordered the appellant company to pay into court the amount of the judgment, subject to certain credits on account of coupons not before credited. The case is now before us upon motion by appellees to affirm as a delay case, and for damages.

It is conceded by counsel for appellant that the decision of the circuit court is in full accord with the mandate and opinion of this court upon the last appeal; but it is urged by counsel that they are in good faith prosecuting the appeal for the purpose of remov-

ing the case by writ of error to the supreme court of the United States, in the belief that a reversal may be there had upon a federal question, namely, that appellant's property is being taken from it without due process of law. It is urged that, unless the court believes the appeal to be prosecuted for delay merely, it cannot exercise the statutory right to affirm as a delay case, and that this court should not exercise that right if it believes that appellant intends in good faith to take the case by writ of error to the supreme court. In answer to this it may be said that, in determining whether an appeal was taken for delay merely, we are confined to an examination of the record before us; and when that record, as in the case at bar, discloses that the judgment appealed from has been rendered in obedience to, and is in full accord with, the opinion by this court upon a former appeal, and so conceded by counsel for appellant, there is no escape from the conclusion that the appeal is, within the meaning of the statute, for delay merely. Were this not so, no case could ever be affirmed as a delay case, unless appellant admitted that the appeal was taken for delay merely. Upon such a motion we cannot consider counsel's statement as to their or their client's intention.

Upon the question of damages upon the supersedeas counsel has referred us to a number of cases in which damages were refused, both by the superior court and this court, upon the affirmance of judgments superseded. Without exception, those cases are cases of contest over a fund in court, or judgments adjudging liens for certain amounts of money, and ordering sales of property to satisfy same. Counsel seeks to establish an analogy between those cases and the case at bar, and calls attention to the fact that in the last opinion (44 S. W. 130), this court held it unnecessary to decide whether, upon the averments of the original petition, a personal judgment could have been rendered against the Louisville & Nashville Railroad Company had it been a nominal defendant, and to the statement therein contained that the proceeding was one essentially "in rem, to subject to appellant's claim the net profits made on business coming to the line of the Louisville, Cincinnati & Lexington Railway Company from and over the Cumberland & Ohio." While this is true, yet the proceeding to compel the payment of the fund into court by the appellant company is essentially personal against it, and a judgment to be enforced by rule, directing appellant to pay the amount of the judgment into court, is, in our opinion, essentially a personal judgment, upon which the court might have ordered execution to issue. We are therefore of opinion that the judgment must be affirmed as a delay case, with damages.

**ÆTNA LIFE INS. CO. v. CURLEY'S ADM'R.<sup>1</sup>**

(Court of Appeals of Kentucky. Oct. 21, 1898.)

**LIFE INSURANCE—WAIVER OF PROMPT PAYMENT OF PREMIUM.**

Where the payment of a premium is dispensed with pending negotiations for a change in the policy, and the premium is tendered as soon as the negotiations fail, the policy is not forfeited.

Appeal from circuit court, Jefferson county. "Not to be officially reported."

Action by Andrew Curley's administrator against the Ætina Life Insurance Company on a policy of life insurance. Judgment for plaintiff, and defendant appeals. Affirmed.

Grubbs & Morancy, for appellant. O. A. Wehle, for appellee.

WHITE, J. This action was brought by appellee, the administrator of Andrew Curley, to recover on a policy of life insurance. The petition alleges that on 17th of February, 1890, appellant issued its policy of insurance on the life of Andrew Curley, in consideration of the payment by him of a certain annual premium; that this annual premium was paid annually in the years up to 1894, and that before the premium became due in February, 1895, the deceased and appellant entered into negotiations for the issuance of another policy, on another plan, in lieu of the one sued on, and that said negotiations were protracted for some time, and finally failed, and that, as soon as the negotiations failed and the deceased was notified, he offered to pay the premium due for February, 1895, but this offer was declined, the appellant refusing to accept the premium; that in May, 1895, Curley died; and that proper proofs of the death were furnished, and payment of the policy demanded. The answer pleaded a forfeiture for nonpayment of premium; denied the negotiations for another policy, or any waiver of the forfeiture for nonpayment of the annual premium when due; and denied that, as soon as the negotiations failed and Curley was notified, he tendered the annual premium; and denied that Curley died during the existence of the contract, but alleged that it had ceased at his death. On this issue of the waiver of appellant of the payment of the annual premium when due, and of its tender during the lifetime of Curley, the case was tried by jury, and their verdict was for appellee. This verdict was set aside, and a new trial granted and had, and, on the same testimony, the same verdict was rendered. After motion for new trial was overruled, this appeal is taken.

The court submitted to the jury on the trial the single question whether the payment of the premium due February 17, 1895, was excused or dispensed with pending negotiations for a change in the policy, and plainly

told the jury in the instructions that if this payment was dispensed with pending the negotiations, if any there were, and afterwards tendered, they should find for appellee, but, if the jury should not believe the payment was excused or dispensed with, they should find for defendant (appellant). These instructions fairly and fully presented the only issue in the case, and we find no objection to either. We are not prepared to say that the verdict is flagrantly against the evidence, and, unless we should so hold, the verdict could not be set aside by us, there being no error in the instructions. Finding no error, the judgment is affirmed, with damages.

**RUSH v. COMMONWEALTH.<sup>1</sup>**

(Court of Appeals of Kentucky. Oct. 11, 1898.)

**INDICTMENT—DISMISSAL AS TO ONE OF TWO DEFENDANTS—INTOXICATING LIQUORS—SUFFICIENCY OF EVIDENCE.**

1. One of two defendants jointly indicted for selling liquor without license cannot complain of the dismissal of the indictment as to the other.

2. Under an indictment for selling spirituous liquors without license, evidence that defendant sold a liquid of red coffee color, labeled "Dr. Anderson's Bitters," which the buyer thought "tasted or smelt like whisky," though he did not think there were any spirituous liquors in it, is sufficient to sustain a conviction.

Appeal from circuit court, Hart county.

"Not to be officially reported."

John Rush was convicted of the offense of selling spirituous liquors without a license, and appeals. Affirmed.

Martin & James and H. L. James, for appellant. W. S. Taylor, for appellee.

WHITE, J. The appellant, John Rush, was indicted by the grand jury of Hart county upon a charge of selling spirituous liquors in Hart county without a license, and after a special act of the general assembly prohibiting the sale of spirituous liquors had, by vote of the people, been adopted therein. The indictment as returned charged appellant and another with the sale to a certain party. Upon demurrer being entered, the attorney for the commonwealth elected to prosecute the appellant alone for the offense charged, and dismissed the indictment as to the other defendant therein. The court then overruled the demurrer.

This action of the court is assigned by counsel as error. The indictment in form is proper, and direct and certain, so as to put the accused upon notice as to the charge as well as to bar another indictment for the same offense. The fact that the charge is made that both appellant and another committed the offense by making the sale does not compel the prosecution to prove that both are guilty jointly, but is like any other crime

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

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charged to two,—either may be convicted without the other. The attorney for the commonwealth had a perfect right, if he had sufficient reason so to do, to dismiss as to one and try as to the other. For the misdemeanors, if an accused be guilty at all, it is as principal, and his conviction does not depend on the conviction of another.

There are other questions presented in this record, but they are fully considered and discussed in the case of this same style (*infra*), and by agreement heard and considered together.

Appellant insists that a reversal must be had for the reason that there is no proof to sustain a conviction. The testimony of the prosecuting witness, as it appears in the bill of exception, reads: "I know the defendant, John Rush, and purchased a bottle of bitters some time during the month of December last year, for which I paid him twenty-five cents. If there was any spirituous, vinous, or malt liquors in it, it was whisky. I do not think there was any whisky in it. It was rather a red coffee color, and was labeled 'Doctor Anderson's Bitters.' The label had the direction on it, which was, 'Take from a tablespoonful to a wineglassful every three hours.' I did not take it according to directions. I do not know whether it would make a person drunk or not. I am sure it would make him sick if he drank enough of it. I never got drunk on it. It was in Munfordville, Hart county. I did not see any jugs or beer boxes in there. I did not see any sugar or glasses. He kept Bologna sausage, and candy, etc. I bought it for bitters and drank it for bitters. Do not think there was any spirituous liquors in it. Thought it tasted or smelt like whisky." From this we think the jury concluded it was whisky, or a mixture thereof, and their verdict and the judgment thereon is affirmed, as we perceive no error therein, and as the court has no power to reverse in a criminal case where there is any evidence to sustain the verdict.

#### RUSH v. COMMONWEALTH.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 11, 1898.)

CRIMINAL LAW—REVERSIBLE ERRORS—INTOXICATING LIQUORS—LOCAL OPTION ELECTION—REPEAL OF STATUTE.

1. Under Cr. Code, § 281, providing that the decisions of the court on challenges to the panel and for cause shall not be subject to exceptions, there can be no reversal for error in decisions upon challenges to the panel or for cause.

2. In a prosecution for selling spirituous liquors, it is admissible to prove defendant's declaration that he kept a "blind tiger."

3. Act March 26, 1890, to prohibit the sale of liquor in Hart county, which provides for an election to take the sense of the voters as to the sale of liquor, and provides that the law shall become operative if it appear "that a

majority of the votes cast at said election" are against the sale, became operative by virtue of an election at which a majority of the votes cast on that question were against the sale, though persons voted at the same time for public officers without voting on that question.

4. Act March 15, 1898, prohibiting the sale of any "intoxicating beverage, liquid mixture or decoction" in the local option districts of the state, was intended to fix a penalty for the sale of intoxicating beverages other than spirituous, vinous, or malt liquors, and does not alter the penalty fixed by the local option law for the sale of such liquors.

Appeal from circuit court, Hart county.

"Not to be officially reported."

John Rush was convicted of the offense of unlawfully selling spirituous liquors, and appeals. Affirmed.

Martin & James and H. L. James, for appellant. W. S. Taylor, for the Commonwealth.

WHITE, J. The appellant, John Rush, was indicted by the grand jury of Hart county for the offense of unlawfully selling spirituous liquors in Hart county, against the provisions of a special act of the general assembly, theretofore adopted by a vote of the people, prohibiting the sale of spirituous liquors; the indictment alleging all the necessary facts as to the adoption of the law by the vote. Upon trial appellant was convicted, and his punishment fixed by the jury at a fine of \$100. After motions in arrest of judgment and for new trial had been overruled, he appealed.

On the trial the appellant offered to prove by the poll book of the November election, 1886 (the time when this local option law was submitted to a vote of the people), that there were cast at said election a total number of 2,749 votes, and for the different candidates for state board of equalization 2,429 votes; while the certificate of election on the local option law shows that 1,272 votes were cast in favor of the local option law, or against the sale of liquors, and only 1,155 votes were cast in favor of the sale of liquor, or against the local option law. The court declined to permit this testimony to be introduced, and exceptions were reserved.

The court on the trial gave an instruction, proper in form, if the general local option law in force prior to June, 1898, applies, which stated the penalty to be a fine of from \$100 to \$200. This was excepted to by appellant. It is contended by counsel that this instruction is erroneous, as the law now is; that by the act of March 15, 1898, entitled "An act to prohibit the sale, barter or loan of any intoxicating beverage, liquid mixture or decoction in the local option districts of this state and providing a penalty therefor," the penalty should be a fine of from \$20 to \$100 for all sales of any intoxicating beverage in local option districts, and that this necessarily includes spirituous, vinous, and malt liquors.

On the trial, when the jury had been ac-

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

cepted by the attorney for the commonwealth, counsel for appellant stated to the jury that the defense would be that appellant had sold to the prosecuting witness "Dr. Anderson's Bitters"; that the jurors at this time had tried several cases in which the proof was that the alleged liquor was Dr. Anderson's Bitters; and then asked the jury if any of them had any opinion as to whether Dr. Anderson's Bitters was either spirituous, vinous, or malt liquor, and, if it was this bitters he sold, had they an opinion as to the guilt or innocence of appellant. Thereupon four of the jurors answered they had an opinion as to this. Appellant then challenged these four jurors for this cause, and the court overruled said challenges, and permitted the four jurors to sit and try the case.

The prosecuting witness testified that he called for whisky, and bought and received whisky, of appellant, within the limit of time and jurisdiction. Appellant testified that he sold the witness Dr. Anderson's Bitters, and did not sell him whisky. This was also testified to by two other witnesses introduced by appellant.

The court also permitted the commonwealth, over objection, to prove by a witness, Brown, that appellant, on an application for fire insurance on his house, stated, in answer to a question to him as to what business he was running, "Put it down blind tiger, or anything," and that witness wrote in the application "grocery" as his business.

These several questions are presented for our consideration.

By section 281 of the Criminal Code it is provided: "The decisions of the court upon challenges to the panel, and for cause, upon motions to set aside an indictment, and upon motions for new trial, shall not be subject to exceptions." Under this section, this court in *Terrell v. Com.*, 13 Bush, 246, held that this court has no power to reverse on appeal of either party for error in decisions upon challenges to the panel or for cause. It is clear that section disposes of the question as to the selection of the jury.

We are of opinion that the court did not err in admitting the testimony of the witness Brown as to statements of appellant as to his occupation, as it is well known that a keeper of a "blind tiger," in its general acceptance and understanding, means a person engaged in the unlawful sale of intoxicating beverages, and it is clear, if appellant had said he was engaged in the illegal sale of intoxicating beverages, that proof of such statements would be proper.

It is next insisted that the court erred in refusing to permit appellant to introduce by the county clerk the poll books of the November election, 1886, upon an avowal that the same would show that a total of 2,749 different names appear as voting on that day for the various officers and this question of local option. However, it was admitted that the poll books showed that on the question

of local option there were cast 1,272 in favor of the prohibition, and 1,155 cast as opposed to the law. We are of opinion that in refusing to permit appellant to so prove, if he could have done so, was not error. The certificate of the county canvassers, properly recorded as the act directs, showed that a majority had voted in favor of the law. The act providing for this vote, being chapter 429, Acts 1886 (2 Sess. Acts 1886, p. 1061), provides for an election on this question, and also provides that the law shall become operative, "if it appear from a comparison of the polls that a majority of the votes cast at said election are against the sale," etc. In our opinion, this is equivalent to saying, "voting on said question"; and, where it appears that a clear majority voted against the sale, it is prima facie evidence that the law was adopted, and this cannot be refuted by showing that many citizens voted that day who did not vote on that question. If they desired to remain neutral, and declined to vote on the question, and the law providing that both sides may vote, we think it was clearly intended they might do so. This view of the law is sustained in case of *Jones v. Com.* (decided Oct. 8, 1898, opinion by Paynter, J.) 47 S. W. 328.

It is further insisted that chapter 30 of the Acts of 1898, being now in force, repeals the penalty, or rather reduces the penalty, for the sale of intoxicating liquors in local option precincts, and that the instruction given, though correct when given, is now erroneous, and a reversal must follow. Without discussing the question as to what effect Acts 1898, c. 30, would have on the conviction prior thereto, and legal when the trial was had, we will say that counsel is in error in his position that the act of 1898 repeals the local option law in any particular. We are of opinion that the general assembly intended to, and we so hold they did, in passing chapter 30, declare that to be an offense that theretofore had been no offense or had been doubtful. Under the law as it now stands in regard to the sale of intoxicants in local option districts, a person, if indicted and convicted for the sale of spirituous, vinous, and malt liquors, or mixtures thereof, may be fined in any sum not less than \$100 nor more than \$200; but, if indicted and convicted for selling an intoxicating beverage, liquid mixture, or decoction, his fine would be from \$20 to \$100. It is said that the term "any intoxicating beverage" would certainly and necessarily include spirituous, vinous, and malt liquors, even if the other two terms, "liquid mixture" and "decoction," did not. We do not think it was so intended. The clear meaning and intention of this act was to provide a penalty for the sale in prohibited districts of the various nostrums, bitters, and such like intoxicants sold, and of which it is so difficult to show the ingredients, or whether it comes under the strict definition of spirituous, vinous, or malt liquors,



This act was to embrace all other intoxicants of a liquid nature. We are of opinion that there is evidence sufficient to authorize the verdict, and there was no error in refusing to set it aside and grant a new trial. Wherefore the judgment is affirmed, with damages.

**LOUISVILLE, ST. L. & T. RY. CO. v. TERRY'S ADM'X.<sup>1</sup>**

(Court of Appeals of Kentucky. Oct. 25, 1898.)

**RAILROADS—PRESUMPTION OF NEGLIGENCE—PEREMPTORY INSTRUCTION.**

1. Where there is no testimony for plaintiff tending to show negligence on the part of defendant railroad company, and the testimony of defendant's servants in charge of the train which killed plaintiff's intestate completely negative any negligence on their part, a peremptory instruction should, on defendant's motion, be given at the conclusion of all the evidence.

2. Where a person who was in possession of all his faculties is found dead on a railroad right of way, evidently killed by a train, no presumption of negligence on the part of the railroad company arises, especially where the person killed was a trespasser.

Appeal from circuit court, Daviess county. "Not to be officially reported."

Action by Jerome Terry's administratrix against the Louisville, St. Louis & Texas Railway Company to recover damages for the death of plaintiff's intestate. Verdict and judgment for plaintiff, and defendant appeals. Reversed.

Reuben A. Miller and Helm & Bruce, for appellant. Walker & Slack, for appellee.

WHITE, J. Between sunset and dark on May 17, 1895, Jerome Terry was run over and killed by a train of cars on appellant's road, just east of Worthington station. This action was brought by his administratrix to recover damages for his death. The petition alleges that the death resulted from the negligence of the agents in charge of the train in failing to avoid the injury after the peril of deceased was discovered, or by the exercise of reasonable care should have been discovered. The answer denied all negligence in the agents or employes of appellant, and pleaded contributory negligence in the deceased. The proof in the case, as appears by the bill of exceptions of the trial, shows that on the evening of May 17, 1895, Jerome Terry left Worthington, a small station on appellant's road, situated in Daviess county, going eastward, towards home, walking on the railroad track of appellant. About 10 minutes after Terry left Worthington, a regular freight train came along, going east, following Terry. The next morning, the remains of Terry were found some 350 yards east of the station. He was cut to pieces. His head, limbs, and body were found at different places. Some groceries he had

bought were found near. The place where the body of Terry was found was a level, straight piece of road,—could see for miles both ways,—and just east of a small trestle. No witness testified as to how Terry was killed. No one saw it. It was shown that that neighborhood, though not thickly settled, had used the railroad in going to the station, instead of traveling the public road. The agents of appellant knew of this use, but had not provided any walkway over the trestle, nor had recognized the use as of right, or even permissive. The train that killed Terry was a regular freight train, and was shown by the time card in force to be due at Worthington at 7:25 p. m. The exact time of its arrival on this occasion is in dispute. Some witnesses say it was, in their opinion, ahead of time, while the trainmen say they were a little behind time, passing the station about 7:30 p. m. Terry was shown to have been a stout, hearty young man, 35 years old, and possessing his full faculties of sight and hearing. He had taken a drink or so of liquor that day, but no witness said he was to any great degree, if at all, intoxicated. The engineer, fireman, and brakeman of that train were introduced as witnesses by defendant, and all three testified to being on the engine when they passed the station, and remained on the engine at least till after they reached the next station; that the headlight of the engine was lighted, and they each of them were on the lookout ahead for obstructions on the track, but that neither one ever saw Terry, or knew or heard of having killed any one till next morning. Appellee also proved that the next morning the engine was examined, but no traces of blood were seen on the engine, nor was there any indication on the engine that it ran over any person. At the close of the evidence for appellee, the appellant asked for a peremptory instruction, which the court refused. At the conclusion of all the testimony, it was renewed, and was again refused. The court gave seven instructions to the jury, to which exceptions were reserved. The jury returned a verdict for appellee for \$1,500, and, after appellant's reasons and motion for a new trial had been overruled, it has prosecuted this appeal. The reasons for new trial assign the action of the court in refusing the peremptory instruction asked for, in giving instructions to the jury, and in refusing to give instructions asked for by appellants; errors of the court in admitting and refusing to admit testimony; that the verdict is not sustained by the evidence, and is contrary to law and the instructions given, and is flagrantly against the evidence.

We are of opinion that at the conclusion of all the evidence, after the employes of appellant had testified, the peremptory instruction should have been given, for the reasons, as said by this court in *Brown's Adm'r v. Railroad Co.*, 97 Ky. 228, 30 S. W. 639: "Of course, in sustaining the court in giving a

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

peremptory instruction to find for defendant, we base it solely on the testimony offered by the plaintiff; and while the court below declined at first to give this peremptory instruction, requiring the defendant to introduce its fireman and engineer, thinking possibly they might develop something in behalf of plaintiff's case, yet, when they failed to do so, the court then gave the peremptory instruction." We fail to see from the evidence of appellee any act of negligence shown on the part of the agents and employes of appellant. The fact that a person possessed of his mental faculties, who could see and hear, and, as appellee contends, sober, is found dead, and evidently killed by a railroad train, on the right of way, in our opinion no more raises the presumption of negligence on the part of the employes of the railroad than it does of contributory negligence on the part of the person killed. Especially is this true when the place where the person killed is not such a place as he had a right to be in. We think that the evidence of appellee wholly failed to show negligence on the part of appellant. It failed to show such a state of circumstances as would clearly show a duty unperformed, and, if there be no duty, there can be no neglect of duty. The court should have given the peremptory instruction asked for by appellant. The court having required the appellant to introduce its employes, they completely negatived any negligence on their part in the management of the train that ran over decedent. For the reasons indicated, the judgment is reversed, and cause remanded, with directions to award appellant a new trial, and for further proceedings consistent herewith.

#### GEVEDON et al. v. BRANHAM.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 27, 1898.)

##### ATTACHMENT—CLAIM TO ATTACHED PROPERTY.

The fact that an indemnifying bond was executed to the sheriff before the levy of an attachment does not preclude claimants of the property from asserting their claims, as provided by Civ. Code, § 29.

Appeal from circuit court, Montgomery county.

"Not to be officially reported."

Action by Wilson Branham against W. M. Gevedon and others on a promissory note. Petition filed by J. W. Gevedon and B. A. Ayers, claiming attached property. Judgment dismissing petition of claimants, and they appeal. Reversed.

Chenault & Briggs, for appellants. B. F. Day, for appellee.

WHITE, J. The appellee, Wilson Branham, having a claim by note against W. M. Gevedon, Green Lacy, and H. H. Terrell, sued out an attachment, and had same levied

on a lot of hogs; and, by agreement of parties, the hogs were sold by a receiver specially appointed for that purpose. The hogs brought a net sum of \$197.35. Before any judgment was rendered in that case as to the distribution of that fund, the appellants, J. W. Gevedon and B. A. Ayers, filed their verified petition, claiming that the hogs belonged to the petitioners; i. e. 30 to Ayers, and 84 to J. W. Gevedon. Appellee moved to strike the answers from the file, because it appeared in the record of that case that, before the levy of the attachment, the appellee (plaintiff in that action) had executed to the sheriff a bond of indemnity, as required by the Code. This motion was not pressed, but appellee filed a general demurrer to the answers, and this demurrer was sustained; and, appellants declining to plead further, they were dismissed, and the court rendered judgment distributing the proceeds of the hogs to the payment of appellee's debt. From the judgment sustaining the demurrer and dismissing their petition, this appeal is prosecuted.

Section 29 of the Civil Code provides that a claimant of real or personal property attached may, before payment of the proceeds to plaintiff, file in the action his verified petition, stating his claim, and controverting that of the plaintiff, and that, upon that being done, his petition shall be treated as his answer. The petition of appellants filed in the attachment suit before judgment applying the proceeds of the attached hogs appears to come under this provision of the Code, and clearly states that the petitioners were the owners of the hogs levied on under the attachment, and expressly claims the proceeds arising from the sale. In our opinion, this states a cause of action, and the general demurrer should have been overruled, and these appellants been permitted to assert their right to the proceeds of the sale of the hogs.

Counsel insists that, as it appears that an indemnifying bond was executed to the sheriff before the levy of the attachment, this action could not be maintained, but that these claimants must look to the bond. This is not the law. The bond, by its terms, only attempts to indemnify the sheriff; it does not include claimant. This court, in *Lewis v. Mansfield*, 78 Ky. 460, expressly held that a claimant could not maintain an action on the bond of indemnity for any damage he might sustain, but that he must sue the officer levying the attachment. Nor does it follow that the action that appellants might maintain against the sheriff precludes appellants from asserting their claim, under section 29, to the property or its proceeds. Wherefore, for the reasons indicated, the judgment dismissing appellants' petition, and sustaining a demurrer thereto, is reversed, and cause remanded, with directions to the court to overrule the general demurrer, and for further proceedings consistent herewith.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

**BRIGHT et al. v. PALMER.<sup>1</sup>**

(Court of Appeals of Kentucky. Oct. 20, 1898.)

**DEDICATION OF STREETS—SALE OF LOTS WITH REFERENCE TO MAP DESIGNATING STREETS.**

Where devisees divide land with reference to a map made by the testator dividing it into lots and streets, and sell lots described by numbers according to the map, the purchaser of a lot bordering on one of the designated streets which is never opened takes title to the center of the strip of ground thus described as a street, though the testator did not intend to dedicate it as a street unless the owner on the other side should give an equal number of feet to complete the street.

Appeal from circuit court, Jefferson county. "Not to be officially reported."

Action by Edward R. Palmer and Lucy B. Palmer against James A. Miller and others to quiet title. Judgment for plaintiffs, and defendants Horatio S. Bright and wife appeal. Affirmed.

Albert S. Brandeis, for appellants. Geo. Weissinger Smith, for appellee.

**PAYNTER, J.** James Guthrie owned land south of the corporate limits of the city of Louisville, which he subdivided into lots, with streets and alleys, under the description of "Guthrie's Subdivision of Campbell's Addition to Louisville." A plat was made of this subdivision, showing lots appropriately numbered, blocks, and streets. The block in which the land now in controversy was situated was bounded by streets named on the plat as St. Catharine, First, Second, and St. Joseph. Previous to his death, which occurred in 1869, Guthrie sold some of the lots of his subdivision. By his will, after some special devise, his entire estate went to his three daughters, one of whom was Mrs. Caperton. In 1869, the daughters, their husbands joining, made deeds of partition of the lots in this subdivision; and, by the deed to Mrs. Caperton, there was conveyed to her, as designated in the deed, tracts or parcels of land in "Guthrie's Subdivision of Campbell's Addition to Louisville," and, among others, a lot described as follows, to wit: "68x200 feet on the west side of First street, being lot 6 in block 6." In 1885, Mrs. Caperton and her husband conveyed to Pinkney Varble lot 6 in block 6 of Guthrie's subdivision of Campbell's addition to Louisville, in which deed some additional description was given of the lot conveyed. In 1887, Varble conveyed the same lot to the appellee, Lucy B. Palmer, which deed gave substantially the same description of the lot as contained in the deed of Caperton and wife to Varble. In neither of these deeds is reference made to St. Joseph street. Lot 6 in block 6 was bounded on the south by a strip of land 30 feet wide, designated on the plat which Guthrie had made as St. Joseph street. The city accepted and improved First, Second, and St. Catharine streets, but did not

accept and improve St. Joseph street. The public has never used the strip of land designated as St. Joseph street as a street; neither does the public or the city claim it as such. It has been abandoned as a public street by the public and the city of Louisville. The appellee claims that, when St. Joseph street was abandoned as a street, one-half of it reverted to her, while those claiming under the will of James Guthrie insist that it belongs to them.

It was held in *Schneider v. Jacob*, 86 Ky. 101, 5 S. W. 850, that where the owner of land adjacent to a city exhibits a map of it, laying it out into building lots, streets, and alleys, and sells the lots as bounded by such streets or alleys, this is an immediate dedication of the streets and alleys to the use of the purchaser and to the public, although they have not been actually opened; and where a lot thus sold fronts on a street, and the deed calls for the street as the boundary, the title passes to the center of the street, subject to the right of the public to the use; and, if the street is never opened, the purchaser is entitled to hold to the center of the strip of ground thus described as a street. In that case the property was described as being bounded by streets. In *Jacob v. Woolfolk*, 90 Ky. 426, 14 S. W. 415, it appeared that certain land had been divided among the devisees of Jacob, and the commissioners appointed to make the division laid off the property into lots, with appropriate streets and alleys. There were assigned to one of the children certain lots, which were described by numbers only. Subsequently the grantee conveyed the lots in the same way by their numbers. In that case the court applied the doctrine of *Schneider v. Jacob*, and held that, when the street was abandoned, the purchaser of the lot binding on it was entitled to hold the land to the center of the street.

It is said that Guthrie did not intend to establish St. Joseph street unless Shreve, who owned land south of him, would give a like number of feet, so as to make it 60 feet wide. There is no evidence that he ever changed the plan of his subdivision as represented on the plat; and it is evident that his devisees did not, because they did not divide the land designated as St. Joseph street among themselves. Those devisees, in the conveyance which the other devisees made to Mrs. Caperton, did not show any purpose to change the plan of the subdivision, but referred to lot 6 in block 6 in Guthrie's subdivision of Campbell's addition to Louisville. The plat of that subdivision, as we have said, represented a strip of land 30 feet wide as St. Joseph street. We are of the opinion that the conveyance to Mrs. Caperton was made with "clear reference" to the streets and alleys designated on the plat, which had the effect to make an immediate dedication of that street to the use of the purchaser and to the public, notwithstanding it was not actually opened. Although Guthrie may have had a purpose not

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

to dedicate the 80 feet in question as a street unless Shreve did a like strip of land, still he made no change of the plan of his subdivision. Besides, the devisees, by their deed to Mrs. Caperton, manifested a purpose to carry out the plan as shown by the plat of Guthrie's subdivision. The court below adjudged that Mrs. Palmer was entitled to one-half of this strip of land, under the doctrine of *Schneider v. Jacob*, and *Jacob v. Woolfolk*. We are of the opinion that she was entitled to it. The judgment is affirmed.

### REED v. LOUISVILLE & N. R. CO.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 28, 1898.)

#### CARRIERS—FAILURE TO RESCUE PASSENGER WHO HAS FALLEN FROM TRAIN.

To authorize a recovery against a railroad company for failure to rescue a passenger who has fallen from its train without fault on its part, it must be alleged in the petition that the train could have been stopped, and the time taken to rescue the injured passenger, without running the risk of collision with other trains, or that there were some means by which the trainmen could have procured others to render the necessary assistance.

Appeal from circuit court, Clark county.

"To be officially reported."

Action by James Reed against the Louisville & Nashville Railroad Company to recover damages for personal injuries. Judgment for defendant, and plaintiff appeals. Affirmed.

J. M. Benton, L. H. Bush, Beckner & Jouett, and B. A. Jeffries, for appellant. Breckinridge & Shelby, for appellee.

BURNAM, J. The facts upon which appellant seeks to recover damages from appellee in this action, as stated in his original and amended petitions, are that he was a passenger on one of appellee's trains from Winchester to Elkin, and that at a point between those places, while the train was moving rapidly and passing over a high trestle, he was thrown or pushed from the train, so that he fell a distance of from 40 to 50 feet; that he received the fall after dark, and that the defendant, through its employes in charge of the train, knew he had received the fall, and that he was either killed or had received such serious personal injuries as to render him helpless, but negligently failed to stop the train, and care for him, or procure others to do so; that, by reason of such negligence, he was compelled to, and did, lie where he had fallen, until 7 o'clock the next day; that the place was about a mile from any dwelling house or habitation or highway, and not in sight of any highway or dwelling house or habitation; that these facts were known to defendant's agents in charge of the train; and that, as a result of the fall, he suffered serious injuries, and that a cold rain fell

upon him where he lay exposed. Defendant filed a general demurrer to the petition as amended, which was sustained, and the petition was dismissed; and this appeal is taken from that judgment.

Two legal questions are presented: First, is a railroad company under legal obligation to stop its train, and rescue a passenger who has been thrown or pushed therefrom without any fault on its part, under circumstances where, unless rescued, he is liable to perish or suffer great injury? and, second, does the petition in this case allege such a state of fact as made it the legal duty of defendant to have done so in this instance? The precise question presented here is a novel one, and our attention has not been directed to a case in which it has been considered or passed upon. From the time the relation of carrier and passenger commences, the passenger is necessarily, in a large degree, under the protection of the carrier, and it is bound to exercise the strictest vigilance in seeing after his safety. It has been held that if a passenger falls from a train, with the knowledge of the persons in charge thereof, and is left in a position of peril, where he is liable to be killed or injured by another train, it is the duty of those in charge of the train from which he fell to notify the crews of other trains, so that they can avoid injuring him; and if they fail to give such notice, and the person is injured by another train, the employer of the crew of the train from which he fell is responsible. And it seems to us that it is not asking too much of a railroad company to require that it shall render such assistance to a passenger who has been rendered helpless by a fall from one of its trains as it can give without endangering the safety of other passengers or property committed to its care. But, on the other hand, it is the settled rule that, when a railroad company undertakes to transport persons by the powerful and dangerous agency of steam, public policy and safety alike require that it shall be held to the exercise of the highest possible degree of care, diligence, vigilance, and skill in the conduct and management of its trains in every particular, with a view to the safety of its passengers; and for the slightest negligence or carelessness in these respects the carrier is liable. See *Beach*, Contrib. Neg. § 144. Its trains necessarily run on fixed schedules of time, and, as a general rule, it is necessary, for the safety of railroad travel, that these schedules should be scrupulously adhered to; and unless appellee could have stopped its train in this instance long enough to have rescued appellant without endangering the safety of its other passengers by collisions arising from such stoppage, or otherwise, it was under no legal obligation to do so. The petition in this case does not allege that the train could have been stopped, and the time taken to rescue appellant, without running the risk of collision with other trains; nor is it al-

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

leged that there were any means by which the men in charge of the train could have procured others to go to the assistance of appellant; and, as the burden is upon appellant to allege and prove these necessary facts, the demurrer was properly sustained. Wherefore the judgment is affirmed.

**CITY OF LOUISVILLE v. KUNTZ.**<sup>1</sup>  
(Court of Appeals of Kentucky. Oct. 28, 1898.)

**STATUTES—SPECIAL AND LOCAL LAWS—LIMITATION OF ACTIONS AGAINST CITIES.**

The special limitation of six months, provided by the charter of cities of the first class as to actions against such cities for damages is in violation of Const. § 59, providing that the general assembly shall not pass local or special acts to regulate the limitation of civil or criminal causes, and is not authorized by section 156 of the constitution, which provides for the classification of cities only for the purpose of organization and government.

Appeal from circuit court, Jefferson county.  
"To be officially reported."

Action by Mary S. Kuntz against R. L. Clark and the city of Louisville to recover damages for injury to property. Judgment for plaintiff, and the city of Louisville appeals. Affirmed.

Henry L. Stone, for appellant. Wm. Marshall Bullitt, for appellee.

BURNAM, J. Appellee, Mary S. Kuntz, instituted this action against R. L. Clark and the city of Louisville, alleging that she was the owner of a lot, and the improvements thereon, located in the city of Louisville; that the city authorized the construction of an alley by the side of it, and that the contract for the work was let to the defendant Clark; and that the appellant, in constructing the alley, encroached upon her premises without right, and negligently destroyed a part of her stable. The defendant Clark filed his separate answer, denying the allegations of the petition, while appellant, in addition to its general traverse, in the second paragraph of its answer pleaded the six-months statute of limitations, which is a provision of charters of cities of the first class, and which provides that "actions against the city for damages for injuries to person or property shall be begun within six months after the cause of action accrued." Appellee demurred to this paragraph, and the court below sustained the demurrer, and upon the trial appellee recovered a judgment against both defendants, and, the motion of the city for a new trial having been overruled, this appeal is prosecuted.

The only question involved on the appeal is whether the statute of limitations relied on by appellant is a good defense to the action, and this depends upon the power of the legislature to enact it. The question, therefore, to

be determined is, is it a special or local act which is prohibited by section 59, subsec. 5, Const., which provides that "the general assembly shall not pass local or special acts concerning any of the following subjects or for any of the following purposes, namely: \* \* \* Fifth, to regulate the limitation of civil or criminal causes"? Or is it authorized and embraced by the provisions of section 156 of the constitution, which provides for the classification of cities and towns, and that the organization and powers of each class shall be defined and provided for by general laws, so that all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions? Appellant contends that as the provision relied on is a section of the general act of the legislature passed in conformity with the requirements of section 156 of the constitution, providing for the government of all cities of the first class, it is a general statute of local application, not special or local within the inhibition of section 59, and that it was within the power of the legislature to pass it. This six-months statute of limitations was a provision of the old charter of appellant prior to the adoption of the general act for the government of cities of the first class, and its constitutionality was upheld by this court in the case of *Preston v. City of Louisville*, 84 Ky. 118; and similar provisions in the charters of the city of Covington were held to be constitutional in *City of Covington v. Voskotter*, 80 Ky. 219, and *City of Covington v. Hoadley*, 83 Ky. 444. But at the time these opinions were rendered there was no constitutional provision enumerating specifically the subjects concerning which it was provided the legislature should not pass local or special acts, and those cases turned upon the question as to whether this provision conferred a special privilege upon the city not in consideration of a public service; and it was held that, "as between a municipal corporation and a private person, a different rule might be adopted by the legislature," upon the theory that "the city is an arm of the state government, and as such performs a public service." But section 59 of the constitution expressly prohibits the legislature from passing a local or special act relating to limitation, and this case clearly illustrates the wisdom of the provision. The city and an individual are sued for a joint trespass. If either is guilty, the city is most in fault, because it was the instigator of the wrong complained of, but, if the statute relied on is held to be not a local or special one, it will be permitted to escape all liability, while its mere servant in the perpetration of the injury must bear the burden of their joint wrongdoing; and thus we have one rule of limitation for cities of the first class, and another for all persons, natural or artificial.

When the constitution prohibits the legislature from passing special laws upon any given subject, it means that all laws upon

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

that subject shall operate alike upon all, whether individual or corporate, public or private. It is a safeguard provided by the constitution for the protection of the weak as well as the strong. The legislature has power to make laws fixing the time when an action must be brought, but they must be general in their character, as the constitution prohibits the legislature from discriminating in favor of or against individuals or classes, when it declares that there shall be no special legislation on the subjects enumerated in section 59; while section 156 makes classification of cities only for the purpose of organization and government, and provides that the powers and organization of each shall be defined and provided for by general laws pertaining thereto. But section 59 expressly excepts the subject of limitation of civil and criminal causes from the operation of such laws, and it seems to us that properly they have no connection with the necessary powers, government, or organization of cities. It is a recognized canon of construction that constitutional provisions should be construed so as to give force and effect to all of them, and this is done by limiting the legislature, in granting municipal charters, to the powers which are incident to, and necessary for, their organization and government, as pointed out by section 156. While the cities of the state may be subject to different laws, so far as they relate to their organization and government, yet, as to matters prohibited by the constitution, they must be subject to the same general laws which apply to other corporations and private citizens.

The constitution of Pennsylvania prohibits local or special legislation on the same subjects, and in almost the same language, as the constitution of Kentucky; and the supreme court of that state, in passing upon a question similar to the one we have here (In re Ruan St., 132 Pa. St. 275, 19 Atl. 221), said: "In order that a given act of the assembly relating to a class of cities may escape the charge of being a local law, it is necessary, as was said in *Weinman v. Railway Co.*, 118 Pa. St. 202, 12 Atl. 290, that it should 'be applicable to all the members of the class to which it relates, and must be directed to the existence and regulation of municipal powers and to matters of local government.' A law that will bear the application of this test is within the purpose for which classification was designed, and therefore constitutional. A law that will not bear its application is local, and offends against the constitution. Among the many subjects of legislation which classification presents, we may call attention to such as the establishment, maintenance, and control of an adequate police force for the public protection; the preservation of the public health; protection against fire; the provision of an adequate water supply; the paving, grad-

ing, curbing, and lighting of the public streets; the regulation of public markets and market houses, and of docks and wharves; the erection and care of public buildings and other municipal improvements. These are mentioned, not because they embrace all the subjects for the exercise of municipal powers, but as a suggestion of some of the more obvious ones, and as an illustration of the character of the subjects upon which classification of cities may be necessary. These classes are thus seen to embrace, not mere geographical subdivisions of the territory of the state, but organized municipalities, which are divided with reference to their own peculiar characteristics and needs; and the legislation to which they are entitled by virtue of such provision is simply that which relates to the peculiarities and needs which induced the division. In this way, each class may be provided with legislation appropriate to it, without imposing the same provisions on other classes, to which they would be unsuitable and burdensome. We come, now, to inquire what legislation remains forbidden to cities, notwithstanding classification. I reply that all legislation not relating to the exercise of corporate powers, or to corporate officers and their powers and duties, is unauthorized by classification. In article 3, § 7, the constitution declares that the legislature shall not pass any local or special law 'regulating the practice or jurisdiction of or changing the rules of evidence in any judicial proceeding or inquiry before courts, aldermen, justices of the peace, sheriffs, commissioners, arbitrators, auditors, masters in chancery or other tribunals.' The same section forbids the passage of any local or special law fixing the rate of interest, exempting property from taxation, changing the laws of descent, affecting the estates of minors, and many other purposes, among which is authorizing the laying out, 'opening, altering or maintaining roads, highways, streets and alleys.' It is very clear that the purpose of the constitutional provision is to require that laws relating to the several subjects enumerated in section 7 shall be general, affecting the whole state, so that the rule upon these subjects shall be uniform throughout every part of the territory in which the constitution itself is operative. For example, there cannot be one rate of interest in cities of the first class, another in those of the second class, and still another for the rest of the state; but the rate, when fixed by law, must apply to all parts and divisions of the state alike. \* \* \* They are the civil rights of the citizens of Pennsylvania as such, and they cannot be affected by the size of the town in which he lives, or the value of his land, any more than by the color of his skin. They are the safeguards provided by the constitution for the protection of the weak as well as the strong, the dweller in the country as well as the

resident in the cities of the first class, and no system of classification of cities or other divisions of the state can disturb them."

And this court in the case of *Simpson v. Association*, 41 S. W. 570, and 42 S. W. 834, held that the provisions of section 864, Ky. St., which permit building and loan associations to exact from their borrowing members monthly and weekly premiums in addition to the legal rate of interest on the money borrowed, are in violation of that section of the constitution which provides that the legislature shall not pass local or special acts concerning, or for the purpose of regulating, the rate of interest. The same principle was adhered to in the case of *Levi v. City of Louisville*, 97 Ky. 394, 30 S. W. 973; and in the recent case of *Gorley v. City of Louisville*, 47 S. W. 263, this court held the provision of section 2882 of the Kentucky Statutes, which limits the time within which actions or proceedings by members of the police force shall be commenced to six months after the cause of action accrued, to be unconstitutional.

As was said in *Chalfant v. Edwards*, 173 Pa. St. 250, 33 Atl. 1049: "The effect of classification must not be carried beyond its purpose as declared in the original classification laws. A law relating to any other subject, though embracing all the cities of any given class, or of all the classes into which cities are divided, is local and unconstitutional, if the subject be one upon which local or special legislation is forbidden." For the reasons herein indicated we are of the opinion that the statute relied on is local and special, and in conflict with the provisions of section 59 of the constitution, and the judgment is therefore affirmed.

#### FARROW v. FIRST NAT. BANK.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 10, 1898.)

##### USURY.

A debt due a national bank may be purged of usury under the state statute if the debtor so elects, the remedy given by the national banking act for forfeiture of all interest or recovery of double the usury not being exclusive.

Appeal from circuit court, Mason county.  
"Not to be officially reported."

Action by First National Bank against B. H. Farrow on a promissory note. Judgment for plaintiff, and defendant appeals. Reversed.

C. D. Newell, Cole & Son, and E. L. Worthington, for appellant. Garrett S. Wall, for appellee.

**WHITE, J.** The appellee brought this action in the Mason circuit court against the appellant and one Champe Farrow on a note

executed to the appellant for \$671.65. The appellant filed answer, admitting the execution of the note, and pleaded that the note contained usury by being renewed every four months at 8 per cent. interest, from 1878 to 1879, except that a part of the same was for corn. The reply denied the renewals of any note, but said the note was for loaned money, giving dates and details, admitting that interest at 8 per cent. had been paid to some extent, and admitted that interest in excess of 6 per cent. had been collected to the amount of \$6.45. On motion of appellant this cause was transferred to equity, and referred to the master commissioner for proof as to the amount of usury. No proof was heard by the commissioner, and he reported, as the pleadings showed, that there was usury to the extent of \$6.45. Exceptions were filed to the report by appellant in November, 1895. In February, 1896, the appellee suggested the death of Champe Farrow, and asked that the case abate as to him, and the court overruled the exceptions to the commissioner's report. Appellee then filed exceptions to the report as to the allowance of any usury. The court sustained the exceptions of appellee, and rendered judgment for the full amount of the note sued on, without any deduction or diminution for usury; the court, in its judgment and opinion, deciding that, appellee being a national bank, the plea of usury was bad, and that, if any usury had been paid on the renewals, the amount could be recovered only under the national banking act, and that appellant could not plead the state usury laws as a defense. From this judgment the appeal is prosecuted.

We are of the opinion that the judgment rendered is erroneous in that it was not purged of usury. The answer pleads and the reply admits usury to the extent of \$6.45, and this amount should have been purged from the note. The court below was evidently of opinion that a plea of usury under the state statute was not good as against a national bank, and that the remedy given by the national banking act for forfeiture of all interest or recovery of double the usury was exclusive. In this, we think, he was mistaken. Appellant had a perfect right to either remedy, and by his answer elected to plead under the state statute, and, the usury being admitted by the reply, it was error to render judgment for this usurious interest. Appellant did not plead, under the federal statute, for a forfeiture, but under the state statute. The plea of usury was made a counterclaim by appellant, and on this issue, except as admitted by the reply, the burden was on him, and, having produced no proof, he was entitled to only the credit of admitted usury, \$6.45. The court did not err in refusing to continue the case, as appellant had had full and ample opportunity to present his proof

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

either before the commissioner or by deposition. For the error indicated, the judgment is reversed, and cause remanded, with direction to render judgment for appellee for the amount of the note sued on, less \$6.45, the amount of usury admitted to be embraced therein, and for proceedings consistent herewith.

### CALLIS v. GARRETT'S EX'RS.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 5, 1898.)

#### APPEAL—EQUITY—FINDING BY JURY.

Where an issue of fact ordered to be tried out of chancery is, by consent, submitted to the court, its finding is entitled to the weight of the verdict of a properly instructed jury, and will not be set aside unless palpably against the evidence.

Appeal from circuit court, Oldham county.

"Not to be officially reported."

Action by James Garrett's executors to settle the estate of their testator. Judgment rejecting claim of W. M. Callis, and he appeals. Affirmed.

Carroll & Clove, W. F. Peak, J. W. McCain, and D. H. French, for appellant. John D. Carroll, for appellee.

**PAYNTER, J.** In this action to settle the estate of James Garrett, deceased, the appellant, Callis, asserts a claim against it in the sum of \$5,000 and interest, on a writing of which he claims to have been robbed, and introduces a paper which he claims is a copy of it, and which reads as follows: "On or before March 1, 1890, I promise to pay W. M. Callis five thousand dollars (\$5,000), value received, bearing six per cent. interest from date until paid. The interest is not to be paid until after maturity of this note. This note is not to be sold, or used as collateral in any bank. This Wednesday, September 1, 1886. Col. James Garrett." He also claims that there was executed at the same time a writing, a purported copy of which reads as follows: "This agreement, made and entered into this September 1, 1886, by and between W. M. Callis of the first part, and Col. James Garrett of the second part, both parties of Trimble county, Kentucky, and brothers-in-law to each other, witnesseth, that said first party has loaned to said second party five thousand dollars at six per cent. interest from date, but the interest is not to be paid until maturity of note. Note given by second party to first party for the within-named amount, bearing even date with this writing, and due on or before March 1, 1890. Second party agrees to list and pay taxes on said note. First party agrees not to sell or place said note as collateral to any one, or deposit it in any bank. Witness our hands this Wednesday, September 1, 1886. W. M. Callis. Col. James Garrett." The court ordered an issue

out of chancery, and, three juries having failed to agree, it was submitted, by consent of parties, to Hon. G. G. Gilbert, as special judge. It was tried as an ordinary action, and the evidence heard in open court,—heard as if the case had been tried before a jury. The court reached the conclusion that the claim was unjust, and not a valid one against the estate, and so adjudged.

Under the adjudications of this court we could not reverse unless the judgment was palpably against the weight of evidence. The court tried the issue of fact which had been ordered tried out of chancery; therefore the judgment of the court has the same weight as the verdict of a properly instructed jury would have had had the issue been tried by one. The principal defense relied upon in this case was, there was no consideration for the note, if it was actually executed by the testator, and the court reached the conclusion that there was no consideration passed therefor. After an examination of the evidence, we are thoroughly convinced that the court did not err. The testimony is voluminous, and the facts are such that the court could not enter into a discussion of them without making the opinion unreasonably long. The judgment is affirmed.

### HOSKINS v. J. B. WATHEN BRO. CO.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 28, 1898.)

#### DEDICATION OF STREET—RIGHTS OF LOT OWNERS—OBSTRUCTION BY BUILDINGS—ACQUIESCENCE.

1. Where property is laid off into lots and streets, and a plat of it recorded, one who purchases a lot with reference to the plat has an easement in the described street on which it fronts, though the city refuses to accept the street.

2. Where one of two lot owners who have an easement in a street dedicated by their vendor, but never accepted by the city, erects costly buildings thereon, in ignorance of the exact location of the street, the other owner, who knew that the buildings were being erected, and made no protest, cannot compel their removal, his remedy being an action for damages.

Appeal from circuit court, Jefferson county.

"Not to be officially reported."

Action by R. H. Hoskins against J. B. Wathen Bro. Company to compel defendant to remove certain buildings from a street. Judgment for defendant, and plaintiff appeals. Affirmed.

Lane & Burnett, for appellant. W. R. Abbott and Barnett, Miller & Barnett, for appellee.

**PAYNTER, J.** The owners of certain land in the city of Louisville had it laid off into lots, streets, and alleys, and a plat was made and duly recorded showing the streets and alleys. One of the streets was designated as "Beatty Street" on the plat, and was 60 feet

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

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wide and 400 feet long, one end of which opened on Shippingport road, the other abutted against private property. The appellees bought nearly, if not all, the property on the south side of the street, upon which they erected a distillery. They also purchased about one-half of the land or lots on the north side of the street, upon which they erected a large and expensive warehouse, and also an office building. The balance of the land fronting on the north side of the street was purchased by the appellant, Hoskins, who now owns it. When these lots were purchased by the parties, no buildings were upon them; in fact, nothing on the ground to designate the location of Beatty street. The warehouse extends 17 or 18 feet on the street, and the office building a little less. The record shows that the appellees did not know the true location of the street at the time the warehouse and office buildings were erected. It also shows that Hoskins was aware of the fact that these buildings were being erected, as he lived within four or five hundred feet of them at the time they were in course of construction, and was on Beatty street frequently during that time. At that time, and in fact until after this suit was instituted, he had more of the street, on the north side, under fence than was occupied by the buildings of the appellees. He claims that he did not know that the buildings were being erected on the street. Previous to the institution of this suit, the city of Louisville had not accepted the dedication of Beatty street; neither had it made any improvements upon it. It does not seem to be used by any one except Hoskins and his family, and the appellees and their employes. Although the city did not accept the dedication of the street previous to the institution of this suit, still, under the adjudications of this court, it was dedicated to the public use when the property was laid off into lots and streets, the plat of it recorded, and the sale of lots made with reference to the streets and alleys. Hoskins has an easement in the street, notwithstanding the general council had not accepted or improved it. Since the institution of this suit, the general council of the city of Louisville passed a resolution declining to accept any of the space as Beatty street except 40 feet, and designated that space so as to leave the northern boundary line of the street 20 feet south of the original northern boundary line; hence leaving the warehouse and office on that part of the street not accepted. As we have said, the suit was pending when the general council took that action, and it could not affect the rights of the parties to this litigation.

Had Hoskins sought to enjoin the erection of the buildings, we have no doubt his action could have been maintained. He stood by, and saw these costly and valuable improvements made, without protest or objection, although he saw the appellees frequently during the progress of the work. The action of

the general council shows that the city will not improve, as part of the street, the space upon which these buildings are erected. It is the judge as to what streets in the city shall be improved. This is a controversy between individuals. The right of the plaintiff existed by virtue of the easement in the street as originally dedicated. It would cost the appellees several thousand dollars to remove these buildings from their present location, and the damage which would thus be inflicted upon them would be many times greater than that which the proof in this record shows Hoskins has sustained. He stood by, and witnessed, without protest, the erection of these buildings, and we are of the opinion that he is not entitled to a judgment compelling their removal. His remedy is by an action at law for such damages as he has sustained by reason of the erection of these buildings on the street. The judgment is affirmed.

#### SMITH v. MERCER COUNTY et al.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 27, 1898.)

COUNTIES—RIGHT TO ISSUE NEW BONDS IN LIEU OF OLD ONES—WAIVER OF CONDITION IN BOND.

Under Ky. St. § 1862, authorizing the various county courts to call in outstanding county bonds matured or subject to call, issued prior to September 28, 1891, and to issue and substitute therefor new bonds, where the holders of old bonds waive a limitation therein as to the amount thereof the county has the right to pay before maturity, and agree that new bonds may be substituted for the old ones, the old bonds are subject to call, and the fiscal court may substitute new bonds therefor.

Appeal from circuit court, Mercer county. "To be officially reported."

Action by H. C. Smith against Mercer county and others to enjoin the fiscal court from executing, issuing, or delivering to the purchaser certain county bonds. Judgment for defendants, and plaintiff appeals. Affirmed.

P. B. Thompson, for appellant. C. A. Hardin, for appellees.

LEWIS, C. J. January 10, 1887, the county judge, on behalf of the county of Mercer, subscribed \$125,000 to the capital stock of the Louisville Southern Railroad Company, and, to pay therefor, issued \$125,000 of county bonds, of which, in August, 1888, there was delivered to said company \$105,000 of bonds, with interest coupons attached, the bonds being numbered serially from 1 to 105, each bearing interest at the rate of 5 per cent., and payable on or before January 10, 1917; but each contained the following clause: "If the county of Mercer shall determine to pay any part of said series of bonds before the end of 30 years after their date, the county judge

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

shall give at least 3 months' notice of such intention by a publication in a newspaper in Harrodsburg, Louisville, and New York City, stating the time when said bonds will be paid; and such call of bonds shall be made consecutively, and not more than \$25,000 of bonds shall be called in one year. Interest on the bonds so called shall cease at the end of 3 months from the publication of said call; provided the county shall have on deposit, at the place of payment, the amount of money necessary to pay the bonds named in said call." It appears that no interest has been paid on these bonds since January, 1892, and that the principal and interest unpaid has amounted to \$145,000 or more; wherefore the fiscal court of that county, September 7, 1898, made an order to call in said indebtedness, and to issue, in place of the old bonds, new bonds to the amount of \$145,000, bearing 4 per cent. interest, a specified number of them to be paid five years after date, and each succeeding year thereafter, and none to run longer than 30 years. Subsequently these bonds were offered in open court to the highest bidder, and purchased at their face value by appellee Thompson; wherefore appellant brought this action, to enjoin the fiscal court from executing, issuing, or delivering said bonds to the purchaser.

Authority to the various county courts of this commonwealth to call in outstanding county bonds matured or subject to call, issued prior to September 28, 1891, and to issue and substitute therefor new bonds, was conferred by act of August 10, 1892, now section 1852, Ky. St. And the only question presented in this case or made by counsel is whether that statute authorizes the action of the county court complained of. It is contended for the appellant that the old county bonds had not, in language or meaning of that act, either matured or become subject to call at the time the county court ordered new ones executed. In our opinion, that statute was enacted in the interest and for the relief of the various counties of this state oppressed with indebtedness. And as it is agreed by the parties that the holders of the old bonds mentioned had waived their right to postpone payment thereof, and agreed to substitute the old for the new bonds, evidently the former were at the time the order of the fiscal court was made, to every intent and purpose of the statute, subject to call of the county court. There is nothing in the limitation contained in the old bonds as to the amount thereof the county had a right to pay, and the conditions upon which it could pay, that restricts its power to now make them all subject to call, holders of the bonds consenting, as they do, thereto; for the restriction was put in the bond for the benefit of the latter. In our opinion, the fiscal court of Mercer county has full power to substitute the new bonds for the old, as it has undertaken to do; wherefore judgment of the lower court denying application for the injunction is affirmed.

DE HAVEN v. DE HAVEN'S ADM'R.<sup>1</sup>  
(Court of Appeals of Kentucky. Nov. 1, 1898.)

EXECUTORS AND ADMINISTRATORS—RIGHT TO SUE FOR LAND—SPECIAL DEMURRER—WAIVER OF OBJECTION TO PLEADING—FAILURE OF PETITION TO DESCRIBE LAND.

1. Under Ky. St. § 3892, an administrator with the will annexed has all the powers of an executor.

2. Where the chancellor had, without objection by any of the parties interested, held that the executor was entitled to hold possession of the testator's estate, and to pay over to each of the devisees the income upon his share, the administrator with the will annexed had the right to sue for possession of land belonging to the estate.

3. Under Civ. Code, § 92, providing that objection to a pleading on the ground that plaintiff has not legal capacity to sue, or that there is a defect of parties, is waived unless taken by special demurrer, to enable defendant to take advantage of the fact that plaintiff, as administrator with the will annexed, cannot sue to recover land belonging to the estate, he must file a special demurrer on that ground.

4. Under Civ. Code, § 125, providing that a petition to recover land must describe it so that it may be identified, a petition which refers to an exhibit filed therewith for a description of land sought to be recovered is good, the land being specifically described in the exhibit.

5. Where a judgment for recovery of land specifically describes it, it will be presumed that the description was taken from an exhibit referred to in the petition for a description of the land, the exhibit being absent from the record.

"To be officially reported."

Petition for rehearing. Denied.

For former report, see 46 S. W. 215.

PER CURIAM. Several points are suggested in the petition for rehearing which were not discussed in the original brief. It is insisted: First, that plaintiff was not vested with either the title or the possession of the land of testator, and was therefore not authorized to institute the action; second, that the petition failed to describe the land, as required by section 125 of the Civil Code; third, that subsection 2 of section 125 of the Code only requires, in an action for the recovery of land, that the answer of defendant shall state that he claims it, and that, as the answer contained this averment, it presented a complete defense to the action.

Plaintiff was the administrator with the will annexed, and, under the provisions of section 3892 of the Kentucky Statutes, was clothed with all the duties and powers of an executor. By the terms of the will the testator directed that his estate be divided among his four sisters and his brother, and that at the death of either of the principal devisees it should be divided among his nephews and nieces, and that the property devised to his sisters and brother be safely preserved during their lives, so that it should not be squandered or wasted before the right of enjoyment accrued to his nephews and nieces. Testator further

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

provided that his lands were not to be sold during the lifetime of any of his sisters or his brother, but that it might be sold by his executor for the purpose of division among his nephews and nieces. The chancellor held that the executor was entitled to hold possession of the real estate and personal property, and to pay over to each of the devisees the income upon their respective shares, and this construction of the will was not objected to by any of the parties in interest. Besides, under the provisions of section 92 of the Civil Code, to enable appellant to take advantage of the fact that plaintiff had not legal capacity to sue, or that there was a defect of parties plaintiff or defendant, it was necessary that he should have filed a special demurrer on that ground, and by failing to do so this objection is waived, and cannot be taken advantage of in this court.

In response to the second objection of appellant, it may be observed that the original petition, after asserting claim to the tracts of land held by appellant and others, recites that "a description of all said tracts of land, by metes and bounds and courses and distances, will be found herewith, marked 'Exhibit X,' which is made a part of the petition." The transcript of the record brought to this court does not contain this exhibit, but, as the judgment appealed from describes the land in possession of appellant by metes and bounds and courses and distances, we think the presumption must be indulged that it was made up from Exhibit X. It was not incumbent upon appellant that her answer should set up her title fully and in detail, but it was essential that it should have put in issue the affirmative allegations of the petition, which alleged title in plaintiff's intestate, and that defendant occupied the land only by permission.

Section 62 of the Civil Code provides that actions must be brought in the county in which the subject of the action, or some part thereof, is situated, for the partition of real estate, except as provided in section 66, which requires actions for the partition of real estate of a deceased person to be brought in the county in which his personal representative qualified; and, in order to divest the Oldham court of jurisdiction, it was necessary that appellant should have put in issue the averments of the petition which gave that court its jurisdiction. For these reasons the petition for rehearing is overruled.

#### LOUISVILLE & N. R. CO. v. COMMON-WEALTH.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 28, 1898.)

RAILROADS—REVIEW OF ACTION OF COMMISSION.

Under Const. § 218, prohibiting common carriers from charging more for a short than for a long haul, but providing that the rail-

road commission may in "special cases" grant relief from the operation of the section, the action of the commission in refusing such relief cannot be reviewed by the courts.

"To be officially reported."

On petition for rehearing. Denied.

For former report, see 46 S. W. 707.

LEWIS, C. J. Willing to consider all that can be said by those who believe themselves injuriously affected by the opinion in this case, we have, in addition to the petition for rehearing filed by appellant as matter of right, permitted petitions filed in behalf of 20 or more coal companies. It is urged as reason for withdrawal of the opinion that, if railroad companies be not permitted to make special rates to competitive points, shipment of coal mined in this state must cease. Though an argument drawn from hardship or inconvenience is usually more appropriately addressed to lawmakers, it should, of course, have due weight with the court in determining the proper construction of a law the meaning of which is doubtful or obscure, but never so much as to induce a construction that is absurd, defeats the evident object in view, or involves stultification of those who made it. However, the argument in behalf of the coal companies, even if based upon entirely correct premise, is counterbalanced by the fact that, while special rates to competitive points may benefit a particular industry, removal of all restraint upon discrimination by railroad companies might be injurious to other industries and interests connected or identified with non-competitive points. Conceding that the construction we have been, by a sense of duty, constrained to give section 218, will work injury to the coal industry of this state, the court is not authorized or permitted to afford relief by perverting the true meaning, and thereby defeating the manifest object of the section. The needed relief must be afforded, if at all, according to, and in the manner provided by, the law itself, which will be hereafter considered.

Counsel for appellant, after stating that it had for seven years relied upon a construction of the long and short haul law settled, as they say, by the interstate commerce commission and certain circuit courts of the United States, permit themselves to use this language: "The court of appeals now, at this late day, propose to repudiate that construction, and announce a construction which has never been announced by any tribunal with reference to the law from which our law was copied verbatim." Counsel might without much effort have recollected that the court of appeals does never propose, but finally decides, the construction to be given such parts of the constitution and statutes of this state as need construction, and cannot be foreclosed or bound by the views in regard thereto by any other tribunal. It is not true that framers of the constitution

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

adopted section 218 with a view to a construction that had been put upon section 4 of the interstate commerce act adverse to the one we have given section 218. At that time there had been no decision of the question by the supreme court of the United States,—the only tribunal empowered to construe section 4 authoritatively and finally. It could, however, be said, if necessary, that, prior to the adoption of our constitution, it had been held by respectable English courts that cost of service constitutes the difference of circumstances and conditions, in the meaning of their statute on the same subject, and similar in terms to section 218. The language of section 218 plainly shows it was made part of the constitution for the definite purpose of surely inhibiting railroad companies doing something they had previously done at will and discretion; that is, charging and receiving greater compensation in the aggregate for transportation of passengers and property for the shorter than the longer distance. But if competition at particular localities in the business of transportation, or other circumstances or conditions influencing the common carrier, not affecting the general public, be held by this court a sufficient reason or excuse for discrimination, railroad companies may, without legal restraint or interference, continue to do precisely what they did before section 218 was adopted, and it becomes a dead letter. In order to give meaning and effect to that section, cost of service must be held to alone constitute the difference of circumstances and conditions which will authorize greater aggregate compensation to be charged or received for the shorter than longer distance of the same line of road; and as, only to the extent of difference in the actual cost of transportation, a difference of aggregate compensation may be rightfully charged or received, the general public, as well as the carrier, is affected thereby. As counsel for appellant do not show or attempt to show in what manner railroad companies would or could be restrained or prevented from charging at will greater aggregate compensation for the shorter than longer distance, nor what possible purpose section 218 would or could serve, if the construction they contend for be accepted, we need not consider their petition for rehearing further.

It is argued by counsel for coal companies that the court has and should exercise jurisdiction to revise an order of the railroad commission refusing an application to authorize a common carrier, in special cases, to charge less aggregate compensation for the longer than shorter distance of the same line of road. Unquestionably, framers of the constitution contemplated probable existence of exceptionable circumstances and conditions working hardship or injustice to the railroad company, as well as particular industries or interests, and therefore recognized the justice and necessity of authorizing spe-

cial rates to be given to competitive points in special cases. But the constitution does not contain, nor would it have been practicable to put in it, provisions applicable to every state of case that might arise. The railroad commission was therefore created to meet the emergency, and was intended to be invested with full power to authorize or not, in special cases, less compensation to be charged for the longer than shorter distance, and to prescribe from time to time the extent to which the common carrier may be relieved from operation of the section. In our opinion, the court has not jurisdiction to either compel the railroad commission, upon application of the common carrier or those interested in particular industries or callings, to suspend or relax operation of section 218, or, upon application of individuals or corporations feeling aggrieved, to prohibit such suspension or relaxation, in special cases. While the commission is thus and to that extent free from judicial interpretation, it cannot, of course, nullify, or except in special cases at all suspend, operation of section 218; and, though the railroad commission be invested with this unusual power, it must be treated as a constitutional power, with which the court cannot interfere. The petition for rehearing is overruled.

#### BUSH v. WATHEN.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 22, 1898.)

##### ANIMALS—INJURY BY DOG—PLEADING EXCEPTIONS TO STATUTE—CONTRIBUTORY NEGLIGENCE.

1. Under Ky. St. § 68, which provides that every person owning or keeping a dog shall be liable to the party injured for all damages done by such dog, the owner is liable for injury inflicted by his dog while under the control of a kennel club.

2. The proviso of the statute that "no recovery shall be had in case the person injured is, at the time, upon the premises of the owner of the dog after night, or engaged in some unlawful act in the daytime," being in a clause following that creating the liability, though in the same section, need not be negatived by the plaintiff in his petition.

3. The plaintiff cannot, by negativing in his petition exceptions to the statute which he is not required to negative, take upon himself the burden of proof, and thus get the concluding argument to the jury.

4. The plaintiff's contributory negligence in teasing the defendant's dog, but for which the injury would not have occurred, is a defense to the action, it matters not when or where the injury was inflicted.

Lewis, C. J., and Guffy, J., dissenting.

Appeal from circuit court, Jefferson county. "To be officially reported."

Action by George Wathen, by next friend, against S. S. Bush, to recover damages for personal injuries. Verdict and judgment for plaintiff, and defendant appeals. Reversed.

O'Neal & Pryor and H. H. Nettelroth, for appellant. R. C. Davis, Matt O'Doherty, and John J. Davis, for appellee.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

**PAYNTER, J.** The right to recover in this action is based on section 68, Ky. St., which reads as follows: "Every person owning, having or keeping any dog shall be liable to the party injured for all damages done by such dog. But no recovery shall be had in case the person injured is, at the time, upon the premises of the owner of the dog after night, or engaged in some unlawful act in the daytime." The appellant, Bush, was the owner of a St. Bernard dog; and, while he was such owner, it attacked, bit, and tore the face of the appellee, George Wathen, a boy over 12 years of age, and permanently disfigured his face. The first trial of the case resulted in a verdict for the defendant. The court gave a new trial, and it resulted in a verdict for the plaintiff in the sum of \$850. Bush entered the dog in the bench show at the Armory of the Louisville Legion, which was under the control of the Louisville Kennel Club, and paid three dollars for the privilege. The dog, while in the stall which was assigned to Bush for his dog, bit and lacerated the face of the appellee, George Wathen.

It is insisted that the appellant, Bush, is not liable for the injury inflicted by the dog, because, at the time it was done, it was under the control of the Kennel Club. The dog was there with the consent of the appellant, and he was as much liable for the injury which it inflicted under such circumstances as he would have been had he been present and in control of it. Suppose A. should loan B. his dog, that he might use him for the purpose of hunting for a time, and during that time the dog killed C.'s sheep, unquestionably A. would be responsible for the damage which his dog did under such circumstances. Under the plain language of the statute, the owner is responsible for the act of a dog, and likewise is the party who may have him in possession at the time of the injury. From this view it follows that the court did not err in refusing to allow the amended answer to be filed, in which the defendant, Bush, alleged he was not responsible, because of the fact the Kennel Club had the dog in its possession and under its control at the time it injured the boy.

The petition averred that the dog bit Wathen, and that, at the time, he was not on the premises of Bush after night, or engaged in any unlawful act in the daytime. It is argued by counsel for appellant that, although the petition negatived the exception in the statute, it was not necessary that it should have been done, and therefore the plaintiff could not thereby control the action of the court in determining who had the burden of proof. It is clear, if such negation was unnecessary, the plaintiff could not make it, and thus take the burden of proof, and consequently get the closing argument to the jury. It was not necessary for the plaintiff to allege that he was not on Bush's premises after night, or engaged in some unlawful act in the daytime, when the dog injured him. When he

alleged that Bush owned the dog, and that it bit and injured him, a cause of action was stated. There is no proviso in the enacting clause to be negatived; neither is there an exception in the clause making the owner liable to a party injured by his dog for the damage done by it. It reads: "Every person owning, having or keeping any dog shall be liable to the party injured for all damages done by said dog." There is a proviso, however, in the same section of the statute, but it is a separate and distinct clause; as much so as if it had been in a separate section. When there is an exception in the enacting clause, the plaintiff must negative it. If the exception is in a subsequent clause to that giving the cause of action, then, if it gives the defendant exemption from liability, he must plead it.

1 Chit. Pl. (8th Am. Ed.) 222, states the rule as follows, to wit: "In pleading upon statutes, where there is an exception in the enacting clause, the plaintiff must show that the defendant is not within the exemption; but, if there be an exception in a subsequent clause, that is matter of defense, and the other party must show it to exempt himself from the penalty." And on the next page (Chitty) Lord Tenterden is quoted as follows: "If an act of parliament or a private instrument contain in it, first, a general clause, and afterwards a separate and distinct clause, something which would otherwise be included in it, a party relying upon the general clause, in pleading, may set out that clause only, without noticing the separate and distinct clause which operates as an exception. But, if the exception itself be incorporated in the general clause, then the party relying upon it must, in pleading, state it, with the exception." Bliss, Code Pl. 202, says: "When the exception is embodied in the body of the clause, he who pleads the clause ought to plead the exception; but when there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause, and leave it to his adversary to show the proviso." When exceptions to the general provision of a statute are found in a distinct clause, the plaintiff need not allege that he is not within them. *Nichols v. Sennitt*, 78 Ky. 630. The court said in *Com. v. McClanahan*, 2 Metc. (Ky.) 10: "It is well settled that, where provisos and exceptions are contained in distinct clauses, it is not necessary to aver in the indictment that the defendant does not come within the exceptions, or to negative the provisos it contains. Nor is it necessary to allege that he is not within such provisos, even though the purview should expressly notice them; as by saying that none shall do the act prohibited, except in the cases thereafter excepted. These are properly matters of defense."

The rule of pleading which requires the exception, when embodied in the body of the clause, to be pleaded by him who pleads the

clause, is well illustrated in the case of *Becker v. Crow*, 7 Bush, 201. That action was authorized by an act which reads as follows: "That the widow and minor child or children, or either or any of them, of a person killed by the careless or wanton or malicious use of firearms or other deadly weapons, not in self-defense, may have an action against the person or persons who committed the killing, and all others aiding or promoting the killing, or any one or more of them, for reparation of the injury, and in such action the jury may give vindictive damages." The act gave the right of action to the widow or child of a person killed by the careless or wanton or malicious use of firearms or other deadly weapons, not in self-defense. The words "not in self-defense" were in the body of the clause. Therefore it was necessary to negative it. The rule is again illustrated in the case of *Railroad Co. v. Belcher*, 89 Ky. 194, 12 S. W. 195. The statute under which the action was brought reads as follows: "If, by the locomotives or cars of a railroad company, cattle or other stock shall be killed or injured on the track of said road, adjoining the lands belonging to or in the occupation of the owner of such cattle or stock, who has not received compensation for fencing said land along said road, the loss shall be divided between the railroad company and the owner of such cattle or stock. \* \* \*"

The court was of the opinion that the plaintiff could not recover if the owner of the land had been compensated for fencing it, and that it was necessary to allege that he had not received such compensation. As a reason for so holding that it was necessary to make the allegation, the court said: "If, then, under this section of the statute, the facts alleged by the plaintiff could be admitted, and still, by reason of the very clause upon which the recovery depends, a state of fact might exist preventing the recovery, the existence of such facts must be negatived by his pleading."

If Wathen had been injured while he was on Bush's premises at night, or when he was engaged in some unlawful act in the daytime, the defendant should have pleaded it as a matter of defense. He did not do this, but alleged that Wathen came to the stall where the dog was kept and chained, and partially threw his hands and face and body into the stall, and handled and annoyed the dog, and continued to do so notwithstanding he was cautioned to desist from such conduct by parties standing near by, and warned that the dog, excited by the presence of a large crowd, and worried by the heat and noise, and fatigued, might attack and bite or in some way injure him if he continued to handle and annoy him. The language of the statute which exonerated the owner of a dog from liability for such injuries as it might inflict does not embrace the defense stated. If the statute, literally construed, does not embrace the defense stated, a party might be doing some "unlawful act" in the nighttime

off of the premises of the owner when he was injured by a dog, still the owner would be liable for such injury as he might inflict on such one. Under the statute, if the party is upon the premises of the owner at night, and doing no unlawful act, still, if the dog bites him, the owner is not responsible. We are of the opinion that although the party is injured by the dog while away from the premises of the owner at night, or is injured in the daytime when not engaged in some unlawful act, still, if the party injured was guilty of some act except for which the dog would not have bitten him, he is guilty of contributory negligence, and cannot recover damages for the injury sustained. We are of the opinion that the alleged acts of the boy in teasing the dog are not such as the general assembly intended to embrace by the words "unlawful acts." The doctrine of contributory negligence applies to the case of injury by animals. *Cooley, Torts*, 346. The principle of law which requires the exercise of reasonable care to avoid doing injury to others also requires the exercise of reasonable care to avoid being injured by the negligence of others; and, as a general rule, one cannot recover compensation for injury occasioned by the mere negligence of another which he might have avoided by the exercise of reasonable care. If the injury would not have happened to him but for his own want of ordinary care, he cannot legally charge to the negligence of the other party the consequence of his own carelessness. It may be said that this rule of law has been changed by the statute. The statute is remedial. It imposes no penalty, but simply makes the owner responsible for the damages sustained by reason of injury inflicted by the dog. It gives a remedy for enforcing the common-law right for the recovery of damages for the actual injury sustained, and should be given a reasonable interpretation. It would not be a reasonable interpretation to wholly disregard the general principle of contributory negligence. It, in part, was intended to obviate the difficulty which existed at common law of showing the owner's knowledge of the vicious propensities of the dog in an action for damages; and the interpretation which we give accomplishes that object. In *Quimby v. Woodbury*, 63 N. H. 370, the court construed a statute substantially the same as the one here construed, and said: "A construction of the statute making the owner of a dog absolutely liable for injuries, regardless of the conduct of the party injured, might in some cases hold the owner responsible for injuries occasioned solely by the reckless carelessness of the party injured. It would make the owner liable to a person injured while intentionally exposing himself by worrying and irritating a dog for the purpose of testing his temper and disposition. Such a construction would be unreasonable. We think the rule of interpretation applicable to this statute is analogous to that applied to the statute making towns

liable for damages happening from defective highways, which, although literally imposing an absolute and unqualified liability, is construed with the qualification that the party injured is not entitled to recover if his own negligence contributed to the injury. As the statute is to be interpreted with reference to the general principle that a party cannot recover damages for the negligence of another if his own negligence contributed to the injury, the expressed exception that the injured party cannot recover if the injury is received while he is in the commission of a trespass or other tort is not to be regarded as excluding the doctrine of contributory negligence. The purpose and effect of the exception is to limit the right of recovery, and not to extend it." We are of the opinion that contributory negligence is available as a defense in an action like this. As we have said, the statute, literally construed, would make the owner of the dog liable for damages inflicted at night, save on his premises, although the party injured was the direct cause of the injury. Suppose the owner should have his dog with him after night on a street, in a town or on the public highway, and some one should maltreat and annoy the dog to such an extent as to cause it to bite him, and except for such conduct the dog would not have bitten him; certainly, the owner of the dog should not be compelled to pay the damages resulting to the injured party by his own wrongful act. If the injury occurred as we have supposed, the owner of the dog could only escape liability by plea and proof of contributory negligence. If such plea is good as to an injury occurring off the premises of the owner at night, it is equally good as to an injury occurring in the daytime. The plea of contributory negligence placed the burden of proof on the defendant, and entitled him to the closing argument. The court's failure to so rule entitled the defendant to a new trial. We do not think the court abused its discretion in relieving the plaintiff of the verdict and judgment rendered in the first trial, and granting a new trial. The judgment is reversed, with directions that a new trial be given, and for proceedings consistent with this opinion.

LEWIS, C. J., and GUFFY, J., dissent.

#### KENTUCKY REFINING CO. v. GLOBE REFINING CO.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 25, 1898.)

SAYES—CONSTRUCTIVE FRAUD—CHANGE OF POSSESSION—PASSING OF TITLE TO GOODS CONSIGNED TO ORDER.

1. Ky. St. § 1908, providing that sales of personal property, unless the actual possession in

good faith accompanies the sale, shall be void as to purchasers without notice, and as to creditors, prior to the lodging for record of such transfer, does not apply to the sale of a car load of oil in the custody of a carrier.

2. Where a draft for the price of goods is forwarded for collection, attached to the bill of lading, making the goods deliverable to the consignor's order, with direction to deliver the bill of lading upon payment of the draft, the title to the goods does not pass to the buyer until the draft is paid, and prior to that time the goods in the custody of the carrier are subject to attachment for the consignor's debts.

Appeal from circuit court, Jefferson county. "To be officially reported."

Action by Kentucky Refining Company against the Marlin Oil Company to recover damages for breach of contract. Petition by Globe Refining Company claiming attached property. Judgment for claimant, and plaintiff appeals. Reversed.

Arthur M. Rutledge, for appellant. Richard, Baskin & Ronalds, for appellee.

GUFFY, J. The appellant was a corporation doing business in the city of Louisville, and engaged in refining cotton-seed oil. The appellee was a corporation doing a like business in said city. The Marlin Oil Company was a corporation doing business in Texas, and engaged in the manufacture of crude cotton-seed oil. The appellant instituted suit against the Marlin Oil Company in the Jefferson circuit court, and in the petition it is alleged: That on the 1st of November, 1895, the defendant, the Marlin Oil Company, sold and agreed to deliver to the appellant 800 barrels of prime crude cotton-seed oil, to be shipped by the defendant from Marlin, Tex., to the plaintiff, in plaintiff's tanks, and upon plaintiff's order, at the price of 19 cents per gallon of 7½ pounds f. o. b. at the mill of defendant in Marlin, Tex., and plaintiff to pay for same by sight draft after arrival of bill of lading and inspection of said oil,—the quality and weight of the oil guaranteed by the defendant. That after said 1st of November, 1895, the appellant had ordered the defendant to ship all of said oil from its mills in the town of Marlin to the plaintiff in the city of Louisville, and furnished to defendant its tanks therefor; but that the defendant broke its said contract, and refused to deliver said oil to the plaintiff, and refused to ship the same from its said mills, and has never furnished or shipped same. That plaintiff has been ready and willing to perfect its part of said contract, and to pay said purchase price for said oil, as agreed upon in said contract. That the quantity of said oil that defendant agreed to sell to plaintiff is 40,000 gallons. That plaintiff, relying on said contract and agreement of said defendant to deliver to it the said oil, made contracts to sell and deliver said quantity of oil, with other oil it had, to its customers; but was unable to fulfill its contract except by purchasing other oil in lieu of said oil. That, after said pur-

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

chase by plaintiff, the market price of said oil advanced 2 cents on each gallon, and is now worth 2 cents more, to wit, 20 cents per gallon; and plaintiff was compelled to buy said quantity of oil from other parties, and pay therefor 2 cents per gallon more than said contract price, and was thereby compelled to pay for said oil purchased by it from other parties to fill said contracts, paying \$300 over and above the price at which defendant agreed to furnish said oil, and plaintiff was thereby damaged in the sum of \$300. Plaintiff further alleged that the defendant was indebted to it in the sum of \$257.29 on another account, the particulars of which were set out in the petition; for which sums plaintiff prayed judgment, and obtained an attachment against the property of the defendant, which attachment was issued November 30, 1895, and came to the hands of the sheriff of Jefferson county at 10:55 a. m., November 30th, and was executed at 11:45 a. m., by delivering a copy of the attachment to Theo. Goeper, an employé of the Louisville & Nashville Railroad Company, and who had said car of oil in his charge, and levied on one car of cotton-seed oil, and left same in charge of said Goeper. It further appears that after the levy aforesaid the plaintiff obtained an order of sale, and the oil was sold. On January 11, 1896, the appellee, the Globe Refining Company, filed its petition, and sought to be made, and was made, a party to this action, and claimed to be the owner of the oil attached. It is alleged by the appellee that on the 25th of November, 1895, it received a telegram from the defendant, the Marlin Oil Company, in words and figures as follows: "Tank K. R. Co. two hundred twenty-six, seven hundred fifty-six, prime oil in Louisville. Draft returned by Kentucky Refining Co. Will you take it at 19 cents? Answer." To which telegram the appellee replied as follows: "Telegram received. Will take Kentucky tank two twenty at 19 cents. Rush documents." On the 26th of November, 1895, appellee received the second telegram from the said Marlin Oil Company, as follows: "We confirm sale of tank two twenty. Forward papers to-day. Routing is care Naty to St. Louis. Final destination, New York City. Trying to locate tank. If in Louisville, answer, our expense." It is further alleged that by reason of said purchase appellee purchased said oil at the price aforesaid, making \$1,155.28. On the 26th of November, 1895, the said Marlin Oil Company drew its draft, payable at sight, on petitioner, for said sum, to pay for said oil, and that appellee duly accepted said draft on the 30th of November, 1895, and thereafter paid same when due. Said two telegrams, also a copy of the reply of the petitioner, and the said sight draft, are filed herewith as part hereof, marked Exhibits 1, 2, 3, and 4, respectively. Attached to said draft of November 26, 1895, was a bill of lading for

said car load of oil, said oil having been shipped to the order of Marlin Oil Company. Said bill of lading was indorsed as follows: "On payment of attached draft, deliver to Globe Refining Co. Marlin Oil Co., by W. D. Keyser Mgr." By said bill of lading said oil was routed and shipped by way of St. Louis to New York, and said oil passed through the hands of the Wiggins Ferry Company of St. Louis, and was transported by them to the city of Louisville to the Kentucky Refining Company, instead of to the city of New York, and the same was, by the railroad company bringing said oil from St. Louis, delivered to the Kentucky Refining Company, without any order or direction from the Marlin Oil Company, and without surrender of the bill of lading, and the attachment sued out herein purports to have been levied upon said oil. That after the appellee had paid the draft for the amount of said oil, it mailed said bill of lading to the Wiggins Ferry Company, with directions to change routing of said car load of oil from New York to Louisville, and to deliver same to petitioner, said Wiggins Ferry Company having erroneously marked said bill of lading, "Canceled." Said bill of lading is attached hereto, and marked "Exhibit No. 5." It is further alleged in the petition that appellee purchased the oil before the filing of this action, and before the suing out of the attachment, and paid said draft without knowledge of said attachment. Appellee prayed judgment for the value of the oil at the time of the suing out of the attachment, which it alleged was \$1,418.76.

Exhibit 1 reads as follows: "11/25/95. Marlin, Texas. Globe R. F. Co.: Tank K. R. Co. two hundred twenty-six seven hundred fifty-six gallons prime oil in Louisville. Draft returned by Kentucky Refining Co. Will you take it at 19 cents? Answer. Marlin Oil Co."

Exhibit No. 2: "11/26/1895. Marlin, Texas. To Globe Refining Co., Lou.: We confirm sale of tank two twenty. Forward papers to-day. Routing is care Naty to St. Louis; destination New York City. Trying to locate tank. If in Louisville, answer, our expense. [Signed] Marlin Oil Co."

Exhibit No. 3: "Nov. 25, 1895. Marlin Oil Co., Marlin, Texas: Telegram received. Will take Kentucky tank two twenty at 19 cents. Rush documents. [Signed] Globe Refining Co."

Exhibit No. 4: "First National Bank of Marlin, Texas. Nov. 26, 1895. At sight pay to the order of First National Bank of Marlin, Texas, \$1,155.28 (eleven hundred and fifty-five and <sup>22</sup>/<sub>100</sub> dollars), for value received, and charge to account of Marlin Oil Co., by J. W. R. Cinson, Secy.

"To Globe Refining Co., Louisville, Ky.

"Accepted by telephone, November 30, 1895. Globe Refining Co., by L. W. Motley, Third Nat. Bank."

By an amended petition appellee alleged



that the oil was of the value of \$1,601.88, and that it brought that sum at sheriff's sale January 27, 1896, and sought judgment against appellant for that sum.

The reply may be treated as a traverse of all the averments of the appellee showing it to be the owner and entitled to the oil at the time of the levy of the attachment. It is further alleged in the reply that, at the time of the pretended communication between defendant and appellee concerning the oil, the oil was in a tank belonging to appellant, and on the switch of the Louisville & Nashville Railroad Company in the yard of appellant, and that the same had been shipped and left there with the knowledge, consent, and direction of the Marlin Oil Company, the Marlin Oil Company then being indebted to the plaintiff to the amount and extent named in the petition; that the said Marlin Oil Company, when it shipped and caused said oil to be sent to plaintiff's said yard, as aforesaid, sent its draft on the plaintiff for the sum of \$—, for which it demanded payment before allowing the railroad company to deliver said oil to the appellant, and without paying or offering to pay or adjust its said indebtedness to the plaintiff, and plaintiff refused to accept or pay the amount of said draft until said Marlin Oil Company's indebtedness to it was satisfied, and plaintiff was then threatening and about to bring an action and sue out an attachment against said Marlin Oil Company to be levied upon said oil to satisfy its claim; that said Marlin Oil Company was at that time, and now is, a foreign corporation. The said Marlin Oil Company then, and for the purpose of defrauding this plaintiff, its creditor, and delaying plaintiff in the collection of its debts against said Marlin Oil Company, commenced communication with the Globe Refining Company to sell to it said oil, and that said pretended sale of oil to the appellee was made for the purpose and with the intention of defrauding plaintiff, and to hinder and delay it in the collection of its claim; all of which said appellee then well knew. In the third paragraph of the reply it is substantially alleged that before the pretended acceptance of said alleged draft by the appellee, and before any sale or delivery to it of the oil attached herein, said attachment had been placed in the hands of the sheriff of Jefferson county, and was then in the hands of the sheriff of Jefferson county, for execution, and plaintiff had acquired and then had a lien on said oil for its said debt. The appellee, in its rejoinder, in substance traversed all the affirmative averments contained in the reply. By an amended petition appellant claimed that it had to pay \$192.55 freight on said oil, for which it in any event asked credit. After the issues were finally made up, and proof taken, the court rendered judgment in favor of appellee for \$1,601.88, with interest from the day of sale, to wit, 27th of January, 1896, subject to a credit of \$195.22, freight paid, and further adjudged

that appellee recover of the appellant its costs; and from that judgment appellant prosecutes this appeal.

The contention of appellant is that the title to the oil in contest was in the Marlin Oil Company at the time of the issue and levy of the attachment, and therefore subject to seizure and sale in satisfaction of its claim against the Marlin Oil Company. It is also claimed by appellant that the alleged sale or transaction between appellee and the Marlin Oil Company was made to hinder or defeat the collection of appellant's claim. If either contention be true, the judgment appealed from should be reversed. It is unquestionably true that the appellee had some notice of some dispute or disagreement between appellant and the Marlin Oil Company, and the proof conduces to show that the appellee had recognized a possibility, if not a probability, of the oil being attached by appellant, else it would not have imparted the information to the Texas company that the oil was not attached. But we are not inclined to hold that the proof establishes any fraudulent attempt upon the part of appellee; hence the only question demanding serious or extended consideration is the question of title at the time of the levy of the attachment. Section 1908, Ky. St., provides that: "Every voluntary alienation of or charge upon personal property, unless the actual possession, in good faith, accompanies the same, shall be void as to a purchaser without notice, or any creditor, prior to the lodging for record of such transfer or charge in the office of the county court for the county where the alienor or person creating the charge resides." It is not, however, seriously contended that the statute supra affects the case at bar, because it is a well-recognized rule of law that there may be such a delivery of the kind of property now in question as will pass title to the purchaser without actual physical possession of the property being placed in the hands of the vendee. It will be observed that the oil in question was shipped first to the appellant, with draft attached to bill of lading. It, however, appears that upon failure of appellant to pay the draft the bill of lading was not delivered to it, and that afterwards the Texas company had the transaction with the appellee as shown by this record. If the contract entered into between the appellee and the Texas company passed the title of the property to appellee, then the same was not subject to the attachment. If, however, the title remained in the consignor at the time of the seizure of the property under the attachment, then the same was liable to seizure and attachment, and the judgment of the court below should be reversed. Counsel for both sides have filed able briefs, and cited numerous authorities. It seems to us that the weight of authority sustains the contention of appellant. It is said in Hutch. Carr. § 130: "The consignee named in the bill of lading is presumptively the owner of the goods, and

must be treated by the carrier as the absolute owner until he has had notice to the contrary; and a delivery to him without such notice will discharge the carrier. But if the party who claims the goods is not the consignee, he should be required to produce the bill of lading, with the indorsement of the consignee, where the goods are deliverable to him or to his assigns, or of the shipper himself when the goods are shipped on his account, and deliverable to his order. And where the goods are shipped deliverable to the order of the consignor, for and on account of the consignee, the carrier cannot deliver them to such consignee except upon the production of the bill of lading, properly indorsed by the consignor, for this is notice to the carrier that the shipper intends to retain in his power the ultimate disposition of the goods." It is said in section 131, same author: "The practice of taking bills of lading providing for delivery to the shipper's own order has become very common, in order to use the bill of lading either as collateral or to obtain payment of the goods before delivery." It appears from section 131a that the consignor had shipped goods consigned to itself, and inclosed to the supposed purchaser an invoice of the goods, which stated on its face that the goods were shipped from Bay City, Mich., via F. & P. M. R. R., to B. & L., with draft. They also drew on the purchaser for the price of the goods, attached the bill of lading to the draft, and sent the draft on for collection. The purchaser exhibited the invoice to the agent of the carrier, and received the goods. He failed to pay the draft, and the carrier was held liable. "The title to the property," said Paxson, J., "remained in the consignor until delivery in accordance with the conditions. Bills of lading are symbols of property, and, when properly indorsed, operate as a delivery of the property itself, investing the indorsee with a constructive custody, which serves the purpose of an actual possession, and so continues until there is a valid and complete delivery of the property under and in pursuance of the bill of lading, and to the person entitled to receive the same. There can be no delivery except in accordance with the bill of lading. The invoice alone furnishes no proof of title." *Railroad Co. v. Stern*, 119 Pa. St. 29, 12 Atl. 758. In *Benj. Sales* (4th Am. Ed.) § 320, it is said: "To these may be added, thirdly, where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer. \* \* \*" It seems to be well settled that, if the vendor intends to retain the *jus disponendi* of the goods, the title never passes to the purchaser until all the requirements of the seller have been complied with. Sections 331 and 332 of Benjamin on Sales (4th Am. Ed.) lay down the law as follows: "It

has already been shown that the rules for determining whether the property in goods has passed from vendor to purchaser are general rules of construction adopted for the purpose of ascertaining the real intention of the parties, when they have failed to express it. Such rules, from their very nature, cannot be applied to cases where exceptional circumstances repel the presumptions or inferences on which the rules are founded. However definite and complete, therefore, may be the determination of election on the part of the vendor, when the contract has left him the choice of appropriation, the property will not pass if his acts show clearly his purpose to retain the ownership, notwithstanding such appropriation." "(382) The cases which illustrate this proposition arise chiefly where the parties live at a distance from each other, where they contract by correspondence, and where the vendor is desirous of securing himself against the insolvency or default of the buyer. If A., in New York, orders goods from B., in Liverpool, without sending the money for them, there are two modes usually resorted to, among merchants, by which B. may execute the order without assuming the risk of A.'s inability or refusal to pay for the goods on arrival. B. may take the bill of lading, making the goods deliverable to his own order, or that of his agent in New York, and send it to his agent, with instructions not to transfer it to A. except on payment for the goods. Or B. may choose to advance the money in Liverpool, and may draw a bill of exchange for the price of the goods on A., and sell the bill to a Liverpool banker, transferring to the banker the bill of lading for the goods, to be delivered to A. on due payment of the bill of exchange. Now, in both these modes of doing the business it is impossible to infer that B. had the least idea of passing the property to A. at the time of appropriating the goods to the contract. So that, although he may write to A., and specify the packages and marks by which the goods may be identified, and although he may accompany this with an invoice, stating plainly that these specific goods are shipped for A.'s account, and in accordance with A.'s order, making his election final and determinate, the property in the goods will nevertheless remain in B., or in the banker, as the case may be, till the bill of lading has been indorsed, and delivered up to A. These are the most simple forms in which the question is generally presented; but we shall see that in this class of cases, as well as in that just discussed, it is often a matter of great nicety to determine whether or not the vendor's purpose or intention was really to reserve a *jus disponendi*."

In the case of *Dows v. Bank*, 91 U. S. 618, the supreme court of the United States had under consideration practically the same question involved in the case at bar, and we quote as follows from the syllabus of the opinion of the court in that case: "An invoice

is neither a bill of sale nor evidence of a sale, and, standing alone, furnishes no proof of title. A party discounting a draft, and receiving therewith, deliverable to his order, the bill of lading of the goods against which the draft was drawn, acquires a special property in them, and has a complete right to hold them as security for the acceptance and payment of the draft. \* \* \* Where neither the evidence received nor offered tended to rebut the intent exhibited in the bill of lading, and confirmed throughout by the indorsement thereon, and the written instructions to retain the ownership of the wheat until payment of the draft, held, that there was no necessity of submitting to the jury the question whether there had been a change of ownership." The supreme court of Ohio, in *Emery v. Bank*, 25 Ohio St. 360, said: "By the rules of commercial law a bill of lading is regarded as the symbol of the property therein described, and, in case the shipper reserves to himself the *jus disponendi*, he can transfer the title, at any time before the property is delivered by the carrier, to the consignee, as effectually by the delivery of the bill of lading as by delivery of the property itself. \* \* \* On such question of intention, the terms of the bill of lading are to be taken as admissions of the consignor, and are entitled to great weight, but are not conclusive." In *Stock-Yards Co. v. Westcott* (Neb.) 66 N. W. 419, it is, in substance, said that directions contained in the bill of lading to notify a certain person of the arrival of the shipment at the place of destination is not authority to the carrier to make delivery of such shipment to the persons to be so notified, without the production of the bill of lading. The supreme court of Arkansas, in *Berger v. State*, 50 Ark. 20, 6 S. W. 15, in substance, said: "The vendor who takes a bill of lading deliverable to his order, or that of his agent, manifests the intention to reserve the *jus disponendi* of the goods shipped in himself, and the title does not vest in the person for whom they are ultimately intended until actual delivery to him." In *Doyle v. Manufacturing Co.*, 76 Wis. 48, 44 N. W. 1100, the supreme court of Wisconsin in effect sustained the doctrine announced by the supreme court of Arkansas in the case supra. In *Bergeman v. Railroad Co.*, 104 Mo. 77, 15 S. W. 992, the supreme court of Missouri, in substance, held that, in a sale of mules, the vendor receiving a small sum of money at the time, and drawing a draft for the balance of the purchase price on certain commission merchants to whom he consigned the mules, to be by them delivered to the vendee on payment of the draft, and not before, the possession remained in the vendor and his agents until the purchase price was paid. In *Rank v. Bangs*, 102 Mass. 295, the court, in discussing the question involved in the case at bar, used the following language: "In all completed contracts of sale, property in the goods sold passes to the buyer, although they may not have come to his actual possession.

An unconditional sale of specific chattels passes the title at once, and the buyer takes the risk of loss, and has the right to immediate possession. When anything remains to be done in the way of specifically appropriating the goods sold to the contract, the agreement is executory, and the property does not pass. When, from the nature of the agreement, the vendor is to make the appropriation, then, as soon as any act is done by him, identifying the property, and it is set apart with the intention unconditionally to apply it in fulfillment of the contract, the title vests, and the sale is complete. Thus the delivery to the buyer or his agent, or to a common carrier, consigned to him, whether a bill of lading is taken or not, if there is nothing in the circumstances to control the effect of the transaction, will be sufficient. If the bill of lading, or other written evidence of the delivery to the carrier, be taken in the name of the consignee, or be transferred to him by indorsement, the strongest proof is afforded of the intention to transfer an absolute title to the vendee. But the vendor may retain his hold upon the goods to secure payment of the price, although he puts them in the course of transportation to the place of destination, by delivery to a carrier. The appropriation which he then makes is said to be provisional or conditional. He may take the bill of lading or carrier's receipt in his own or some agent's name, to be transferred on payment of the price, by his own or his agent's indorsement to the purchaser; and in all cases when he manifests an intention to retain this *jus disponendi* the property will not pass to the vendee. Practically, the difficulty is to ascertain, when the evidence is meager or equivocal, what the real intention of the parties was at the time. It is properly a question of fact for the jury, under proper instructions, and must be submitted to them, unless it is plain, as matter of law, that the evidence will justify a finding but one way. *Allen v. Williams*, 12 Pick. 297; *Stanton v. Eager*, 16 Pick. 473; *Stevens v. Railroad Co.*, 8 Gray, 262; *Coggill v. Railroad Co.*, 3 Gray, 545; *Moakes v. Nicolson*, 19 C. B. (N. S.) 290; *Godts v. Rose*, 17 C. B. 292; *Tregelles v. Sewell*, 7 Hurl. & N. 574; *Benj. Sales*, 245." The same court, in *Alderman v. Railroad Co.*, 115 Mass. 233, substantially decided that when goods are consigned deliverable to the order of the consignor, and the bill of lading, with a draft for the price, drawn on the purchaser of the goods, attached, is forwarded for collection, the purchaser has no title to the goods until the draft is paid, and the bill of lading is indorsed to him; and the previous sale of the goods to arrive is void as against the person advancing the money to pay the draft, to whom the bill of lading was indorsed by the drawee as soon as he obtained possession; and the second carrier, who received the goods from the first carrier to transport to their destination, with knowledge on whose account they are carried, though without

knowledge of the bill of lading, is liable to the holder of the bill of lading if he delivers the goods to such a purchaser. The court of appeals of New York in *Bank v. Logan*, 74 N. Y. 568, substantially announced the same doctrine contained in the last-named case. It is said in 21 Am. & Eng. Enc. Law, p. 507: "The foregoing rules for determining whether the property in goods sold has passed from seller to buyer are rules of construction adopted for the purpose of ascertaining the intention of the parties. It follows necessarily that such general rules are not applicable where exceptional circumstances repel the presumptions or inferences upon which the rules rest. If, notwithstanding the appropriation of the goods, the seller's acts show clearly his purpose to retain the ownership, the property does not pass. It is to be borne in mind, however, that this doctrine applies as between the parties to the sale, and not to the prejudice of the rights of third parties, such as creditors or bona fide purchasers, who, under the circumstances, may be entitled to insist that as to them the reservation should be treated as inoperative. Where the seller delivers goods to the common carrier for delivery to the buyer, this is equivalent to a delivery to the buyer whose agent the carrier is deemed to be. If a bill of lading is taken, the carrier is bailee for the person indicated by the bill of lading. If, as is frequently the case, the seller has the bill of lading so drawn that the goods are deliverable to his order, this, in the absence of evidence to the contrary, is almost decisive in showing his intention to reserve the *jus disponendi*, and prevent the passing of the title to the buyer. This *prima facie* conclusion that the seller reserves the *jus disponendi* when the bill of lading is to his order may be rebutted by proof that in so doing he acted as agent for the purchaser, and did not intend to retain control of the property; and it is for the jury to determine as a question of fact what the real intention was. So, when the seller ships goods to a third person, who is his agent, for delivery to the purchaser, he equally manifests the intention to reserve the *jus disponendi*, and to prevent the property from passing to the purchaser until such delivery has been made. \* \* \* If the bill of exchange is payable at sight or on demand, there must be both an acceptance and payment before the purchaser can claim the bill of lading." The principle *supra* seems to be sustained, to some extent at least, by the opinion of this court in *Railroad Co. v. Hartwell*, 36 S. W. 183.

We have carefully examined the authorities relied on by the appellee, but are unable to see that they sustain its contention, or are at all in conflict or inconsistent with the doctrine announced in the various decisions hereinbefore referred to. It seems to us that

it would be unjust and inexpedient to announce as a principle of law that a consignor consigning property to his own order, with directions to notify the purchaser thereof, and sending a draft, with bill of lading attached, requiring payment of the draft before the bill of lading should be delivered, should be held to have parted with his title to the property. In the case at bar, if it be true that the appellee acquired title to the property before it had paid the draft in question, it would then follow that the property would be liable to its debts, and subject to seizure and sale in satisfaction thereof. It is manifest from the evidence in this case that the Marlin Oil Company never intended to part with its title or its *jus disponendi* to the property in question until the purchase price thereof had in fact been paid. The acceptance of the draft in question was not payment thereof, and, besides, it is questionable whether or not the attachment had not been placed in the hands of the officer, and probably levied, before the acceptance of the draft, which acceptance was only by telephone. The appellee did not pay the draft until December 3d, at which time it received the bill of lading, the symbolic delivery of the property. It can hardly be questioned but that the title to the oil remained in the Marlin Oil Company until the acceptance of the draft, and it may well be questioned whether it was not incumbent on the appellee to show that the acceptance of the draft preceded the *issuam* and *levy* of the attachment, even if it was to be conceded (which it is not) that the acceptance of the draft perfected appellee's title to the property. It seems manifest that the business interests of the country demand that the consignor in a distant part of the country should have the right to ship property to be delivered to the purchaser only upon the condition that the purchaser first actually pays for the same. It is worthy of note in the case at bar, upon the failure of appellant to pay the draft attached to the bill of lading for this identical car of oil, that the consignor asserted and exercised the right to make such disposition of the property as it saw fit, although the property was in a tank confessedly the property of appellant, and also in its private yard, though still in custody of the common carrier. Taking into consideration all the facts and circumstances proven in this cause, it is clear that the Marlin Oil Company never intended to part with the *jus disponendi* to the oil until it had first received the price demanded therefor. For the reasons indicated, the judgment of the court below is reversed, and cause remanded, with directions to sustain the attachment of the appellant, and to adjudge the property in question subject to the attachment of the appellant, and for proceedings consistent herewith.

**BARKER et al. v. SOUTHERN CONST. CO.<sup>1</sup>**

(Court of Appeals of Kentucky. Oct. 29, 1898.)

**MUNICIPAL CORPORATIONS — ASSESSMENT FOR STREET IMPROVEMENTS—PERSONAL JUDGMENT—FAILURE TO TAKE BOND FROM CONTRACTOR.**

1. No personal judgment can be rendered against property owners for the cost of street improvements.

2. Ky. St. § 3572, part of charter of cities of the fourth class, providing that the city council shall require the accepted bidder for the work of constructing a street to execute a bond to the city, with good security, is mandatory; and no lien is acquired on abutting property, unless such bond is given.

3. The city council must fix the amount chargeable to the several abutting owners for the cost of a street improvement, and not leave the clerk to determine the amount from the number of feet, and the price per foot, reported by any agent or engineer.

4. Where the cost of making sidewalks in some blocks is twice as much per yard as that of making such improvements in front of other blocks, it is improper to assess the cost against abutting property at an average price per yard for the entire length of the street.

5. To authorize the assessment of the cost of street improvement against abutting property, there must be a strict compliance with the substantial requirements of the statute.

6. If it be competent for the city council to employ an agent to make a contract on its behalf for a street improvement, so as to bind property owners, the authority of the agent must appear of record.

7. A nonresident of the state cannot hold a city office.

Appeal from circuit court, Pulaski county.  
"Not to be officially reported."

Action by the Southern Construction Company against J. F. Barker and others to enforce a lien for the cost of street improvements. Judgment for plaintiff, and defendants appeal. Reversed.

Denton & Cook and W. S. Taylor, for appellants. O. H. Waddle and W. A. Morrow, for appellee.

**GUFFY, J.** The object of this action was to obtain a sale of the property of appellants in satisfaction of certain apportionment warrants alleged to have been issued under the authority of the city council of Somerset, Ky., against the appellants, to pay for certain sidewalk improvements, as well as to obtain a personal judgment. It was further alleged in the petition that certain parties had mortgages upon some of the property sought to be sold, and it was claimed that the lien for the improvements was superior to the mortgage liens, which proposition was controverted by the mortgagees. The appellants relied upon numerous defenses. After the issues were finally made up, and proof introduced, the court, upon final hearing, adjudged in favor of the plaintiff as to the enforcement of the lien upon the property in question, but refused to render a personal judgment, and also held that the mortgage

liens were superior to that claimed by plaintiff. The appellants appealed from the judgment adjudging to plaintiff a lien upon the property in question, and plaintiff obtained a cross appeal upon the judgment refusing a personal judgment, and also upon the judgment adjudging the mortgage liens superior to that of the plaintiff. So much of the latter cross appeal has, however, as we understand it, been withdrawn by the appellee by a statement in its brief. Although this court in *Dressman v. Bank*, 38 S. W. 1052, decided that a lien for street improvements was superior to that of an antecedent mortgage, we will not reverse on the cross appeal, inasmuch as appellee's attorney requests that it be withdrawn. It has been heretofore decided by this court (*Meyer v. City of Covington*, 45 S. W. 769) that no personal judgment can be rendered against property owners for the cost of street improvements, and to that decision we adhere; and the cross appeal, as to that question, must be affirmed.

It appears from the testimony in this case that the plaintiff entered into a contract with the city of Somerset, through its mayor, to perform the work in contest, and that at the time of the contract it was expected that a payment would be made in bonds issued by the city of Somerset; and on that expectation, and without any written contract, the work, or a greater portion of it, was performed. Afterwards, it seems, the plaintiff reached the conclusion that the city of Somerset had no authority to issue bonds in payment for the work; and finally, about the 7th of August, the written contract filed herein was entered into, which seems to have been approved by the city council of Somerset, although the work had been about completed. The evidence conduces to show that sidewalks were to be constructed along a certain street, for a distance of perhaps a mile or more, at so much per lineal foot for curbing, and so much per cubic yard for vitrified brick. It is claimed by appellee that the work was to be completed by sections, and that as a section was completed plaintiff was entitled to apportionment warrants at the contract price against the property holders whose property abutted upon said section. It seems that the city council received the work as done by plaintiff. It is the contention of appellants that no valid contract was made with the city of Somerset; that the proof and pleadings show that, after the alleged ordinance was passed, appellee made a bid, which was accepted by the city of Somerset, but that the same was made upon the idea that the city was empowered to issue bonds to pay for same; and that, when appellee was advised that the city had no such power, it took down the certified check it had deposited when the bid was made, and declined to stand by its bid. But afterwards appellee, under some kind of verbal agreement made with the mayor of Somerset, who was not empowered by any record to make any

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

contract, began the construction of the sidewalks, and had completed the work in contest in this suit before any contract was entered into; but, when some of the citizens began to make inquiry by what authority the sidewalks were being built, the appellee entered into a contract in writing, August 7, 1895, which was approved August 12, 1895, and at the same meeting the board of council undertook to make out apportionment warrants for work already done.

Section 3572, Ky. St., authorizes the city council to provide for the original construction of any street, road, etc., to be paid for by the property holders owning property bordering upon the grounds so improved, to be equally apportioned by the board of council according to the number of front feet owned by them, respectively, upon a petition of a majority of the property owners of lots or parts of lots of ground abutting or bordering upon the ground to be improved: "Provided, however, that said board of council may cause same to be done without petition from owners of lots or parts of lots or land fronting," etc., "upon the grounds to be improved if two-thirds of the members elected to the said council at a regular meeting shall concur therein. The said city council shall require the accepted bidder to execute bond to the city with good security, to be approved by the city council, for the faithful performance of the contract, and the contractor shall within ten days begin his work under said contract, and shall complete the same without delay." It seems to us that the statute requiring security for the faithful performance of the contract is mandatory, and manifestly for the benefit and protection of those who have to pay for the improvements, because it is well known that it is possible for work to be apparently done in the manner required, and yet in fact great frauds might be perpetrated by contractors; and, if no security had been taken, the loss would fall upon those who had to pay for the improvements, because, if the improvements proved worthless, the property owners would again be liable to assessment for additional improvements; and the reason for this rule is well illustrated in the case at bar, because the plaintiff is confessedly a nonresident corporation. It appears that at the time the bid was made, and it was expected that city bonds would be issued in payment for the work, a \$5,000 certified check was required to be deposited as security; but it further appears that for some reason appellee was allowed to withdraw same, and thus leave the property owners without any protection whatever.

It is further insisted for appellants that in fact no apportionment warrants have been issued; that the order of the city council left the amount to be charged against each property owner blank, and thereafter it was within the discretion of the city clerk to determine for what amount each warrant should issue, which contention, it seems to us, is

well founded. It was the duty of the council to fix and determine the amount chargeable to the several abutting property owners, and not leave the clerk to determine, from the number of feet and the price per foot reported by any agent or engineer, as to the amount due from the abutting owners. It clearly appears that the entire contract has not been complied with. It is also insisted for appellants that no apportionment warrants should be issued until plaintiff had completed all the improvements specified in his contract. It further appears that plaintiff had suspended work for many months, but an attempt is made upon its part to show that the suspension was caused by the condition of the weather, and it was impracticable to continue the work, owing to the condition of the weather. It is further suggested that the entire length of the street to be improved is a mile and a quarter or more, and that some portions of it cost more than twice as much per yard or lineal foot to make the improvements as it cost in front of other blocks of property owned by the parties; and this claim seems to be sustained, to some extent, by the testimony. If it be true that in front of some blocks it will cost twice as much to make the sidewalks as it will in front of others, it would be unjust, as well as illegal, to let the entire line at an average price per yard, because the effect would be to make A. pay a much larger amount for the construction of sidewalks in front of his property than the real cost thereof. The power of the city council to order such improvements as these under consideration is a statutory power, and may be said to be a very extreme power, and is often quite oppressive to the property owners; and we think it no more than justice that the authorities ordering such improvements should be held to a strict compliance with all the substantial requirements of the statute, and, unless there be such a compliance, no liability can be imposed upon the property holders for any improvements so made or ordered. If it be competent for the city council to employ an agent to make a contract upon its behalf, that fact should appear of record, in order to authorize such agent to enter into contracts that will bind property holders who are not a party to such appointment.

There is some discussion in the briefs as to the appointment or election of a city engineer, who seems to have been supposed to have had considerable authority as to the superintending and directing of the work in controversy. We are not, however, of the opinion that that question is material to a decision of the question involved in the case at bar. Section 3558, Ky. St., provides that: "It shall be lawful for the board of council to elect a city engineer to hold his office for a term of two years. The time for his election, his salary and duties shall be as may be fixed by ordinance, except as provided herein."

We are not inclined to the opinion, however,

that the city of Somerset had any legally elected or appointed engineer during the performance of the alleged contract, as it does not appear that any election was had; and in fact it is reasonably clear from the proof that the party performing the alleged services mentioned was in fact a citizen of another state, and by the terms of the constitution could not hold an office in Somerset, Ky.

There is some proof conducing to show that some of the work has already proved to be defective, but we do not deem that of much importance in this controversy. If it be conceded that plaintiff presented a prima facie right to recover, we are still of the opinion that, taking the entire proceedings had in relation to the contract, the performance of the work, and the so-called "apportionment warrants," the same fall in so many substantial respects to comply with the law that the plaintiff has failed to acquire any lien upon the property in question, and that the judgment adjudging to it a lien is erroneous. The judgment is therefore reversed, and cause remanded, with directions to dismiss the petition of the plaintiff, and for proceedings consistent herewith.

#### OLD TIMES DISTILLERY CO. v. CASEY et al.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 28, 1898.)

##### TRADE-MARKS—ACQUIESCENCE IN USE—INJUNCTION.

Where two distilling concerns began the use of the same brand on their whiskies near the same time, and continued its use for 10 years, one of them, whose prior right to the use of the brand was not clear, could not then enjoin its use by the other, who had added greatly to its value by expending large sums of money in its advertisement.

Appeal from circuit court, Jefferson county.

"To be officially reported."

Action by Casey & Swasey against the Old Times Distillery Company to enjoin the use of a trade-mark. Judgment for plaintiffs, and defendant appeals. Reversed.

Gibson & Marshall, for appellant. William Lindsay, Newton G. Rogers, and Samuel J. Boldrick, for appellees.

HAZELRIGG, J. The right of the appellees to the exclusive use of the words "Kentucky Comfort," as a brand and trade-mark for their whiskies, is the question presented on this appeal. It appears that on March 26, 1883, the appellees, who were wholesale whisky dealers at Ft. Worth, Tex., procured, through the distillery concern of the Boldrick-Callaghan Company of Calvary, Ky., the design and brand in dispute, and the same was on that day branded into 50 barrels of

whisky sold to appellees by the distilling company, and which were shipped to Ft. Worth, and received by appellees on April 10, 1883. Thereafter appellees pushed this brand of whisky, using as their trade-mark the words "Kentucky Comfort" in connection with the words "Casey & Swasey, Sole Proprietors." Yearly since then the Kentucky company has continued to furnish appellees with from 800 to 1,000 barrels of whisky branded as indicated. On the other hand, it appears that the distilling concern of F. G. Paine & Co., of Louisville, Ky., the predecessors of the appellant, attempted to adopt the words "Kentucky Comfort" as a trade-mark for their whiskies as early as the fall of 1882, and in fact sold some whisky under that name. They did not, however, at that date, actually brand the words on any barrels of whisky, or apply them directly in any form to their goods. One of the members of the firm did apply to one Jones, a designer of brands, and agreed to take the design and brand in question, but the time when he was to have the branding iron actually made was left open, and as to this time there seems to be some dispute. At any rate, after selling some whiskies under that name, this firm did apply to Jones, about the 1st of April, 1883, for the iron, expecting to get the brand they had contracted for some months before. They learned that a few days before that Jones had let the Boldrick-Callaghan Company have the brand, but, upon insisting that they were entitled to it by prior contract, Jones agreed to see the other company to know what he should do. He says he got permission from a member of the Callaghan Company to make the branding iron for Paine & Co., and did so. Paine & Co. also at once gave notice to the Boldrick-Callaghan Company that they claimed the name, and warned them against its use. The brand so made was actually put on the barrels of F. G. Paine & Co., on the 10th of April, 1883, which appears to be the same day that appellees received their goods at Ft. Worth, and first offered them to the public under the brand and trade-name of "Kentucky Comfort, Casey & Swasey, Sole Proprietors." Since that date, F. G. Paine & Co., and their successor, the appellant, have built up a large demand for this brand of whisky all over the country. Indeed, it is shown that their use of it has been four or five times as great as that of the appellees. In all the trade journals of the country the whisky branded by appellant as "Kentucky Comfort" has been advertised, and the value of the brand has come in great part from the moneys expended by appellant in such advertisements. Their sales of this brand amount to from three to five thousand barrels per year.

There are many interesting details connected with the original selection of these words, and the obtention of the brand, and its application to the goods of the appellees and

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

appellant, to which we have not adverted. These facts would have been important 10 years ago, in a contest between these parties for this trade-mark. The undisputed facts are, however, that, with the knowledge of both sides to this controversy, there have been two brands of "Kentucky Comfort" whisky on the market since 1883, and neither party has seen fit to take steps against the other to try the question of title thereto. The chancellor found the appellees had first actually applied the words to their goods. We think this is, at least, a very doubtful question. Certainly the first sale and delivery of goods so branded was the sale and delivery of the goods of appellant shown to have been on April 10th; and it was on this day appellees received their whisky so branded for them at Ft. Worth, and on that day presumably offered it for sale. It may be that the application of the brand to the goods at the distillery in Kentucky was sufficient to constitute a prior appropriation of the words, but, if this is true, the difference in time between the dates of actual application of the words by the two claimants was only a few days; and, however important this might have been in a contest then inaugurated, it ought not to affect the question now. Each party was clearly acting in good faith in the selection of the words, and there was no intention on the part of either to wrongfully appropriate the invention or the property of the other. As a matter of fact, the parties for 10 years have acted on the theory that their geographical position made it unimportant to put to the test the question who was technically entitled to this trade-mark. The appellees have stood still too many years with knowledge of the fact that appellant has been expending large sums of money in extending the use of and demand for this brand of whisky, and ought not to be permitted now to reap the benefit of the appellant's industry and enterprise. This is not a case where one who is clearly the owner of a trade-mark is seeking to withdraw his permission for its further practical use. In *Prince's Metallic Paint Co. v. Prince Mfg. Co.*, 6 C. C. A. 647, 57 Fed. 938, it is said: "Now, it is true that, where the plaintiff's title to a trade-mark is clear, mere delay, unaccompanied by anything else, will not ordinarily bar a suit for injunction against a naked infringer. *Fullwood v. Fullwood*, 9 Ch. Div. 176; *McLean v. Fleming*, 96 U. S. 245; *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. 143. But we are dealing with no such case. In courts of equity the rule is to withhold relief where there has been unreasonable delay in prosecuting a claim, or long acquiescence in the assertion of adverse rights. *Creath's Adm'r v. Sims*, 5 How. 192; *Godden v. Kimmell*, 99 U. S. 201; *Lansdale v. Smith*, 106 U. S. 391, 1 Sup. Ct. 350. Again and again has it been judicially declared that nothing can call into activity a court of equity but conscience, good faith, and reason-

able diligence. *McKnight v. Taylor*, 1 How. 161; *Sullivan v. Railroad Co.*, 94 U. S. 806-812. In *McLaughlin v. Railway Co.*, 21 Fed. 574, Judge Brewer held a bill for the infringement of a patent alleging the unauthorized use and construction of a patented invention for 13 years, without stating an excuse for the plaintiff's delay in suing, to be demurrable. Laches for even less than the statutory period of limitations, aided by other circumstances, will bar a right. *Ashhurst's Appeal*, 60 Pa. St. 290, per Strong, J. In *Lewis v. Chapman*, 3 Beav. 133, the master of the rolls refused an injunction to restrain the infringement of a copyright on the ground of 6½ years' delay, where there was knowledge of the commencement and prosecution of the defendant's publication. Long acquiescence before filing a bill for an injunction, with full knowledge of the infringement, is deemed laches equivalent to a breach of good faith. *Browne, Trade-Marks*, § 497. Hence, in *Manufacturing Co. v. Garner*, 55 Barb. 151, a delay of nine years in applying for an injunction to restrain infringement of a trade-mark was held to be good cause for refusing it." We have quoted at length from this case, because it evidences a full investigation of the authorities, and announces what we conceive to be a sound rule of law, and one quite applicable to the case at hand, viewed from appellees' standpoint. That case was one where the plaintiff had a clear title to the trade-mark, but the defendant had for more than eight years been using it "under a known assertion of right, and at least color of title," and had, by constant and successful advertisement, extended the market for the article, and largely enhanced its reputation; and the court held that "to take from the defendant the trade advantages thence ensuing, and give them to the plaintiff,—the certain effect of an injunction,—would be unconscionable"; and we so think here. The judgment is reversed, with directions to dismiss the petition.

#### LISCHY v. SCHRADER et al.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 3, 1898.)

#### WILLS—CONCLUSIVENESS OF JUDGMENT DISMISSING APPEAL—UNDUE INFLUENCE—WANT OF MENTAL CAPACITY.

1. Under Ky. St. § 4850, providing that an appeal from an order probating or rejecting a will may be prosecuted from the county court to the circuit court, and thence to the court of appeals; and section 4859, providing that "the final decision given shall be a bar to any other proceeding to call the probate or rejection of the will in question,"—while the final decision of a court probating a will has the effect of a judgment in rem, so as to bind parties in interest not before the court, an agreed judgment dismissing an appeal from an order probating a will has not that effect

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.



so as to prevent other parties in interest from appealing.

2. Slight evidence of undue influence is sufficient to authorize an instruction on that subject, that being peculiarly a question for the jury.

3. Under Ky. St. § 4850 (providing that the same effect shall be given to the verdict of a jury in a will case as in any other civil proceeding), where the evidence as to mental capacity of the testator is conflicting, a verdict rejecting the will, will not be disturbed.

Appeal from circuit court, Daviess county.  
"To be officially reported."

Appeal by James P. Schrader and John C. Schrader from an order of county court probating the will of Margaret Griffith. Judgment of circuit court rejecting the will, and Effie Lischy appeals. Affirmed.

Robert S. Todd, Reuben A. Miller, and Little & Little, for appellant. Sweeney, Ellis & Sweeney, R. W. Slack, and J. H. Miller, for appellee.

BURNAM, J. On the 17th day of January, 1894, the will of Margaret Griffith, who died, a resident of Daviess county, on the 14th day of the same month, was probated in the Daviess county court; and, on the 20th day of January thereafter, her son John C. Schrader, one of the devisees under the will, took an appeal from the order of probate, making all the other heirs and devisees appellees. The Daviess circuit court was in session when this appeal was taken, and at the same term a compromise was effected, and the following order was made in the case: "State of Kentucky. Daviess Circuit Court, January Term, 1894. February 22, 1894. John C. Schrader, Plaintiff, vs. Effie Schrader, etc., Defendants. By the agreement and consent of the parties appellant and appellees to this appeal from the order of the Daviess county court probating the will of Margaret Griffith, deceased, dated January 17, 1894, the appeal and contest of said will is now, for the consideration herein stated, the receipt of which is acknowledged, settled, and the appeal dismissed, said consideration being the payment to Jennie Schrader, the wife of John C. Schrader, the sum of \$2,000, the receipt of which sum Jennie Schrader acknowledges by fixing her signature hereto, which said settlement and payment are accepted and received by John C. and Jennie Schrader as in satisfaction and bar of any contest of said will, by them or either of them; and this action is dismissed. [Signed] John C. Schrader. Jennie Schrader." The three daughters of Mrs. Griffith, the appellees in that appeal, paid the \$2,000 mentioned. The present appellee, James P. Schrader, at that time resided in McLean county, and was not before the court on that appeal, no process having been issued thereon; but the three daughters of deceased, who paid the money, entered their appearance to the appeal; and, pursuant to the agreement made with John C. Schrader, his appeal was dismissed, and no further steps were taken as to the will

until the 19th day of September, 1895, when James P. Schrader and John C. Schrader filed a second appeal from the order of the Daviess county court probating the will of their mother. Before the trial of the issue involved in the second appeal, the appellees in that appeal, Mrs. Lischy and others, filed their plea in bar thereof, in which they set up the first appeal of John C. Schrader, and the disposition of that contest by the order above referred to, and relied on same as a bar to the second appeal, against both John C. Schrader and the present appellee, James P. Schrader. Separate demurrers to the plea in bar were filed by John C. and James P. Schrader, which the court overruled as to John C. Schrader, but sustained as to the appellee James P. Schrader. Subsequently the plea in bar was amended, appellants alleging that James P. Schrader had participated in the settlement above referred to, knew of the negotiations which preceded and induced the appellees on the first appeal to make the settlement and pay the \$2,000 to Jennie Schrader, in consideration of which the appeal of John C. Schrader was dismissed, and these facts were relied on as an estoppel against James P. Schrader. James P. Schrader filed his answer to the plea in bar as amended, and denied that he had induced the appellees in the first appeal to make the settlement, or that he knew anything about it, or had participated in the matter in any way. With the issues thus made up, the parties went to trial before a jury, and the court directed the jury to find a separate general verdict on the plea in bar. The jury returned a general verdict against the will, and a separate verdict against the then appellees on the plea of estoppel against James P. Schrader, and judgment was entered thereon, and this appeal is prosecuted to reverse that judgment.

A number of errors are relied on. It is contended by appellant—First, that the order dismissing the first appeal of John C. Schrader is a bar under the statute to a second appeal by him, or any other person interested in the will; second, that the court erred in instructing the jury upon the question of undue influence, as it is claimed that there was no testimony introduced on the trial bearing upon this issue; and, third, that there was no evidence of lack of testamentary capacity at the time the will was executed, or, at least, that the testimony on this point was overwhelmingly in favor of the contention of appellant, and that the verdict is consequently flagrantly wrong. It may be taken as settled law that a final judgment of a court of competent jurisdiction upon any disputed question of fact is conclusive as between the parties or privies to the proceeding in which the judgment was rendered; and it is equally well settled by repeated adjudications of this court that a final decision of a court (having jurisdiction of the question) probating or rejecting a will, upon appeal from au

order of the county court, is a bar, while it remains in force, to any other appeal for the same purpose, not only between the parties to the record and their privies, but also to all others who may be interested in it. The reason and necessity for this rule have been so frequently argued that it would be superfluous to repeat them here. See *Singleton v. Singleton*, 8 B. Mon. 840; *In re Wells' Will*, 5 Litt. 275; *Jacob v. Pulham*, 3 J. J. Marsh. 200; *Tibbatts v. Berry*, 10 B. Mon. 473; *Mitchell v. Holder*, 8 Bush, 862; and *Reed v. Reed*, 91 Ky. 267, 15 S. W. 525. But the question to be decided in this case is not the legal effect which is to be given to a final decision in the circuit court on an appeal in a will case, but whether the consent order entered by agreement of the appellant and John C. Schrader in the Daviess circuit court, in pursuance to which his appeal was dismissed, is such a final decision under the statute as to be a bar to the appeal of James P. Schrader in the second proceeding.

The law governing the probating and rejecting of wills is found in the following sections of chapter 135 of the Kentucky Statutes: 4849 provides that wills shall be admitted to record by the county court of the county of the testator's residence. 4850 provides that appeals may be prosecuted from the county court to the circuit court of the same county, and thence to the court of appeals, from every judgment admitting a will to record, or rejecting it. 4850 provides that, when an appeal is taken to the circuit court, all necessary parties shall be brought before the court, and that either party may demand a jury to try the question whether the paper produced is or is not the last will of the testator; and it is further provided in the same section that, if no jury is demanded, the court shall determine that question, and that the final decision given shall be a bar to any other proceeding to call the probate or rejection of the will in question. 4861 provides that any person interested at the time of the final decision in the circuit court, who resided out of the state, and was proceeded against by warning order only, and any other person interested who was not a party to the proceeding by actual appearance, or being personally served with process, may, within three years after such final decision in the circuit court, by petition in equity, impeach the decision, and have a retrial of the question of probate.

It will be observed that section 4850 provides that an appeal may be taken to the court of appeals from every judgment of the circuit court admitting a will to record, or rejecting a will, and that section 4859 provides that the final decision of the circuit court determining the question of will or no will shall be a bar to any other proceeding to call the probate or rejection of the will in question, subject, however, to the right of appeal to the court of appeals, as provided for in section 4850. It is evident from the

whole context of these provisions of the statute that the final decision contemplated is such a final judgment as determines whether the paper offered for probate is the true will of decedent, or that it is not, from which judgment an appeal would lie; and in order to make effectual these provisions of the statute, which give to the final decision of a court probating a will the effect of a judgment in rem, so as to bind parties in interest not before the court, the requirements of the statute as to the method of procedure must be adhered to, and the fact as to whether the paper is the last will of decedent must be determined by a bona fide trial, either by the court or by a jury. We cannot believe that it was the purpose of the statute to permit parties to an appeal of this character to enter into such agreement with each other as to take from the court the consideration and determination of the question which the appeal was prosecuted to decide, so as to deprive parties equally interested in the question, but who are not before the court, and have not been consulted about the proposed agreement, of the right to have the question passed on in one of the modes provided for by statute. In our opinion, the agreement which was entered up as a judgment of the court is not such a final determination of the question as prevents other parties in interest from prosecuting the appeal provided by law.

The next error complained of is that the court erred in instructing the jury upon the question of undue influence, it being insisted that there is no evidence in the record to justify such an instruction. The record does not bear out this broad assertion, as there is evidence which conduces to show that deceased had frequently stated—and had done so up to within a short time of her death—that she did not intend to make any will; and the fact that she postponed this important matter until within a few hours of dissolution is corroborative of this testimony. This paper was not executed until deceased had taken up her abode in the home of her daughters, and there is testimony conducing to show that their influence over her was very great. The undue influence contemplated by law is often exceedingly difficult to establish by proof. It, of necessity, depends largely upon circumstantial evidence. As said by this court in *Fry v. Jones*, 95 Ky. 149, 24 S. W. 6: "No general rule may be laid down by which this force may be detected. Manifestly, this must be done by that tribunal to which is afforded opportunity of meeting the witnesses face to face, and hearing them testify. Before such, the general bearing and conduct of the witnesses, and especially the mental characteristics of those charged with having controlled another, may become matters of personal observation and oversight. To a jury of the vicinage, therefore, must be left, in a large measure, the detection of this refined and subtle power. They may not determine its presence without evidence of it, but we may

well hesitate to determine the absence of such evidence when, in their wisdom, it is found to be present. The question of undue influence was not prominent, and was not the point on which this case turned, but we cannot say that there was not enough proof to authorize an instruction on the question.

The main ground relied on by appellant, and that to which most of the proof was directed, was that testator, at the time she executed the paper in contest, did not have sufficient capacity to do so; and it is urged by counsel that the verdict of the jury was so flagrantly at variance with the weight of the evidence on this point that it is the duty of this court to reverse the judgment, and grant a new trial, for this reason. The testimony as to mental capacity to execute the paper is conflicting, and the duty of determining the question is one which the law imposes upon a jury; and the statute provides that the same effect shall be given to their verdict in a will case as in any other civil proceeding. See Ky. St. § 4850. We are not authorized to ignore the testimony of quite a number of witnesses, including a brother and a nephew of the deceased, several reputable physicians, and her nearest neighbors, who testify to facts conducing to show that, for several years prior to the execution of the paper in contest, deceased had at times been subject to hallucinations, which could only be the offspring of a mind diseased, and who are emphatic in the expression of the opinion that, by reason of mental infirmities, she was incompetent to execute a will. It is impossible for this court to determine the degree of weight which shall be attached to the testimony of individual witnesses. This must be relegated to the sound discretion of the jury, who have the opportunity to see the witnesses and hear them testify. And we feel, after a careful and thorough consideration of this case, that there is no legal ground for reversal; wherefore the judgment is affirmed.

UNION CENT. LIFE INS. CO. v. LEE.<sup>1</sup>  
(Court of Appeals of Kentucky. Nov. 2, 1898.)

LIFE INSURANCE—FALSE STATEMENT AS TO USE OF  
INTOXICATING LIQUORS—MATERIALITY  
OF REPRESENTATION.

Under Ky. St. § 639, providing that no misrepresentations in an application for a policy of insurance shall prevent a recovery unless material or fraudulent, false statements by an applicant that he does not use intoxicating liquors will invalidate the policy, though he be not addicted to the intemperate use of such liquors; the rule being different, however, as to his past habits in that regard.

Appeal from circuit court, Carlisle county.  
"Not to be officially reported."

Action by Sallie Lee against the Union Central Life Insurance Company on a policy of insurance. Judgment for plaintiff, and defendant appeals. Reversed.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

J. M. Nichols & Son, for appellant. Sheldoun & Ray and John W. Ray, for appellee.

GUFFY, J. It appears that on the 24th day of September, 1894, John T. Lee made an application to appellant for a policy on his life. He gave his note for the first premium, and the agent through whom the application was made delivered to him what may be called a binding receipt. The application was forwarded to the home office, and was received there on the 27th day of September, 1894 which seems to have been approved, and policy made out, and dated September 24, 1894, the date of the application. On the 29th day of September, and before the delivery of the policy, said Lee died, and his wife, Sallie Lee, the beneficiary of the policy, instituted suit against the appellant for the sum named in the policy, to wit, \$2,000. It further appears that the policy required a larger premium than that named in the application, and the court below, under the pleadings and proof, adjudged, in effect, that no contract of insurance had been entered into by the parties, and from that judgment appellee prosecuted an appeal to this court, which judgment was reversed, and upon the return of the case to the circuit court appellant made defense upon several grounds. Upon final trial verdict and judgment were rendered in favor of appellee for the amount of the policy, less the premium note, and, appellant's motion for a new trial having been overruled it prosecutes this appeal. The grounds relied on for a new trial are: (1) Because the court erred in giving instructions Nos. 1 and 2 to the jury; (2) because the court erred in refusing to give instructions A, B, C, and D, asked by appellant; (3) the verdict of the jury is not sustained by sufficient evidence; (4) the verdict is contrary to law. Appellant also moved for judgment notwithstanding the verdict.

It is the contention of appellant that the insured committed suicide, and also that he had not truthfully answered certain questions propounded to him in the application, which questions are as follows: "Do you use spirituous, malt, or other intoxicating liquors? If so, to what extent? Kind? Average quantity each day? Have you at any time used them to excess? When? Give full particulars?" To each of the foregoing questions the insured answered, "No." The appellant assumed the burden in the court below, and it is insisted that the verdict of the jury is so flagrantly against the evidence that it should be set aside for that reason. It is true that appellant introduced a considerable amount of testimony which conduces to sustain its contention, and especially in regard to the questions asked the insured. The appellee, however, insists that the decision of this court in *Insurance Co. v. Thomson*, 94 Ky. 259, 22 S. W. 87, settles the law to be that, although the insured might not have truly answered the question under consider-

ation, yet his failure to do so cannot defeat a recovery unless his use of intoxicants or narcotics had been such as to affect his health or physical condition at the time of making the application. The instruction in the Thomson Case was as follows: "If the jury believe from the evidence that Rodes Thomson had a habit of intemperately using intoxicating liquors prior to his application for the insurance in question, and that such habit existed at such a time and to such an extent that it might reasonably have injured or impaired his health at the time of the application, then they should find for the defendant." The court, in discussing the question, said: "It is provided by section 22, c. 22, Gen. St., that all statements or descriptions in any application for a policy of insurance shall be deemed and held representations, and not warranties, and that no representations, unless material or fraudulent, shall prevent a recovery on the policy. Therefore, unless the fact of a former habit of using intoxicating liquors be considered a material inquiry at the time of an application for life insurance, whether his health may or may not thereby have been impaired or injured, the instruction quoted presented the issue on that subject fully and correctly. It is of vital importance for an insurance company to know, before issuing a life policy, whether the applicant is thus temperate in his habits, for, obviously, he would not be a fit subject for insurance; nor could a company prudently issue to him a life policy if he was not then temperate in his habits of drinking intoxicating liquors; and, consequently, if he had made a false statement in that particular, it would be no answer to say the habits were not such as to impair his health, because insurers have a right to protect themselves by guarding against the risk of pernicious habits. May, Ins. § 290. But it seems to us an inquiry in regard to previous habits of drinking intoxicating liquors is not material unless they existed to such an extent as to affect the health or physical condition of the applicant, and thereby render him an unsatisfactory subject for life insurance." It will be seen that the court approved the instruction quoted above. It is true that the instruction given in the case at bar is more favorable to the appellee than the instruction supra.

It is further insisted for appellant that the failure of the insured to truly answer the first question—as to whether he used spirituous, malt, or other intoxicating liquors, etc.—should operate to defeat a recovery, and that the court failed to properly instruct the jury in respect thereto. It seems to us that the inquiry was material to the risk, and that appellant was entitled to have a full and correct answer thereto; and this view seems to be in strict accord with the opinion in the case of Insurance Co. v. Thomson, supra. It will be seen from instruction No. 1 given by the court in the case at bar that the jury

was required to find for the plaintiff as to the former habit of intemperance, unless they believed from the evidence that the insured had at some time previous to his application for said policy been so addicted to the use of spirituous, vinous, or malt liquors, or to the use of morphine or other narcotics, as to impair his health at the time of said application to such an extent as to enhance the risk upon his life, or to render it more hazardous, or was at the time of said application addicted to the excessive or intemperate use of such liquors or narcotics. The second instruction is substantially the same as No 1, differently stated. It will thus be seen that the appellant was required to show that the insured was, at the time of the application, addicted to the intemperate or excessive use of intoxicating liquor, etc., in order to defeat a recovery on that issue. It seems clear to us that an insurance company has a right to know the habits of an applicant as to the use of intoxicants, and it is the duty of the applicant to answer correctly all questions in that respect; and if the applicant was, at the time, in the habit of using such intoxicants, no recovery should be allowed upon the policy, although he was not using them excessively or intemperately; and it was therefore error to give instructions Nos. 1 and 2, above referred to. It must be conceded that there was evidence conducing to show that the insured, at the time of his application, was in the habit of using at least some of the liquors mentioned in the questions propounded to him. For the errors indicated in the instructions, the judgment is reversed, and cause remanded, with directions to award appellant a new trial, and for proceedings consistent herewith.

WHITE, J., not sitting.

# CHESAPEAKE & O. RY. CO. v. DIXON'S ADM'X.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 28, 1898.)

RAILROADS—NEGLIGENT SPEED OF TRAIN AT CROSSING—EVIDENCE—JOINDER OF DEFENDANTS—REMOVAL OF CAUSE TO FEDERAL COURT.

1. It is negligence of a high degree to run a train from 15 to 20 miles an hour over a crossing, within the limits of a city, which is much used both by persons in vehicles and on foot; the track being visible in one direction only a short distance.

2. A verdict for \$10,000 for the death of a man 70 years of age is not excessive.

3. It is not error to instruct the jury to assess the damages for the death of plaintiff's intestate at such sum as will "reasonably compensate plaintiff for the loss sustained" by such death, and that "in fixing the amount of such compensation they may take into consideration the power of the deceased to earn money."

4. Defendant was not prejudiced by evidence

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

that there was no flagman at the crossing; the jury not being instructed in regard thereto, and the crossing being one which in fact required a flagman.

5. The rule confining the evidence to the particular acts of negligence charged does not apply where there are no specific acts of negligence alleged in the petition.

6. Where a railroad corporation and its servants are jointly guilty of negligence resulting in the death of plaintiff's intestate, they may be joined as defendants.

7. The fact that the plaintiff and one of several defendants are citizens of different states does not authorize the removal of the cause to the United States circuit court, though the other defendants were joined for the purpose of preventing such removal, provided there was in fact a joint liability.

Appeal from circuit court, Boyd county.  
"To be officially reported."

Action by Alexander Dixon's administratrix against the Chesapeake & Ohio Railway Company and others to recover damages for the death of plaintiff's intestate. Verdict and judgment for plaintiff, and defendants appeal. Affirmed.

W. H. Wadsworth and A. M. J. Cochran, for appellants. Jas. A. Scott and John F. Hager, for appellee.

LEWIS, J. This action was brought by Lucy Dixon, administratrix of Alexander Dixon, against the Chesapeake & Ohio Railway Company, owner, and R. H. Chalkey and William Sidles, engineer and fireman, of a railroad train, by collision with which plaintiff's intestate was killed. The killing occurred on the crossing of the Chesapeake & Ohio Railroad, leading from Catlettsburg to Ashland, by a turnpike road extending from one to the other of the two cities, and being the only public highway from Catlettsburg to Ashland. The place of said crossing is within the corporate limits of Catlettsburg, and very much used by persons in vehicles and on foot; the proof showing that as many as 500 or more persons cross there each day. Parallel to, and about 8 feet from, the Chesapeake & Ohio Railroad track, is the track of the Ohio & Big Sandy Railroad, likewise crossed by the same highway. The evidence shows that at the time of the occurrence the deceased, Alexander Dixon, who was about 70 years of age, was going on foot from Catlettsburg, westward, to his home, near Ashland. The train which killed him (being a passenger train) was going in the same direction. According to the evidence of eyewitnesses, he had crossed the track of the Ohio & Big Sandy Railroad, and was near to, and about to or had put his foot upon, the track of the Chesapeake & Ohio Railroad, when, his attention being apparently attracted, he looked up the track towards Catlettsburg; but seeing nothing, nor being able to see any object on the track at a greater distance than 600 or 700 feet, on account of a curve in the track and intervening houses, he turned and looked westward along the track, about which time he was struck by the train. The train, which

was 15 minutes late, was running, according to the testimony of the engineer, 15 to 20 miles, and, according to the testimony of others, between 30 and 40 miles, per hour. He was struck with such force as to knock his body 8 or 10 feet in the air, and drive it bounding 73 feet, measured. According to the testimony of the engineer, when he first discovered him, Dixon was between the tracks of the Chesapeake & Ohio Railroad and the Ohio & Big Sandy Railroad; that he immediately gave the alarm signal, by short, sharp blasts of the whistle, and put the air brake on, and immediately Dixon looked in the direction of the approaching train, whereupon he released the air brakes, supposing Dixon would get out of danger. But other witnesses testify that the air brake was not put on until after Dixon was struck. The engineer and trainmen testified that a signal, by blowing the whistle, of the approach of the train to the crossing was made at the usual place, and they were corroborated by others not connected with the train; while others, who were near to the whistling post, and whose attention was given to the passing train, testify that there was no whistle until the train had approached very near to the crossing, when there were several short, sharp blasts of the whistle, in quick succession. There is evidence tending to show, and from which the jury could reasonably find, that those in charge of the train were guilty of negligence, in two respects: First, in failing to give proper signal of the approach to the crossing; second, considering that the crossing was within the limits of a city, the fact of the number of people usually crossing at that place in vehicles and on foot, and the short distance the track could be seen therefrom looking eastward, it was a high degree of negligence to move the train, when near the crossing, at even the rate of speed admitted by the engineer it was moving.

We will now consider the various grounds relied on by appellants for reversing the judgment:

It is contended that the verdict, which was \$10,000, is excessive; and in that connection instruction No. 4 is objected to, being as follows: "If the jury find for the plaintiff, they shall assess such damages as will, in the opinion of the jury, reasonably compensate plaintiff for the loss sustained by the death of plaintiff's intestate, not exceeding \$30,000; and, in fixing the amount of such compensation, the jury may take into consideration the power of the deceased to earn money." This court has not heretofore considered itself authorized to interfere with the verdicts of juries on account of excessive damages assessed, unless they appear to have been given under the influence of passion or prejudice; and, compared with other cases that have been heretofore passed on by this court, we cannot say the assessment in this case was excessive. The instruction complained of, in our opinion, did not, nor could it, mislead or

prejudice the jury; nor, as urged by counsel, is it liable to the same objection made to an instruction in the case of *Railroad Co. v. Gastineau*, 33 Ky. 123.

The court did not err to the prejudice of appellants in permitting evidence to go to the jury that there was no flagman at the crossing where the accident occurred; for though that crossing is, according to the evidence, such a one as to require a flagman, the jury was not instructed in regard thereto. The argument of counsel that the evidence was, according to the rule confining a recovery to the particular acts of negligence charged, incompetent, is not well founded, because there are no specific acts of negligence charged in the petition of appellee.

The main ground for reversal is the refusal of the lower court to sustain the petition of appellant the Chesapeake & Ohio Railroad Company for a transfer of this case to the United States court for the district of Kentucky. The ground upon which the transfer was sought, as alleged in the petition asking it, is that the action is wholly between citizens of different states; the Chesapeake & Ohio Railroad Company being a corporation created under the laws of the state of Virginia, and a citizen thereof, while appellee, Lucy Dixon, is and was a citizen of the state of Kentucky. As appellants Chalkey and Sidles were, when this action was commenced, citizens of Kentucky, the Boyd circuit court had jurisdiction of the persons of all the defendants, as well as of the subject of the action, if the defendants were jointly guilty of the negligence alleged to have been the cause of the death of Alexander Dixon, and jointly liable therefor. It is alleged by appellee in her petition, and, so far from the contrary being shown by appellant the Chesapeake & Ohio Railroad Company, is clearly proved by the evidence in this case, that appellants Chalkey and Sidles, as engineer and fireman of said train, were guilty of the negligence causing said death, and that the Chesapeake & Ohio Railroad Company, through its said employees, was also guilty of said negligence; and therefore they were jointly liable for the destruction of the life of said Dixon, caused thereby. It is not material that, as alleged in the petition for a transfer of this case, Chalkey and Sidles were made parties defendant for the single purpose of preventing the removal of the case by the Chesapeake & Ohio Railroad Company to the circuit court of the United States for the district of Kentucky, or what may have been the motive of the plaintiff for bringing a joint action, unless they were wrongfully and illegally joined; and such is the doctrine as settled by the supreme court of the United States. As, therefore, appellant the Chesapeake & Ohio Railroad Company neither sufficiently alleged nor attempted to prove that the defendants were wrongfully joined as such, the lower court properly refused to make the transfer. Judgment affirmed.

**CARROLL COUNTY ACADEMY v. TRUSTEES OF GALLATIN ACADEMY.<sup>1</sup>**

(Court of Appeals of Kentucky. Nov. 1, 1898.)

**DEEDS—CONDITION SUBSEQUENT—CONVEYANCE OF PROPERTY FOR SCHOOL PURPOSES—FAILURE OF CHARITY—REMEDY FOR ABUSE OF TRUST.**

1. If it be doubtful whether a clause in a deed be a condition or a covenant, courts will incline to the latter construction.

2. A deed conveying property to a corporation "on condition and in trust" that same shall always be devoted to school purposes, without any provision for a reversion, does not create an estate on condition; and a discontinuance of the use of the property for school purposes does not work a forfeiture.

3. The grantors, though the grantees have ceased to use the property for school purposes, cannot recover it as the donors of a charity which has failed; they having sold it, for a valuable consideration, without any condition as to reversion to them.

4. The fact that the building had become out of repair, and that no school had been taught therein for a few years, did not amount to an abandonment of the property under the covenant of the deed.

5. If the grantee has abused its trust by devoting the property to other than school purposes, the remedy of any one having a right to sue is an action to have the trustees removed.

Appeal from circuit court, Carroll county.

"To be officially reported."

Action by the trustees of the Gallatin Academy against the Carroll County Academy for a restitution of certain real estate to plaintiffs, and for a dissolution of defendant corporation. Judgment for plaintiffs, and defendant appeals. Reversed.

Winslow & Winslow, for appellant. J. J. Orr, J. A. Donaldson, and R. W. Masterson for appellees.

BURNAM, J. Plaintiffs allege that they are the trustees of the Gallatin Academy, by appointment of the Carroll county court; that their corporation was the owner of a lot of ground in the town of Carrollton, which was unimproved by suitable buildings, and that in the year 1859 they conveyed this lot to the defendant, for a nominal consideration, upon condition that it should erect thereon suitable buildings for a high school, and that it should always thereafter be devoted to school purposes, whether retained by defendant, or be passed into other hands; that the deed was accepted, and suitable buildings erected on the lot for school purposes, by the defendant, and that a school was maintained there for many years; but that the defendant had abandoned the property for school purposes, and had failed for more than two years before the institution of their suit to have a school kept in the building, and it is claimed that they thereby violated the conditions of the trust. And they further allege that the charter of the defendant company provides

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

that the corporation may be dissolved with the concurrence of four-fifths of the stockholders, or for the failure for two consecutive years to maintain a school in connection with the defendant association; and they plead that by reason of such failure defendant has forfeited its right to the property, and they ask for a restitution of the lot to them, and for a dissolution of the defendant corporation. A copy of the deed is filed with the petition, the habendum clause of which is in these words: "To have and to hold same unto said parties of the second part, their heirs and assigns, forever, on condition and in trust that they shall erect and put up a suitable building or buildings for a high school or seminary of learning, and that same shall always be devoted to school purposes, whether retained by said association, or be passed into the hands of others." The defendant demurred generally to the petition, which was overruled, and it then filed its answer, in which it denied that such a corporation as the Gallatin Academy has existed since the time the trustees conveyed the lot to it, in 1859; denied that the county court of Carroll county had the power to appoint trustees for such corporation, or that it has done so; and denied that it has abandoned the use of the property for school purposes, or made any other use thereof. Plaintiffs, in their reply, aver that the defendant accepted the deed to the lot in question from the trustees, who were appointed by the Carroll county court exactly as they were, and plead that the defendant is estopped to deny the existence of the corporation, or the power of the court to appoint trustees of the Gallatin Academy, after the acceptance of such conveyance. The pleadings being made up, proof taken, and the case submitted for judgment, the chancellor adjudged that the defendant had failed to carry out the purposes and objects of the conveyance and the terms of its charter, and that the conveyance of the lot being without consideration, and for a charitable purpose, the property reverted to the Gallatin Academy; and this appeal is prosecuted to reverse that judgment.

By the acceptance of the deed from the Gallatin Academy, defendant obligated itself to erect on the lot conveyed therein suitable buildings for a seminary of learning, and covenanted with the grantors that the property should always be devoted to school purposes; and the petition alleges that defendant, in conformity with this condition of the deed, did erect the buildings required. And the only question left for the determination of the court, under the averments of the petition, is, has the property been abandoned for school purposes, and used by the defendant for other purposes inconsistent with the terms of the deed? And, if so, are the plaintiffs entitled to have the property restored to them, as the successors of the trustees of the Gallatin Academy, who executed the deed to defendant in 1859?

The clause of the deed upon which appellees must rely to work the forfeiture asked for herein, even if it be conceded that they are entitled to maintain this action, is not a subsequent condition of ownership, but a mere covenant on the part of the defendant that the property should not be diverted from school purposes, and for the breach of which forfeiture does not lie. It is a rule of law that conditions subsequent are not favored, because they tend to destroy estates; and, if it be doubtful whether a clause in a deed be a condition or a covenant, courts will incline to the latter construction. See 4 Kent, Comm. (12th Ed.) pp. 129, 130; 3 Rap. Dig. §§ 1095, 1096; and *Rawson v. School Dist.*, 83 Am. Dec. 670. A full and intelligent discussion of this question is found in the recent case of *Greene v. O'Connor* (decided by the supreme court of Rhode Island) 25 Atl. 692. The clause of the deed discussed in that case reads as follows: "This conveyance is made upon the condition that the strip of land shall be forever kept open and used as a public highway, and for no other purpose." And the court held it to be a covenant, and not a condition, saying: "We do not think the clause quoted created a condition subsequent. Conditions subsequent, as is well understood, are not favored in law. A deed will not be construed to create an estate on condition, unless language is used which, according to the rules of law, *ex proprio vigore* imports a condition, or the intent of the grantor to make a conditional estate is otherwise clearly and unequivocally indicated. If it be doubtful whether a clause in a deed be a covenant or a condition, courts will always lean against the latter construction. The clause in question is merely a declaration of the purpose for which the land conveyed was to be used and improved, to wit, as a public highway. It contains no language which imports that the grant shall be void in case the purpose for which the land is conveyed is not carried out; nor does it reserve to the grantor and their heirs the right, in that event, to re-enter on the land, and resume possession of it as of their former estate. Moreover, the purpose is, in its nature, general and public, and not one inuring specially to the benefit of the grantors. Such a declaration does not create an estate on condition, but merely imposes a confidence or trust on the land, or raises an implied agreement on the part of the grantee to use the land for the purpose specified." In the case at bar, as in the case above quoted, the deed contains no language which imports that the grant shall be void in case the purpose for which the land was conveyed is not carried out; nor does it reserve to the grantor the right in that event to re-enter on the land, and resume possession of it as of their former estate. In *Raley v. Umatilla Co.*, 15 Or. 172, 13 Pac. 890, the supreme court of Oregon held that "a con-

veyance in consideration of one dollar, to hold for the special use, and none other, of conditional purposes, does not make a condition subsequent." In *Curtis v. Board*, 43 Kan. 138, 23 Pac. 98, the supreme court of Kansas held that "a conveyance of land to a school board and their successors forever for the erection of a school house thereon, and no other purpose, makes only a limitation on the use of the property, and not a condition subsequent."

Nor can the judgment appealed from be upheld upon the theory that the plaintiffs are the legitimate successors of the donors of a charity which has failed. They do not seek to recover upon such a theory, as they do not allege that they gave the lot as a charity, but, on the contrary, aver that they sold it for a valuable and presumptively commensurable consideration, without any condition as to reversion to them. This is clearly shown by the habendum of the deed, quoted *supra*. There is no testimony in the record which conduces to show that the defendant has abandoned the property in question for school purposes, or made any use thereof inconsistent with the terms of the deed. The mere facts that the buildings had become somewhat out of repair, and that no school had been taught therein for a few years, do not amount to an abandonment of the property under the covenant of the deed under which defendant holds. And if, as a matter of fact, the defendant has abused its trust, and appropriated the trust property to its own use, or diverted it from the purposes for which the lot was conveyed and the buildings erected, the remedy for any person having a right to institute suit is an action to have the trustees removed. Mr. Perry (2 Perry, Trusts [3d Ed.] § 744) says: "If the trustees of a charity abuse the trust, misemploy the fund, or commit a breach of the trust, the property does not revert to the heir or legal representative of the donor, unless there is an express condition of the gift that it shall revert to the donor or his heirs in case the trust is abused; but the redress is by bill or information by the attorney general, or other person having the right to sue. If a good public charity is created by gifts upon condition or limitations, or by gifts for particular purposes, or to a certain end, the heir cannot defeat the charity by reason of a breach of the trust or perversion of the charity; but the courts, upon proper proceeding, will correct all abuses, and restore the charitable gift to its original purpose. Heirs and personal representatives of a donor have no beneficial interest, reverting or accruing to themselves, from the breach or nonexecution of a trust for a charitable use."

In view of the conclusions we have reached on this question, it will be unnecessary for us to express an opinion upon the validity of the appointment by the county court of

Carroll county of plaintiffs as trustees of the Gallatin Academy, or of their prayer for a dissolution of defendant's charter. But for the reasons indicated the judgment is reversed, and the cause remanded, with directions to dismiss the petition.

### DOHN v. BRONGER.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 1, 1898.)

PLEADING—REFUSAL TO PARAGRAPH—PRINCIPAL AND SURETY—LIMITATION OF ACTION.

1. It was error to strike defendant's answer from the files for his refusal to paragraph, the answer, as copied in the record, being sufficiently paraphrased, and one of the paragraphs containing a good defense.

2. Where the creditor, for a valuable consideration, extends the time of payment of a note for the principal without the knowledge or consent of the surety, the surety is released.

3. The seven years which will bar an action against a surety in a note must be counted from the maturity, and not from the execution, of the note.

Appeal from circuit court, Bell county.

"Not to be officially reported."

Action by Henry F. Bronger against W. H. Dohn on a promissory note. Judgment for plaintiff, and defendant appeals. Reversed.

G. W. Saulsberry, for appellant.

HAZELRIGG, J. Appellant was the surety of one Scanlan on a note to appellee, and, when sued, pleaded (1) that, for a valuable consideration, the appellee had extended the time of payment of the note for Scanlan without the knowledge or consent of appellant; (2) that more than seven years had elapsed since he signed the note, and its collection as to him was therefore barred by the statute. On motion, the appellant was ruled to paragraph his answer, and, on a subsequent day of the term, a judgment was entered reciting that, appellant having failed and refused to paragraph his answer, the same is stricken from the files, and then follows a judgment against appellant for the amount of the note sued on. The answer, as copied in the record, is sufficiently paraphrased, the facts supporting the two defenses of the appellant being set out in two separate paragraphs; and while the facts set up in the second do not constitute a defense, because seven years had not elapsed from the maturity of the note until the institution of the suit, the averments of the first paragraph are sufficient to constitute a defense. On the issues thus presented, the appellant was entitled to a trial. In fact, in the absence of a reply controverting the averments of the first paragraph, he was entitled to have the petition dismissed. Judgment reversed for further proceedings consistent herewith.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.



**PEPPER'S ADM'X v. HARPER.<sup>1</sup>**

(Court of Appeals of Kentucky. Nov. 2, 1893.)

**ACTIONS—WAIVER OF MISJOINDER—LANDLORD AND TENANT—DECEDENT'S ESTATE—INTEREST.**

1. Misjoinder of causes of action is waived by failure to require plaintiff to elect.

2. Though it may be that an action cannot be maintained on a written lease of land for a term of three years because not signed by the lessee, rent may be recovered from the deceased lessee's estate for the last year of the term, the premises having been actually occupied during that time by the administrator for the benefit of the estate.

3. Ky. St. § 3884, providing that no interest accruing after his death shall be allowed on any claim against the decedent's estate unless the claim be demanded of the personal representative within one year after his appointment, does not apply to a claim not due until after the appointment of the administrator.

**Appeal from circuit court, Franklin county. "Not to be officially reported."**

Action by W. W. Harper, guardian, against the administratrix of R. P. Pepper, Sr., to recover rent. Judgment for plaintiff, and defendant appeals. **Affirmed.**

Frank Chinn, for appellant. W. M. Franklin, for appellee.

**LEWIS, C. J.** This action was brought by appellee, guardian of infants, on the following contract: "Frankfort, Kentucky, Dec. 4, 1893. I have this day leased to R. P. Pepper, as guardian for my children Sallie B. and W. P. Harper, the tract of land near White Sulphur, Scott county, Ky., being a portion of the Dudley Davis farm, supposed to be about two hundred and fifty-five acres, for the term of three years, for \$1,000; the lease commencing first day of March, 1894, and expires on first day of March, 1897. First payment, 333⅓ dollars, due March first, 1895; second payment, 333⅓ dollars, due March first, 1896; third payment, 333⅓ dollars due March first, 1897. I agree to furnish any new material and put up any new fencing necessary to protect the crop, and pay the same. The said Pepper agrees to keep any old fencing now on the place in repair as far as the material will answer, and not charge for his labor. W. W. Harper." It is alleged in the petition that by the terms of said contract R. P. Pepper entered upon and took possession of the premises mentioned therein on March 1, 1894, and continued to use and occupy same until he died, at which time the lease and the right to the use and occupancy of said premises passed to the administratrix as assets of the estate of said decedent, and that she, as administratrix, used and occupied same from said date until the expiration of said lease, on March 1, 1897. Judgment is asked for \$344.67, with interest from September 27, 1897.

A motion was made in court by defendant to compel plaintiff to paragraph the petition,

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

which was overruled, but the motion to strike out that part of the petition we have italicized was sustained. It appears that the writing sued on was in possession of the administratrix, which, by rule, she was required to, and did, file in this action. By an indorsement on the original contract it appears that the rent for the first two years and part of the third, less a discount of 8 per cent., was paid in advance. The court finally gave judgment for plaintiff for \$290, with interest from March 1, 1897, being balance of rent unpaid. It may be that two distinct causes of action were stated in the petition, but appellant did not avail herself of the motion to compel appellee to elect which might have been done. And it may be that, under the statute, the action could not be maintained upon the written contract, because it was signed alone by Harper, the lessor, and not by Pepper, the lessee, the party to be charged therewith. But, with or without a written contract, appellee is entitled to recover one year's rent for use and occupation of the land in 1896; for it is distinctly stated in the petition, and not sufficiently—though attempted to be—denied, that R. P. Pepper, pursuant to said contract, entered and took possession of said premises, and continued to use and occupy the same until he died, when the said lease and the right to the use and occupancy of said land passed to his administratrix as assets of the estate. And, though this action may not be maintainable on the written contract, being in possession of R. P. Pepper at his death, and in possession of his administratrix when this suit was brought, and having indorsed thereon credits for more than the rent of the first two years, it sufficiently shows not only the right of R. P. Pepper while living, and his administratrix after his death, to occupy and use the land for the year 1896, at the price fixed, but as well the fact that it was so used and occupied for the benefit of his estate; and his estate, having thus received and enjoyed the use and profits of the land of these infants, cannot legally or justly escape payment of rent for the year 1896.

The court did not err in giving judgment for interest on the demand, for section 3884, Ky. St., has no application to this case, being as follows: "No interest accruing after his death shall be allowed or paid on any claim against the decedent's estate, unless the claim be verified and authenticated, as required by law, and demanded of the executor, administrator or curator within one year after his appointment." That section applies to claims due and bearing interest at the death of the decedent, or at the time of the appointment of his personal representatives. Appellant was appointed administratrix February 23, 1895, but the claim of appellee was not due or demandable until March 1, 1897, when the lease for the year 1896 expired. Perceiving no error of court prejudicial to appellant, the judgment is affirmed.

**DANIELS et al. v. GIBSON et al.<sup>1</sup>**

(Court of Appeals of Kentucky. Nov. 4, 1898.)

**STATUTE OF FRAUDS—PROMISE TO PAY DEBT OF ANOTHER—VENDOR AND PURCHASER—RESERVATION OF TIMBER.**

1. An agreement to pay, as a part of the purchase price of land, notes executed by the vendor to another, is not a promise to pay the debt of another, within the statute of frauds.

2. Where a vendor, who reserved all the timber on the land of certain dimensions, again became the owner of the land by purchase from a remote vendee, a judgment for the sale of the land to pay the purchase money will not be reversed because the timber is not excepted out of the sale ordered; nine years having elapsed since the reservation was made, and there being nothing in the pleadings to show that all the timber reserved has not been taken.

Appeal from circuit court, Owsley county. "Not to be officially reported."

Action by J. S. Judd and J. G. Sebastian against G. W. Baker. Judgment for plaintiffs, and defendant appeals. Affirmed.

A. M. Baker, for appellant. E. E. Hogg, for appellees.

**WHITE, J.** The real appellant in this case is G. W. Baker, and the appellees J. S. Judd and J. G. Sebastian, and by mistake it appears on the docket as in the caption. The appellant Baker sold, by title bond, a tract of land in Owsley county, to Irvin Baker. The consideration was paid, except \$62.50. Irvin Baker sold the land to G. W. Gibson, who paid all the consideration that he was to pay to Irvin Baker. Gibson sold the land to G. W. Daniels for \$500. The purchase money lien due G. W. Baker of \$62.50 was included in this amount. For the balance of the \$500 purchase price, Daniels executed notes to Gibson, who assigned one to Judd, and the other to one Needham, who, by a general assignment of all his property, assigned it to Sebastian. Daniels resold to appellant G. W. Baker, and surrendered the title bond back to Baker, the same one he had executed to Irvin Baker; and the debt due to G. W. Baker was satisfied, as all parties agree. It is alleged on the part of appellees that, in the repurchase by G. W. Baker from Daniels, he agreed to pay the balance of the two notes executed by Daniels to Gibson, and, to recover these notes, this suit was brought. The answer of Baker denied this or any agreement by him to pay these notes, and also pleaded the statutes of frauds against the right of recovery. Baker also, in his answer, pleaded that Daniels exchanged some of the land with one Burns for other lands, and took a title bond from Burns, but admitted that, in his contract with Daniels, this exchanged loan was taken by him, and the Burns title bond assigned to Baker. On the issue raised as to the contract between Bak-

er and Daniels as to whether Baker was to pay these two notes executed to Gibson, proof was taken, and the chancellor, on final hearing, adjudged that Baker had agreed to pay these notes, and rendered a personal judgment against him, and also a decree to sell the land for the lien. From this judgment, this appeal is prosecuted.

It appears that by the title bond executed by the appellant to Irvin Baker, executed in 1887, appellant reserved all the walnut and poplar timber of certain dimensions; and it is insisted that the judgment must be reversed because by it this timber is not excepted out of the sale ordered; and it is insisted that this contract, if made, by appellant, to pay the two notes, was the promise to pay the debt of Daniels, and, being in parol only, cannot be enforced by reason of the statute of frauds. It is also insisted that a reversal should be had on the proof as to the contract to pay. We are of opinion that the chancellor did not err in finding as a fact that appellant Baker agreed to pay these two notes as part of the consideration of the land, in addition to his debt of \$62.50, and, this being true, this contract was not within the statute of frauds. While it was in a sense an agreement to pay the debt of another, being an agreement to pay a debt then owing by Daniels, still, as to Baker, it was an original undertaking to pay a debt of his own. Daniels could not have compelled appellees to accept Baker for the debt, and be himself relieved; but, if they chose to look to Baker (which, by their pleading, they appear to have done), he will not be heard to complain, and cannot be relieved by the statute of fraud from paying his own debt. Appellees, being benefited by it, and having elected so to do, might maintain an action on the promise to Daniels for their benefit, as was expressly held in *Jennings v. Crider*, 2 Bush, 322, and *Hodgkins v. Jackson*, 7 Bush, 342. There is nothing in any of the pleadings showing that appellant had not taken all the timber reserved from the land, and nine years had passed. There is nothing to present that question before us.

It is insisted that a part of Burns' land is ordered sold, and that this is error. We are unable to say whether this be true or not; but, conceding it to be a fact, Burns was before the court, and does not complain, and appellant Baker cannot be prejudiced by any such judgment. Finding no error, the judgment is affirmed.

**LOUISVILLE SOUTHERN R. CO. v. HOOE.<sup>1</sup>**

(Court of Appeals of Kentucky. Nov. 5, 1898.)

**RAILROADS—INJURY TO ABUTTING PROPERTY—INSTRUCTIONS TO JURY.**

1. Damages may be recovered for injury to abutting property on account of annoyance and

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

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discomfort habitually suffered by the occupants from smoke, cinders, and unusual noise from trains passing over a railroad in the streets of a city.

2. In an action to recover such damages, an instruction that: "A mere personal annoyance, of itself and alone, will not authorize a verdict for the plaintiff. There must be a diminution of value. But it is competent for you to consider whether the personal annoyance (if there be any) of the occupant will conduce to a diminution of value,"—is substantially correct.

Appeal from circuit court, Mercer county. "Not to be officially reported."

Action by E. A. Hooe against the Louisville Southern Railroad Company to recover damages for injury to property. Judgment for plaintiff, and defendant appeals. Affirmed.

Thos. W. Bullitt and Bullitt & Shield, for appellant. Guthrie & Vanarsdal and Bell & Bell, for appellee.

BURNAM, J. Appellee is the owner of a dwelling house situated on the southwest corner of Factory and Childs streets, in Harrodsburg, fronting on Childs street; and in 1894 she instituted this suit against appellant for damages thereto growing out of the location and operation of defendant's railroad along Factory street. The special elements of injury relied on are that appellant, in operating its trains on this street, throws sparks, cinders, smoke, etc., directly upon appellee's property; that the vibration has damaged the walls, plastering, and ceiling thereof; that the track has interfered with the accessibility of her premises from the street; and that a screeching and racking noise is made by the engines and trains passing over the curves in the road near that point. This is the second time the case has been appealed to this court. 35 S. W. 266; 38 S. W. 131. On the former appeal the judgment of the lower court was reversed upon the ground that the proof did not authorize a recovery for interference with egress and ingress, or prove injury resulting from smoke, cinders, etc.; and the case was sent back for retrial, and instructions to suit the proof that might be offered upon a new trial. A retrial of the case in the court below, after eliminating the element of damage arising from interference with egress and ingress, because of lack of proof, resulted in a verdict for appellee for \$900, and from this judgment appellant appeals.

Two grounds of error are relied on: First, that the verdict is flagrantly against the weight of the evidence; second, that the court erred to appellant's prejudice in giving instruction No. 1, which reads as follows: "If you believe from the evidence in this case that, while trains of cars are in careful and prudent operation on the railroad track adjacent to plaintiff's abutting property, sparks, smoke, cinders, or soot from the engine naturally and by their own gravity, and not blown by currents of wind, habitually settle

on plaintiff's property, or that the cars, while in careful and prudent operation on the track adjacent to plaintiff's property, habitually make disagreeable noises, other than those which are customarily made by trains of cars, as a necessary incident to the motion of such bodies in careful and prudent operation, and to the annoyance of the occupants of the property, or that the plastering of the buildings has been cracked or otherwise injured by the vibrations or concussions caused by passing trains in careful and prudent operation; and if you further believe from the evidence that these things, or any of them, exist or occur to such a degree or extent that the value of the property is diminished,—then you will find for the plaintiff in damages. A mere personal annoyance, of itself and alone, will not authorize a verdict for the plaintiff. There must be a diminution of value. But it is competent for you to consider whether the personal annoyance (if there be any) of the occupant will conduce to a diminution of value. Unless you believe one or the other of the propositions herein set forth, you will find for the defendant."

It is contended that there is no evidence in the case to establish the claim that smoke, sparks, cinders, or soot from engines naturally and by their own gravity, and not blown by currents of wind, habitually settle on appellee's property, or that appellant's trains habitually make disagreeable noises, other than those which are customarily made by trains; and it is especially insisted that the qualification at the close of the instruction supra, that: "A mere personal annoyance, of itself and alone, will not authorize a verdict for the plaintiff. There must be a diminution of value. But it is competent for you to consider whether the personal annoyance (if there be any) of the occupant will conduce to a diminution of value,"—is prejudicial to appellant. An ordinary steam railroad is not a local convenience. Its cars do not stop at the call of any one who may wish to ride, and they do not ordinarily transport passengers from one point to another within the city. The city is but one of its termini, and its location and operation along the streets thereof is a different use of such streets from that originally contemplated in their dedication, and imposes an additional servitude, for which compensation must be made to the original owners of property abutting on the street, if the result of such location be to cause smoke, dust, cinders, etc., emanating from engines to habitually fall upon the property of such owners. Upon the second trial of this case the testimony was much fuller than on the first, and was materially strengthened. There is testimony to show that appellee's house is constantly filled (when the windows are raised) with smoke, and that sparks and cinders emitted from passing engines fall thereon; that the railroad makes two sharp curves in the immedi-

ate vicinity of the house of appellee, which have a tendency to increase the volume of smoke, sparks, and cinders emitted from engines operating around these curves; and that a disagreeable, screeching noise is made thereby, which is not the usual accompaniment of running trains. The instruction complained of is substantially correct. If, as a matter of fact, the occupants of this building habitually suffer annoyance and discomfort on account of the smoke, cinders, noise, etc., from passing trains, this fact tends to diminish the value of the property. There is proof in the record that the property was worth between five and six thousand dollars before the location of the railroad on this street, and that in a large measure its value has been destroyed by reason of the annoyance and discomfort complained of, and we do not feel authorized to disturb the verdict on the sole ground that it is against the weight of the evidence. Wherefore the judgment is affirmed.

#### FARMERS' & DROVERS' BANK OF EMINENCE v. BENNETT.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 5, 1898.)

PRINCIPAL AND AGENT—TRANSFER BY AGENT OF NOTE IN PAYMENT OF HIS OWN DEBT.

Where one to whom a note is payable as agent has authority merely to collect the note and distribute the money, he cannot exchange it for his note held by one who has notice of the extent of his authority, though he represents that he has settled with his principal, and is in fact the owner of the note.

Appeal from circuit court, Henry county.

"Not to be officially reported."

Action by Bank of Newcastle against J. M. Miles and the Farmers' & Drovers' Bank of Eminence to enforce a lien on real estate. Judgment awarding to Virginia Bennett, who became a party to the action, the proceeds of a lien note; and the Farmers' & Drovers' Bank of Eminence, which claimed the note, appeals. Affirmed.

W. P. Thorne and D. A. Sachs, for appellant. W. B. Moody, for appellee.

HAZELRIGG, J. One J. S. Corbin, under a power of attorney from the heirs of Mrs. S. A. Jenkins, sold to Miles a house and lot in Eminence for the sum of \$2,400, of which he received in cash \$800, and took to himself "as agent for the heirs of S. A. Jenkins, deceased," two notes, of \$800 each, due in one and two years. The cash payment seems to have been distributed properly among the heirs, as well as the proceeds of the second note, which was discounted for cash by Corbin at the Bank of Newcastle; but of these sums the appellee, one of the heirs, got nothing, because she agreed with the other heirs that she would await the collection of the

last note, and take it as her share of the estate. Before the maturity of the last note, Corbin delivered it to the appellant bank, in payment of certain notes the bank held on him and others. At the time of this transaction the appellant had full notice of Corbin's agency, and the extent of it; the authority being merely to collect the note and distribute the money. It is shown by the officer of the bank who effected the exchange of its notes on Corbin for the Miles note that he inquired of Corbin how he stood with the heirs of Mrs. Jenkins; and it is clear that he knew Corbin could make no such disposition of the Miles note as he attempted to make, unless he had settled with the heirs, and was in fact the real owner of the note. That he was misinformed by Corbin as to the fact of such ownership, we do not doubt, but this cannot affect the rights of the real owner. Corbin was authorized to collect the note, and, under the arrangement with the heirs, he might doubtless have discounted it. But this must have been done for cash. He could not exchange the Miles note for his own note. This was not a collection of it. Bank v. Gray, 84 Ky. 574, 2 S. W. 168; Galbraith v. Insurance Co., 12 Bush, 35. The judgment giving the proceeds of the note to appellee is affirmed.

#### LAUGHLIN et al. v. FIRST NAT. BANK OF GEORGETOWN et al.<sup>1</sup>

(Court of Appeals of Kentucky. May 28, 1898.)

PREFERENCE OPERATING AS AN ASSIGNMENT FOR CREDITORS—JUDGMENT SUFFERED IN CONTEMPLATION OF INSOLVENCY.

Where, with the consent of defendant, who was insolvent, suit was brought and summons served on him in a county in which neither he nor the plaintiff resided, for the purpose of obtaining a speedy judgment without the knowledge of other creditors, the judgment obtained therein was a "judgment suffered" in contemplation of insolvency, and with design to prefer, within the meaning of Ky. St. § 1906, declaring that any judgment so suffered shall operate as an assignment for the benefit of creditors.

Appeal from circuit court, Scott county.

"Not to be officially reported."

Action by First National Bank of Georgetown and others against Owen Laughlin and B. J. Laughlin to have certain acts of defendant B. J. Laughlin declared to operate as an assignment for the benefit of all his creditors. Judgment for plaintiffs, and defendants appeal. Affirmed.

Owens & Finnell, for appellants. Victor F. Bradley, Jas. F. Askew, and Jas. Y. Kelley, for appellees.

LEWIS, O. J. By the judgment appealed from in this case it was determined that B. J. Laughlin, defendant in the action, in con-

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

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temptation of insolvency, and with the design to prefer his co-defendant, Owen Laughlin, as a creditor, to the exclusion of his other creditors, including the plaintiff the Deposit Bank of Georgetown, suffered a judgment to be rendered against him for \$2,895.44. It was further adjudged that the suffering of said judgment operated as an assignment and transfer of all the property and effects of the defendant B. J. Laughlin which he owned on the 24th day of November, 1894, and inured to the benefit of all his creditors in proportion to the amount of their respective claims. It appears that the debt due to Owen Laughlin was created in 1889, and judgment was rendered thereon in his favor against B. J. Laughlin in the Fayette circuit court, November 24, 1894. At the latter date B. J. Laughlin resided on and owned one half interest in a tract of land situated in Scott county, and personal property which, at forced sale, brought \$650; while Owen Laughlin, who was his brother, and owned the other half of said tract, resided in Montgomery county. The evidence shows that the interest of B. J. Laughlin in the tract of land, after satisfying a mortgage lien upon it, did not exceed in value \$6,200, and his entire estate was not worth more than \$6,900. His indebtedness then amounted to between \$11,000 and \$12,000. It is therefore manifest that B. J. Laughlin was unable to pay all his creditors, and the judgment in favor of Owen Laughlin would, if enforced, have operated as a preference of him to the exclusion in whole or part of other creditors. The transaction, as admitted by both of them, is about as follows: In October, 1894, B. J. Laughlin requested his brother, Owen, who was then visiting at his house in Scott county, to advance him some money, and take a mortgage on his interest in the tract of land; but it was not then done. Subsequently B. J. Laughlin visited his brother, Owen, at Mt. Sterling, for the purpose, as he says, of inducing him to advance him the money, and there furnished a statement of his financial condition, as Owen, when in Scott county, had requested him to do. Instead of advancing the money, Owen, after having a consultation with his attorney, went to Lexington, accompanied by B. J. Laughlin, where suit was brought, and summons served on B. J. Laughlin. We are satisfied the judgment subsequently rendered in that action was, in meaning of the statute, suffered by B. J. Laughlin, in contemplation of insolvency, and with the design to prefer Owen Laughlin, to the exclusion in whole or in part of other creditors. In the first place, neither of the parties to it, nor, so far as this record shows, any of the other creditors of B. J. Laughlin, then resided in Fayette county; and when, a short time afterwards, one of the creditors, a neighbor of B. J. Laughlin, having read in a newspaper published in Lexington an account of a suit being brought by Owen against B. J. Laughlin, asked him

about it, he denied knowing anything on the subject. Second. It is admitted by Owen Laughlin that his lawyer advised him that, by bringing the suit in Fayette county, he could obtain judgment more speedily than to bring it either in Montgomery county, where he resided, or in Scott county, where B. J. Laughlin resided. Thus, two objects, neither according to the ordinary course of business, seem to have been contemplated by both of them: First, a speedy judgment, which debtors do not ordinarily aid in bringing about; and, second, recovery of that judgment without the knowledge of other creditors. Judgment affirmed.

### GOWDY v. JOHNSON.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 3, 1898.)

**HOMESTEAD—MISTAKE AS TO VALUE—FRAUD IN VALUATION—LIMITATION OF ACTION—LOSS OF DEBTOR'S FAMILY AFTER ALLOTMENT OF HOMESTEAD—INCREASE IN VALUE.**

1. Allotment of a homestead cannot be disturbed on account of a mistake of judgment by appraisers as to value.

2. Under Ky. St. § 2519, requiring that relief against fraud shall be sought within five years from the discovery thereof, and, in any event, within 10 years from the act complained of, the allotment of a homestead cannot be disturbed on the ground of fraud after the lapse of 10 years.

3. A pleading seeking relief on the ground of fraud, which shows that more than 10 years have elapsed since the alleged fraud was committed, is bad on demurrer.

4. While it is essential to the creation of the homestead right that the debtor should have a family, the loss of his family after the allotment of homestead does not deprive him of the right.

5. The fact that a homestead, after its allotment to the debtor, increases in value so as to exceed the limit of value prescribed in the statute, does not authorize a revaluation and reassignment, so as to allow creditors to subject the excess.

Appeal from circuit court, Taylor county.

"To be officially reported."

Action by John A. Johnson against George H. Gowdy, administrator, to quiet title. Judgment for plaintiff, and defendant appeals. Affirmed.

W. C. McChord, for appellant. Garnett & Garnett and H. S. Robinson, for appellee.

**HAZELRIGG, J.** On June 26, 1879, one Christie caused an execution to be levied on 123 acres of land belonging to his debtor, the appellee, Johnson, who was a housekeeper with a family and entitled to a homestead. Appraisers Cundiff and Griffin were accordingly selected by the officer levying the execution to set apart the homestead, and did so by giving the debtor 92 acres of the tract. The residue of the land was sold by the officer. On November 5, 1883, the appellant, Gowdy, caused an execution against John-

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

son to be levied on the 92 acres theretofore laid off as a homestead; and appraisers Sublett and Burress were selected, and they set apart the entire tract to the debtor as a homestead, at \$328. On November the 20th of the same year another execution issued on the same judgment, and appraisers Taylor and Shreve set apart the same tract, valuing it at \$463. Two other executions were issued subsequently, but no further effort seems to have been made to subject the homestead to the debt until December, 1894, when another execution issued, and appraisers Kerr and Romine set apart 29 acres of the tract as a homestead, valuing it at the statutory limit of \$1,000. The officer then proceeded to sell the residue under the execution, when the plaintiff therein bought it at the price of \$90, a sum considerably less than his debt and interest. Johnson then instituted this action in equity to have the levy and sale declared void, and his title and right quieted to the homestead as originally laid off. The answer of Gowdy sets up at length various matters supposed by him to authorize the revaluation of the homestead, and the levy on, and sale of, the excess of land over the value limit of the statute. Among other things, he avers that, as he was no party to the Christie execution, he is not bound by the action of the appraisers in setting apart the 92 acres; that as the Christie debt was small, and the residue of the tract left for sale was ample to pay the debt, the proceeding was merely formal; that as a matter of fact the 92 acres of land at that time were worth at least \$1,500 or more,—a fact well known to the appraisers,—and their action was therefore fraudulent; that he is not estopped by the action of subsequent appraisers under his execution; and that since 1883 the land has increased in value to the extent of \$500 at least. He avers, further, that, prior to the last levy and sale under his execution, the debtor, Johnson, ceased to be a housekeeper with a family.

We are of opinion, as held by the chancellor on demurrer, that these averments do not constitute any reason whatever for disturbing the original setting apart of the 92 acres to Johnson as a homestead under the Christie execution. It is settled law that the action of the appraisers is final and conclusive against the world, unless impeached for fraud or mistake. The mistake meant is not one of mere judgment with respect to the value of the land set apart. That is the precise thing they are called on to do,—value the land and set it apart. If, intending to set apart, by mistake, 100 acres, in fact, set apart, by mistake, 100 acres, this would afford ground for relief to any complaining creditor. Nor can there be relief in this case on the ground of fraud. The answer declares that more than 10 years have elapsed since the alleged fraud (section 2519, Ky. St.), and as relief against fraud or mistake should be sought within 5 years from the discovery thereof,

and, in any event, within 10 years from the act complained of, the averments were insufficient to afford ground for relief, and it was proper to so declare on demurrer.

It was not denied that Johnson was a housekeeper, and in the possession of the 92 acres, when Gowdy obtained the new appraisal, and levied on and sold the residue of the tract; his averment on this subject being simply to the effect that Johnson had ceased to have a family. This question has been authoritatively settled by this court in *Stults v. Sale*, 92 Ky. 5, 17 S. W. 148, where it was held that, while it was essential to the creation of the homestead right that the debtor should have a family, it was not essential to the continuance of the right. The loss of his family, as by death or marriage, did not deprive him of the right.

The only remaining question is to ascertain what effect, if any, is to be given the averment of Gowdy, presented in the nature of a counterclaim, that the value of the homestead had increased to the extent of at least \$500 since 1883. He avers that it is now in fact worth \$2,500, and expresses his willingness to pay \$2,000 for it. Whether the fact that the homestead, as originally established, has so increased in value as to exceed the limit of value prescribed in the statute, may authorize a revaluation and reassignment, is a question not free from difficulty. It seems not to have been determined in this state, and in other states the courts have not agreed. In Missouri the statute seems to be quite similar to ours, and in *Beckner v. Rule*, 91 Mo. 62, 3 S. W. 490, it was said: "There is not a provision in the statute which looks to the conclusion that, when a homestead is once set off, it cannot be revalued. \* \* \* The debtor may have a homestead, but he must take and hold it subject to the fluctuations in value. If, in course of time, it should increase in value, so as to be worth more than the statutory limit, it may be assigned again, and the excess applied to payment of his debts. If the assigned homestead should depreciate in value, he may add to it, and claim a revaluation himself." In Illinois the same rule seems to prevail. *Stubblefield v. Graves*, 50 Ill. 103. In Tennessee, under a similar statute, the opposite conclusion was reached. In *Hardy v. Lane*, 6 Lea, 380, it was said: "There is nothing in the act from which it can be inferred that it [the homestead] is subject to repeated valuations, if perchance it may appreciate in value, or be estimated at a higher value by proceedings subsequently instituted for this purpose. The policy of the act is to secure a fixed and permanent abode and home for the head of the family, his wife and children, in the possession of which they should not be disquieted and disturbed, if by their industry they so far improve the premises as to make them really more valuable than they were when first assigned to them. Upon the construction contended for, i. e. that the homestead must

always be kept to the exact value first assigned to it, the occupants would be constantly liable to the annoyance of new suits to ascertain, by the speculations and opinions of creditors and others, whether the homestead had not appreciated in value." In *North Carolina (Gully v. Cole, 96 N. C. 447, 1 S. E. 520)* it was held that, as no provision was made in the statute for laying off the homestead a second time, it could not be done, in the absence of fraud or irregularity in connection with the assignment. But whether the creditor might have an equitable remedy in case the homestead had greatly increased in value was a question not decided, although mentioned.

Our statute provides that, in addition to the personal property exempted from sale, there shall be exempt from sale, under execution, attachment, or judgment, except to foreclose a mortgage given by the owner or for purchase money due therefor, so much land, including the dwelling house and appurtenances owned by the debtors who are actual bona fide housekeepers with family resident in this commonwealth, as shall not exceed in value \$1,000. Other sections provide for valuation and allotment, and no sale is to be made of the homestead unless it is of greater value than \$1,000, and is not divisible without great diminution of its value. We thus see that the thing attempted to be protected from sale is the land,—the homestead itself. The object of the statute, as of all statutes of like character, is not so much to exempt a certain sum of money from subjection to debt, or land of a certain value, but it is intended to protect the homestead itself,—the dwelling house and appurtenances,—to the end that the citizens of the commonwealth may be home owners. The matter of value is a mere incident,—a proper one, it is true, as our lawmakers have conceived it to be the better rule that some limitation in value should be applied. In some other states, we believe, no limitation of value is prescribed.

We have already seen that the act of setting apart the homestead, whether by the sheriff or by commissioners appointed under order of court, is a final and conclusive act. In effect, the act is an adjudication,—a judicial procedure in rem,—not to be disturbed except for fraud or mistake, as in other adjudications. We think this judgment in the homesteader's favor is, in effect, a judgment that he is the permanent holder of a certain described tract of land, and, is entitled to the possession of it so long as it remains his homestead. The matter of its value, at most only an incident controlling the quantity of the assignment, is no longer a question of importance or interest to the owner and homesteader after his rights are once fixed to a particular boundary. That question is a closed one. It was never other than a preliminary one,—a condition precedent, as it were, to the final assignment of the homestead by metes and bounds. When that is fixed, the owner-

ship and right of occupancy is fixed. We regard it as altogether repugnant to the policy and object of our homestead law that this fixed right of occupancy shall be made to depend on the fluctuations of the real-estate market. How often might it happen that homesteads of the prescribed value as originally assigned, and not susceptible of further division, would have to be sold, upon an advance in the market? It is against the policy of the law that any homestead be sold at all, and it is to be laid off—set apart—in all cases except where great diminution in value would result by a division. It is sold then as a matter of necessity, and the conditions which give rise to the necessity of selling the homestead of the citizen ought not to be multiplied or increased, after his rights have once been judicially determined and fixed of record.

The bad effect on the homesteader of rendering his habitation unstable, and increasing his anxiety for the continued shelter of his family, is not to be overlooked. While it is said that the state by such statutes is conferring merely a favor or privilege on the debtor. It is to be remembered that the state gets value received. It comes to be supported in time by a citizenship interested in the state and tied to her soil, of independent home owners, and not of transient and uncertain tenants. It was aptly said by Mr. Benton in the senate of the United States that "tenantry is unfavorable to freedom. It lays the foundation for separate orders in society, annihilates the love of country, and weakens the spirit of independence. The tenant has in fact no country, no hearth, no domestic altar, no household god. The freeholder, on the contrary, is the natural supporter of a free government; and it should be the policy of republics to multiply their freeholders, as it is the policy of monarchies to multiply their tenants." As already stated, we have heretofore decided, in effect, that once a homesteader always a homesteader. And we think it equally clear within certain limitations as to occupancy and possible exceptions to be noticed, once a homestead always a homestead.

Learned counsel suggest that a gold mine might be discovered on the premises of the original assignment as made. If so, or if an extravagant residence were erected on the premises, there would likely be found some equitable remedy for the creditor. The law will not brook fraud on the part of the homesteader, and, if extraordinary outlays of money or property are put on the exempted premises beyond what is reasonably necessary to the profitable use and comfortable enjoyment of the home as such, it might afford ground for the interposition of a chancellor. In the case before us there has been a presumably natural increase in the value of the premises of \$500, in a space of some 10 or a dozen years; and the doctrine contended for would have permitted the appellant, or some other creditor, to have cut off a part of the homestead.

stead every year of the 10. The result even then would have to be based on mere opinions and speculations as to value, reached often after years of constant legal warfare. However, we have before us no gold-mine case, or one involving any fraud on the part of the appellee, or unreasonable outlay on the premises, or the question of rapid and extraordinary inflation of prices. It will be time enough to consider such cases, if any such should arise, when they are reached. The judgment granting the appellee the relief sought and dismissing appellant's counterclaim is affirmed.

### FITCH v. PARKER.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 2, 1898.)

#### APPEAL—REVERSIBLE ERROR—RIGHT TO CONCLUDING ARGUMENT—BURDEN OF PROOF.

1. It is a reversible error to deny to the party on whom is the burden of proof the concluding argument to the jury.

2. A peremptory instruction having been given to find for the surety in the notes sued on, the burden of proof was on the principal, whose only defense was a counterclaim for damages by reason of fraudulent representations of plaintiff.

Appeal from circuit court, Lewis county. "Not to be officially reported."

Action by A. H. Parker against H. P. Fitch and another upon a promissory note. Judgment for plaintiff, and defendant H. P. Fitch appeals. Reversed.

E. L. Worthington and R. D. Wilson, for appellant. Holt & Holt, for appellee.

WHITE, J. This action was brought by appellee upon notes for the purchase price of hotel business in Huntington, W. Va. The answer of appellant, Fitch, admitted the execution of the notes, and pleaded an offset and counterclaim for damages by reason of certain alleged false and fraudulent representations of appellee as to the amount of indebtedness of a firm of Parker & Co.; and for the interest of appellee, Parker, in said firm, these notes were executed. There was a separate defense by one Glasscock, who pleaded that he was only surety on the notes, and that he did not sign same in person, and did not, in writing, authorize any person to sign the notes for him. Appellee, by reply, denied both defenses presented by Fitch and Glasscock. On these issues the case went to trial. On the trial, appellee introduced himself as a witness, and proved the execution of the notes, and offered to prove the consideration, but the court refused to permit him to state or produce evidence in that regard;

also proved that Glasscock was only surety. Appellee also proved that the name of Glasscock was signed to the notes by another, without any written authority so to do. Their appellee rested his case, and appellant introduced his evidence as to the counterclaim, and, when appellant had finished all his testimony, appellee was recalled, and testified as to the counterclaim, and introduced other evidence on this issue. At the conclusion of all the evidence the court, of his own motion, instructed the jury to find for Glasscock; also instructed the jury to find for appellee the full amount of the notes sued on, and, if they believed any false or fraudulent representations were made as to the indebtedness, they might find for appellant on his counterclaim. There are no exceptions to any of the instructions, and their correctness are not called in question. After these instructions were given, the appellant moved the court to permit him to close the argument to the jury. Appellee objected, and the court sustained the objection, and refused to permit the appellant to close the argument to the jury, but permitted the appellee to have the closing argument. To this ruling the appellant excepted, and this ruling of the court is made one of the grounds for new trial, and is urged as error on this appeal. The trial resulted in a verdict and judgment for the appellee for the full amount of the notes sued on, and, after the motion for new trial had been overruled, this appeal is prosecuted.

This court has repeatedly held that a refusal to a party of the concluding argument, when entitled to it, is reversible error. *Insurance Co. v. Schwing*, 87 Ky. 410, 9 S. W. 242; *Crabtree v. Atchison*, 93 Ky. 338, 20 S. W. 260. We are of opinion that the court erred in refusing to the appellant the concluding argument to the jury. It is manifest that, if no evidence had been introduced by either party, the appellee would have been entitled to judgment as against appellant. Glasscock is not a party to this appeal, and is not interested. The appellee, by his own proof, showed he was not entitled to recover as against Glasscock; and this fact is all that he established, when he first produced his evidence, that did not stand admitted by the pleadings. The court took this view of the matter by refusing to permit appellee to enter into the details of the trade with appellant, and again in instructing the jury to find the full amount of the notes sued on. The view of the court should have been followed by permitting appellant to conclude the argument to the jury. For this error the judgment is reversed, and cause remanded, with directions to set aside the verdict and judgment, and grant appellant a new trial, and for further proceedings consistent herewith.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.



## CONRAND v. STATE.

(Supreme Court of Arkansas. Oct. 22, 1898.)

INDICTMENT—DATE OF OFFENSE—SLANDER—CONSENT OF PARTY SLANDERED—VERDICT.

1. Under Sand. & H. Dig. § 2081, providing that the allegation of the time of the offense shall be material in an indictment only as charging the commission of the offense before the finding of the indictment, and sections 2090, 2075, and 2076, requiring an indictment to be sufficiently certain to enable accused to understand what was intended, and the court, on conviction, to pronounce judgment, and providing that no indictment is insufficient for defects which do not prejudice the substantial rights of the accused, or where it can be understood that the offense was committed before bringing the indictment, an indictment stating that defendant "did" utter a slander at a date later than that of the indictment is sufficient where defendant was not misled thereby.

2. On a prosecution for slander the state need not prove the consent of the person slandered to the finding of the indictment, though the statute provides that no such indictment shall be found except by the consent of the slandered, since want of such consent only goes to the authority to bring the indictment.

3. Under Sand. & H. Dig. § 2126, authorizing the setting aside of an indictment if not found as required by law, the objection that an indictment for slander was not found with the consent of the person slandered, as required by statute, is waived unless taken by motion to set the indictment aside.

4. A verdict, in a prosecution for slander, that accused is guilty, is sufficient, since the crime of slander does not consist of different degrees.

5. A verdict of guilty, stating that the jury leaves the punishment to the court, is sufficient, since the court is authorized to assess the punishment where the jury fails to do so. Sand. & H. Dig. § 2279.

Riddick, J., dissenting.

Appeal from circuit court, Faulkner county; E. A. Bolton, Special Judge.

Charles Conrand was convicted of slander, and appeals. Affirmed.

John G. B. Simms, for appellant. E. B. Kinsworthy, Atty. Gen., for the State.

BATTLE, J. On the 14th day of July, 1896, an indictment was filed in the Faulkner circuit court, in which Charles Conrand was accused of slander. The commission of the offense was charged in part as follows: "The grand jury of Faulkner county, in the name and by the authority of the state of Arkansas, accuse Charles Conrand of the crime of slander, committed as follows, to wit: The said Charles Conrand, in the county and state aforesaid, on the 15th day of May, A. D. 1898, then and there maliciously, willfully, feloniously, and falsely did use, utter, and publish (in the presence of James Campbell, Rebecca Campbell, Elias Stone, Mary Ann Stone, and others), of and concerning Barbara A. Rosamond," etc.; and it was alleged in the indictment as follows: "This prosecution is with knowledge and consent of the said Barbara A. Rosamond." The indictment was indorsed as follows: "This prosecution with

consent of Barbara A. Rosamond. A true bill. [Signed] A. J. Witt, Foreman."

The defendant moved to set aside the indictment, because it was alleged therein that the offense charged was committed "upon a future and impossible date," and the court overruled the motion. He thereupon pleaded not guilty, and was tried by a jury. He introduced witnesses, and testified, and thereby clearly indicated that he was not misled by any allegation in the indictment as to the time when the offense of which he was accused was committed.

The court refused to instruct the jury, at the request of the defendant, as follows: "The state must prove every material allegation in the indictment, and, if it has failed to prove that this indictment was found and prosecuted by the instance or consent of Mrs. Barbara A. Rosamond, they will acquit." Instructions were given, and others were asked and refused; but it is not necessary to notice any of them in this opinion except the one we have copied.

The defendant was convicted, the jury having returned a verdict in the following form: "We, the jury, find the defendant guilty, and leave punishment with court. [Signed] T. L. Daniel, Foreman." The court fixed his punishment at imprisonment and hard labor in the penitentiary for the period of three years, and rendered judgment against him accordingly.

The defendant insists that this judgment should be reversed for the following reasons:

(1) Because the court erred in overruling his motion to set aside the indictment.

(2) Because the court erred in refusing to give the instruction copied in this opinion.

(3) Because the verdict was insufficient.

1. The allegation as to the day on which the offense was committed is immaterial, and did not affect the sufficiency of the indictment. The statutes provide that the indictment must contain "a statement of the acts constituting the offense, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended"; that it is sufficient if it can be understood therefrom: "First, that it was found by a grand jury of a county impaneled in a court having authority to receive it, though the name of the court is not accurately stated; second, that the offense was committed within the jurisdiction of the court, and at some time prior to the time of finding the indictment; third, that the act or omission, charged as the offense, is stated with such a degree of certainty as to enable the court to pronounce judgment, on conviction, according to the rights of the case;" and further provide that "no indictment is insufficient, nor can the trial judgment or other proceeding thereon be affected by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits." Sand. & H. Dig. §§ 2090, 2075, 2076. According to these provisions of the statutes,

an allegation in the indictment as to the day upon which the offense charged was committed cannot affect it, if it can be understood therefrom by a person of common understanding that the grand jury intended to charge that the offense was committed "at some time prior to the time of finding the indictment." The only necessity for such allegations is to show that the offense was committed before the indictment, unless time is a material ingredient of the offense. Except as stated, it is not necessary to a conviction that the state prove that the offense was committed on the day alleged, but it is sufficient, as to time, to show that it was committed on any day before the indictment was found, and within the time prescribed by the statutes of limitations. Hence section 2081 of the Digest declares: "The statement in the indictment as to the time at which the offense was committed is not material, further than as a statement that it was committed before the time of the finding of the indictment, except when the time is a material ingredient in the offense." This section does not mean to say that a statement as to the day on which the offense was committed shall be necessary to constitute a good and sufficient indictment, but, when made, what purpose it shall serve. An interpretation of it to the contrary effect would make it conflict with the section of the Digest preceding it, which declares that an indictment shall be sufficient, in that respect, if it can be understood therefrom that the offense was committed before it was found.

Under a statute of which section 2081 is an exact copy the court of appeals of Kentucky held that an indictment for breaking into a railroad depot and stealing therefrom, which was returned on the 28th of December, 1891, and fixed the date of the commission of the offense on the 29th of December, 1891, but alleged that the defendant "did break open and enter the depot building," and "did steal and carry away," etc., contained a sufficient allegation that the offense was committed before the indictment was found, and sustained the indictment. *Williams v. Com.*, 18 S. W. 1024; *Com. v. Miller*, 79 Ky. 451; *Vowells v. Com.*, 84 Ky. 52.

The question decided by the court of appeals of Kentucky is presented in this case. In the indictment before us the grand jury of Faulkner county accused the defendant of the crime of slander, "committed as follows," and alleged that the defendant, "on the 15th day of May, 1899, then and there maliciously, willfully, feloniously, and falsely did use, utter, and publish," etc. They alleged that the offense was committed in the past, using the words "committed" and "did" for that purpose, on a day some time in the future. No man of common understanding could infer from the indictment that the grand jury intended to accuse the defendant of having committed a crime before it was committed.

To accuse one of a crime is to charge that it was committed prior to the accusation. The allegation as to the date of the commission of the offense was a clerical error, apparent on the face of the indictment, and was not calculated to, and did not, mislead the defendant, and did not affect the validity or sufficiency of the indictment or the judgment against him.

2. The statutes provide that no indictment for slander shall be found "except at instance or by consent of the person slandered or his legal representative." The grand jury alleged in the indictment in this case that it was found with the consent of the person slandered. But this allegation was no part of the statements which were made to show the commission of the offense, and it was not necessary to prove it to convict the defendant. In pleading not guilty the defendant did not put it in issue. If it was untrue, the defendant could have taken advantage of it by a motion to set aside the indictment, as it affected the authority of the grand jury to find the indictment, and nothing more. Having failed to do so, he waived any advantage he could have taken of it, and it was not necessary for the state to prove that it was true; and the court properly refused to instruct the jury that it was their duty to acquit in the event they found that it was not proved. *Sand. & H. Dig.* § 2126; *Wright v. State*, 42 Ark. 94; *Miller v. State*, 40 Ark. 488.

3. The verdict, although not as full as it might have been, was sufficient. The offense charged did not consist of different degrees, and it was, therefore, not necessary for them to say more than that they found the defendant guilty, and assess the punishment. As the statute authorized the court to assess the punishment when they failed to do so, this defect was not fatal and did not affect the judgment of the court.

Judgment affirmed.

RIDDICK, J. (dissenting). I regret that I am unable to agree with so much of the opinion of the court as holds that it is not necessary, under our statute, for the indictment to allege that the offense charged was committed at a time prior to the finding of the indictment. Before the adoption of the Criminal Code it was necessary not only to allege that the offense was committed at a time prior to the finding of the indictment, but also at a time within the period of the statute of limitations. *Scoggins v. State*, 32 Ark. 215. The Code changed this rule by providing that the indictment was sufficient, so far as the allegation of time was concerned, if it could be understood therefrom that the offense was committed "prior to the finding of the indictment." *Sand. & H. Dig.* § 2075. The rule is that the charge in the indictment cannot be helped out by argument or inference (*Clark, Cr. Proc.* 162), and I understand from the provisions of the Code above re-

ferred to that it must appear from the allegations as to time in the indictment that the offense was committed before the finding of the indictment. If the indictment allege the offense to have been committed on a future day, it is, I think, still bad under our statute. *State v. Smith (Iowa)* 55 N. W. 198; *Clark, Cr. Proc.* 242. This is made plain by a subsequent section of the statute, which provides that "the statement in the indictment as to the time at which the offense was committed is not material, further than as a statement that it was committed before the time of finding the indictment, except when the time is a material ingredient in the offense." *Sand. & H. Dig.* § 2081. It seems to me that this section expressly makes it material to allege that the offense was committed at a time prior to the finding of the indictment. Had the legislature intended that a mere inference, drawn from the use of the word "did," or from other language of the indictment, should be allowed to overcome the direct allegation as to time, it seems reasonable to believe that it would have expressed its intention by simply saying that such allegation as to the time the offense was committed was immaterial, as the court in effect held in this case. As grand juries do not indict for crimes to be committed in the future, it can be inferred from any indictment that it refers to a past offense, and the effect of the decision of the court in this case is that it is not necessary to allege time in an indictment except when it is a material part of the offense. "To accuse one of a crime," says the court, "is to charge that it was committed prior to the accusation." But the legislature did not so declare the law, nor did it intend that an inference of that kind should take the place of a direct allegation as to time; much less did it intend that an inference should be allowed to overturn such allegation when made. After enacting that the statement in the indictment as to the time the offense was committed is not material, it does not stop, as the court seems to have done in its construction of the law, but it goes further, and makes an exception. Such statement, says the statute, is not material "further than as a statement that it was committed before the time of finding the indictment." The decision of the court in this case has stricken this exception from the statute. I may admit that there seems to be little reason why an allegation of time should be required in an indictment except in cases where time is a material ingredient in the offense. I may admit that the construction given by the court improves the statute, but I cannot concur in it, for it seems to do violence to the language of the act. As stated by a learned author, "It is not the province of the courts to supervise legislation, and keep it within the bounds of propriety and common sense." *Suth. St. Const.* § 238. The indictment here alleged that the offense was committed on the 15th day of May, 1899, and

I hold that it was insufficient, and therefore dissent from the opinion and judgment of the court.

**BLASS et al. v. GOODBAR et al.**  
(Supreme Court of Arkansas. Oct. 15, 1898.)

**FRAUDULENT CONVEYANCES—PLEDGE—ASSIGNMENT FOR CREDITORS—EVIDENCE.**

1. An insolvent pledged in writing, at night, with delivery of possession, property worth about \$19,000, to secure a debt of about \$5,000, part of which was a note on which the pledgees were liable only as indorsers, and which was otherwise secured by a mortgage made by the debtor on the same night. The pledgees took the lead in endeavoring to effect a compromise with other attaching creditors, with one exception, but did not use the pledge, or attempt to use it, to the detriment of other creditors, nor seek to collect any more than their own claim, nor otherwise aid the debtor in retaining property. After the pledge was delivered, the pledgor executed a fraudulent mortgage on the same property. Held insufficient to show actual fraud in the execution of the pledge.

2. An insolvent pledged property solely to pay off certain debts. After they were paid, what remained were subject to various other mortgages and deeds of trust covering all his property, made about the same time, and intended solely to secure debts; but the pledge did not stipulate that the pledgee, after being paid, should hold and manage the balance of the property as a trustee to pay other debts, and such an agreement did not otherwise appear. Held not to constitute an assignment constructively fraudulent, for preferring creditors.

Appeal from Faulkner chancery court; Thomas B. Martin, Chancellor.

Attachment by Goodbar & Co. against L. B. Griffing & Co. Gus Blass & Co. intervened, and the issue was transferred to equity, and consolidated with a foreclosure suit by W. W. Martin, trustee, against the same defendants and others. From a decree sustaining the attachment, and declaring the lien thereof superior to that of the interveners, interveners appeal. Reversed.

The insolvent firm of L. B. Griffing & Co. on October 17, 1895, executed the following pledge: "Gus Blass & Co.: We hereby pledge to you the goods and property in our dry-goods store at Conway, this day delivered into your possession, to hold in pawn for the account—(\$3,211.32) thirty-two hundred and eleven dollars and thirty-two cents—which we owe you, due and to become due; and to hold further as indemnity for your liability as our indorsers on a note for (\$1,500) fifteen hundred dollars given by us to E. E. Slade, dated about August 16, 1894, bearing 10 per cent. interest from date, and due January 1, 1896, and now held, as we understand, by the Bank of Conway. If you realize your money out of the goods and property before all the account falls due, you are to give us an equitable discount on amounts you realize before maturity, at the rate of 10 per cent. per annum. L. B. Griffing & Co. Attest: J. D. Collier. Dated at Conway, Ark., Oct. 17, 1895." This pledge, and the property men-

tioned therein, were immediately and simultaneously delivered to Gus Blass & Co. All except the last item mentioned in the pledge was past due when the pledge was executed. On the same night (for the pledge to Blass & Co. was executed at night), after the pledge and property described therein had been delivered to Blass & Co., L. B. Griffing and J. D. Collier, partners as L. B. Griffing & Co., executed four several deeds of trust, with W. W. Martin named therein as trustee, to secure certain debts which they owed other creditors whom they wished to prefer. These trust deeds were all substantially in the same form, as follows: "We, L. B. Griffing and J. D. Collier, partners as L. B. Griffing & Co., hereby bargain, sell, and mortgage to W. W. Martin, trustee for Jesse E. Martin, our entire stock of groceries and other personal property which we have in the corner house, known as the 'J. E. Martin House,' in Conway, Arkansas, and also the stock of dry goods and other property which we have this day pledged to Gus Blass & Co., in the Hill Fontaine & Co. Building, in Conway, Arkansas. This mortgage is given subject to the rights of Gus Blass & Co. in the stock of dry goods, and subject also to a prior mortgage this day given to W. W. Martin, trustee for the Bank of Conway. To have and to hold as security for two notes, aggregating \$1,400, given, one for \$1,100.00, and one for \$300.00, during the year 1895, by us to J. E. Martin; said notes being subject to a credit by a contra account against J. E. Martin, as shown by our books, for about \$160. Witness our hands this 17th day of October, 1895. L. B. Griffing. J. D. Collier." The *cestuis que trustent*, and amounts respectively secured by these several trust deeds, were as follows: J. E. Martin, whom the firm owed \$1,400; one Carter, a note of \$500, on which the trustee, Martin, was indorser; the Bank of Conway, a note held by it, which Griffing & Co. had executed to one Slade for \$1,500, with interest, on which note Gus Blass & Co. were indorsers, being the same note mentioned supra in the pledge to them; and to Zettleton Manufacturing Company a debt due it of \$——. These several trust deeds were delivered to the trustee about 6 o'clock of the morning after the night they were executed; also, at the same time, the contents of said grocery store named in said deed were delivered to the trustee, who took possession of same. These trust deeds were filed for record at 6.30 o'clock a. m. on the same day, and after their delivery. A few minutes after these trust deeds were filed for record, two or three mortgages were executed to other creditors (among them, Mrs. Griffing) by Griffing & Co., covering the same property included in the pledge and deeds of trust, and also a small amount of property not embraced therein. But these mortgagees did not obtain possession of any of the property named in the pledge or deeds of trust supra. As indicated in the trust deeds, Grif-

fin & Co. had two stores,—a dry-goods store and a grocery store, in separate buildings, and across the street from each other. On October 17, 1895, after the pledge and deeds of trust had been delivered, and possession of the property therein mentioned had been taken, respectively, by the pledgees and the trustee, and after the trust deeds had been recorded, appellees, Goodbar & Co., brought suit by attachment, and had same levied upon the said property in the two stores; the sheriff taking possession of said property. On the next day, the 18th, Trustee Martin brought this suit to foreclose one of these deeds of trust, and to have other deeds of trust and mortgages and pledge to Gus Blass & Co. foreclosed. Griffing & Co., Gus Blass & Co., and other parties, mortgagees, as well as all the attaching creditors, were defendants in this suit to foreclose, and entered their appearance, and agreed to the appointment of a receiver. H. B. Ingram was appointed such receiver, and he qualified, and took possession of the goods as such receiver, and was directed to sell same at public auction on November 16, 1895. On November 15, 1895, Gus Blass & Co., under the terms of a certain compromise agreed upon by the parties, by which all the creditors except Goodbar & Co. were eliminated from the case, were permitted to enter into bond with said Goodbar & Co., which should stand in lieu of the goods attached, and to take possession of the said goods. That bond is as follows: "Whereas, Goodbar & Co. have a suit pending in the circuit court of Faulkner county, Arkansas, against L. B. Griffing and J. D. Collier, composing the firm of L. B. Griffing & Co., for \$518.30, in which suit an attachment was issued and levied upon certain goods and property, which goods and property were afterwards placed in the hands of a receiver of the Faulkner chancery court in the case of W. W. Martin, trustee, and others, plaintiffs, against L. B. Griffing & Co. and other defendants: Now, if said attachment shall be sustained, and if it shall be finally adjudged that said Goodbar & Co. are entitled to have their money paid out of the assets of said L. B. Griffing & Co. now in the hands of the receiver, and that the attachment of Goodbar & Co. is a lien on said property superior to that of Gus Blass & Co., and to the lien of those creditors of said L. B. Griffing & Co. to whom they gave mortgages on said property, then we, the undersigned, agree and bind ourselves to pay said Goodbar & Co. the full amount of their said claim, with interest and costs of suit; otherwise this obligation shall be null and void. L. B. Griffing. J. D. Collier. Gus Blass & Co. Nov. 15, 1895." Griffing & Co. traversed the attachment pending in the circuit court, and Gus Blass & Co. intervened therein; and by consent the attachment issue in the cause was transferred to equity, and there consolidated with the present suit. Gus Blass & Co. filed in this consolidated case in chancery their answer,

interplea, and cross bill, in which they set out all the facts supra, and claim title to the goods under receiver's sale to them approved by the chancellor. They adopt the traversing affidavit of Griffing & Co.; deny any fraud on the part of Griffing & Co., or any knowledge of it on their part, or on the part of the trustee or creditors in the trust deeds; and deny any grounds of attachment, or that the property was subject thereto. Appellees filed an answer setting up that the pledge to Blass & Co., and the mortgages to W. W. Martin, trustee, and the other mortgages, were fraudulently made to secure fictitious debts, and claiming a lien on the goods by attachment, and asking to have same enforced. The decree was in favor of appellees, sustaining the attachment, and declaring the lien created thereby superior to the lien of Gus Blass & Co.

W. S. & Farrar L. McCain, for appellants.  
P. H. Prince, for appellees.

WOOD, J. (after stating the facts). The most painstaking examination of this record fails to discover any fraud upon the part of Gus Blass & Co., either actual or constructive. The matters pressed here for actual fraud are all consistent with honest conduct, and only comport with the efforts which we would naturally expect an honest and vigilant creditor to put forth to collect his debt. The bona fides of the Blass claim is nowhere called in question. That being true, the other matters urged as evidence of fraud are not even suspicious. It is insisted, for instance, that the time of night the goods were delivered to Gus Blass & Co.; the character of the instrument that evidenced the transfer; the disparity between the amount of the debt and the goods pledged for its payment; the fact that the pledgee included \$1,708.75, for which Blass & Co. were only indorsers, and, after all the goods had been attached, Gus Blass & Co. "took the lead," as counsel express it, in getting up a compromise at 45 cents on the dollar with the attaching creditors except Goodbar & Co., by the terms of which Blass & Co. were first to be paid in full, and then the mortgagees, and then, if any, balance to go to Griffing & Co.,—all these things, it is urged, when taken in connection with all the circumstances, bear the earmarks of actual fraud upon the part of Blass & Co. But not so. Undoubtedly Griffing & Co. in the impending financial collapse desired to have Gus Blass & Co. fully protected, and hence notified them of the situation, and they, as prudent creditors, stood not upon the order of their going, but made haste to reach their debtors and to secure their own claim, and indemnify themselves against certain loss upon that for which they were sureties. They adopted the most expeditious and efficient means and methods for accomplishing the purpose. That is all there is about the transfer being at night, and

being evidenced by an unrecorded pledge, with delivery of possession, instead of by a recorded mortgage.

The transfer of some \$19,000 worth of goods in pledge to secure the payment of an amount approximating only \$5,000 is not *prima facie* or *per se* fraudulent. It is a circumstance to be considered in determining the good faith of the parties to the transaction. Inasmuch as a pledge and also a mortgage of property remove the property so pledged or mortgaged beyond the reach of other creditors under the ordinary process of execution, the placing under pledge or mortgage of an amount grossly in excess of what would be necessary, under any and all contingencies, to meet the debt intended to be secured, might tend to show a purpose upon the part of the debtor making, and the creditor receiving, such a pledge or mortgage, to hinder and delay other creditors in the collection of their debts. Therefore, where a fraudulent disposition of property is charged it is always proper to consider the question of excess, in connection with other circumstances, to determine whether the debtor, in making the conveyance to one creditor, was seeking some undue advantage to himself against other creditors, in which the favored creditor was assisting him. *Bennett v. Bank*, 5 Humph. 612-617; *Burgin v. Burgin*, 23 N. C. 453-459; *Ford v. Williams*, 13 N. Y. 577; *Bump, Fraud. Conv.* § 58; *Wait, Fraud. Conv.* § 238a, and authorities cited. We do not find this to be the case, however, in the present instance. The pledge of the dry goods to Gus Blass & Co. immediately transferred the possession of the same to them, and, as to said goods, immediately took it out of the power of Griffing & Co. to use them any longer for their own profit. The language of the pledge indicates that Gus Blass & Co. were to proceed immediately to use the goods in pawn for the payment of their debt; and it is not shown, or even pretended, that, during the short interval in which Gus Blass & Co. had the possession of the goods, they used or attempted to use and dispose of same in any manner detrimental to, or inconsistent with, the rights of other creditors. It is not shown that they sought to collect any more than their own debt, or in any manner to assist the debtor in gathering unto himself forbidden gains. Likewise it may be said of the proceeding under the trust deeds and mortgages. The effect under these was simply to collect in the legal way the debts which had been provided for in said deeds.

The fact that \$1,708.75 was included in the pledge, for which Blass & Co. were only liable as indorsers, was not evidence of a fraudulent purpose in taking the pledge, and could not render the same nugatory and void on that account. Griffing & Co. were notoriously and hopelessly insolvent. It was only a matter of time, and of a very

short time at that, when Blass & Co. would have the note to pay. They only purported in the pledge to indemnify themselves in the event of their having the note to pay. It was a perfectly legitimate transaction, indicating foresight rather than fraud. The fact that the same amount was also included in a mortgage to secure the Bank of Conway could not affect Gus Blass & Co. with fraud, even if it had been any evidence of a fraudulent purpose upon the part of Griffing & Co. It remains that there could, in law, properly be but one satisfaction of the note, and there was no possible chance for any creditor to be defrauded because Gus Blass & Co. had provided indemnity for themselves in case of its payment; for the moment Blass & Co., the first preferred creditors, paid off the note, that would extinguish the note, and so instantly the mortgage given to the bank to secure it. So far as the compromise is concerned, the creditors are supposed to be dealing with each other "at arm's length." We see nothing that Blass & Co. might have done in connection therewith that could be regarded as a badge of fraud on their part. Certainly no creditor was forced to accept any compromise, and the one complaining here has not done so, as to the paying off of its debt for 45 cents on the dollar. The other provisions of the compromise, by which Blass & Co., for a certain price, bought the goods from the receiver, and executed to appellees a bond which was to take the place of the attached property, appellees assented to. We fail to comprehend how any kindly offices that might be extended by a favored creditor to his debtor, who had preferred him, in bringing about a compromise with other creditors, who had not been preferred, could be regarded as even tending to show actual fraud upon the part of the preferred creditor in the transfer of property which had been previously made to him. This is the most that could be said of the compromise.

The suggestion or contention that the pledge of Blass & Co. may be tainted with fraud for the reason that Griffing & Co. a short time thereafter executed to Mrs. Griffing a mortgage which was indeed fraudulent, is an obvious non sequitur; for a creditor may know at the time he takes his conveyance or transfer that his debtor has an intent to defraud other creditors, but that does not prevent him from collecting his own debt, and so long as he does not willfully or intentionally, or by gross and inexcusable carelessness, assist his debtor to defraud another, his sole purpose being to collect his own debt, any transfer or conveyance made with that end in view will be upheld.

2 Was there constructive fraud? It is insisted that the pledge to Gus Blass & Co., and the deeds to Martin, trustee, and the other mortgages, taken all together, constitute an assignment for the benefit of cred-

itors. We do not so construe them. It would be doing violence to the plain language and tenor of the instruments themselves to so construe them. They lack essential elements for an assignment. "Conveyances directly to creditors, in payment or by way of security for their own debts, solely," says Mr. Burrill, "are not generally assignments for the benefit of creditors." Burrill, Assignm. § 3. The pledge to Gus Blass & Co. was made to them direct, no trustee was named or contemplated, and the transfer was to enable them solely to pay off their own debt. After they were paid, the property remaining was subject to various other mortgages and deeds of trust, to be sure. But there was no stipulation in the pledge, nor was any understanding otherwise shown, that Gus Blass & Co., after they were paid, should hold and manage the balance of the property as a trustee to raise money to pay other debts. The doctrine "that one or more instruments, in whatever form or by whatsoever name, when executed with the intention of having them operate as an assignment, and with the intention of granting the property conveyed absolutely to the trustee to raise a fund to pay debts, shall constitute an assignment," was announced under the peculiar facts in the case of *Richmond v. Mississippi Mills*, 52 Ark. 31, 11 S. W. 960. In *Fecheimer v. Robertson*, 53 Ark. 101, 18 S. W. 423, this court, through the same learned judge, shows that that case was not to be extended to cover cases not brought strictly within the facts upon which it was decided. Speaking of *Richmond v. Mississippi Mills*, supra, Judge Sandels says, "Richmond's agreement that Taylor should assume charge for himself and twelve others, not represented or consulted, and that a man suggested by Richmond should be manager for all, together with many other circumstances indicating the intention of the parties, made it clear that the transaction in that case was an assignment." See other cases cited in *Fecheimer v. Robertson*, supra. The facts of the case under consideration are altogether different from those of *Richmond v. Mississippi Mills*, and bear a nearer resemblance to the facts in *Fecheimer v. Robertson*. Certain it is that, so far as Gus Blass & Co. were concerned, they were trustees for nobody,—acted for themselves and themselves alone, and not in conjunction with any other creditor. Nor was there any concert of action among any of the various creditors. It appears from the terms of the compromise to which Goodbar & Co. assented, and the provisions of the bond filed in pursuance thereof, that said bond was to stand in lieu of the attached property, and that Goodbar & Co. were to establish "a lien on said property superior to that of Gus Blass & Co. and to the lien of those creditors of said L. B. Griffing & Co., to whom they gave mortgages on said property."

Conceding that the attachment should be sustained, we have been unable to find warrant for the ruling of the learned chancellor that the lien created by the attachment in favor of Goodbar & Co., appellees, is superior to that of Gus Blass & Co. As to the ruling of the court sustaining the attachment against Griffing & Co., it suffices to say that there is evidence to support the finding of the chancellor in that particular. Reversed, and remanded, with directions to enter a decree in favor of Gus Blass & Co. for the proceeds of the attached property, and in favor of Goodbar & Co. for costs in the attachment against L. B. Griffing & Co., and for such other and further proceedings as may not be inconsistent with this opinion.

#### HARRIS, Sheriff, et al. v. STEWART.

(Supreme Court of Arkansas. Oct. 22, 1898.)

##### ATTACHMENT—RIGHTS OF ALLEGED OWNERS—FORTHCOMING BONDS—JUDGMENTS—COLLUSION.

1. One claiming to be owner of personalty attached as the property of another, who gives a forthcoming bond, cannot retain the property as against a subsequent attachment creditor, while such bond is in force, unless he gives another forthcoming bond.

2. An alleged owner of personalty attached as the property of another, who gives a forthcoming bond to the attachment creditor, does not thereby prevent a subsequent judgment creditor from levying on the property to satisfy an execution against the attachment debtor, unless another forthcoming bond is given, as especially provided for in execution sales by Sand. & H. Dig. § 3088.

3. Where a judgment by consent, fixing the value of attached property, for the delivery of which intervenor had given a forthcoming bond, is obtained by collusion of the parties to enable intervenor to pay the judgment and retain the property, the real value of which is several times the value fixed by the judgment, and to remove the same beyond the reach of the sheriff, so as not to be subject to a subsequent judgment against the attachment debtor, the proceedings constitute a fraud against the subsequent judgment creditor, which he may plead as a defense to an action against him by intervenor for a wrongful levy under his execution.

Appeal from circuit court, Lafayette county; Charles W. Smith, Judge.

Action by W. W. Stewart against S. L. Harris, as sheriff, and J. F. Looney, to recover damages for an alleged illegal seizure of goods under an execution. From a judgment for plaintiff, defendants appeal. Reversed.

The complaint and answer as set forth in appellants' abstract of record are as follows:

The complaint alleges that: "On the 1st day of July, 1893, one Alex Stewart was attached under a writ of attachment from the Lafayette circuit court in favor of S. G. Dreyfus & Co. vs. A. Stewart, and a large lot of personal property taken into the possession of the sheriff under said writ, among said property there being four (4) log wagons, of the value of two hundred and fifty (\$250) dollars. That on the 28th of July, 1893, W.

W. Stewart interpleaded for said property, alleging that said attached property was his property, and not that of A. Stewart, and on the same day entered into a bond, with surety, conditioned that if the property, on the trial of such interplea, be found to be the property of A. Stewart, and judgment was recovered against said A. Stewart, that said W. W. Stewart would deliver said property to the sheriff whenever demanded by him after execution upon such judgment came to his hands to be levied thereon. That, on the trial of said interplea, judgment was rendered against said W. W. Stewart, this interpleader. That afterwards, on the — day of November, 1894, S. L. Harris, as sheriff, under an execution issued upon a judgment in favor of one J. F. Looney against A. Stewart, levied upon, advertised for sale, and did sell four (4) log wagons for the sum of \$250, the identical wagons seized under said attachment suit, and for which the said W. W. Stewart interpleaded and gave bond. That on the 4th day of December, 1894, the said S. L. Harris, as sheriff, under an execution issued upon the judgment of S. G. Dreyfus & Co. against A. Stewart, demanded of W. W. Stewart the return of the property included in said interplea, of which the four wagons levied upon and sold by said Harris, as sheriff, under said execution in favor of J. F. Looney against A. Stewart, were a part. That in consequence of said seizure and sale by said sheriff, under said Looney execution, of the four wagons, the said W. W. Stewart could not deliver said property in accordance with his bond, and was compelled to pay to S. G. Dreyfus & Co. the sum of \$250, the value of the said four wagons. That said four log wagons seized and sold by said Harris, as sheriff, as the property of A. Stewart, was the plaintiff's property, and not subject to said sale and seizure. That said four wagons were worth \$250, and that by virtue of said seizure and sale of said wagons the said W. W. Stewart has been damaged in the sum of \$250, and prays for judgment for said sum, with interest, costs, and other relief."

"In the first paragraph defendants deny that, in consequence of the seizure and sale of four log wagons by the defendant Harris, as sheriff, under an execution in favor of J. F. Looney against A. Stewart, the said W. W. Stewart, plaintiff, was compelled to pay to S. G. Dreyfus & Co. the sum of \$250, the value of said wagons, or any other sum whatever; they deny that said four log wagons seized and sold by defendant Harris, as sheriff, as the property of A. Stewart, was the property of the plaintiff W. W. Stewart, and not subject to said seizure and sale under said execution; they deny that by virtue of said seizure and sale of said wagons the plaintiff, W. W. Stewart, has been damaged in the sum of \$250, or any other sum whatever. In the second paragraph of their said answer, as a further defense, the defendants allege: That on the 3d day of July, 1893, defendant

Looney commenced an action in the Lafayette circuit court against one A. Stewart for the recovery of \$190, due upon contract, and made and filed in said court his affidavit and bond for a general order of attachment against the property of said A. Stewart; that said order was, on said 3d day of July, 1893, by the clerk of said court, duly issued, directed and delivered to the then sheriff of the county, commanding him therein to attach and safely keep the property of A. Stewart in his county, not exempt from execution, or so much thereof as will satisfy the claim of said Looney for \$190, and \$30 for the costs thereof. That under and by virtue of said writ of attachment said sheriff forthwith levied upon and attached in his county a stock of merchandise, five log wagons, a two-horse wagon, and thirteen stock horses, being the same property, then in his possession and custody, under a levy of attachment previously made on said day, under an order of attachment issued out of the Lafayette circuit court in a suit then therein pending wherein S. G. Dreyfus & Co. were plaintiffs and the aforesaid A. Stewart was defendant. That on the 28th day of July, 1893, W. W. Stewart made and delivered to the sheriff his affidavit that he was the owner of the property attached as aforesaid, and that the same was not liable to seizure on the order of attachment issued in said suit of S. G. Dreyfus & Co. against A. Stewart. That thereupon the sheriff chose two citizens of Lafayette county, where the writ was levied, who, on their oath, ascertained the value of said property so attached and claimed by the said W. W. Stewart to be \$3,288, as follows:

Stock of merchandise.....	\$1,973
Five (5) log wagons.....	420
One two-horse wagon.....	50
Thirteen (13) stock horses.....	845
Total .....	\$3,288

-That thereupon said W. W. Stewart gave bond, with security, in favor of S. G. Dreyfus & Co., in the sum of \$8,660, conditioned that he would interplead at the July, 1893, term of the court, and prosecute such interplea to judgment without delay, and if, on the trial of such interplea, the said property shall be found to be the property of the defendant A. Stewart, the property shall be delivered to said sheriff, or his successor in office, whenever demanded; which said bond was approved by the sheriff, and, together with the affidavit, was by him returned with the writ issued in said suit of S. G. Dreyfus & Co. against said A. Stewart. That no affidavit of ownership of said property, or any part thereof, nor claim that the same was not liable to seizure on the order of attachment issued in the suit of J. F. Looney against A. Stewart as aforesaid, was ever made and filed in said suit by the said W. W. Stewart, the plaintiff herein. That on the 27th day of July, 1893, judgments were duly rendered in this court against A. Stewart

in favor of S. G. Dreyfus & Co. for \$1,438.05 and J. F. Looney for \$190 and costs and interest, and the attachments in said suits were sustained, subject to the rights of the said W. W. Stewart, as same might be hereafter determined. That one year after the rendition of said judgment, to wit, on the 20th day of July, 1894, the interplea of W. W. Stewart, the plaintiff herein, in the suit of S. G. Dreyfus & Co. against A. Stewart, came on to be heard in this court, and by consent of the parties the court found 'in favor of the plaintiff, S. G. Dreyfus & Co., and against the interpleader, W. W. Stewart; that the property described in the return to the order of attachment in said suit, to wit, the stock of merchandise, the five log wagons, the two-horse wagon, and the thirteen head of stock horses, is and was subject to the attachment; that all of said property is and was of the value of \$1,000; that at the time of filing the interplea in said suit said interpleader executed an interpleader's bond in said suit in the sum of \$8,660, conditioned as provided by law, and retained possession of said attached property, and the court adjudged that said property be delivered to the sheriff, and, if not delivered then, the clerk to issue execution in favor of the plaintiff against the obligors on the bond in the sum of \$1,000,' and half the costs expended. (See certified copy of judgment and finding, marked 'Exhibit A.')

That on the — day of November, 1894, an execution against the property of A. Stewart, based upon the judgment of J. F. Looney, was issued in due form of law by the clerk of this court, directed and delivered to the defendant S. L. Harris, as sheriff of Lafayette county, for service, whereby he was commanded to satisfy the same out of the property of said judgment debtor subject to execution. That on the — day of November, 1894, the said S. L. Harris, as sheriff, under and by virtue of said execution, levied upon the identical four log wagons previously levied upon and attached under the writ of attachment issued in the suit of Looney against A. Stewart, as hereinbefore set forth, and which said attachment was by this court sustained, and all which said property was adjudged subject and liable to seizure and sale under said attachment levy on the trial of the interplea of the plaintiff herein; and, after due advertisement, the said sheriff sold the said four log wagons to satisfy said execution in favor of J. F. Looney; and which said levy and sale constitute the levy and sale alleged, but which four log wagons so levied upon and sold these defendants aver were at the time subject to said levy and sale under the said execution. And for a further defense the defendants aver that the finding and judgment by consent, on the trial of the interplea set up in the complaint, as the ground upon which the plaintiff relies to recover in this action, was fraudulently intended by the parties to said consent, finding, and judgment to



prevent and defeat the defendant Looney from subjecting any of said property in question in said action to the payment of his judgment debt aforesaid, and thereby cheat and defraud him out of the same. That said finding and judgment was erroneous and void as to defendants, in this: that the court was without jurisdiction—First, to find the value of all the property claimed by the interpleader in said action to be \$1,000, or any other and different sum than \$3,288, the value of the same as ascertained and determined by appraisers duly appointed by the sheriff for that purpose, as provided by law; and, second, to adjudge the entire property to be subject exclusively to the lien of Dreyfus & Co., the first attaching creditor, for said sum of \$1,000. That said property was of the value as appraised, as aforesaid, and, if surrendered to the sheriff for sale, would have realized a sufficient sum to have paid the judgments of S. G. Dreyfus & Co. and the defendant Looney, aforesaid. That, if the defendants had not realized and sold the property in the manner and at the time they did, defendant Looney would have wholly lost his judgment, as said property was about to be fraudulently removed from this state, and the judgment debtor had no other property in this state out of which said debt could have been made."

A. H. Sevler, for appellants. Scott & Jones, for appellee.

WOOD, J. The court erred in sustaining the demurrer to the second paragraph of the answer, and in finding that at the time of the levy of the execution and sale of said four log wagons said wagons were the property of plaintiff, and in his possession under and by virtue of said interplea and bond filed in said suit of Dreyfus & Co. against Alex Stewart. The sheriff acquired control of the property as much by reason of the levy of the attachment in favor of Looney as of that in favor of Dreyfus & Co., and it was his duty to retain control over it under said writ as much so as under the attachment in favor of Dreyfus & Co., until he was legally deprived of such control. No bond was given in favor of Looney for the forthcoming of the property in case his attachment was sustained. Consequently, in contemplation of law, the sheriff still had control of the property under the Looney attachment, when judgment was rendered sustaining same, and when execution was issued. The sheriff had the right to take the property by virtue of the lien of the Looney attachment, and to hold same under that attachment, and, if the appellee desired to retain possession of same against said attachment, he should also have given a forthcoming bond in favor of Looney. Moreover, there was nothing to prevent the sheriff from levying upon the property of A. Stewart, although in the possession of a third party, to satisfy an execution creditor of

said Stewart. Because W. W. Stewart had given bond for the forthcoming of said property in an attachment proceeding was no reason why it should not be levied upon and sold under execution as the property of A. Stewart, if it really was his property, as it seems to have been. And if it was not his property, and W. W. Stewart wished to test that matter as against the execution creditor, there was nothing to prevent him from giving the bond required by section 3088, Sand. & H. Dig., which is as follows: "The sale of personal property upon which an execution is levied, shall be suspended at the instance of any person, other than the defendant in the execution, claiming the property, who shall execute \* \* \* a bond to the plaintiff," etc. It would not be the province of W. W. Stewart to say, "This property is not subject to execution as the property of A. Stewart now, because it has already been attached in my possession as his property, and I have given bond to retain possession of same, and for its forthcoming in that case." That would furnish only the greater reason why he should not suffer the property taken out of his possession under the execution. He could not raise the issue for the prior attaching creditor or for the debtor that the property was not subject to execution. That would be a matter for the creditors and the debtor to settle between themselves. If he claims the property, and wants to retain possession of same until the rights of property are settled, the law points out the way, whether the property be taken under attachment or execution. Sand. & H. Dig. §§ 406, 3088. When he has pursued neither course as against the process which is sought to be enforced in favor of Looney, he cannot claim that the sheriff and the execution or attachment creditor are trespassers for taking the property under such process.

Again, that part of the second paragraph of the answer which undertakes to set up that the judgment obtained by Dreyfus & Co. against W. W. Stewart was a fraud as to Looney, although not aptly and clearly stated, was sufficient on demurrer, and constituted a good defense to this action. Looney was not a party to that judgment. If, as can be seen from the statements in this part of the answer, the judgment fixing the value of the property attached and claimed by W. W. Stewart at \$1,000 was obtained by the collusion of said Dreyfus & Co. and the said Stewart for the purpose of enabling the said Stewart to pay off the Dreyfus judgment, and retain property of the real value of over \$3,000, according to the appraisers, and to remove the same beyond the reach of the sheriff, so that it could not be subjected to the Looney judgment, said proceedings would constitute a fraud against Looney, which he had the right to plead and to establish as a defense to this action. "Judgments," says Mr. Black, "entered into by the collusion or fraud of both parties to the action, are void

as to creditors, and may be attached in any collateral proceeding by them." Black, Judgm. §§ 291-293. Whatever this part of the answer lacked in the manner of statement to make it conform to the requirements of good pleading, could have been corrected on motion. It showed a good defense. For the errors indicated, the judgment is reversed, and cause remanded, with directions to overrule the demurrer, and for further proceedings.

### HALPERN v. SPENCER.

(Supreme Court of Arkansas. Oct. 22, 1898.)

#### APPEAL—REVIEW—STRIKING PLEA.

Where a pleading is stricken from the files, it ceases to be part of the record; and error in striking it cannot be considered, unless the motion to strike and the pleading are brought up by bill of exceptions.

Appeal from circuit court, Monroe county; James S. Thomas, Judge.

Action by George Spencer against Isaac Halpern. From an order striking defendant's amended answer, he appeals. Affirmed.

Manning & Lee, for appellant. Norton & Prewett, for appellee.

WOOD, J. We are asked by this appeal to pass upon the ruling of the circuit court sustaining a motion of appellee to strike an amended answer of appellant, and in rendering judgment for appellee upon the mandate from this court. 37 S. W. 711. Neither the motion to strike nor the stricken answer are brought upon the record by bill of exceptions. That was necessary to bring the question ruled upon by the trial court before this court. Although a pleading has been filed and made a part of the record, if said pleading is afterwards stricken from the files by order of the court it is no longer a part of the record, and stands as though it never had been filed. Hence a bill of exceptions is necessary to bring the motion and the pleading which was stricken upon said motion upon the record for the inspection of this court. *Hurlbut v. Manufacturing Co.*, 38 Ark. 594; *Floyd v. McDaniel*, 36 Ark. 494; *Harrell v. Tenant*, 30 Ark. 684; *Pelham v. Page*, 6 Ark. 535; other cases cited in *Crawford's Dig.*, tit. "Appeal and Error," V. f. p. 131. There being nothing before us to show error in the judgment of the circuit court, it is affirmed.

### WIGGINS v. BISSO.

(Supreme Court of Texas. Oct. 31, 1898.)

#### PLEADING—DEMURRER—EQUITY—ACCOUNTING—ILLEGAL CONTRACT.

1. The positive allegations of a plea, that a partnership was entered into for the purpose of securing an unlawful agreement, cannot be overthrown on demurrer by the fact that dates stated therein show the agreement to have

been made before the partnership was created, if the discrepancy between the dates and allegations is capable of explanation.

2. A partnership was entered into for the purpose of contracting with a foreign brewing association to combine their skill, capital, and labor to create and carry out restrictions in trade, to increase the price of beer, and prevent competition in the transportation, sale, and purchase of beer, in violation of the anti-trust law of March 30, 1889. *Held*, that equity would not compel an accounting between the partners as to the profits accruing therefrom.

Error to court of civil appeals of Fifth supreme judicial district.

Bill by Peter Bisso against William Wiggins. From a judgment for plaintiff, affirmed by the court of civil appeals, defendant brings error. Reversed.

Stone & Lee and R. S. Neblett, for plaintiff in error. Simkins & Mays, for defendant in error.

BROWN, J. Peter Bisso sued the plaintiff in error in the district court of Navarro county, alleging, in substance, that on May 1, 1892, the plaintiff and the defendant entered into a partnership, to continue one year from that date, under the style of William Wiggins, by which they agreed each to put into the partnership certain named property and services, and to carry on, in the city of Corsicana, the sale of ice and beer. The petition alleged that all profits derived from the said business, amounting to \$7,980, were to be divided equally between the said partners, all of which went into the possession of the said William Wiggins, who likewise had possession of all the invoices of the beer and ice shipped to, and sold by, the said firm, and of its books; that William Wiggins failed and refused to account to the plaintiff for any of the profits of the business; and prayed that an accounting might be had of the said partnership business, and for judgment for one-half thereof.

The defendant below filed a general demurrer, a general denial, and a special answer, in substance as follows: That no such partnership ever existed between him and plaintiff, as is alleged in plaintiff's petition, but that on or about the 20th day of April, A. D. 1892, plaintiff and defendant, by verbal agreement, entered into a partnership contract by which it was mutually agreed that they should sell ice and beer in Corsicana, Tex., and, if it be true that the said partnership accumulated any profits in that business, such profits were accumulated under an illegal and unlawful undertaking, by which the defendant entered into a contract in writing with the St. Louis Brewing Association, whereby the said partnership and the brewing association combined their skill, capital, and labor and acts to create and carry out restrictions in trade, to increase the price of beer, and to prevent competition in transportation, sale, and purchase of beer, etc.; making sufficient allegations to bring the con-

tract between the partnership and the brewing association within the provisions of the anti-trust law of the state of Texas approved March 30, 1889. The plaintiff demurred to this special answer, and the trial court sustained the demurrer; whereupon the defendant, Wiggins, filed a trial amendment, in which he reiterated, in substance, the allegations of the former plea, with the additional allegation that the partnership entered into between the plaintiff and himself was so formed for the express and sole purpose of obtaining, making, and carrying out the contract with the St. Louis Brewing Association, whereby the said partnership and the said brewing association agreed to do the things embraced in the said contract, and that the said partnership did carry on the business under the illegal contract made with the brewing association, and that all the profits, if any, of the said business, were made out of the business carried on and conducted under and by virtue of the said illegal contract. The trial amendment referred to the contract with the brewing association, which was attached, dated on the 5th day of April, 1892. The plaintiff below filed a general demurrer to this trial amendment, which was sustained by the court. A trial of the case was had in the district court, which resulted in a verdict and judgment for the defendant in error, which was affirmed by the court of civil appeals.

For the defendant in error it is claimed that the allegations of the defendant's special plea show that the contract of partnership was not entered into for the purpose of securing the unlawful agreement for the sale of beer made between Wiggins and the brewing association, because it appears from the answer that the contract of partnership was made on the 20th day of April, 1892, and the agreement for the sale of beer, which is attached to the answer, bears date April 5, 1892, showing that the unlawful agreement had been entered into before the partnership was formed. It is distinctly alleged in the answer that the partnership was formed for the sole purpose of procuring the contract which was made between Wiggins and the brewing association, and that the said contract was actually made on behalf of the partnership composed of Wiggins and Bisso, in the name of Wiggins alone, by the agreement of the partners. In testing the sufficiency of this answer by general demurrer, it was the duty of the court to indulge in favor of the plea every reasonable intendment arising from the pleading. *Wynne v. Bank*, 82 Tex. 383, 17 S. W. 918. There are many ways in which the discrepancy between the dates and allegations could be accounted for, and, although the plea may be somewhat uncertain, the positive allegations contained in it cannot be overthrown by the fact that the dates may conflict with the facts alleged. The allegations must be taken, in this investigation, as showing that the co-partnership

was formed for the purpose of procuring the unlawful agreement.

If the facts alleged by the defendant in his answer be true, Bisso and Wiggins entered into the partnership agreement for the purpose of violating the laws of the state of Texas, by procuring a contract between themselves and the brewing association which, in its terms, was a distinct violation of the anti-trust law of this state approved March 30, 1889. The parties agreed to enter upon a business the conduct of which involved daily violation and disregard of the laws of the state, out of which violation of the law the profit sued for accrued. Bisso cannot recover in this case without proving the contract of partnership between himself and Wiggins, and must recover, if at all, according to its terms. To give relief to Bisso, the court must examine each of the transactions which the partnership had with other people under the unlawful agreement entered into with the brewing company, and thus the court would be engaged in the examination of the unlawful acts of these parties in order to do equity between them. Under the circumstances alleged in the answer, the courts of this state will not investigate such transactions, but will leave the parties as they find them. *Read v. Smith*, 60 Tex. 379; *Wills v. Abbey*, 27 Tex. 203; *Reed v. Brewer*, 90 Tex. 144, 37 S. W. 418; *Beer v. Landman*, 88 Tex. 450, 31 S. W. 805; *Bartle v. Nutt*, 4 Pet. 185; *Todd v. Rafferty*, 30 N. J. Eq. 260; *Gregory v. Wilson*, 36 N. J. Law, 315.

In the case of *Read v. Smith*, which is directly in line with the case now before the court, Judge Stayton said: "It has been often said that the test whether a cause of action connected with an illegal transaction can be enforced at law is whether the plaintiff requires any aid from the illegal transaction to maintain his cause. While this is a correct rule, it may not go far enough to meet all the cases which may arise upon which, under well-settled principles, the courts would refuse relief upon the ground of the illegality of the transaction. This rule, however, goes far enough to include this case. The plaintiff claims the value of one-half of the scrip. Why? Because while sheriff he made the agreement set out, and in pursuance therewith furnished the money with which the paper was bought. Thus, is he compelled to set out the agreement. Illegal as it is shown to be by the answer, as the sole basis of his right. The object and purpose of the contemplated partnership was to do indirectly through Wood, for the benefit of both, that which the law prohibited Smith to do directly. and it had no single purpose legal in its character. In such a case as is made by the pleading, we believe that the law forbids relief to either party in the way of forcing an account and settlement between them, they never having made a settlement themselves."

In this case, as in that, relief must be giv-

en by virtue of, and in accordance with, the partnership agreement, which was itself illegal. Bisso entered into this agreement in order to do directly in the name of Wiggins what the law forbade either of them to do in conjunction with another or with others. The facts of the two cases are so nearly identical that a proposition of law applicable to the one cannot be inapplicable to the other.

In the case of *Reed v. Brewer*, cited above, the plaintiff sued to recover of the defendant upon a note given for furniture to be used by her in a house of prostitution. The court found that the person who sold the furniture knew that it would be used in maintaining that house, and intended, by the sale, to aid the woman in carrying on the immoral and unlawful business. Upon this state of facts, this court held that the note upon which suit was brought was illegal and void, and that the plaintiff could not recover. The reason given was that the plaintiff could not recover except upon the void contract.

On behalf of the defendant in error, counsel cited many authorities, which we have examined, but find none that we think it necessary to comment upon except *Pfeuffer v. Maltby*, 54 Tex. 454; *De Leon v. Trevino*, 49 Tex. 80; and *Brooks v. Martin*, 2 Wall. 70.

The first case mentioned involved the right of a partner to recover against his co-partner for profits accruing in what was alleged to be an illegal partnership. The defendant alleged, in substance, that the partnership was formed for the purpose of furnishing tinware to the Confederate States government, in lieu of military services required of the partners by that government, and that the tinware not so used had been sold for Confederate money, which had been invested by the defendant partner in cotton, shipped to Mexico, and sold for specie. Plaintiff demurred to this answer, which demurrer was overruled, and, upon trial, judgment was entered against the plaintiff. The case was referred to the commission of appeals. The opinion was written by Judge A. S. Walker, and approved by the supreme court. Judge Walker states the question thus: "Whether the contract of partnership, at the time it was formed and entered upon by the parties, was illegal and void, as against public policy, is not necessarily the controlling question; but the true inquiry is whether a party to that contract is liable or not, in an action against him brought by his former partner to recover from him his share of the proceeds of the partnership." The judge then proceeded to state what was decided in the case of *De Leon v. Trevino*, and to quote largely from that case, principally what Judge Moore had himself quoted from the case of *Brooks v. Martin*; but does not announce in that part of the opinion what application he made of the quotations from *De Leon v. Trevino* to the facts of the case

before the court. He then proceeded to discuss a different question from that stated in the first part of the opinion, after which he concludes the opinion thus: "We rest our conclusion in the case before us, however, upon the question first discussed. It is not necessary to decide beyond the point which is there involved." We understand from the opinion that the judge intended to decide that, notwithstanding the contract of partnership might be illegal, the plaintiff could recover of the defendant under the facts of that case. He does not notice that the answer of the defendant alleged that the Confederate money received in the course of the business had been invested in cotton and it sold for specie. There can be no doubt that where parties have jointly, in the pursuit of an illegal purpose, acquired money, and have invested that money in property which is in the possession of one of the joint owners, such possessor cannot resist the claim of the other on the ground of the illegality of the business in which the money was first acquired. It was not necessary for plaintiff to prove the partnership, because the cotton was bought for the firm not in the course of the unlawful business. That case was rightly disposed of, and the opinion, when applied to the facts, is not objectionable in the propositions that it lays down, but it wholly fails to sustain the plaintiff's contention in this case.

*Brooks v. Martin* involved the right of a partner to recover from his co-partners under the following state of facts: *Martin, Brooks, and Field* entered into a co-partnership contract, whereby *Martin* agreed to furnish the money, and the other two agreed to transact the business, of the partnership, which was then formed for the purpose of buying the claims of soldiers for lands before warrants were issued. The purchase of such claims from soldiers was prohibited by an act of congress, and the supreme court of the United States held the partnership to be illegal. *Brooks and Field* bought up a large number of claims from the soldiers as they passed through New Orleans on their return from Mexico to their homes in the United States, and *Martin* furnished the money to pay for them, amounting to about \$50,000. It was then agreed that *Brooks* should go to Washington City, and secure the warrants, which he did, and that *Field* should go to the Northwest, and look for suitable locations. The claims bought from the soldiers were converted into warrants issued by the government, and regularly transferred to the firm, and by that firm had been sold, and converted into money, or located upon land and the title procured. Some of the land had been sold for cash, and some had been sold upon time, with mortgages to secure purchase money. *Martin* failed in business, and, knowing nothing of the condition of the partnership business in the lands, met *Brooks*, who represented to him that the

business was in a very bad condition, and purchased Martin's interest for about \$3,000. Martin sued to set aside his conveyance of his interest in the assets of the firm, and to recover what was properly due to him, to which suit Brooks pleaded the illegality of the partnership by which the purchase of the original claims of the soldiers was made. The supreme court of the United States, speaking by Justice Miller, said: "When the bill in the present case was filed, all the claims of the soldiers thus illegally purchased by the partnership with money advanced by the complainant had been converted into land warrants, and all the warrants had been sold or located. The original defect in the purchase had, in many cases, been cured by the assignment of the warrant by the soldier after its issue. A large portion of the lands so located had also been sold, and the money paid for some of it, and notes and mortgages given for the remainder. There were then, in the hands of defendants, lands, money, notes, and mortgages, the results of the partnership business, the original capital for which plaintiff had advanced. It is to have an account of these funds, and a division of these proceeds, that the bill is filed. Does it lie in the mouth of the partner who has, by fraudulent means, obtained possession and control of all these funds, to refuse to do equity to his other partners because of the wrong originally done or intended to the soldier? It is difficult to perceive how the statute enacted for the benefit of the soldier is to be rendered any more effective by leaving all this in the hands of Brooks instead of requiring him to execute justice as between himself and his partners. Or what rule of public morals will be weakened by compelling him to do so? The title to the land is not rendered void by the statute. It interposes no obstacle to the collection of the notes and mortgages. The transactions, which were illegal, have become accomplished facts, and cannot be affected by any action of the court in this case." The conclusion of the court in the above-cited case is not expressed in definite terms, but, taking into consideration the facts stated as the premises from which to draw the conclusion, it could rest upon no other ground than that the funds derived from the transactions, which were illegal, had been realized and invested in other property, for which one of the partners could maintain an action against his co-partners without resorting to the terms of the illegal partnership. Any other view of the case would place it in direct conflict with the decision made by the same court in *Bartle v. Nutt*, 4 Pet. 185. We do not think that *Brooks v. Martin* sustains the contention of the defendant in error in this case.

In the case of *De Leon v. Trevino*, 49 Tex. 88, the plaintiff sued to recover of the defendant upon notes executed by the latter, to which the defense was interposed that the notes sued upon were given in settlement of

the transactions of the partnership, which was formed for an illegal purpose. Judge Moore, for the court, delivered an opinion in which the case of *Brooks v. Martin* was carefully reviewed, and announced the conclusion that, although the claim for which the note was given could not have been enforced if the partnership was illegal, yet when the parties made a settlement of the illegal transactions among themselves, and executed notes, the illegal character of the transactions did not attach to the notes, and the defense set up could not prevail.

The answer of the defendant, Wiggins, as amended by the trial amendment, alleged facts which, if true, would constitute a good defense to the plaintiff's action for an accounting of the affairs of the partnership between the plaintiff and the defendant. The district court erred in sustaining the demurrer to the answer, and the court of civil appeals erred in affirming that judgment. It is therefore ordered that the judgments of the district court and of the court of civil appeals be reversed, and this case remanded for further trial.

#### BROOKS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 9, 1898.)

#### CRIMINAL LAW—THEFT—CONTINUANCE—EVIDENCE—INSTRUCTIONS.

1. In a prosecution for the theft of property alleged to belong to "J. W. Bryant," accused applied for a continuance to procure witnesses to prove that the owner's name was "Bryan," by which he was commonly known and which he gave as his name. *Held*, that the application was properly refused, where the evidence at the trial showed that he was generally known as Bryant, although his name was Bryan, and where the court properly instructed the jury.

2. An application for continuance by one accused of theft, to procure witnesses to prove that a co-defendant was in possession of the stolen property "on the day before the sale," and was claiming to own the same, and that accused was not with him at the time and had nothing to do with it, is too general, and therefore properly refused.

3. Accused, who with a co-defendant had been in possession of and had sold a stolen cow which accused had claimed as his own and for which he had received the pay, applied for a continuance to secure a witness to prove that "on the morning said animal was sold" accused met the co-defendant, who was driving the animal, and who told accused that he owned it, and was going to sell it, and asked accused to help him. The place or time of meeting was not alleged, nor that the proposed witness was present at the time. *Held*, that the application was properly refused.

4. After accused had been denied a continuance to procure three witnesses, testimony objected to by accused, "because it was irrelevant and not pertinent to any issue," was admitted to show the relationship of the proposed witnesses to accused, and their present whereabouts. *Held* harmless error.

5. Where other facts and circumstances besides possession of the stolen property are relied on by the prosecution, an instruction that recent unexplained possession is not sufficient to sustain a conviction, unless defendant was

called upon at the time to explain such possession, or unless his right to it had been challenged, is properly refused.

Appeal from district court, Montague county; D. E. Barrett, Judge.

Fabe Brooks was convicted of theft, and appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of the theft of a yearling alleged to be the property of J. W. Bryant, and his punishment assessed at two years' confinement in the penitentiary; hence this appeal.

When the case was called for trial appellant presented an application for a continuance on account of the absence of B. W. Brooks, R. L. Brooks, and Joe Clark. He expected to prove by all of said witnesses that the real name of the alleged owner was "Bryan," and not "Bryant," and that he was commonly known among his acquaintances as Bryan, and gave his name to the people as Bryan. The evidence on the trial showed that he was generally known as Bryant, though his name was Bryan. The court properly instructed the jury with reference to this matter, and we see no error in refusing the continuance on this ground.

He also expected to prove "by each of said witnesses that Joe Price was in possession of the alleged stolen animal the day before said sale, and was claiming to own the same, and that at said time this defendant was not with said Joe Price, and had nothing to do with said animal." These statements are too general. There is not a single fact stated, except that it was the "day before said sale." Where it was or the attendant circumstances are not stated; nor is the idea excluded that defendant may have been with said Joe Price before it is claimed these parties saw Price. Price was jointly indicted with the defendant for the theft, and defendant and Price were together when defendant sold the animal to Salmon, 10 miles from the point of the theft. This statement is too general. See *Miller v. State*, 31 Tex. Cr. R. 609, 21 S. W. 925; *Miller v. State*, 32 Tex. Cr. R. 319, 20 S. W. 1103.

It is further stated in said application that defendant expected to prove by Clark that "on the morning said animal was sold to Salmon he [defendant] met Joe Price, and that at the time said Joe Price was driving said animal by himself in the direction of and near to Will Salmon's ranch, and that then and there, in conversation with this defendant, said Joe Price said he bought said animal, that she was his, and that he needed some money, and was taking the animal to Salmon's ranch to sell to Salmon, and asked defendant to go along with him and help him down there." The same observations may be made in regard to this as the former state-

ments in the application. Defendant's presence at the time and place is not stated, nor does it allege that Joe Clark was present at the time. In this connection, the testimony on the trial shows that defendant and Price brought the animal to Salmon's, 10 miles from where it was stolen, and that the defendant sold the animal to Salmon. Price, so far as the record is concerned, remained silent; the defendant acting as the owner of the animal, and receiving pay for the same. We do not believe there was any error in overruling the application for a continuance. It might also be stated that the facts may have occurred as stated in the application, and yet defendant have been guilty of the theft along with Joe Price. The theories are not inconsistent.

On the trial the state asked the witness D. A. Price what relation B. W. Brooks and R. L. Brooks were to the defendant, and as to their whereabouts; and also asked the witness where he last saw Joe Clark, and as to his then whereabouts. Appellant objected to this, "because it was irrelevant and not pertinent to any issue." These are all the grounds stated in the bill of exceptions. The witness answered that B. W. Brooks was the father, and R. L. Brooks the wife, of the defendant, and that B. W. Brooks did live in Montague county, but he did not know his whereabouts at that time, but understood he was in Palo Pinto county; that he saw Joe Clark at his (witness') residence on the Sunday previous to the time of trial, and he said he was working for a man in Fannin county. While the relevancy of this testimony is not apparent, nor its pertinency to any issue in the case, still we fail to see what bearing it could have had injuriously to the appellant. It seems to have been thrown in without reference to any issue before the jury. As presented, we do not believe there was such error as requires a reversal of the judgment.

Appellant requested the court to charge the jury that the recent possession of stolen property, unexplained, is not sufficient to warrant a conviction, unless the defendant was at the time he was found in possession in some way called upon to explain such possession, or unless his right to the property had been challenged. This was refused, and we think properly. While it is possible that such a case might arise as stated in the charge, it would be a rare one indeed. As we understand this record, the state did not rely upon the bare possession of the stolen property. There were other facts and circumstances which tended to throw light upon the transaction, and the court in this connection gave a charge upon circumstantial evidence.

We believe the testimony is sufficient to support the judgment, and it is therefore affirmed.

HURT, P. J., absent.

## CLIFTON v. STATE.

(Court of Criminal Appeals of Texas. Nov. 9, 1898.)

ASSAULT WITH INTENT TO MURDER—CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY.

A shot was fired into a house where persons were playing cards in the evening. No one witnessed the shooting. Prosecutor, who was shot while standing opposite the window, had had a difficulty with defendant some three years previous, but the parties were at the time on friendly terms. On the day of the shooting, defendant had had a pistol of the same caliber as the one with which the wound was inflicted. Tracks which defendant's shoes fitted were found outside the house, but at a point other than the place from which the shot was claimed to have been fired. Defendant's pistol was found on the same night on the roadside, but all the chambers were loaded, and there was no appearance that any of them had recently been discharged. Defendant had been in the house where the playing was going on about an hour before the shooting, but neither of the persons with whom he had had a difficulty during the day was then in the room, and he left the room about half an hour before the shooting, stating that he was going to get his supper about three-quarters of a mile distant. He gave evidence that, at the time of the shooting, he was either eating his supper, or on his way back to the house. He was arrested after the shooting, en route. He was not shown to have had any malice against any person in the room. *Held* insufficient to warrant a conviction for assault with intent to murder.

Appeal from district court, San Augustine county; Tom C. Davis, Judge.

Squire Clifton was convicted of an assault with intent to murder, and he appeals. Reversed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of an assault with intent to murder, and his punishment assessed at two years' confinement in the penitentiary; hence this appeal.

There is but one assignment of error that requires notice, to wit, that the evidence does not sustain the conviction. The case is one of purely circumstantial evidence. All the testimony that can be said to tend even remotely to show that appellant was the person who fired the shot into the house where the parties were playing cards on the night of the 25th of December, 1897, as we gather from the record, is as follows, to wit: No one witnessed the shooting. It occurred at night, the shot coming through a window, and into a house where a number of parties were playing cards. Bill Sublet, the prosecutor, who was standing by the chimney jamb opposite the window through which the shot was fired, was shot through the thigh. (1) Certain testimony showing that appellant, some three years before the alleged shooting, had a difficulty with the prosecutor, Bill Sublet; but it is shown, without controversy, that the parties had made up this difficulty, and were at the time on friendly terms. (2) That appellant had a difficulty, on the morning of the 25th of December, with Dan Ballard,

and subsequently, on the evening of the same day, had a difficulty with Ballard and Price. At the time of the last difficulty, he had a pistol, 38 caliber, the same size with which the wound was inflicted on Sublet that night.

(3) The state showed by one witness that defendant had a pistol when he came there in the morning. The defendant showed, however, that he borrowed the pistol he had from one Harper that day, after he had the difficulty with Ballard in the morning. (4) The state relied upon tracks. No tracks were shown near the window, but a number of tracks were found in a branch 35 or 40 yards from the window on that side of the house. It was not claimed that the shot was fired from this point, but through a crack between the sill and the window shutter. Among a number of tracks found in the branch, tracks that resembled appellant's were found; and his shoes were placed in some of the tracks, and fitted exactly. (5) A pistol was found that night on the roadside (but not in proximity to defendant), which was identified by one witness as defendant's pistol. All the chambers, however, of this pistol, were loaded, and the witnesses testified that there was no appearance that any of them had been recently discharged. (6) Appellant was shown to have come to the house where the card playing was going on, with one John Holman, about an hour before the shooting, bringing some crackers and canned goods. It was not shown that either Ballard or Price was in the room at this time. Appellant left the room about half an hour before the shooting, stating that he was going to get his supper about three-fourths of a mile distant. About half an hour after he left, some one fired a shot into the room, inflicting a wound on Sublet, as before stated. Appellant showed that, at the time, he was either at Mr. Bewley's (where he had gone for his supper), or on his way back to the house. He was arrested after the shooting, en route.

This is a summary of all the inculpatory facts which we are able to glean from the record; and, in our opinion, they do not establish with that degree of certainty required by the rules of circumstantial evidence the identity of appellant as being the party who fired the shot into the building on that night. Appellant is not shown to have had any malice against any person in that room. The tracks attributed to him by the state are not shown to be in such juxtaposition to the building as to indicate with any degree of certainty that he was the party who did the shooting. No tracks were found nearer than 35 yards of the window; and, when tracks attributed to him were found, they were among a number of other tracks in the branch. If the pistol found was his, the evidence for the state would exclude the idea that it had been recently fired. There is no testimony which places him in proximity to the scene of the shooting at that time. The evidence points with as much probability to

John Holman or Col. Horton as to appellant as being the party who fired the shot into the house; and it may be attributed to any person who may have been about the premises on that night with as much probability as to defendant. The most that can be said of this evidence is that it creates a suspicion against the defendant. But persons in this state cannot be convicted on suspicion alone; there must be competent evidence identifying such person with the commission of the offense. We quote from the language of the court in *Tollett v. State*, 44 Tex. 95, as follows: "To sustain a conviction, it should appear, not only that an offense as charged has been committed, but there should also be proof tending to establish that the party charged was the person who committed it, or was a participant in its commission, to a degree of certainty greater than a mere probability or strong suspicion. There must be legal and competent evidence pertinently identifying the defendant with the transaction constituting the offense charged against him. It is the duty of the court to require that such legal and competent evidence shall be adduced on the trial, in order to sustain a verdict of guilty." In this case, on the evidence as adduced, the court should have instructed the jury to bring in a verdict of not guilty. The judgment is reversed, and the cause remanded.

HURT, P. J., absent.

Ex parte WICKSON.

(Court of Criminal Appeals of Texas. Oct. 26, 1898.)

**ORDINANCE—VALIDITY—PUNISHING STATE OFFENSE.**

A conviction for a violation of a city ordinance, which is identical in terms with a section of the Penal Code, is void, since the city has no authority to pass an ordinance covering the same acts denounced by the Penal Code.

Appeal from Milam county court; W. M. McGregor, Judge.

Habeas corpus proceedings by Ben Wickson. From a judgment remanding relator to custody, he appeals. Reversed.

R. Lyles, for relator.

DAVIDSON, J. Relator was convicted in the mayor's court for a violation of a city ordinance. He was tried in two cases before the mayor of Cameron. The first case was for a violation of an ordinance prohibiting drunkenness in a public place in the city of Cameron, and the second for using abusive, insulting, and obscene language, etc. After conviction, he was placed in charge of P. L. Batte, city marshal, until the fine and costs were paid. Batte placed the relator upon his farm, and was working him. The petition for writ of habeas corpus was made and

sworn to by Giles O. Avirett. Upon service of the writ the city marshal, Batte, produced the relator before the county judge, showing as the cause for detaining the relator two commitments issued by A. J. Lewis, mayor of the city of Cameron, under the two judgments mentioned. Upon the hearing of the writ the county judge discharged the relator on the judgment in the case in which he was charged with using abusive, etc., language, but remanded him to custody under the other, —for drunkenness in a public place.

The only question before us is whether or not the action of the court was correct in remanding him under the particular judgment. The city ordinance under which relator was convicted, in its definition of the offense, is identical with article 150 of our Penal Code, the only difference between the ordinance and said article being that one creates an offense against the city and the other against the state; but in each the same acts are denounced, and the same punishment affixed. Relator seeks his discharge because the city has no authority to pass an ordinance covering the same acts denounced by the Penal Code. We are of opinion that the position is correct. We have heretofore expressed our views clearly upon this question. See *Coombs v. State*, 44 S. W. 854. In that opinion the writer entered rather fully into a discussion of this question, and in a concurring opinion (47 S. W. 163) Judge Henderson treats the matter as fully from another standpoint. Perhaps the same question might be treated from one or more points of view than those already expressed; but we deem it unnecessary in this case. Why trial judges will permit appeals in cases of this character, in view of the decisions of this court, is incomprehensible. If we have failed to make ourselves understood, we do not well see how we can do so in other opinions. We have examined and re-examined the questions underlying the decision in the *Coombs Case*, and have seen no reason to change our views as therein expressed. The judgment is reversed, and the relator is discharged. In view of the fact that the county judge remanded relator to the custody of the sheriff of Milam county, and not to the city marshal, the clerk of this court will direct said sheriff to release relator at once; and it is accordingly so ordered.

HURT, P. J., absent.

HARRIS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 9, 1898.)

**ASSAULT WITH INTENT TO MURDER—INSTRUCTIONS—AGGRAVATED ASSAULT—ARGUMENTS TO JURY—WIFE AS WITNESS.**

1. In a prosecution for assault with intent to murder, the state claimed that defendant shot at prosecutor for the purpose of killing



him, and defendant testified that he shot up in the air to frighten the crowd, in order to get his wife away from them. The court charged that if defendant shot off his pistol in the air at the time and place as charged, but for the purpose of causing the crowd to scatter, so as to enable him to get his wife, they should find defendant not guilty. *Held*, that it was not error to refuse to further instruct that if defendant shot at prosecutor, but shot at him for the purpose of alarming him, and not for the purpose of killing him, they should acquit defendant.

2. In a prosecution for assault with intent to murder, it is not error to refuse to charge as to aggravated assault where, if the person assaulted had been killed, it would have been a clear case of murder, and not of manslaughter.

3. In a prosecution of a husband, a statement by the district attorney, in his argument to the jury, that: "It is a wife's place and duty to cling to her husband, and she is not here to-day. I do not see her in the court house,"—is not objectionable on the ground that it is using the wife as a witness.

Appeal from district court, Bell county; John M. Furman, Judge.

Emmett Harris was convicted of assault with intent to murder, and he appeals. Affirmed.

James Boyd and J. B. McMahon, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of assault with intent to murder Sam Bailey, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

As usual in such cases, there were different theories presented by the evidence. The state's evidence shows that appellant and his wife had been separated for a couple of weeks on account of some disturbing matter between them. On the night of the alleged assault, all the parties met at a social gathering. After the party was over, the wife of the defendant got in a wagon driven by Sam Bailey, the assaulted party, with the intention of being conveyed to the residence of her mother. There were several parties in the wagon. The defendant rode up, and demanded of his wife that she leave the wagon and accompany him. The assaulted party induced her to get out of the wagon, which she did; and, having finished hitching the team, Bailey got up in the wagon. Defendant's wife, who was a cousin of Bailey's, stated to him that, if he was not going to remain with her, she would not stay there, and was going to get in the wagon and go with them. Bailey made no reply, being busy with his team; one of the mules being rather foolish and wild. The noise and confusion frightened this mule, and he broke to run. This excited the other mule, and he started to run, and both started away rapidly. The defendant rode up near the hind wheel of the wagon, threw his pistol down upon Bailey, and told him that, if he did not stop his wagon, he would kill him. He could not stop the wagon, and the defendant fired, missing Bailey, and

shooting the right-hand mule. This seems to have deflected the mules, and they ran into a ditch, upsetting the wagon, and throwing all of its occupants out in the ditch. There were two or three other shots fired. The defendant immediately ran, and some of the testimony indicates that he fired two more shots. As to who fired these shots, however, there is some uncertainty. It is certain, however, that Bailey did not fire any shot; and the only other man in the wagon denied firing said shots, and further stated that he was not armed, and had nothing to do with the trouble. Defendant testified that he fired up in the air to frighten the crowd, so he could get his wife back; that he did not shoot at any one; that in the dark he could not tell one from the other, at a short distance; that he shot over the wagon, high up; was not excited or mad, but was nervous; that when he shot some one shot from towards the house, and he turned and ran his horse; that the two shots passed close to him; that he fled, and was arrested in another county in the following June, the shooting occurring about the 1st of January.

The court submitted the issue of assault with intent to murder, and in behalf of the defendant charged the jury: "If you find from the evidence that defendant did shoot off his pistol in the air at the time and place as charged, but that he did so for the purpose of causing the crowd to scatter, so as to enable him to get his wife out of the wagon driven by Sam Bailey, or if you have a reasonable doubt thereof, you will find the defendant not guilty." The defendant asked a special charge as follows: "You are further charged, if you believe from the evidence that defendant did shoot at Sam Bailey, but that he shot at Sam Bailey for the purpose of alarming him, and not for the purpose of killing said Sam Bailey, you will acquit the defendant, and so say by your verdict." This was refused, and an exception reserved. The state's testimony placed it beyond question, if the jury believed that appellant shot at Sam Bailey for the purpose of killing him, that defendant was guilty. The defendant denied shooting at him or any one else, but stated that he shot in the air for the purpose of scattering the crowd and getting his wife. When the court submitted the issue under the charge quoted as given in the general charge, he submitted every issue made by the testimony of the defendant. The evidence on one side is that he shot for the purpose of killing; and on the other, that he shot for the purpose of scattering the crowd, in order to get his wife. The charge as given by the court pertinently and sharply submitted his defensive theory.

Nor did the court err in failing to charge the jury the law of aggravated assault. Under the facts stated, this issue was not involved. If appellant shot for the purpose of killing, it was an assault with intent to murder. Had Sam Bailey been killed, the killing

under no phase of the evidence should have been reduced to manslaughter. There is no adequate cause shown by the testimony.

The district attorney, in his argument to the jury, stated: "It is a wife's place and duty to cling to her husband, and she is not here to-day. I do not see her in the court house." A bill of exceptions was reserved to this language, on the ground that the state could not use the wife as a witness in the prosecution. The ground of objection would have been a sound one, had the state undertaken to use the wife. The district attorney simply commented upon the fact that she was not present. This he had the right to do. We are of opinion that the judgment should be affirmed, and it is accordingly so ordered.

HURT, P. J., absent.

### MORSE v. STATE.

(Court of Criminal Appeals of Texas. Nov. 2, 1898.)

#### APPEAL—STATEMENT OF FACTS—CERTIFICATION—NOTICE—JURISDICTION.

1. A statement of facts merely signed by the judge, without his certificate that it is a correct statement, cannot be considered as part of the record.

2. The entry of notice of appeal nunc pro tunc at a subsequent term confers no jurisdiction on the appellate court.

Appeal from Karnes county court; F. Theo Barnes, Judge.

Action by the state against Mrs. Rosa Morse and others to forfeit a bail bond. From a judgment, Mrs. Rosa Morse appeals. Dismissed.

Graves & Bell and J. C. Goode, for appellant. Mann Trice, for the State.

HENDERSON, J. This is an appeal from a judgment final on a forfeited bail bond, the appeal being prosecuted by Mrs. Rosa Morse, one of the sureties on said appeal bond.

At the Austin term of this court, a motion was filed by the assistant attorney general to dismiss this appeal, because no brief of appellant was filed in the court below, as required by law. In answer to that motion, appellant brings before this court the certificate of the clerk, showing that a copy of her brief was filed in said court within the time authorized by law.

What purports to be a statement of facts is not certified as such by the judge. It is merely signed by him, without any certificate whatever. The rule is that, if the parties agree to a statement of facts, the judge shall certify to same as a correct statement of facts. If they do not agree, the statute requires that the judge shall make up a statement of facts, and properly certify to same. And it has been held, following the statute on this subject, that, unless the statement of facts is certified in one or the other of these

modes, it will not be considered. See *Hess v. State*, 30 Tex. App. 478, 17 S. W. 1069; *Wilson v. State*, 34 Tex. Cr. R. 355, 32 S. W. 529. There being no proper certificate and approval by the county judge, we cannot consider the purported statement of facts as a part of the record in this cause.

There is also lacking in the record a notice of appeal given in open court at the term, as required by law. There is an attempt to remedy this, however, by an order nunc pro tunc, which was made at a subsequent term. This order was made over the objections of the county attorney, who reserved a bill of exceptions to said order entering the notice of appeal nunc pro tunc; the grounds of his objection being that the entry of the order in the final minutes of the court could not be made after the term, and after filing an appeal bond; that, after the elapsing of the term and the filing of the appeal bond, the court below had no further jurisdiction. Under the rulings of this court, the entry of the order nunc pro tunc of notice of appeal at a subsequent term was without authority of law, and did not confer jurisdiction on this court to hear and entertain said appeal. See *Lewis v. State*, 34 Tex. Cr. R. 126, 29 S. W. 384, 774, and 30 S. W. 231; *Quarles v. State* (Tex. Cr. App.) 39 S. W. 668; *Youngman v. State* (Tex. Cr. App.) 43 S. W. 519; *Perryman v. State* (decided Tyler term, 1898) 47 S. W. 364. The appeal is accordingly dismissed.

HURT, P. J., absent.

### LOGAN v. STATE.

(Court of Criminal Appeals of Texas. Nov. 2, 1898.)

#### CRIMINAL LAW—APPEAL—PRESUMPTIONS—CONTINUANCE—ABSENT WITNESS—NEW TRIAL.

1. Where, on motion to change venue, accused did not demur to the contest therefor as insufficient, and the court heard the testimony on the whole case presented, and the testimony was not set out in the bill of exceptions, it must be presumed that the court was justified in overruling the motion.

2. Return "Not found" of process issued to other counties than that of the residence of an absent witness as alleged in the motion, without reason therefor appearing, and without stating when it was issued and forwarded to such counties, is not sufficient showing of diligence to entitle to a continuance.

3. In a motion for continuance, accused, charged with murder, stated he expected to prove by the absent witness that deceased threatened to beat the life out of accused, and picked up a chair before accused struck him. This threat was not proved by other witnesses on the trial. *Held*, that this was material, and it could not be said not to be probably true, and accused was entitled to a new trial, under Code Cr. Proc. art. 597, subd. 6, which provides that where continuance is refused, and accused convicted, if it appear on the trial that the evidence of the witness named in the application was material, and the facts stated probably true, a new trial should be granted.

4. Where it was suggested before the court in a murder trial that an absent witness had

been kept away by deceased's friends, and a witness was sent for to prove this, but he was not brought into court until after overruling motion for continuance, the matter should have been thoroughly sifted by the court.

5. A killing resulted from a sudden quarrel between persons having no former grudge against each other, but who promptly armed themselves with bludgeons. Accused struck deceased with a stick, badly crushing his skull. A witness testified that accused afterwards said that he did not care, that he tried to knock his brains out; but this witness said nothing of this on the examining trial, and only recalled it after being taken at night by a crowd with a rope. *Held* not to justify verdict of murder in the first degree.

Appeal from district court, Cherokee county; Tom C. Davis, Judge.

Dolph Logan was convicted of murder in the first degree, and he appeals. Reversed.

W. H. Shook, F. N. Broach, and J. F. Weeks, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of murder in the first degree, and his punishment assessed at death; hence this appeal.

He reserved a bill of exceptions to the action of the court refusing to change the venue. This bill discloses that appellant proposed to change the venue on two grounds: "First, because there existed in said county of Cherokee so great a prejudice against appellant that he could not get a fair and impartial trial in said county; second, that there existed in said county a dangerous combination among influential persons, by reason of which he could not expect to get a fair and impartial trial." This was sworn to by appellant and two compurgators. The state filed a contest to this application, which, as stated by the bill, "was signed by three citizens of Cherokee county." The bill, however, states that said "affidavit did not sufficiently attack defendant's application, as required by law, and that it set out that defendant's attorneys were practicing lawyers, one living at Jacksonville, and the other at Rusk, and that they had no means of knowing the sentiment of the people of Cherokee county, but did not deny the last proposition in defendant's application, but that the court deemed the counter affidavit sufficient, and overruled the defendant's motion for a change of venue." The court explains this by stating: "There was a trial on the application to change the venue, and witnesses introduced failed to show the existence of the matter contained in the application, and in the examination of the venire only five or six were challenged for cause." The bill as drawn is exceedingly vague and indefinite. No statement of the facts is embodied therein. If the contest to the application was insufficient (which appears to be the case), then appellant should have demurred to same; and, if his demurrer was overruled, he should have taken a bill of exceptions to the action of the court; and, if the court then proposed

to hear testimony, he should have taken a bill of exceptions to any evidence upon the issue not raised by the contesting affidavit. See *Davis v. State*, 19 Tex. App. 201. This course was not pursued; but it seems that the court heard the testimony on the whole question as presented in the motion for a change of venue, and then overruled the motion. As stated above, we are not informed what the testimony was, but we are bound to presume that it justified the court in his action, and there was no error in overruling the motion to change the venue. See *Davis v. State*, supra.

It is also claimed that the court erred in overruling the appellant's motion for a continuance. The motion was based on the absence of one Will Goodman, who was alleged to have resided in Cherokee county, at Jacksonville, the place of the homicide, at the time the same was committed, but whose present whereabouts were unknown to appellant. Process was issued to Tarrant and Smith counties; but why this process was issued to said counties does not appear, nor does the application state when said process was issued and forwarded to said counties. It does show, however, that the same had been returned stating that Goodman was not found in said counties. We do not believe that the diligence here shown was sufficient.

He states that he expected to prove by said witness that, at the time of the homicide, deceased, Emmett Simpson, threatened to beat the life out of him if he did not treat, and that said threat was accompanied by the picking up of a chair by Simpson prior to the striking of any blow by the defendant. Looking at the record, this testimony appears to us to be quite material. It was a crucial point in the case whether or not deceased picked up the chair, and made a demonstration with it against the defendant, prior to the blow struck by defendant which caused his death. More than this, it was proposed to prove the language used by deceased in connection with his picking up the chair; and no such language was proved by any witness whom appellant was able to procure. There is no question here but that said evidence was material to defendant on the trial, and we cannot say that the same is not probably true. The court acted properly in overruling the motion for a continuance because there was a lack of diligence; but, when considering the motion for a new trial, a new rule applies, made so by statute. Code Cr. Proc. art. 597, subd. 6. It was the duty of the court, in passing on the motion for a new trial, made on account of said absent testimony, to consider the materiality and probable truth thereof, in connection with the evidence adduced on the trial. See *Jackson v. State*, 23 Tex. App. 183, 5 S. W. 371; *Covey v. State*, 23 Tex. App. 388, 5 S. W. 283. In the latter case the following is laid down as the true rule: "It is not in every case, however, where the absent testimony is material and

probably true, that this court will revise the ruling of the trial court. It is only in a case where, from the evidence adduced on the trial, we would be impressed with the conviction, not merely that the defendant might possibly have been prejudiced in his rights by such ruling, but that it was reasonably probable that, if the absent testimony had been before the jury, a verdict more favorable to the defendant would have resulted." Looking at the entire record, we believe that, if the appellant had had the benefit of the absent testimony on the trial before a fair and impartial jury, the result would have been different.

We would observe in this connection that there is some suggestion in the court's explanation that the absent witness may have been kept away from court by the procurement of deceased's friends, and that a witness was sent for to prove this fact, but he was not brought into court until after the motion for a continuance had been overruled. In our opinion, in a case of this importance, this matter should have been thoroughly sifted by the court.

Appellant saved a number of bills of exception to the impanelment of the jury and the charge of the court, which are not necessary to be considered. In addition to this, he urgently insists that this case should be reversed because the evidence does not sustain the verdict of the jury. We have carefully examined the record in this connection; and, in our opinion, if there is testimony showing express malice, it is exceedingly weak. No former grudge or ill will is shown to have existed between deceased and defendant. The homicide occurred as the result of a sudden quarrel. A number of persons were congregated on the streets in Jacksonville, at night. Both deceased and defendant appear to have been in the crowd. Some of the parties were wrestling, and all were in good humor. Appellant bantered deceased for a wrestle, and offered to bet him a dollar that he could throw him down. Deceased agreed to bet, but, not having a dollar, offered to put up his watch. Defendant declined to bet a dollar against the watch. Deceased then sent off and got a dollar, and pressed appellant to put up his money. Appellant declined to do this. Deceased then insisted that he should treat the crowd. Appellant refused, and deceased still insisted. In the meantime appellant had taken a seat. There was a large stick near by, and deceased asked him what he was going to do with that stick. Appellant said the stick was there when he came. Deceased then kicked it down. Appellant picked up the stick, and started off, the deceased still insisting that he should treat the crowd before he left. Appellant, after going a few steps, turned around with his stick raised. Deceased then picked up a watermelon, but put that down, and then grabbed a chair. The state's witnesses show that he did not advance on ap-

pellant at this juncture, but that appellant advanced on him, and struck him, though they admit that deceased had the chair raised as if about to use it. One witness for defendant states that, when defendant turned, deceased stepped backward, and grabbed a chair, and, as he picked it up, said, "If this is your game, here's at you," and advanced on defendant a step or two, when defendant struck him with the stick, and felled him to the ground. Some one remarked to defendant, "Dolph, you have done it;" to which he replied, "Yes, by God, I have done it," and ran off. One witness for the state, Warren Shanks, testified that he saw defendant that night some time after the difficulty; that he asked him how Simpson was; and that he (witness) told him that he was pretty badly hurt, to which appellant replied "that he did not give a damn; he tried to knock the damned son of a bitch's brains out." We would remark, however, in this connection, that this testimony comes in rather questionable shape, as this witness said nothing about this on the examining trial; and it was shown that afterwards he was taken out at night by a crowd with a rope, and, after this occurrence, he recollected he met the defendant that night after the homicide, and had the above conversation with him. We would observe that this testimony of the witness Shanks, and the fact that the wound inflicted on the head of the deceased was a severe one (the evidence showing that his skull was badly crushed), constitute the only suggestions of express malice. But the wound itself would hardly indicate express malice, under the rule that this can sometimes be shown by circumstances attending a brutal or cruel killing. This was not such a killing, but one springing from a sudden quarrel, in which at the time both the parties were armed with bludgeons. The chair held by the deceased was shown to be heavier than the weapon used by the defendant. We doubt if any case can be found in the books where a murder upon express malice has been sustained under such slight circumstances as are here shown. We are not unmindful of the regard in which courts should hold the verdicts of juries. Sometimes, however, yet rarely we believe, jurors, in their zeal, go beyond the evidence; and, in our opinion, this is such a case. The judgment is reversed, and the cause remanded.

HURT, P. J., absent.

#### MATTHEWS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 2, 1898.)

#### THEFT—INDICTMENT—INSTRUCTIONS—CONFESSION.

1. Where an indictment, intended to charge accused with stealing "one cattle," by mistake read "on cattle," the word "on" may be treated as surplusage, and the indictment is good

on motion in arrest, since, under a charge of stealing "cattle," the taking of one head of cattle may be shown.

2. Accused is not entitled to a charge on circumstantial evidence where the testimony shows a confession by him.

3. Where the owner testified to the loss of property under circumstances strongly tending to show it was stolen, accused, charged with stealing it, is not entitled to a charge that the jury could not convict on a confession without other proof of the corpus delicti.

Appeal from district court, Tarrant county; W. D. Harris, Judge.

D. L. Matthews was convicted of larceny of one head of cattle, and he appeals. Affirmed.

O. S. Lattimore and Jas. S. Davis, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of the theft of cattle, and his punishment assessed at confinement in the penitentiary for a term of three years; hence this appeal.

Appellant made no motion to quash the indictment. In the motion for a new trial, however, as one of the grounds of his motion he says that the indictment fails to charge any offense against the laws of the state of Texas, and fails to allege theft of any specific property from any person. Appellant assigns as error the action of the court in failing to arrest the judgment, and the specific ground pointed out is that in the charging part of the indictment the word "on," and not "one," is used between the words "Bradbury" and "cattle," so that the indictment reads that the defendant "did unlawfully and fraudulently take from the possession of M. A. Bradbury on cattle, the same being the corporeal personal property of the said M. A. Bradbury," etc. He insists that the use of the word "on" is not idem sonans with "one," nor equivalent to or substantially the same word, and that, therefore, the indictment is meaningless. We cannot tell therefrom how many cattle, and the expression "on cattle" does not describe any property. It has been repeatedly held by this court that it is not competent to supply a material word in the indictment. See *Scroggins v. State*, 36 Tex. Cr. R. 117, 35 S. W. 908. And it has been held that where a word is used in the indictment that is not idem sonans with the proper word, does not mean the same thing, or has no meaning, and is a material word, the indictment in such case cannot be held good. *Evans v. State*, 34 Tex. Cr. R. 110, 29 S. W. 266. But it has been held that, where an indictment will be complete by the rejection of a word or a phrase, the same may be rejected as surplusage, and the indictment sustained. *Williams v. State*, 35 Tex. Cr. R. 391, 33 S. W. 1080. Now, if we hold that the word "on" cannot be pronounced as "one," as was evidently intended by the pleader,

yet we may reject the same as surplusage, and the indictment will be good. Then it would read, defendant did then and there "unlawfully and fraudulently take from the possession of M. A. Bradbury cattle," etc. "Cattle," according to the Century Dictionary, is a noun, and may be either singular or plural; so that the use of the term "cattle" may mean one cattle. It is true that "cattle" means "live stock; domestic quadrupeds which serve for tillage or other labor, or as food for man,"—and so includes a number of different kinds of live stock. The term "neat cattle" more appropriately describes kine, or animals of the bovine species; yet in common usage, in our country, "cattle" has come to mean more particularly animals of the bovine species. We accordingly hold that the indictment was good as against a motion in arrest of judgment. We would not be understood by any means as commending the negligence of the county attorney, yet it is not such as will authorize the quashal of the indictment.

Appellant complains because the court failed to give a charge on circumstantial evidence; insisting that this is a case of purely circumstantial evidence, and that consequently the court erred in not giving such a charge. It has been repeatedly held by this court that, where the evidence shows a confession by defendant, the case is no longer one of circumstantial evidence. The evidence shows that appellant, if the state's witness Jim Keys is to be believed, confessed to him the theft of the head of cattle.

Appellant also claims that the court committed an error in not instructing the jury that they could not convict the defendant on a confession alone, without other proof of the corpus delicti. If the corpus delicti depended alone on confessions, it would have been proper for the court to have instructed the jury to return a verdict for the defendant. But, in view of the fact that the corpus delicti did not depend alone on confessions, it was not proper for the court to give such a charge. The court might have given a charge to the effect that the jury could look to the other facts and circumstances in the case, with the confessions of the defendant, in order to determine whether or not the corpus delicti had been proven. See *Kugadt v. State* (Tex. Cr. App.) 44 S. W. 989. Aside from the confession of defendant, M. A. Bradbury testified to the loss of the yearling under circumstances which strongly tended to show that it was stolen. Other witnesses circumstantially tend to connect defendant with the theft of that yearling. This testimony, in connection with the confessions, left no reasonable doubt of the theft of the yearling, and that defendant was the taker. There being no errors in the record, the judgment is affirmed.

HURT, P. J., absent.

**Ex parte CHESTNUTT.**

(Court of Criminal Appeals of Texas. Nov. 9, 1898.)

**HABEAS CORPUS.**

A person released from custody on a convict bond is not entitled to habeas corpus.

Grove Chestnutt was convicted of an offense, and he applies for habeas corpus. Petition dismissed.

J. M. Richards, for relator. Mann Trice, for the State.

DAVIDSON, J. Relator applied to the presiding judge of this court for a writ of habeas corpus, which was granted, and made returnable on the 19th of October, 1898, before this court in session at Tyler. In response to the writ the respondent makes return that the relator had executed a convict bond to the proper county judge, to wit, of Palo Pinto county, in regard to the matter about which he resorted to said writ, and had been released from custody. For this reason the assistant attorney general moves to dismiss the application from the docket. We believe the motion is well taken, and the application is accordingly dismissed.

HURT, P. J., absent.

**NASH v. STATE.**

(Court of Criminal Appeals of Texas. Nov. 9, 1898.)

**THEFT—EVIDENCE—INSTRUCTIONS.**

1. Evidence that an accomplice of accused was seen at night, after a theft, going towards the place where the stolen property was concealed, and was shortly after followed by the accused, was admissible against the accused, as tending to show that they were going for the stolen property.

2. Where the evidence showed that accused was seen following an alleged accomplice, who was going towards the place where the stolen property was concealed, an instruction to disregard the evidence unless the accused was near the accomplice at the time was properly refused.

Appeal from district court, Lamar county; E. D. McClellan, Judge.

Curley Nash was convicted of theft of cotton, and he appeals. Affirmed.

A. P. Park, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of the theft of two bales of cotton, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

In substance, the evidence discloses that on Thursday night the alleged owner lost two bales of cotton from his gin yard, in the edge of the town of Paris. It further shows that two or three parties were engaged in the theft. The circumstances indicate that

defendant and his two brothers, Will and Howell Nash, were the guilty participants. The cotton was taken about four miles north of Paris, and secreted in some brush not far from the public road. By means of wagon and horse tracks, and other circumstances, the wagon and the team attached to the wagon were shown to belong to Will Nash. By other testimony it is shown that the defendant and Howell Nash were with Will Nash in the town of Paris as late as 9 o'clock on the night of the theft; that they left the town, and went home, traveling the road near which the cotton was found; that the wagon tracks were followed on to the residence of Will Nash, and thence in a northerly direction some 18 or 20 miles, where Will Nash was overtaken, driving a wagon and team, the tracks of which wagon and team corresponded exactly with those found at the gin, and at the place where the cotton was secreted. On Friday night following the theft of the cotton on Thursday night, the state was permitted to prove by Buck Bray that he met Will Nash driving a wagon drawn by two mules coming down the same road that had been traveled by the team the previous night, and near a point where the stolen bales of cotton were afterwards found concealed. Babe Debro was in the wagon with Will Nash. The same witness met the defendant traveling the same road and going in the same direction as Will Nash and Debro, and all going in the direction of the place where the stolen cotton was concealed. The defendant was on horseback, as he was on the night before. This was objected to because it was the act of Will Nash, not in the presence of the defendant, and after the commission of the theft by Will Nash, and therefore it could not be used as evidence against the defendant. We are of opinion that there is no merit in this contention. The object and purpose of the conspiracy and theft had not ended. The cotton had been taken and concealed the previous night. The parties were going in the direction of and near the cotton at the time they were seen. If this testimony was admissible against Will Nash, it was evidence against the defendant, and was a circumstance tending to show that they were going after the cotton. It was at the least a circumstance to be weighed by the jury in connection with the other facts, and was the act of both pending the conspiracy. This also disposes of bill No. 2, in regard to the testimony of Charley White. The same question was raised on this bill as in the previous bill.

It is also objected that the court did not instruct the jury to disregard the evidence of Bray and White in this connection "unless they found from the evidence of said witnesses that the defendant was present near the place about the time that Buck Bray saw Will Nash on said Friday night." The contingency stated by appellant is not shown by the evidence. In fact, the contrary is

shown, because each witness testified that appellant was following along behind Will Nash on horseback, and was near him, at the time about which they testify. We do not think the court erred in failing to so charge the jury. The case is one of circumstantial evidence, and, while no witness saw the parties take the cotton, yet the circumstances indicate with sufficient certainty the guilt of the defendant, and his participancy in the taking of said cotton. The judgment is affirmed.

HURT, P. J., absent.

### SAWYER v. STATE.

(Court of Criminal Appeals of Texas. Nov. 2, 1898.)

JURY—SPECIAL VENIRE—TALESMAN—GROUNDS OF CHALLENGE—OPINION AS TO GUILT—DEATH PENALTY—CONSCIENTIOUS SCRUPLES—APPEAL—RAPE—SUFFICIENCY OF EVIDENCE.

1. Two jurors drawn on a special venire were absent during the call of the venire. Defendant excepted to the order of the court that the impanelment proceed without waiting for such jurors. The defense did not request attachments for the absent veniremen, but said they waived no rights. The state then requested such attachments. One of said veniremen appeared before the venire had been exhausted, and was excused on account of his age, to which defendant did not object. The special venire was exhausted, and talesmen summoned. Pending the examination of the talesmen, the other venireman appeared, and was excused on account of his age, without objection. *Held* to not show prejudicial error.

2. Certain jurors stated on their voir dire that they had formed an opinion as to the guilt of defendant, and that it would take evidence to remove it, but that the opinion was not fixed, and would not influence them in arriving at their verdict, and that they could give defendant an impartial trial. The bill of exceptions failed to show the means from which the jurors had formed their opinions. *Held*, that it was not error to allow them to sit as jurors, since the statute requires that, to disqualify, there must be established in the mind of the juror such a conclusion as would likely influence him in his verdict.

3. Where said jurors were peremptorily challenged, and it was not shown that a juror obnoxious to defendant was impaneled, the ruling was, at least, not prejudicial error.

4. In a prosecution for rape, a juror stated on his voir dire that he had conscientious scruples in regard to inflicting the death penalty except in extreme cases of murder in the first degree. He further stated that he did not know whether he had conscientious scruples as to the death penalty in rape cases. *Held*, that it was not error to excuse the juror on the state's challenge.

5. The action of the audience in the court room in applauding the state's argument to the jury, where presented simply as a ground for a motion for a new trial, but in no way verified or shown to be true, cannot be considered on appeal.

6. Prosecutrix in a rape case slept in a bed with her eight year old child, in a room at the back of a sample room. A man and his wife usually slept in an adjoining room. Prosecutrix was awakened by the presence of a person whom she identified as defendant, and started to make an outcry when he told her, if she made any noise, he would kill both

herself and the sleeping child. After accomplishing his purpose, he made her swear not to betray him. On leaving the room, he went into the sample room, where prosecutrix heard him most of the night. He had told her, if she attempted to leave the room during the night, he would kill both herself and child. At day-break she made complaint to the woman in the adjoining room, and showed her the bruises on her neck, shoulders, hips, and limbs. Defendant unexpectedly departed by the first train on the following morning. After being arrested, he made violent attempts to escape, and, on being asked by the officers if he was guilty, said, "Damn them, they will have to prove it." *Held* to sustain a conviction.

Appeal from district court, Ellis county; J. E. Dillard, Judge.

Fred Sawyer was convicted of rape, and he appeals. *Affirmed*.

W. M. McKnight, for appellant. Lee Hawkins, Co. Atty., and Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of rape, and his punishment assessed at death; hence this appeal.

The first bill of exceptions recites that, during the call of the special venire, it was ascertained that T. H. Williamson and J. M. Gillpen, whose names had been drawn upon said special venire, were absent. The court ordered that the impanelment of the jury proceed without waiting for the appearance and examination of said jurors, to which defendant excepted. The bill further recites "that the county attorney asked defendant if he desired attachments for said veniremen. Defendant did not request attachments, but said they waived no rights. It was then that the county attorney requested attachments for said veniremen." Before the venire had been exhausted, Williamson appeared, and claimed his exemption by reason of being over age, and was excused. The special venire was exhausted, and talesmen summoned. Pending the examination of the talesmen, Gillpen appeared, and claimed exemption by reason of his over-age, and was also excused. The bill of exceptions states no reason or objection to this action of the court. No error was committed by the court in this regard, and it is not shown or claimed that appellant suffered any injury thereby. See *Hudson v. State*, 28 Tex. App. 323, 13 S. W. 388; *Habel v. State*, 28 Tex. App. 588, 13 S. W. 1001.

The second bill of exceptions discloses that three jurors, McDuffy, Jenkins, and Graves, stated upon their voir dire examination that they had formed an opinion as to the guilt or innocence of the defendant, and, if taken as jurors, they would go into the jury box with this opinion in their minds, and that it would take evidence to remove it. Whereupon the court asked each of said veniremen if that opinion was a fixed opinion; and they answered that it was not fixed, and, in answer to further inquiry, stated that said opinion would not influence them in arriving at their verdict, and that they could give defendant a fair and impartial trial. Whereupon the court held they were qualified. Appellant excepted to the

rolling of the court, and peremptorily challenged each of said jurors. So it would seem that these jurors did not sit in the case. Nor is it shown anywhere in the record that a juror obnoxious to appellant was impaneled. It will be observed that the means by which the jurors arrived at a conclusion or formed an opinion is not shown; only conclusions were stated. Doubtless, if the bill had stated the answers of the jurors, it would have been shown that the opinion was formed from mere idle rumors or hearsay. At least, the bill fails to show the fact or information upon which the jurors may have based an opinion, or the reasons why the court held them qualified. The burden is upon the objecting party to show the error of the court; and, unless this has been done, it is a legal presumption that the court acted properly. See *And v. State*, 36 Tex. Cr. R. 76, 35 S. W. 671; *Post v. State*, 10 Tex. App. 579. It is further stated in the bill that this opinion was not fixed; that is, established. Before the juror is incompetent, this must be ascertained. If it is a mere loose opinion, formed from idle rumors or newspaper accounts or matters of that sort, and is not established or fixed as to the guilt or innocence of the accused, the juror would not be incompetent. The statute requires that there must be established in the mind of the juror such a conclusion as would likely influence him in finding the verdict, before he would be incompetent. So, in this regard the court committed no error. See *Suit v. State*, 30 Tex. App. 319, 17 S. W. 458; *Adams v. State*, 35 Tex. Cr. R. 285, 83 S. W. 354; *Trotter v. State*, 37 Tex. Cr. R. 468, 36 S. W. 278. And, in addition, the jurors did not sit in the case; and, in so far as they are concerned, there was no question as to the fairness or impartiality of the jury. It was not contended that, because these jurors may have had an opinion therefore the jurors who tried this case did.

A bill of exceptions was reserved to the action of the court holding M. A. Bairy disqualified as a juror, on the ground that he had conscientious scruples in regard to the infliction of the death penalty in capital cases. The bill states the circumstances as follows: "The juror was asked by the county attorney 'if he had any conscientious scruples in regard to the infliction of death as a punishment for crime.' The juror answered that he had, except in extreme cases of murder in the first degree. The county attorney explained that this was a case of rape, and stated to said juror that he was to be the judge as to whether or not this is an extreme case. The juror stated he did not know whether or not this is an extreme case. On being asked by the county attorney if he had conscientious scruples as in a case of this kind, the juror answered he did not know whether he had or not,—could not make up his mind on that. The county attorney stated to the court that he thought the juror had disqualified. Whereupon the court excused said juror, to which

defendant excepted." If the juror has conscientious scruples in regard to the infliction of the death penalty, the state has the right to challenge him for cause in a case where a capital crime is under investigation. If this were not true, the state would be compelled to take jurors in capital cases who had conscientious scruples in regard to inflicting the death penalty, unless the defendant saw proper to exercise his challenge for such cause. This is not the intention or meaning of the law. The rights of the parties are largely the same with reference to challenges for cause. If the defendant alone had the right to challenge on this ground, then this construction of the law would render inoperative the punishment of death for crime in Texas. It would be a rare instance in which the defendant would excuse a man who had conscientious scruples in regard to the infliction of the death penalty, when he was on trial for a capital offense. It is the duty of the state to furnish a juror qualified to sit in the trial of the case. If the juror himself on his voir dire leaves his qualification in doubt, the court cannot be certain that he is a qualified juror; and in such case, when the challenge is made by either party (when both have the equal right to challenge), it may be the duty of the court to excuse the juror. Especially is this the case when there is no request by either party to further examine the juror as to his qualifications. But in this case the juror himself stated that he had conscientious scruples in regard to the infliction of the death penalty, except in extreme cases of murder in the first degree. His attention was called to the fact that this was a case of rape, not of murder; and he was then asked if in such a case he had any conscientious scruples. He replied that he did not know whether he had or not. In such case it was impossible for the court to know that the juror was qualified, and, on challenge being made at this stage, he did not err in allowing the challenge.

It is contended that the court erred in overruling the motion for a postponement or continuance of the cause. As no bill of exceptions was reserved, this action of the court cannot be revised.

There is nothing in appellant's motion to quash the indictment. It is in accord with the well-approved forms in such cases.

The fifth ground of the motion for a new trial alleges that, when the assistant county attorney had closed the opening argument for the state, the audience in the gallery applauded, which appellant avers can be considered only as an expression of an indorsement of the views and suggestions advanced by said assistant county attorney "in crying for the defendant's blood," and thus giving to the jury an indication as to the feeling and excitement on the part of the audience against the defendant. This is presented simply as a ground of the motion for a new trial, and in no way verified or shown to be true. No bill of exceptions was reserved;



and it is not shown by affidavit or otherwise that there was any applause or excitement manifested by the audience. As this matter is presented, we cannot consider it.

This disposes of the questions raised by appellant, except the last, which is that the verdict of the jury is not supported by the evidence. The issues made by the defendant were—First, if the prosecutrix was raped, that the state's proof failed to identify him as the guilty perpetrator; second, conceding that defendant was sufficiently identified, then the state's proof failed to establish beyond a reasonable doubt that she did not consent to the act of carnal intercourse,—in other words, that the force proved was not sufficient.

As to the first proposition, the evidence of the prosecutrix (if she is to be believed), in connection with the surrounding circumstances, settles beyond controversy the identity of the appellant as being the person who came to her room on the night in question. Appellant denied this, and testified to an alibi; but her evidence on the question of identity was positive, and it was the province of the jury to credit her, and discredit him. It is urged on the part of appellant that conceding as true the circumstances attending the alleged rape, as shown by the evidence of the prosecutrix, it is not established beyond a reasonable doubt that she did not consent to the act of copulation. In this connection it is insisted that the circumstances narrated by the prosecutrix show that, at the time of the alleged rape, she was in a room adjoining a room occupied by King and his wife, and that the least outcry on her part would have brought them to her assistance; that her child eight years old was sleeping by her side, and that a slight disturbance would have awakened the child; that consequently there must have been no resistance or scuffle on the bed that would indicate any degree of resistance. Moreover, it is urged that, from her own testimony, she must have consented to the act, as she narrates a conversation had with the defendant, and acts and conduct on her part inconsistent with the fact that she offered any resistance; and, in addition to this, that after the outrage, which occurred about 3 o'clock at night, she remained in her room the remainder of the night, making no outcry or disclosure of the offense until the next morning, when it was reasonably within her power to have informed others of the offense long before that time.

The facts as stated by the prosecutrix show that she slept in the room in the rear of the sample room, which was connected with her room by a door, and adjoining the room of the prosecutrix was another room, in which King and his wife usually slept; that she retired to her room about 11 o'clock; that her bed was situated near the back of the room, next to the wall; that her boy, eight years old, slept in front, and she slept behind, next to

the wall. About 3 o'clock she was aroused from her slumber by some one standing over her. She says: "When I awoke and saw him over me, he gave me my orders. I threw up my hands before me, and he told me to be quiet, or he would kill me and my child. After that he grabbed my hands. At this time he was right down over me, and I tried to keep him away with my feet. I tried to move over near my little boy to wake him. Sawyer told me I had better not wake that child. When I would try to move over towards the child, he would pull me back. He grabbed me in different ways,—first one way and then another. Every time I tried to move towards the child, he would tell me I had better not wake that child, that he would kill us both. He remained in the room about fifteen or twenty minutes. It seemed like a long time to me, but I suppose it was not longer than that. \* \* \* I remarked, 'Oh, my God! if I had not left my window open' (thinking he came in there). I said, if I had fastened the window, he would not have been there. And he said he did not come through the window, but came through the door. The wardrobe was against the door between the two bedrooms. He tried to make me kiss him, but I would not. He had been in there some minutes at that time. When I told him I would not kiss him, he said he would make me kiss him. He asked me why I would not kiss him, if it was because he was a negro. I told him I would not kiss any man. He told me what he was going to do, and offered me money,—five, ten, and twenty dollars. I told him, 'No, not for the world,' that I was a poor woman, but I did not make my living that way. He said I had just as well consent, that he was going to anyway. During the time he was in there, he used good language, and seemed to be finely educated. I judged so by the way he talked. I recollect some of the expressions he used. He asked me if I knew what the penalty would be for the crime he had committed, if it should be found out. I did not answer at first, not wanting him to know that I knew; and I finally told him that I did not know that I did know. I was afraid to tell him that I knew. He said he would be hanged. That was after he had accomplished his purpose. He said he had a wife and two children, and told me it would be quite a favor to him to never give it away; that he would not tell it. He made me swear twenty times, I suppose, not to tell it. He said he would kill me if I did not swear. I know it was that negro there [looking at the defendant] who was in my room that night. It was about three o'clock Sunday morning. I fix the time by hearing a clock strike somewhere about the building, just after he left the room. He went into the sample room, and stayed in there the remainder of the night. I heard him in there from that time on until he left. I heard him or somebody; it sounded like he was on the

planks, and was turning over. I heard that noise continually after he went out of my room until morning. I was sitting up on the foot of my bed all the time the noise was going on. I never laid down any more after he went out; and the reason I did not go out and give the alarm was because he said he would kill me if I left, and would also kill my child. I went out of the room about daylight; went out of the window, and across to the first room of the main building [which was about 30 feet distant from her room]." The planks referred to by prosecutrix in the sample room were those that were laid from one bench to another for the purpose of placing or exhibiting the samples of the drummers. Mrs. King, the proprietress of the hotel, occupied the room to which the witness went early in the morning. She reported the matter to Mrs. King, who was in bed at the time. Prosecutrix further testified that, when she first discovered the negro in the room, she tried to halloo, but he gave her her orders, that he would kill her if she did. She tried to talk loud, but he would jerk and check her, and would not allow her to talk except in a low whisper. When she would undertake to talk loud, he would check her, and say he would kill her, and frequently put his hand over her mouth. She said that she did not know positively that any one occupied the adjoining room at the time; that ordinarily Mr. Ed. King and his wife slept there. Ed. King was the son of the proprietress. In this connection, the testimony shows that she had been at the hotel only one or two days previous, having come from Kaufman to become an employé at the hotel. She was weak and sore across the back and other places, some of which she hated to mention, and, at the time she testified, there were still bruises on her limbs. The pain she suffered was caused by being jerked around by defendant and worrying with him while she was struggling with him. She further stated, as to the act of copulation: "I tried to protect myself with one hand, and fight him with the other. He tried to make me take away the hand I was protecting myself with, but I would not; and he jerked it away, and got on top of me, and did what he wanted to do." It was further shown by Mrs. King that prosecutrix exhibited her person to her on that morning, and that she was bruised about the neck, shoulders, hips, and limbs. This was about daylight. The matter was immediately reported by Mrs. King to her husband. He went at once from the main building to the sample room to see defendant. He found him there, engaged in unpacking certain trunks of his employer, Hyman, who was a drummer; appellant having come there with him as his porter the day before. This witness states that appellant was busy unpacking the samples, and appeared so cool and collected that he thought there must be some mistake about it, and immediately went back

to see his wife; and, having seen her again, he at once returned to the front of the building, being absent only a few minutes, but saw appellant at that time going from the direction of the hotel towards the depot of the H. & T. C. Railway, which was situated about 250 feet from the hotel. He followed appellant there, and saw him buy a railroad ticket, and then went to get a policeman to arrest defendant. Before he returned, the train had pulled out, and defendant was gone. This was 7 o'clock in the morning. Appellant was arrested on a telegram to the conductor; the telegram being received by him at Hutchins, but the arrest was not made until they reached Dallas. In this connection, the state also showed that appellant, on his arrest by the officer, manifested some anxiety to know for what he was arrested; and, when informed that it was for rape, he seemed to be very much disturbed. When fastened in the calaboose, he at once attempted to effect his escape by tearing a hole through the roof of the building. He told the officers that he did not intend, if he could help it, to be taken back to Ellis county, to be tried for said offense by a jury of farmers. In reply to the direct question if he had committed the offense, he said, "Damn them, they will have to prove it," and repeated this several times. It was further shown, in regard to his leaving Ennis, that it was without the knowledge of his employer, Hyman, who expected him to remain with him. He gave the porter of the hotel the keys belonging to his employer, and told him to tell him, if he wanted him, to telegraph him at Dallas, in care of the post office. Appellant explains this hurried trip to Dallas by a sudden desire on his part (it being Sunday) to go to that place, and see his wife and children. The evidence shows that appellant and his employer only reached Ennis later on the evening before; that he had an opportunity to see into the room of the prosecutrix, and to know that that was her sleeping apartment. He saw her go into said room through the sample room, and, on leaving the room and returning to the main building, he had some conversation with her. He asked her if she did not formerly live in Kaufman, and he says that in that conversation he informed her that he had a wife and two children in Dallas. From the testimony, appellant appears to have either previously known Smith (the hotel porter), or become acquainted with him on this trip. He arranged with Smith (who occupied a house at Ennis) to sleep at his house on that night. Smith and defendant, in the early part of the night, went to see one Emma Foster, and stayed there for some time. When they left, appellant made an arrangement to come back and stay with her that night. The testimony tends to show that he did go back, but was unable to get in the house. He did not go to Smith's to sleep, as he had promised, but explains this by stating that he was unable

to find Smith's house, which had been pointed out to him, because the light had gone out which Smith had left for him in the room. The state's evidence shows that he stated the next morning to Smith and another that he slept in the sample room, next to the room of the prosecutrix. He denied this, and stated that, after being disappointed in failing to find Smith's house, he sought quarters under the Midland freight depot; that he got up on a cross-piece or brace running between the pillars that support the building, and slept there that night. In regard to this, the state offered some testimony showing that it was unreasonable that he could have slept on one of those cross-pieces under the depot.

From this testimony, were the jury justified in finding their verdict,—in other words, does the evidence establish beyond a reasonable doubt that appellant copulated with the prosecutrix without her consent, by the use of force, or force and threats combined? Our statute provides and all the authorities teach that, before this offense is made out, it must be shown that the prosecutrix did not consent to the act of copulation, and she must have put forth all the resistance within her power, considering the circumstances surrounding her at the time. If she did not do so, the presumption will be that her resistance was not bona fide, and that she consented to the act. In determining, however, the degree of her resistance, and the sufficiency of the force used by appellant, all the surrounding circumstances may be looked to; and in this connection, as a potential factor entering into the force that may have been used, we are authorized to consider any threats that may have been made by the appellant at the time. The alleged outrage was shown to have been committed at night. The prosecutrix was isolated, no one being in the room with her except her eight year old child. Under these circumstances, she is awakened. Violent hands are laid upon her. She starts to make outcry, but is immediately told by appellant that, if she does make any disturbance or noise, he will kill both herself and child. She apparently is entirely within his power. Still she does not consent to the act of copulation; but appellant, by his threats and violence, renders her helpless, and accomplishes his purpose. The fact that he may have had a conversation with her in whispered tones during this time is not inconsistent with the use of force on his part. But this very conversation is reasonably accounted for in the testimony of the prosecutrix. He imposed quiet and silence by his threats, and, not content with her simple promise not to betray him, he required a solemn oath from her to that effect. The circumstances indicate that he not only used force, as shown by the bruises on her person, but that he overcame her with threats that were calculated to render her helpless. That she did not make outcry at

the time is accounted for by his conduct; and the fact that she did not flee immediately from the room to report the matter before daylight is also reasonably accounted for. She knew that he was in the next room, and she had been told by defendant that, if she attempted to leave the room that night, he would kill both her and her child. She evidently gave information of the outrage that had been perpetrated upon her as soon as daylight came. If she needed corroboration as to the violence, this was furnished in the testimony of Mrs. King. If further corroboration were needed, this was had in the conduct of the appellant himself. His sudden and unexpected trip to Dallas, notwithstanding his version of that matter, reasonably indicates that some great apprehension was operating on his mind; especially when viewed in connection with his acts and conduct at the time of and immediately after his arrest; also his contradictory statements in regard to the place where he slept on the night of the alleged outrage. In fact, all the circumstances transpiring after the alleged outrage shed light upon, and lend force to, the testimony of the prosecutrix. We have given the record a careful examination, both because of the gravity of the charge and the severe penalty inflicted; and, after that investigation, we are constrained to the opinion that the jury were fully warranted in finding that all the constituent elements of the offense of rape were proved, and they were justified, under the law, in finding appellant guilty, and visiting upon him the severest punishment authorized by the statute. Finding no error in the record, the judgment is affirmed.

HURT, P. J., absent.

#### TERRY v. STATE.

(Court of Criminal Appeals of Texas. Nov. 9, 1898.)

#### BURGLARY—EVIDENCE.

Evidence tending to identify a pistol taken from the house alleged to have been burglarized, and found in the possession of one of defendants, is admissible against the other defendants to establish the burglary, and to identify the party who committed it.

Appeal from district court, Freestone county; L. B. Cobb, Judge.

Oscar Terry was convicted of burglary, and appeals. Affirmed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of burglary, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

On the trial the defendant objected to the testimony of Otis Bryant, on the ground that same was not pertinent as against him; that it did not in any wise tend to show his con-

section with the alleged burglary. The testimony of Bryant tended to show the identity of a pistol taken from the house alleged to have been burglarized, and found in the possession of one of the defendants. We think said testimony was pertinent, as tending to establish the burglary and theft, and also to identify the party who committed said burglary.

There is no bill of exceptions to the admission of the testimony in regard to the snuff, and consequently we cannot notice what is said in the motion for a new trial or in the assignment of errors in this respect.

We have examined the record carefully, and in our opinion the evidence supports the verdict. The charge of the court was fair and impartial, covering all the issues in the case. The judgment is affirmed.

HURT, P. J., absent.

### GUERRERO v. STATE.

(Court of Criminal Appeals of Texas. Nov. 9, 1898.)

#### HOMICIDE—DEGREE—INSTRUCTIONS.

1. In a prosecution for homicide, the evidence showed that, on the morning of the altercation, deceased had insisted that they step aside and fight, and that later in the day he met accused again, and suggested that they go to the suburbs of the town and settle it, and that accused went, protesting that he did not wish to fight. *Held*, that the evidence did not show such a prearrangement to fight with deadly weapons as would constitute a duel, under Pen. Code, art. 715, and therefore an instruction that, if either of the combatants in a duel be killed, the survivor is guilty of murder in the first degree, is error.

2. There were no eyewitnesses of a killing, and accused claimed self-defense; and the evidence showed that accused, who was severely shot in the struggle, had protested against fighting, but had followed deceased, who had been the aggressor in all altercations between them, to a secluded spot, and that deceased had a pistol, and accused had only a knife. The court charged on murder in the first degree and self-defense. *Held*, that it was error to refuse to also charge on murder in the second degree.

3. It was also error to refuse to charge as to manslaughter.

Appeal from district court, Webb county; A. L. McLane, Judge.

Yldefonso Guerrero was convicted of murder in the first degree, and appeals. Reversed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of murder in the first degree, and his punishment assessed at confinement in the penitentiary for life; hence this appeal.

Appellant objected to the following charge of the court: "And the law further declares that, if either of the combatants in a duel be killed, the survivor shall be deemed guilty of murder in the first degree, and be punished accordingly." There was some testimony in this case indicating a mutual combat, but we fail to find testimony showing a duel, as de-

fined by article 715 of the Penal Code. We also refer to the oath of office required by the constitution, in this connection. The most that can be said, as suggestive of a duel, as shown by the record, is that the deceased insisted in the morning, when he and the defendant had an altercation, that they step aside and fight. Later in the day he met the appellant, and then suggested to him that they retire to the suburbs of the town of Laredo and settle the matter. Defendant did not want to go, but went along, protesting that he did not want to fight; that he had a family. They went off by themselves, and how the killing occurred, except from the testimony of appellant himself, is only gathered from circumstances. We believe that the testimony does not show that prearrangement to fight with deadly weapons which would constitute a duel, and that the court erred in giving the charge.

Appellant also insists that the court committed an error in failing to charge on murder in the second degree and on manslaughter. The record presents a very meager statement of facts, but it appears that the court should have given a charge on murder in the second degree, and probably on manslaughter. The court gave a charge on murder in the first degree, and a charge on self-defense. The homicide occurred in a secluded portion of the suburbs of Laredo. No eyewitness saw it, except appellant. His testimony raises self-defense, and the state relies exclusively on circumstantial evidence as to how the fight began. Appellant in the struggle was severely wounded, being shot through with a pistol which deceased is shown to have had. Deceased was shown to be the aggressor in all the altercations which had occurred between them, and in the invitations to go out and settle it. The state's testimony shows that appellant protested against fighting, but followed along. He was not equally armed with the deceased; deceased having a pistol, and defendant only a knife,—the character of the knife not being disclosed. If defendant was following along, not for the purpose of engaging in the conflict with deadly weapons, and deceased set upon him and shot him, then appellant had a right to defend himself, and to use his knife; and thus his right of self-defense would be complete. If appellant was following deceased, not for the purpose of engaging in a deadly conflict, and was suddenly shot by deceased, and he then succeeded in wrenching his pistol from him, which he is shown to have had when first seen by the state's witnesses, and then, not in his necessary self-defense, stabbed and killed deceased, it might have been murder in the second degree, or manslaughter. If appellant, not desiring to fight deceased, was goaded by his repeated aggressions and invitations to fight, and at length agreed to fight him, and followed him for that purpose, but such intent was not formed when his mind was cool and deliberate, but existed because of the aggres-

sions and insults of deceased, and so engaged in a mutual combat with the deceased, and slew him, it would not be murder with a sedate and deliberate mind, but would be murder upon implied malice. At least, under the circumstances of this case, the jury should have been afforded the right to pass upon this question; and the court should have not restricted them to murder in the first degree, on the one hand, or self-defense, on the other. A case can rarely arise where a court would be required to charge self-defense in which he would not also be required to give a charge on murder in the second degree. We believe the court erred in failing to give a charge on murder in the second degree. The court gave a charge on murder in the first degree, which does not seem to be excepted to, which appears to eliminate the question of malice altogether; and we simply call attention to this in view of another trial of the case. For the errors discussed, the judgment is reversed and the cause remanded.

HURT, P. J., absent.

#### LUNA v. STATE.

(Court of Criminal Appeals of Texas. Nov. 9, 1898.)

WITNESSES—CONVICTS—CRIMINAL LAW—  
CONFESSIONS.

1. Conviction of felony does not render a witness incompetent before sentence, where the time for applying for a new trial has not expired.

2. Accused is not entitled to a charge on the competency of a confession elicited by himself on cross-examination of the state's witnesses, without objection by the state.

Appeal from district court, Victoria county; James C. Wilson, Judge.

Phillip Luna was convicted of burglary, and he appeals. Affirmed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of burglary, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

There are two bills of exception in the record. The first is to the action of the court allowing Jesus Martinez to testify against appellant. The grounds of objection are that said Martinez had been convicted of a felony. This is explained by a statement that said witness had been convicted of the same felony charged against this appellant, but sentence had not been passed upon him, and time remained in which he might apply for a new trial. The court did not err in permitting the witness to testify.

There is also an objection urged to the action of the court refusing to give a charge with reference to certain statements or confessions made by appellant to one Hays after his arrest. The bill shows that this testimony was adduced by appellant on cross-ex-

amination. We know of no rule that would require the court to charge on such character of testimony. There are cases where some question is made whether the confession was freely and voluntarily made, in which the court would be required to charge the jury on this subject, but in this case the testimony appears to have been adduced by the defendant himself. There was no objection on the part of the state on the ground that appellant was then under arrest, and a confession could not be used against him without warning, nor on any other account, and hence the court was not required to give the requested charge. We find no error in the record, and the judgment is affirmed.

HURT, P. J., absent.

#### HAMLIN v. STATE.

(Court of Criminal Appeals of Texas. Nov. 2, 1898.)

JURORS—COMPETENCY—OPINIONS—HOMICIDE—  
CONFESSIONS—DURESS—IDENTIFICATION OF LET-  
TER—EVIDENCE—ACCOMPLICES—CRIMINAL LAW—  
POISONING—MALICE—CIRCUMSTANTIAL EVIDENCE  
—INSTRUCTIONS.

1. A juror stated on his voir dire that he had an opinion formed from having heard a member of the grand jury which had found the bill of indictment express his opinion as to the guilt of defendant, but that he could give defendant an impartial trial, regardless of his opinion. It was not shown that the grand juror stated to the juror any fact in regard to the case. *Held*, that the juror was competent.

2. Defendant, before his arrest for murder, was called into the office of a brother-in-law of deceased, who used abusive language, and severely beat defendant with his fists. The brother-in-law was armed with a pistol, which fell to the floor in the scuffle, but was not picked up. A few minutes afterwards, the brother-in-law and his father-in-law told defendant they wanted to have a talk with him, and requested him to come to the brother-in-law's house that evening for that purpose, and that they would not hurt him, but, if he did not come, he (brother-in-law) would make him (defendant) hard to catch. Defendant called in the evening, and was questioned by said persons as to the murder. At that time no firearms were exhibited, and no threats made. *Held*, that defendant was not under such duress as to make his statements absolutely inadmissible.

3. Defendant must affirmatively show on appeal that the warning given to him by the officer was given so long before his statements or confessions as to have escaped his memory, in order to avail himself of that contention.

4. A confession, in order to be admissible in evidence, need not have been made to the person who had warned defendant.

5. Evidence of a confession to one indicted and in jail for the same offense, but not on trial, is admissible, though the latter had not been warned.

6. A few days before the death of deceased, he accused his wife of infidelity, and she produced three letters from defendant, one of which deceased kept, and on the same day showed to his attorney, who advised deceased to put the letter in a secure place. After the death of deceased, the attorney asked the wife where said letter was, and she replied that deceased and herself made peace before his

death, and burned the letter. The attorney testified to its contents. *Held* to sufficiently identify the letter as the one deceased obtained from his wife.

7. In the trial of an accomplice, evidence which would be admissible against the principal if he was on trial is admissible as evidence to show the guilt of the principal.

8. In the prosecution of an accomplice for murder, the admission in evidence of the confessions of the principal solely to show her guilt, and where so limited in its effect by the court's charge, is not error.

9. Error in refusing to admit evidence to impeach a witness will not be considered on appeal where the bill of exceptions does not show that such witness was a material one, nor state material facts proved by him.

10. An indictment charging homicide by poisoning must also charge the premeditated malice in order to constitute a charge for murder.

11. Circumstantial evidence, in order to warrant a conviction, need not demonstrate the guilt of defendant beyond the possibility of his innocence.

12. In a prosecution for murder, where the evidence was circumstantial, the court instructed that, in order to warrant a conviction, "each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt, and all the facts necessary to such conclusion must be consistent with each other and the main fact sought to be proved; and the circumstances, taken together, must be of a conclusive nature, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty of the guilt of defendant, and excluding every reasonable hypothesis except the guilt of defendant." *Held*, that a further clause in the instruction that circumstantial evidence, to warrant a conviction, need not demonstrate the guilt of defendant beyond the "possibility" of his innocence, was not calculated to mislead or confuse the jury.

13. Giving an instruction to find defendant guilty if the jury believed he killed deceased "by poisoning," as charged in the indictment, is not objectionable on the ground that the indictment and proof showed only an arsenic poisoning, where there was no evidence of any other kind of poisoning.

Appeal from district court, Coleman county; J. O. Woodward, Judge.

J. F. Hamlin was convicted of being an accomplice in murder, and he appeals. Affirmed.

Jenkins & McCartney and H. C. Randolph, for appellant. F. L. Snodgrass and Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of being an accomplice in murder, and his punishment assessed at confinement in the penitentiary for life; hence this appeal.

It appears from the record that Walter Holmes was the husband of one Carrie Holmes. They lived together as husband and wife a number of years, and had several children. During the last few years prior to the homicide, they lived near the village of Santa Anna, in Coleman county. Appellant was a widower, and lived about 300 or 400 yards from them, and in view from the rear of the Holmes' residence. The relations of deceased and his wife appear to have been agreeable until about a year prior to the de-

cease of the former, about which time it appears that an attachment sprang up between her and appellant, which resulted in illicit intercourse between them. This was carried on for some time, until at length deceased became suspicious of his wife. On Tuesday morning, December 1, 1896, he called his wife into the room, and accused her of being too intimate with appellant. She finally admitted the fact, and told him that she loved appellant, and that he loved her. On request, she produced certain letters from appellant to her, under promise that deceased, after reading them, would return them to her. He read two letters, and returned them to her, but, on reading the third, he retained it. She became very angry, and threatened him if he did not give it back to her. This deceased refused to do, but at once got in his buggy, took his gun with him, and proceeded to the town of Coleman, and there conferred with his lawyer, Mr. Sims, exhibiting the letter to him. Sims advised him not to return to his home, and not to eat a meal in the house again; that his life would be in danger if he remained at home. On the same morning, appellant was informed by Mrs. Carrie Holmes of what had occurred, and he was warned to beware of her husband. Appellant left on the same morning, going to the little town of Glen Cove, about 15 or 20 miles distant, and remained there until the latter part of the week, ostensibly organizing a lodge of the Woodmen of the World. Deceased returned to his home on that evening, and slept with his wife that night. He and his wife had some conversation about the matter of her infidelity, and it seems there was something like a reconciliation between them. He did not return the letter to his wife. After he had gone to sleep, his wife got up, found the letter in his pocket, and destroyed it. On Wednesday, the deceased was taken violently ill, and he continued so until the following Tuesday, when he died. His wife waited upon him during that time, and he also had the attendance of other persons. Physicians were also called in, and during his illness there were several consultations between the physicians as to his ailment. It does not appear that the physicians were able to determine the nature of his illness; nor does the record indicate any apprehension on their part that deceased was suffering from poison. Appellant returned from Glen Cove on Saturday, before the death of the deceased, but it does not appear that he ever went into the presence of the deceased before his death. He was seen on Sunday or Monday, however, in the rear of the premises of the deceased, about his barn, and under circumstances that indicated a conference between him and the wife of the deceased. During the burial service, some circumstances occurred which indicated that some suspicion then existed as to the cause of the death of the deceased. The conduct of appellant and Mrs. Carrie Holmes

shortly after the death of Holmes became suspicious. On the evening of the burial, Dr. Hayes, a brother-in-law of deceased (after the burial), rode in the buggy with the wife of deceased on her way home, and some conversation occurred between them with reference to deceased. He subsequently had several interviews with her in regard to his death. On December 12th, an interview occurred between Hayes and Mrs. Carrie Holmes at his house, in the hearing of Hayes' wife and one Phillips, who was stationed outside of the house at the window. Mrs. Holmes, in this interview, in effect admitted the illicit relations between herself and appellant, and also that she had poisoned the deceased, but refused to inculcate appellant therein. Subsequently to this, about the 8th of February, Dr. Hayes saw appellant at his office, in the town of Santa Anna, and on the evening of the same day interviewed him by appointment at his (Hayes') house, in regard to the cause of the death of the deceased. During all this time, Hayes was busy collecting evidence in the case. On the 20th of February, he caused the body of the deceased to be exhumed; and a portion of the intestines, together with a portion of liver and lungs, were placed in a vessel, and securely fastened, and sent to a chemist at Ft. Worth, to be analyzed and tested as to poisons. Prof. Chase, of Ft. Worth, finished the analysis of the contents of the stomach on March 5th; and his testimony shows that the stomach contained a large quantity of arsenic,—“in short, the liver, stomach, and duodenum showing altogether about  $3\frac{3}{4}$  grains of metallic arsenic, or 5 and a fraction grains of white arsenic.” The testimony shows that the ordinary fatal dose of this drug is about two grains. Mrs. Holmes and appellant were indicted for the crime on the 27th day of February, 1897, and were both arrested within a short time thereafter, and placed in jail. The indictment contains two counts,—one charging appellant as a principal in the homicide, and the other charging him as an accomplice. The court only submitted the question of accomplice to the jury. A great deal of the testimony on the trial relates to the principal in the homicide, alleged to be Mrs. Carrie Holmes. This was limited in the court's charge to that purpose. The testimony connecting appellant with the offense, aside from certain testimony in the nature of confessions, is purely circumstantial. There are 32 bills of exception and 27 assignments of error in the record; but we will only discuss such as we deem material to a proper disposition of this case.

Appellant assigns as error the action of the court in regard to the impanelment of the jury. It seems that Parker had stated on his voir dire that he had an opinion, formed from having heard his uncle, who was a member of the grand jury that found the bill of indictment, express his opinion as to the guilt or innocence of the appellant. The bill falls

to show that the grand juror stated to the juror any fact in regard to the case; and the bill further shows that the juror stated that he could give appellant a fair and impartial trial, regardless of any opinion that he might entertain. So far as we are advised, whatever opinion the juror may have entertained was formed from a purely hearsay source. He had talked with no witness, had heard no testimony, and he was clearly a competent juror, under the rule laid down by this court. See *Suit v. State*, 30 Tex. App. 319, 17 S. W. 458; *Adams v. State*, 35 Tex. Cr. R. 285, 33 S. W. 354; *Trotter v. State*, 37 Tex. Cr. R. 468, 36 S. W. 278. It is not attempted to be shown that the juror Templeton, who was subsequently taken on the jury, after appellant had exhausted his challenges, was not a fair and impartial juror.

Appellant strenuously urges that the court committed a reversible error in permitting the state to prove by the witnesses Hayes and Stanlee a conversation between them and appellant at the residence of Dr. Hayes on the 8th of February, 1897, said testimony being substantially as follows: Witness told defendant that he (Hayes) and Stanlee wanted him to make a full statement of his and Mrs. Holmes' connection from beginning to end. In reply, he asked Hayes if he would believe him; to which Hayes replied that he would believe him if he told the truth, but that, if he did not tell the truth, he would not believe him. Appellant then stated that his and Mrs. Holmes' relations began last November, a year ago; that she wrote him the first letter, but he paid no attention to it, and that she wrote him a second letter, and he answered it; that he advised her it was wrong. Witness then asked him why he kept it up, to which he replied that she kept on and was so persistent that it became so irresistible that he could not help it, and that he got to loving her. Witness then asked him if that was all, and he said, “Yes; that is all.” Witness then said, “How about the 20-year plan?” to which appellant replied, “That is so; we agreed to marry, and wait for one another twenty years if necessary;” but he told her that Walter Holmes was a stout, robust man, and that he would likely outlive both of them. Witness then asked him about their marriage, and he replied they were to be married on the 17th of December next, if circumstances would permit. Witness then asked him, “What circumstances would prevent it? You are a widower, and she a widow.” Appellant replied that he did not know. Witness then asked him how he knew Holmes had his gun, and was going to kill him; and he said Mrs. Holmes told him. He was then asked when she told him, and he said, “The day before Holmes got sick.” Witness then said to him, “Look here, you planned this whole thing, and are a murderer; and I do not understand how you could have associated with this old man [referring to Dr. Stanlee], and been with him in his office as

you have, and be guilty of such a thing;" to which appellant made no reply. Witness then told him he could go, "but asked him to try not to meet us any more on the streets, and to avoid meeting either of us; that we do not want to see you;" and he said he would try to do so as much as he could. The bill of exceptions shows that this testimony was admitted under the following circumstances: On the morning of that day, the witness Hayes had called defendant into his and Dr. Stanlee's office, to have a settlement with him in regard to some transaction. That Dr. Stanlee was the father-in-law of Hayes. Witness used very abusive language to defendant, but said nothing to him about the death of Walter Holmes. That he (Hayes) was armed with a pistol at the time, and, while the altercation was going on, he attempted to close the door of the office. That, in doing so, Hamlin ran against him in getting out of the door. When he did this, Hayes' pistol fell to the floor, and was not picked up or used during the fight. That, as defendant ran against him, Hayes caught him, and they both went out of the door on the sidewalk, and fell in the street. Hayes got defendant down, and was beating him with his fists. That A. C. Weaver came up to where the parties were, and started to interfere; and Dr. Stanlee, who was standing near by, would not permit him to do so. Defendant cried for help, and Hayes continued to beat him until other parties came and pulled him off. Hayes went into his office, and defendant went into the drug store to have his bruises attended to. Hayes followed defendant into the drug store, and again violently abused him. That while they were in the back end of the drug store, and in Dr. Matthews' office, Hayes and Dr. Stanlee told defendant they wanted to have a talk with him, and requested him to come to Hayes' house that evening for that purpose. They told him they would not hurt him, and assured him, upon the honor of a man, that he would not be hurt if he came, and told him, if he did not come, he (Hayes) would make him (defendant) hard to catch. Defendant promised he would come to the house of Hayes; and he came about 2 o'clock that evening, bringing with him his two little boys, aged 14 and 16 years respectively. Said boys remained on the porch of the Hayes house, while defendant went into the house at the request of said Hayes. Dr. Stanlee was sent for, and, after he came, the conversation above set out occurred. Appellant contends that said statements were not freely and voluntarily made by appellant, but were made under duress or fear superinduced by the conduct of Hayes and appellant's environments at the time. It is not pretended here that appellant was under legal arrest or in custody of an officer, nor that Hayes and Stanlee had any authority to restrain or offer any promise or inducement to appellant. The objections to the statements made are

solely based on the antecedent circumstances leading up to this meeting, in connection with the surroundings or environments of the parties at that time.

We understand that the same rule is here applicable which applies to a confession at common law (if what was said by appellant at the time can be called a confession). The rule at common law is simply to the effect that it must appear that the confession was freely and voluntarily made before it will be received as evidence against the accused. And confessions were equally as admissible if the party was under arrest or in jail as if made under other circumstances; there being no objection as to the admissibility of the testimony, unless, perhaps, the courts would more closely scrutinize a confession made by a party under arrest or in jail, in order to ascertain if same was freely and voluntarily made. Our statute, however, changes this rule; and, before a confession made by a party who is under arrest or in jail is receivable in evidence, it must appear that same was freely and voluntarily made after the party had been warned or cautioned by the officer that anything he might say would be used in evidence against him. As stated above, the statements or confessions of the party here were not made while he was under arrest or in jail; but it is claimed that he was under such duress at the time as shows that his said statements were not freely and voluntarily made. The rule at common law, and in most of the states, is that the admissibility of confessions is a question solely for the court. After such admission, however, it is competent for the defendant to introduce before the jury all the testimony tending to show that the confessions were not freely and voluntarily made; and where testimony of this character is introduced, either for the state or the defendant, it is the province of the court to instruct the jury that they can look to all the facts and circumstances in evidence in order to determine the degree or credit they will attach to the confessions. See note to Daniels v. State, 78 Ga. 98, 6 Am. St. Rep. 242; Johnson's Case, 2 Lead. Cr. Cas. 570; Rice v. State, 47 Ala. 38; Young v. State, 68 Ala. 569; State v. Freeman, 12 Ind. 100; State v. Dildy, 72 N. C. 325. And this seems to have been the rule formerly in this state. See Carter v. State, 37 Tex. 362; Cain v. State, 18 Tex. 387. But more recently our courts seem to have adopted the rule, where there is testimony tending to show that the confession is not admissible, as where there is any evidence to the effect that the party was under duress or in jail, and not properly warned after the admission of such testimony by the court, to instruct the jury with regard to such confession that if they believed it was made under duress, or when the party was in jail and not properly warned, and that such confession was not freely and voluntarily made, they would exclude it



altogether from their consideration; thus enabling the jury to pass upon the question of law,—that is, the admissibility of the confession. See *Speer v. State*, 4 Tex. App. 474; *Rains v. State*, 33 Tex. Cr. R. 294, 28 S. W. 398; *Sparks v. State*, 34 Tex. Cr. R. 86, 29 S. W. 264; *Carlisle v. State*, 37 Tex. Cr. R. 108, 38 S. W. 991. And this seems to accord with the practice in Georgia and Massachusetts. See *Holsenbake v. State*, 45 Ga. 44; *Stallings v. State*, 47 Ga. 572; *Mitchell v. State*, 79 Ga. 730, 5 S. E. 130; *Bailey v. State*, 80 Ga. 359, 9 S. E. 1072; *Com. v. Cuffee*, 108 Mass. 285; *Com. v. Nott*, 135 Mass. 269; *Com. v. Smith*, 119 Mass. 305; *Com. v. Preece*, 140 Mass. 276, 5 N. E. 494. However, whether the jury excluded the evidence altogether, if they determined that it was not freely and voluntarily made, or disregarded it, is the same in practical effect. We quote from Mr. Rice as follows: "When a confession is offered in evidence, the question whether it is voluntary is to be decided primarily by the presiding justice. If he is satisfied that it is voluntary, it is admissible; otherwise, it should be excluded. When there is conflicting testimony, the humane practice is for the judge, if he decides that it is admissible, to instruct the jury that they may consider all the evidence, and that they should exclude the confession if, upon the whole evidence in the case, they are satisfied that it was not the voluntary act of the defendant." See *Rice*, Cr. Ev. § 308.

It will be remarked in this connection that the judge trying this case instructed the jury, in effect, in accordance with the above; so the sole question for our determination is whether the circumstances surrounding the declarant Hamlin at the time he made the confessions were of such a character as to show that he was at the time under duress, such as to indicate that his statement was not freely and voluntarily made, and in fact was not the truth. Of course, the surrounding circumstances can always be looked to by the court primarily to determine whether or not there was duress; secondarily, these surrounding circumstances can be looked to by the jury, under instructions from the court, in order to determine what degree of credit they will give the confession, or whether they will regard it at all. See *Rice's* and *Young's Cases*, supra; *Thomas v. State*, 35 Tex. Cr. R. 180, 32 S. W. 771.

Now, do the facts and circumstances in evidence surrounding appellant at the time show that he was under such duress at the time as to render his declarations or statements absolutely inadmissible? The only circumstances tending in this direction are the fight he had with Hayes in the morning, and his request to appellant, a little while after he had knocked down and beat him, to come to his house that evening, that he and Stanley wanted to talk to him (this being coupled with the threat that, if he did not come, he would make him hard to catch), and the fur-

ther fact that after he arrived at the house that evening, and came in the room, before the interview, Hayes closed the door, and then demanded of him that he make them a full statement of his and Mrs. Holmes' connection with the killing of the deceased, Holmes. It may be conceded that Hamlin did not desire to go to Hayes' house for the interview that evening; yet it does not follow that he was compelled to go. He had ample time afterwards to have invoked the law for his protection if he apprehended trouble should he fail to go, for it was some four or five hours after the request in the morning before the interview in the evening. And, when he arrived there, it may be also conceded that he did not desire to talk about the cause of the death of Holmes, and did not desire to be questioned in regard thereto. But the circumstances fail to show that any threat was either used against him, or that he was coerced to talk. For aught that appears, what he said was voluntary on his part. No arms were exhibited by the parties, and no threat made. He brought his two sons there with him, and at the time of the interview they were on the porch. This view is further manifested from an examination of his conversation at that time. However the statements may be used for the state as more or less incriminative, yet his expressions appear to have been guarded. Indeed, that part of the conversation which was most calculated to prejudice appellant was not what he said, but what Hayes said. But we do not understand the bill to raise an objection to what Hayes may have said; nor does the bill raise any objection to appellant's silence under the questions and remarks of Hayes. It may be conceded, as stated above, that the environments as shown by the evidence raise some question as to whether the confessions or statements of appellant were entirely free and voluntary; but we do not understand that this would exclude the testimony, the rule being that the court is first to determine the admissibility of the confession, and if there are facts and circumstances tending to show that it was made under duress, and was not entirely free and voluntary, that this matter should be submitted to the jury under appropriate instructions. We could cite a number of cases where such evidence has gone to the jury under circumstances of a more serious nature than is here indicated. See *Rice's Case*, *Young's Case*, and *Freeman's Case*, supra. We know of no case where the testimony of coercion was as slight as in this case where the evidence of confession has been withheld from the jury.

Appellant urges as cause for reversal the admission by the court in evidence of a certain letter shown to have been written by appellant while in jail, to Mrs. Carrie Holmes, who was also in jail, in another cell. The bill substantially shows that the state put the witness Ben Clark on the stand, who

testified that he was the jailer of Coleman county; that he had in his custody J. F. Hamlin, who was confined in one cell, and Mrs. Carrie Holmes, who was confined in another cell, both under arrest on the charge of murdering Walter Holmes. The witness stated that he warned the defendant Hamlin, after he was put in jail; that he told him that anything he might say or do while confined in jail could be used in evidence against him; that, after this warning, he saw a letter from defendant to Mrs. Carrie Holmes; that he saw the letter in Mrs. Holmes' cell; that he knew the defendant's handwriting, and the letter was in his handwriting. Said letter was, in substance, as follows: "It commenced, 'Mrs. Holmes, my own dear Nellie.' It was then a love story, telling her how much he loved her, and how true he had been to her, and in several places asked her not to give him away. In one place, I remember, he said, 'I have been true to you, my darling, and I want you to be true to me, and not give me away.' It was signed, 'Your own Jim H.'" All of which, at the time and before the giving in of said testimony, the defendant objected to, for the reasons (1) that defendant, as shown by the statement of said witness at the time of writing said letter, was confined in the Coleman county jail, upon the charge upon which he is now being tried; (2) he was not warned as required by law to make said statement admissible; (3) that it was not an admission, statement, or confession to the witness by the defendant; (4) it was not a statement or confession freely made by defendant after proper warning. Mrs. Holmes was under duress at the time of the transaction testified to by the witness, and had not been properly warned, so that the same might be properly used against her or the defendant. Which objections were overruled, and the witness permitted to testify as above set out. We are not authorized to refer to the statement of facts to help out the bill of exceptions. *McGlasson v. State* (Tex. Cr. App.) 43 S. W. 93.

It will be presumed that appellant has stated fully the conditions under which said testimony was admitted, and, furthermore, that he has stated the very grounds of his objection to the testimony. Appellant says that he was not warned as required by law to make said statement admissible, and that it was not a statement or confession freely made by appellant after proper warning. If we look back to the prior portion of the bill stating the conditions under which the letter was received, it will be seen that the officer states that he warned defendant after he was put in jail; that he told him that anything he might say or do while confined in jail could be used in evidence against him; that, after this warning, he saw the letter in question. He does not state how long after he gave the warning before he read the letter. For aught that appears, it may have

been immediately. At any rate, appellant does not show by the bill, which he was bound to do in order to avail himself of it, that such an interval of time elapsed after the warning and before the witness saw the letter as to suggest that appellant did not at the time have in mind the warning which had been given. He therefore does not bring himself within the rule as laid down in *Barth v. State* (Tex. Cr. App.) 46 S. W. 228. Appellant also says that same was not an admission, statement, or confession made to the witness by the defendant. We know of no rule of law that would require that the statement or confession must be made to the party giving the warning. Indeed, the contrary has been repeatedly held in this state. See *Martin v. State* (Tex. Cr. App.) 41 S. W. 620. It is said that the statement made—that is, the letter written—was not freely and voluntarily made after warning given. There is no suggestion in the record to sustain this contention. Indeed, it would seem that the letter was written absolutely free from restraint. It was not intended by appellant that it should be seen by the officer, but was intended to influence Mrs. Holmes in her conduct. It would certainly appear, if the circumstances of a case could take a statement of a prisoner out of the statute, that this would be such a one. But it is not necessary to discuss that matter, as we have before seen that the proper warning was given before the letter was written.

Appellant further objects to the introduction of this letter because it was obtained from Mrs. Holmes while she was under arrest. Mrs. Holmes was not on trial, and the statute in this respect does not apply to her. However, if it did, Mrs. Holmes appears to have been warned by the officer.

Appellant further objected to the testimony of Mrs. Holmes while in jail on the ground that her statements were not freely and voluntarily made; that the officer used both threats and persuasion. The explanation of the court to this bill shows that said testimony, after it was introduced, was subsequently, during the trial, excluded from the jury, and they were instructed not to consider same. If this testimony was improperly admitted, it would appear that this subsequent action of the court was calculated to correct the error. We have looked through the bill, however, in vain, to find that she made any statement inculpatory of the appellant. When asked with regard to his guilt, she invariably stated that he was innocent.

On the trial, the state introduced the contents of another letter purporting to be from defendant to Mrs. Carrie Holmes. The circumstances attending the introduction of this letter were as follows: On Tuesday morning, December 1st, it appears that Holmes had some conversation with his wife, Carrie, at their house, regarding the defendant, and that she produced three letters which she said were from appellant, Hamlin, to her.

Walter Holmes read two of these letters and gave them back to her. He read the third, but retained it, and they had quite an altercation in regard to it. On that day he carried this letter to Coleman, some eight or nine miles from Santa Anna, and there showed it to his attorney, Mr. H. T. Sims. The letter, as testified to by Sims, was substantially as follows: "Dear Carrie: You know how well I love you, and we ought to live for one another. I am willing to wait one, two, five, or ten years, if necessary, but it seems a long time to wait. I noticed at church the other day that he is watching us. We will have to be mighty careful, or he will find out about it. If you will hoist your flag of truce, and he is away, I will be there. I often think of the pleasant times we have had at the [stating two capital letters, I cannot recall]." It was shown in this connection that Sims read the letter, and advised deceased to place that letter in a secure place, and that he had never seen it since. Sims testified, further, "that he was at the burial of Walter Holmes, on Wednesday, and while at the graveyard, before the body was interred, Dr. A. Stanlee (the father of Mrs. Carrie Holmes) introduced said Carrie Holmes to him, with the statement that she wanted to have a talk with him (Sims); that he and Mrs. Holmes stepped off a few steps, and the following conversation occurred: Mrs. Holmes said, 'Well, Mr. Sims, I suppose Mr. Holmes told you all about it.' And I said, 'All about your family trouble concerning you and Hamlin?' She said, 'Yes.' I said, 'Well, he told me a good deal about it.' She said, 'Well, it wasn't as bad as you thought it was.' I said, 'Mrs. Holmes, if it was as he stated to me, it was pretty bad.' She said, 'You are the only living person that knows anything about it.' I said, 'No, I am not the only person that knows anything about it.' We then each looked at Dr. Hayes, who was standing near, looking at us; and she said, 'What Dr. Hayes knows about it don't amount to anything.' I said, 'I don't know what Dr. Hayes knows about it, but he is not all.' She then said again, 'You are the only one that knows anything about it.' I then said, 'Mrs. Holmes, where is that letter from Hamlin to you that Mr. Holmes showed me?' She said, 'We got together, made it up, and he forgave us both, and we burned the letter; it's in ashes now.' 'It's in ashes?' I said to her; 'Mr. Holmes promised me he would take that letter, and put it in the bank with his papers in the vault, and preserve it.' She said, 'He didn't do it, but carried it back home, and we burned it.'" This letter was only introduced as evidence against Mrs. Holmes, the principal, and was so limited by the charge of the court. We understand the grounds of objection to the introduction of this letter to be that the letter that Sims read was not sufficiently identified as the letter that deceased obtained from his wife on Tuesday morning. We are of opinion that

said letter was sufficiently identified as the letter Walter Holmes obtained from his wife on Tuesday morning. But one letter was alluded to or spoken of by them, and there was but one letter which deceased had obtained from his wife and read to Sims, and she explicitly told Sims that the letter in question had been burned. If she were on trial, we have no doubt that said testimony would be admissible; and, as the same character of evidence is admissible against the principal in the trial of an accomplice, we hold there was no error in the court's admitting this testimony. See *Crook v. State*, 27 Tex. App. 198, 11 S. W. 444.

Appellant also objected to the confession Mrs. Holmes made at the house of T. M. Hayes, in the presence of said Hayes, his wife, and Sam Phillips, in which she stated that she poisoned Walter Holmes on December 8th, by giving him four doses of arsenic, the first of which was given on Wednesday, December 2, 1890. Appellant objected to this testimony, because the statement was made in the absence of the appellant, and after the death of Walter Holmes. The court admitted this testimony solely for the purpose of showing the guilt of Mrs. Holmes, and in his charge limited it to that purpose. The testimony was admissible for that purpose.

Appellant reserved a bill of exceptions to the action of the court in refusing to allow him to introduce certain testimony, which he claimed was legal evidence in impeachment of said Stanlee. The bill shows that Stanlee was a witness for the state; but it is not shown that he was a material witness, nor what he testified to, save and except that his feelings were friendly towards Mrs. Carrie Holmes. Appellant then proposed to impeach him by showing that he had made an affidavit to secure temporary letters of administration on the estate of Walter Holmes, to the effect that said Carrie Holmes was wasting and selling the community property of said estate, and wasting the proceeds, and had not and was not paying off any of the debts of said estate; and, further, that he knew the fact to be at the time that Mrs. Holmes had only sold \$415 worth of the property of the estate, and had paid \$1,045 of the debts thereof, paying \$620 thereof out of her private estate. Without discussing the question as to whether or not this character of testimony would be admissible in impeachment of the witness, the bill should certainly show that said witness, whom it was sought to impeach, was a material witness for the state, or should state some facts proved by him which appeared to be material.

Appellant also objected to the court propounding certain questions to the witness Chase, who was introduced as an expert by defendant. The grounds of the objection were that the court should not interfere in the examination of witnesses, and that a hypothetical question was not stated to the witness Chase. The bill fails to show how the

court came to ask the question; and it does not show that the question propounded by the court was a leading one. The witness stated that he had heard the testimony of the state's expert who had made the analysis, and he was then asked upon the hypothetical case, which involved all the testimony, what he thought caused the death of the deceased. We fail to see any impropriety in this action of the court.

Appellant objected to the 2d, 3d, 4th, 5th, 7th, 8th, 9th, 10th, and 12th paragraphs of the charge of the court. By referring to these charges, it will be observed that they are all charges defining malice, and presenting the charge of malice aforethought as an element in the case. By referring to the indictment, it will be seen that the charging part alleges that "Mrs. Carrie Holmes did then and there unlawfully, with malice aforethought, kill Walter Holmes, by poison; and that the said J. F. Hamlin, prior to the commission of the offense, \* \* \* as aforesaid, did unlawfully and willfully, of his malice aforethought, advise, command, and encourage the said Carrie Holmes to commit said offense, the said J. F. Hamlin not being present at the time of the commission of said offense by Carrie Holmes." So that, if the charge be objectionable, the indictment is also. The grounds of appellant's objection are, as we understand it, that our statute makes murder upon express malice a distinct offense, and a homicide by poisoning a distinct offense, and it is not necessary that the latter contain, as an essential element, the charge of malice aforethought. This is not the rule. From time immemorial, a charge of poisoning, as one of its distinctive elements, contains the charge that it was done with malice aforethought. Unless it was so done, it is not murder. A killing by poisoning may be either negligent or purely accidental homicide. The rule at common law required that an indictment for poisoning contain the allegation "malice aforethought." See Whart. *Hom.* § 735. In 1 Hale, P. C. p. 453, we find: "He that willfully gives poison to another, that hath provoked him or not, is guilty of willful murder. The reason is because it is an act of deliberation, odious in law, and presumes malice." The same rule has been followed in this state. See *Tooney v. State*, 5 Tex. App. 163. We would, moreover, observe in this connection, that certainly appellant cannot be heard to complain, because, if his contention be true, it was only necessary to prove homicide by poisoning; but the indictment superadded to this, and the court instructed the jury accordingly, that there must be both poisoning and malice aforethought. If the court had failed or refused to submit a charge requiring the jury to believe that the homicide was committed with malice aforethought, it would have been error.

The court gave the jury the following charge on circumstantial evidence: "In this

case the state relies upon circumstantial evidence for a conviction of the defendant; and you are instructed that, in order to warrant a conviction on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt; and all the facts necessary to such conclusion must be consistent with each other and the main fact sought to be proved; and the circumstances, taken together, must be of a conclusive nature, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty of the guilt of the defendant, and excluding every reasonable hypothesis except the guilt of the defendant. It is not requisite that circumstantial evidence, to warrant a conviction, must demonstrate the guilt of the defendant beyond the possibility of his innocence." Counsel reserved a bill of exceptions to this charge on account of the last clause thereof. It was not necessary for the court to have given this last clause, as he had before given a full and complete charge on circumstantial evidence. But the question is: Was the addendum upon the weight of the testimony, and of a nature calculated to injuriously affect or prejudice appellant? This charge is not usual, and a trial court has done its full duty when it has given the ordinary charge on circumstantial evidence. However, the cautionary charge given as an abstract proposition is correct. Whether circumstantial or positive, the evidence in no case is required to be so cogent as to exclude every possibility of defendant's innocence. This is not like the charge in *Harrison v. State*, 8 Tex. App. 183, 9 Tex. App. 407; nor is it like the charge in *Post v. State*, 10 Tex. App. 580. In the latter case, however, the court says that, though the charge was upon the weight of evidence, it was not, under the circumstances of that case, of a character to injure the rights of appellant. In *White v. State*, 19 Tex. App. 343, the charge went to a greater length in being a charge upon the weight of testimony than the charge in this case. The court, however, in that case, says that the main charge given by the court, being a correct enunciation of the law, taken in connection with the qualification, did not mislead or confuse the jury as to the rule of law which had been properly given, and that the same was not prejudicial to the rights of appellant. If said addendum had been calculated to change the rule announced in the main charge, or to modify it, then it might be considered injurious. The main charge instructed the jury that, before they could convict defendant, the testimony must be of a conclusive nature, etc., producing in effect a reasonable and moral certainty that the defendant was guilty, and must further exclude every reasonable hypothesis except his guilt. The addenda in this case merely stated that, while the rule above given was correct, the hypothesis must not present a mere possibility of innocence, but

It must present a reasonable hypothesis. We do not regard the charge as stated above as restrictive of the main charge, or as calculated to mislead or confuse the jury as to the principle announced in the main charge.

The charge was given by the court, applying the law to the facts of the case submitted to them, that if they believed that Carrie Holmes, of her malice aforethought, did unlawfully kill Walter Holmes, by poisoning said Walter Holmes, as charged in the indictment, and that defendant aided, etc., as charged in the indictment, they should convict appellant of being an accomplice in said murder. This charge was objected to on the ground that the indictment and proof showed an arsenic poisoning only. If there was evidence of any other character of poisoning in the record, there might be something in this objection.

Appellant objects to the court's charge on insanity of Mrs. Holmes. The objections are not well taken. The instruction is in accordance with the authorities in this state, beginning with *Webb v. State*, 5 Tex. App. 596, and down to *Burt v. State* (Tex. Cr. App.) 40 S. W. 1000. See, also, *White's Ann. Pen. Code*, par. 51, for collated authorities.

The issue of alibi was not raised in this case. The court submitted alone the charge of an accomplice, and the state's case did not depend on the presence of the defendant during the commission of the homicide.

As to the other matters complained of in the court's charge, we would observe that this case is divided into two phases: First, the guilt of Mrs. Carrie Holmes, as the principal in the murder; and, second, the guilt of appellant, as an accomplice with Mrs. Carrie Holmes. A great mass of testimony was admitted by the court that had reference alone to the guilt of the principal. All the testimony admitted in that connection, we think, was properly admitted, and was properly limited as to its purpose by the court; and appellant's guilt alone was made to depend on the evidence which connected him with the homicide as an accomplice.

The discussion we have given of the court's charge sufficiently shows that there was no error in the refusal of the court to give the requested charges, and we will not further discuss said charges.

Appellant also objects to the conviction in this case, because he alleges that the court was not authorized to hold a term at the time of the trial of said case. We presume that his contention is that the act regulating judicial districts did not authorize the term of court of Coleman county at the time appellant was convicted. Appellant does not furnish us with any data as to his contention in this regard. There is nothing in this contention.

Appellant insists that the verdict of the jury is not sustained by the evidence. We have examined the record thoroughly, and, in our opinion, the verdict is supported by the evi-

dence. Looking at the record, there can be no question as to the guilt of Mrs. Carrie Holmes, the principal. It is abundantly established, both by circumstantial evidence and by her own confessions, that she poisoned her husband with arsenic, administered to him in water four different times during the week before his death; and the circumstances, we think, amply connect appellant as an accomplice in the charge. We summarize the inculpatory facts as far as appellant is concerned, as follows: The testimony showed his illicit relations with Mrs. Carrie Holmes about a year antedating the homicide. This, in connection with his desire to marry her, was the motive which actuated him in getting rid of the deceased. His going to Glen Cove on Tuesday morning, and remaining there until Saturday, is accounted for only on the hypothesis that Mrs. Holmes informed him on that Tuesday morning of the altercation that had occurred between herself and her husband previously on that same morning, with reference to the letter which he (appellant) had written to Mrs. Holmes; and the further fact, as admitted by him, that Mrs. Holmes informed him on that Tuesday morning of what had occurred, and that her husband had gone to Santa Anna armed, and his life was in danger. His conduct during the sickness of deceased, when he was suffering with poison administered by his wife, also tends to show guilty knowledge on his part. Though he lived within half a mile of deceased, was his neighbor, and in the habit of getting milk at his house, after his return from Glen Cove (which was on Saturday before deceased's death, on Tuesday), appellant did not go into his presence, but was seen in the rear of the premises in the vicinity of the barn under circumstances that showed that he and the wife of the deceased had held an interview. This was on Sunday. On the night after the death of the deceased, he was seen to have a private conversation with Mrs. Holmes on the gallery of their house. His conduct at the grave the next day, when the pigeon was turned loose, was a circumstance against him; as was also his conduct on the night after the burial, when he was seized with horrors, saw spirits, and physicians had to be sent for and neighbors called in to attend him; and the further fact that, the next morning after the burial, he had a private interview with Mrs. Carrie Holmes, at the house of Dr. Hayes, which is not explained. Appellant not only admitted his illicit relations with the deceased's wife antedating his death, but also that their marriage was agreed upon. In that connection, he told deceased's wife that Holmes was robust, and was calculated to outlive either one of them; but he said he would wait for her, if it was 20 years. Furthermore, he admitted in January (after the death of deceased, on December 8th) that he and Carrie Holmes were to be married in the coming December, unless something happened. And in addition to all this, as evidence strongly

inculpatory, after the homicide he addressed a letter to Mrs. Holmes, avowing his affection and trust in her, and beseeching her "not to give him away." These, and other facts we might mention, it occurs to us, are of a conclusive nature, establishing his guilt beyond any reasonable doubt; and the jury were fully authorized in finding the verdict they did. There being no reversible errors in the record, the judgment is affirmed.

HURT, P. J., absent.

### SPENCER v. JONES.

(Court of Civil Appeals of Texas. Nov. 12, 1898.)

#### POWER OF PARTNERS.

Where a partner allows notes due the firm to be made payable in negotiable form to another partner, and such partner indorses and delivers the notes to a third person as a pledge, he has been so held out as having power to negotiate them as to preclude the other partner from asserting that it was not within the scope of the partnership for the partner indorsing the notes to borrow money on them.

On motion for rehearing. Affirmed.  
For former opinion, see 47 S. W. 29.

STEPHENS, J. It is now strenuously insisted, in support of the motion for rehearing, that Spencer and Chapman were not partners in the purchase and sale of the Rochefeller land. The high authority cited (Clark v. Sidway, 142 U. S. 682, 12 Sup. Ct. 327) in opposition to the conclusion, announced on the original hearing, that they were partners, has led us to re-examine the question. In the opinion of Justice Blatchford in Clark v. Sidway this language is used: "The transaction between Sidway and Clark, of their joint purchase of the land, did not constitute a co-partnership in respect thereto. It was a single, special adventure on joint account, involving the payment in equal proportions of designated sums of money. It was a mere community of interest in the property, and the agreement to share the profits and losses on the sale of the land did not create a partnership. The parties were only tenants in common, and the action at law would lie." But it will be observed that the question before the court in that case was one of jurisdiction, whether the action was maintainable at law, and it was decided—perhaps correctly—that it was. Nine out of the ten cases cited by Justice Blatchford as authority for what we have quoted from his opinion have been examined, but none of them are analogous to the case at bar. In the first so cited (Jordan v. Soule, 79 Me. 590, 12 Atl. 786) the land was purchased, not for sale at a profit, but because of an ice privilege attached, for the purpose of harvesting and selling ice; and it was held that, as it was "purchased by the parties as individuals, each paying for his share out of

his private funds," the purchasers were tenants in common. The other cases need not be discussed. On the other hand, the following cases, or most of them, are parallel to the one at bar, and hold that joint purchasers of land intended to be disposed of for their joint benefit are partners in the venture. Yeoman v. Lasley, 40 Ohio St. 190; Hulett v. Fairbanks, Id. 233; Canada v. Barksdale, 76 Va. 899; Bank v. Van Slyck, 29 Hun, 188; Brinkley v. Harkins, 48 Tex. 225. Spencer negotiated the purchase from Bartlett in the first instance, advanced the cash payment demanded, and took the deed in the name of Chapman for their mutual convenience, all with the understanding that Chapman was to sell the land to others, such sales being then in contemplation, and, after reimbursing Spencer and paying the balance of purchase money to Bartlett, divide the profits with Spencer. They bought the land for immediate sale, purely as a speculation. The case is thus brought clearly within the following definition of partnership: "A particular partnership is one where the parties have united to share the benefit of a single individual transaction or enterprise." 1 Bates, Partn. § 12. Chapman was, as we interpret the transaction, the partnership name (Bank v. Van Slyck, supra), and so the case, we think, should be determined by the principles of partnership law, rather than by that exceptional, as well as very technical doctrine of the common law which resulted from the ancient use of seals in the execution of deeds, but which is still clung to by the courts, notwithstanding such use of seals has long since been dispensed with. See Sanger v. Warren (Tex. Sup.) 44 S. W. 477. The doctrine of this case, so much relied on by appellant, is fully recognized by the author above quoted from. 1 Bates, Partn. § 436. But in the subsequent sections 438, 439, 443, and 444 it is laid down that the sanctity of sealed or negotiable instruments is not available to screen from liability the partner whose name does not appear in the deed or note, provided the name used, though it be the name of the other partner, be also the firm name.

It is further insisted that we were in error in the conclusion that the evidence did not tend to show a loan by Jones to Chapman, but only a sale from Chapman to Jones. We have concluded to modify this finding, and now hold that the testimony of Jones was such as to raise that issue, but need not decide whether the evidence would have warranted a finding that merely a loan, and not a sale, was made. We are, however, further of opinion that Spencer had, by allowing the partnership notes indorsed and delivered by Chapman to Jones to be made payable in negotiable form to Chapman, so held Chapman out as having power to negotiate them as to preclude him from asserting that it was not within the scope of the partnership for Chapman to borrow money on them. Hence, for this additional reason, there was no material

error in refusing the requested charge on that point, notwithstanding the agreed correction of the record made pending this motion. *Bank v. Van Slyck*, 29 Hun, 188. The rehearing will be refused, but the remittitur voluntarily tendered by appellee to correct an error in the verdict will be accepted, and the judgment reformed accordingly.

### HURST v. McMULLEN.

(Court of Civil Appeals of Texas. Nov. 9, 1898.)

**VENDOR AND PURCHASER—DEEDS—TRIAL—BURDEN OF PROOF—EVIDENCE—ADMISSIBILITY—SUFFICIENCY—INSTRUCTIONS—APPEAL—PRESUMPTIONS.**

1. Error in refusing to permit defendant to prove a certain fact by a particular witness is not shown by a bill of exceptions in which it does not appear that such person was offered as a witness on that subject.

2. Where a deed describes land as so many acres more or less, and recites a gross consideration, the burden is on the vendee, who claims that the sale was by the acre, and not in gross, to show that fact.

3. Where defendant in an action on a note did not request a charge on the question of the vendor's fraud in inducing a sale of land for which it was executed, he cannot on appeal complain that the court erred in not submitting that issue.

4. It was not error to refuse a charge which embodied several propositions of law, some of which were in general terms, and did not submit to the jury any issue to be decided by it.

5. An argumentative charge is properly refused.

6. It is proper to refuse a charge which directed as to the weight to be given to certain of the testimony.

7. Since delivery is necessary to the execution of a deed, and its execution is essential to its admissibility in evidence, it will be presumed on appeal that a deed admitted in evidence without objection was delivered.

Appeal from district court, McLennan county; Marshall Surratt, Judge.

Action by T. N. McMullen, Jr., against John L. Hurst. There was a judgment for plaintiff, from which defendant appeals. Affirmed.

Counsel for appellant correctly state the nature and result of this suit, as follows: "This was an action brought by appellee, T. N. McMullen, Jr., originally, against John W. Masters and John L. Hurst. Said plaintiff below, in his first amended original petition, filed November 24, 1897, alleged that on August 2, 1892, he (said plaintiff), by his deed of that date, duly executed and acknowledged, conveyed to said defendant John W. Masters a certain parcel of land situated in McLennan county, Texas, being a part of the Antonio R. Valdez survey, east of the Brazos river, and further describing the same. Plaintiff alleged that in part payment of the purchase money for said land said defendant John W. Masters executed and delivered to said plaintiff his two certain promissory notes, dated August 2, 1892, for the sum of \$200 each, due, respectively, November 1, 1896, and November 1, 1897, each of said notes bearing ten

per cent. per annum interest, and providing for ten per cent. attorney's fees if collected by suit, and providing for annual payment of interest, and, if interest be not paid when due, to become as principal, and bear same rate of interest, and each note providing further that failure to pay same, or any installment of interest thereon, when due, shall, at the election of the holder of them, mature all notes given by said Masters to said McMullen in payment for said property. And plaintiff alleged that by the terms of said deed and said notes the vendor's lien was retained and acknowledged in plaintiff on said land to secure the payment of said notes; that Masters failed to pay the note falling due November 1, 1896, and plaintiff elected to then mature the note which fell due November 1, 1897, and that he instituted suit herein to collect said notes on December 18, 1896. Said plaintiff alleged that on or about July 6, 1896, said Masters and his wife, by deed duly executed and acknowledged, conveyed said land to defendant John L. Hurst, and that, as part payment of purchase money to said Masters for said land, said defendant John L. Hurst promised and agreed to pay said plaintiff the balance of the purchase money due by said Masters to plaintiff, to wit, the two notes above described. Plaintiff prayed for judgment against defendant John L. Hurst for the amount of the principal, interest, and attorney's fees due on said notes, and for his debt, damages, and costs of suit, and for foreclosure of his said vendor's lien on said land, and for general relief. Masters having died, the suit abated as to him. Defendant John L. Hurst answered by general exception and denial, and specially that the sale of the land by said plaintiff to Masters, for which the notes sued on were given, was a sale by the acre; that in all of the negotiations leading up to the sale the same were had and done on a basis of six dollars per acre; that Masters in said negotiations informed plaintiff that he would trade no other way than on a basis of six dollars per acre, and that all the negotiations and dealings in respect thereto were had with that understanding and on that basis, and that the trade was completed on said basis and with that understanding; that plaintiff during said negotiations represented that the tract of land purchased contained fully 150 acres, and at the time said trade was completed by the making and delivery of the deed, and the execution of the notes sued on, said plaintiff still represented that there were fully 150 acres in the tract so conveyed, but that said plaintiff himself caused the deed to be prepared, and therein described said land by metes and bounds, and further described the same as containing 150 acres, more or less; that Masters, relying entirely upon the representations of plaintiff as to the quantity of land contained in said tract, completed said contract by paying the cash payment of three hundred dollars, executing three promissory notes, each for the sum of

two hundred dollars, due, respectively, November 1, 1894, 1896, and 1897, and accepting the deed so made as aforesaid; that said note falling due November 1, 1894, was fully paid off and discharged. Defendant represented that there was a considerable shortage in said land; that plaintiff knew of such shortage, but still represented to Masters that there were fully 150 acres in the tract; that this defendant, if he made any promises, only agreed to pay what Masters was equitably bound to pay. There was a first and second supplemental petition by plaintiff, and a supplemental answer by defendant. There was a verdict of the jury in favor of plaintiff, on which the court rendered a judgment in his favor against defendant John L. Hurst. Defendant John L. Hurst made a motion for a new trial, which the court overruled, to which defendant duly excepted, and in open court gave notice of appeal, and now brings this cause to this court." The undisputed testimony shows that the plaintiff sold and deeded the land to John W. Masters for the consideration and on the terms alleged, and that the notes were executed and payments made as alleged by the plaintiff. The undisputed evidence also shows that John W. Masters and wife executed a deed conveying the land to the defendant John L. Hurst, in which it is recited that said Hurst agreed and promised to pay the notes sued on. There was no direct testimony showing that this deed had been delivered to the defendant, or that he had accepted under it. It was shown that it had been duly recorded. As to whether the contract of sale between the plaintiff and Masters was a sale by the acre, or by the tract in gross, there was conflict in the testimony; and, in support of the verdict, we find that the sale was by the tract, or in gross.

Lindsey & Smith, for appellant. Jones & Sleeper, for appellee.

**KEY, J.** (after stating the facts). The first assignment of error charges that the court erred in not allowing defendant to prove by the witnesses John H. Harrison and A. L. O. Hurst that "the plaintiff did not say to them, or in their presence, or to said Masters, at the time and place of the arbitration between plaintiff and A. L. C. Hurst, that he (plaintiff) had sold to him (Masters) the land in a body, for a specified sum of money, and in no other way." The bill of exceptions does not show that A. L. C. Hurst was offered as a witness on this subject, and the statement of facts shows that John H. Harrison had previously testified in substance as stated in the bill of exceptions. Hence no error is shown in the ruling complained of.

The charge of the court submitted the case fairly and correctly to the jury on the issue of sale by the acre, or in gross; and as the deed described the land as 150 acres, more or less, and recited a gross consideration of \$900, the court properly instructed the jury that the

burden rested upon the defendant to show that the sale was by the acre, and not in gross.

If the pleadings and evidence raised the issue of fraud in the sale between plaintiff and Masters, and if appellant had the right to urge such fraud as a defense, he is not in a position to complain of the action of the court in not submitting that issue to the jury; he not having asked a charge upon it.

No error was committed in refusing the special charge asked by appellant, embodying several different propositions of law. Some of these propositions are stated in general terms, and would not have submitted any issue to be decided by the jury. This charge was also argumentative in its nature, and the latter part of it was upon the weight of testimony.

Appellant did not object to the introduction in evidence of the deed from Masters and wife to him, in which deed it is recited that he agrees to pay the notes sued on, but insists now that, as there was no direct proof that he had accepted the deed, appellee failed to make out his case, and show that he was liable on the notes sued on. Appellant being the grantee in the deed, the deed being duly recorded, and he having permitted it to go in evidence without objection, we do not think he should now be permitted to urge this defense. Delivery to the grantee is a necessary part of the execution of a deed, and a deed must be duly executed, to be admissible in evidence. Therefore, appellant having conceded such execution as authorized the deed to be put in evidence, his acceptance thereunder should be presumed.

We have considered all the questions presented in the briefs, and conclude that the judgment should be affirmed, and it is so ordered. Affirmed.

#### SANDERSON v. RILEY et al.

(Court of Civil Appeals of Texas. Nov. 9, 1898.)

#### BILLS AND NOTES—ACTION—JURISDICTION—JOINDER—COLLATERAL—VENDOR'S LIEN.

1. In an action in the district court on a note, to secure which vendor's lien notes have been given as collateral, in which the maker of the collateral notes has been made a party defendant, the court has jurisdiction to render a judgment foreclosing the lien for the amount due on the principal note.

2. Where vendor's lien notes are given as collateral to secure a note, an action on the principal note may be joined with an action against the maker of the collateral notes to foreclose the lien to the amount of the principal note.

3. Where judgment is rendered against the maker of a note, and also against the maker of another note given as collateral for the first, the maker of the principal note cannot complain of the judgment rendered against the maker of the collateral note, where the latter does not appeal.

Appeal from district court, McLennan county; Marshall Surratt, Judge.



Action by J. D. Railey and others against A. W. Sanderson and another. Judgment was for plaintiffs, and defendant Sanderson appeals. Affirmed.

Dyer & Dyer, for appellant.

FISHER, C. J. This suit was brought by the appellees, as plaintiffs below, against the defendant Sanderson, for the sum of \$160, on a promissory note, executed February 2, 1895, due December 1, 1895, with 8 per cent. interest and 10 per cent. attorney's fees, which note was indorsed as follows: "With two notes, of \$50 and \$250, vendor's lien as security." These two notes were executed by J. S. Prock, who was made a defendant. These notes retained a vendor's lien upon certain land, which the plaintiffs asked to be foreclosed. They were delivered to the plaintiffs by E. W. Sanderson, as collateral security for the amount due from Sanderson to plaintiffs. Prock was only joined in the suit for the purpose of foreclosing the lien. Plaintiffs also alleged that defendant Sanderson was due them a further sum of \$100, as commission earned by the plaintiffs in the sale of certain land for Sanderson. The case was tried before the court, which found conclusions of law and fact as follows:

"First: I find that in November, 1894, plaintiffs, as real estate brokers, concluded sales of land for the defendant E. W. Sanderson, in which their commission amounted to \$160. That the sales were made part cash, and the purchaser executed to defendant Sanderson vendor's lien notes for the unpaid purchase money. I find that on February 2, 1895, the defendant Sanderson executed to plaintiffs his note for the sum of \$160, due December 1, 1895, with this statement, 'With two notes, of \$50 and \$250, vendor's lien as security.' That he delivered to plaintiffs, as collateral security for said \$160 note, without indorsement, two vendor's lien notes,—one for the sum of \$50, executed November 1, 1894, payable November 1, 1895; the other for \$250, of same date as the first one, payable November 1, 1896, each signed by one J. S. Prock,—which notes plaintiffs now hold and sue upon in this case, making the said J. S. Prock a party defendant, and seeking judgment against defendant Sanderson on his note for \$160, with foreclosure of the vendor's lien against defendant Prock.

"Second. I further find that the two vendor's lien notes held by the plaintiffs as collateral are two of a series of six notes, executed at the same time, the last one of said series being due in 1901. I find that since the maturity of these notes held by plaintiffs, both principal and collateral notes, that the defendant Sanderson has purchased from the defendant Prock the land conveyed, upon which the vendor's lien was retained in said notes, and that the remainder of said series of notes was canceled by said defendant Sanderson in said repurchase, and that defendant Sanderson now owns the land.

"Third. The defendant Sanderson files his plea of failure of consideration to one-half of the \$160 note, alleging that the consideration therefor has totally and wholly failed. On the evidence, I find against the defendant Sanderson on his plea of failure of consideration.

"Fourth. I find that subsequent to February, 1895, the precise date not being fixed, that, at the instance of defendant Sanderson, the plaintiffs agreed, for a consideration of \$100, to find him a purchaser for another and different tract of land. That at the time of the agreement with the plaintiffs to find a purchaser of said land, that the defendant Sanderson thought he was possessed of a good title to said other tract of land, being 258 acres, and so stated to plaintiffs that his title was all right. That plaintiffs, in the prosecution of their undertaking to find a purchaser for said land, took one E. E. Fitzhugh to examine the land, and, after examination of the same, the said E. E. Fitzhugh agreed to take the same, and pay therefor the sum of \$2,000 cash, the full price at which it had been placed in plaintiffs' hands for sale. That on returning to the city of Waco, after the examination of said land, the plaintiffs inquired of the defendant Sanderson for an abstract of the title for said land. Informing the said Sanderson that they had found a purchaser for the same. That the abstract of title was placed by the said E. E. Fitzhugh, the prospective purchaser, in the hands of one J. S. Fitzhugh, an attorney, for examination. That the said attorney condemned the title and pointed out the defect. I find that the defendant Sanderson admitted the defect to be as pointed out by the attorney, there being a complete hiatus of one link in the chain, owing to the destruction of some deeds without record, and perhaps the death of the party who had made the deed. The purchaser, Fitzhugh, then agreed with the defendant Sanderson that if he would give him a bond for the title, or a bond to perfect the title, to said land, that he would go ahead and close the trade, and pay the money, which the defendant Sanderson agreed to do, but failed to do. I find that the purchaser, Fitzhugh, was ready, able, and willing to complete the trade, and would have taken the land, but for the defect in the title, which was admitted by the defendant Sanderson.

#### "Conclusions of Law.

"First. I conclude from the foregoing facts that the plaintiffs are entitled to their judgment on the \$160 note, with interest and attorney's fees, and foreclosure of the lien, as against the defendant Sanderson, and Prock, to that extent, on the land upon which the lien was retained in the two collateral vendor's lien notes above mentioned.

"Second. That the item of \$100 I find to be due the plaintiffs because of the fact that they perfected their undertaking by finding a purchaser for the land who was able and

willing to buy the same at the price named, the trade being defeated by the defect in title admitted by the defendant Sanderson. I conclude that the plaintiffs had complied with their undertaking, and are entitled to their judgment for \$100; and it is so ordered."

There is no statement of facts in the record.

It is contended, in the first assignment of error, that the court had no jurisdiction, and that it erred in overruling the defendants' demurrer raising this question. There is no merit in this contention. The vendor's lien notes which were executed by Prock to Sanderson were deposited by Sanderson with the plaintiffs, as collateral security for the \$160 note due plaintiffs from Sanderson. Plaintiffs, in suing Sanderson upon this \$160 note, had the right to foreclose the vendor's lien upon the land in question. They only sought to foreclose the lien for the amount due them from Sanderson, and they brought Prock in to the case for that purpose. The power of the district court to foreclose the lien upon the land necessarily brought to it the jurisdiction to render judgment for the amount sued for.

The second assignment of error contends that there was an improper joinder of causes of action. This is, in effect, disposed of by what has been previously said in disposing of the first assignment of error. Plaintiffs' remedy did not only consist of foreclosing their lien on the notes themselves, but they had the right to foreclose the lien on the land represented by the notes.

In response to appellant's fourth assignment of error, the facts stated by the court show that these notes were delivered to the appellees, as collateral security, to secure a debt due them from Sanderson.

Appellant Sanderson is not in a condition to complain of the judgment that was rendered against Prock. In his sixth assignment of error he states that the court erred in rendering judgment against the defendant Prock. Prock is not a party to this appeal, and is not complaining of the judgment of the court below. We find no error in the record, and the judgment is affirmed. Affirmed.

#### NEWNOM v. SOUTHWESTERN TELEGRAPH & TELEPHONE CO.

(Court of Civil Appeals of Texas. Nov. 9, 1898.)

**ELECTRICITY—INJURY—MASTER AND SERVANT—  
NEGLECTANCE—PROXIMATE CAUSE—AS-  
SUMPTION OF RISK—VARIANCE.**

1. Where the act of passing a rope under electric wires is dangerous only if the person passing it under comes in contact with the wires, which he could avoid by the exercise of due care, it is not negligent to order such act to be done.

2. Where a person negligently ordered to pass a rope under electric wires is injured by accidentally or negligently coming in contact

with the wires, the act of the person injured, and not the negligence in giving the order, is the proximate cause of injury.

3. Where a person ordered by his foreman to pass a rope under electric wires understands the danger of coming in contact with such wires, he assumes the risk in obeying the order.

4. Under a petition alleging injury resulting from contact with two primary electric wires, testimony of plaintiff that he was guarding against the primary wires, and did not touch them, constitutes fatal variance.

Error from district court, Travis county; F. G. Morris, Judge.

Action by George H. Newnom against the Southwestern Telegraph & Telephone Company. Verdict was directed for defendant, and plaintiff brings error. Affirmed.

Sidon Harris, for plaintiff in error. A. H. Graham and G. E. Shelley, for defendant in error.

FISHER, C. J. The plaintiff in error, while in the employment of the defendant in error as a lineman in placing wires, was injured by an electric shock, caused by coming in contact with wires heavily charged with electricity. At the time, the plaintiff was under the control of one Trahen, who was the foreman of the defendant in error, in charge of the work in which they were then engaged; and in his petition alleges that he was commanded by Trahen to pass the rope he was then using with which to handle the wires under two primary electric light wires, and in doing so, while exercising due care, he received the shock from which the injuries resulted. In other words, the plaintiff's case, as made by the averments of his petition, is tersely stated by the defendant in error in its brief as follows: "The injuries to plaintiff were caused by an electrical shock received by plaintiff from the primary wires, which shock precipitated him upon said wires, causing him to be burned and otherwise hurt; that said primary wires were charged with electricity, of which fact plaintiff was ignorant; that Trahen knew the fact, and did not warn plaintiff; that defendant was responsible for the injury, because Trahen ordered the plaintiff to do the act which necessarily brought him in contact with the charged wires, and did not warn plaintiff that they were charged; that at the time Trahen's gang were engaged in rebuilding and reconstructing defendant's lines, the business for which its members had been employed." The court below instructed the jury as follows: "As this case must be decided against the plaintiff on his own testimony, it becomes my duty to instruct you to find for the defendant, without submitting it to you for your deliberation, as in cases where there is a conflict of testimony. There are two reasons why the plaintiff cannot recover upon the facts which he has testified to be true: First. It clearly appears from his testimony that the act of passing the rope and wires under the electric wires, which he was instructed

to do, was not necessarily dangerous, but only so if the party passing them under should come in contact with the wires, which he would be supposed to avoid in the exercise of due care. Hence there was no negligence in directing this to be done, or, if there was, it was not the proximate cause of injury to plaintiff; the proximate cause of injury being the act of plaintiff in accidentally or negligently coming in contact with the wires. Second. It appears from plaintiff's testimony that he understood the probable danger of coming in contact with the wires; and if there was necessarily danger of coming in contact with them involved in passing the rope and wire he held under the electric wires, of which he was aware, he must be held to have assumed the risk, and cannot excuse his thus going into known danger because instructed so to do by the agent of plaintiff." All the assignments of errors are directed against this charge. We are of the opinion that the court below took the correct view of the evidence. In fact, in our opinion, the evidence admits of no other construction than that reached by the trial court. Such being the case, it was proper for him to instruct the jury to return a verdict in favor of the defendant. However, if we are wrong in this conclusion, the judgment of the court can, nevertheless, be sustained upon the ground of variance between the proof and the pleading. The petition, in effect, states that his injuries were caused from coming in contact with primary electric light wires. The plaintiff, in his testimony, states that he did not touch the primary wires. These were the wires that he was guarding against, and which he testifies he did not touch; but alleged as his cause of action that coming in contact with them caused the shock that he received. If we cannot be sustained upon the grounds upon which we dispose of the case, then the other facts, as stated in the record, upon which we have not expressly found, would justify the submission of all of the issues raised in the pleadings to the jury, and are sufficient to sustain the verdict in favor of the plaintiff. We find no error in the record, and the judgment is affirmed. Affirmed.

#### ELLIS v. SHARP et al.

(Court of Civil Appeals of Texas. Nov. 9, 1898.)

#### SECONDARY EVIDENCE—NOTICE TO PRODUCE ORIGINAL PAPERS.

Copies of documents are improperly admitted in evidence where the notice to the adverse party to produce the originals is not given until after the objection is made to such copies, and where the originals are not in the court room, but are in another part of the state, so as to make it impossible to produce them at the trial.

Appeal from Travis county court; A. S. Walker, Judge.

Action by John E. Sharp and others against Mrs. A. M. Ellis. From a judgment for plaintiffs, defendant appeals. Reversed.

Eugene Williams and West & Cochran, for appellant. Fiset & Miller, for appellees.

KEY, J. We sustain the first and second assignments of error, and reverse the judgment in this case. These assignments relate to the action of the court in admitting in evidence copies of the original contract and specifications, upon which the plaintiffs' suit is founded. The plaintiffs' petition did not charge the defendant with possession of these documents, and no notice was given defendant or her counsel to produce them until after the trial began, and objection was made to the introduction of the copies. When the objection was made, the plaintiffs' counsel gave defendant's counsel notice to produce the original contract and specifications, and proved that they had been delivered by the plaintiffs' counsel to A. C. Watson, the architect who prepared the specifications, and that Watson delivered them to Cass Ellis, the defendant's agent. The defendant's leading counsel stated to the court that, while he had all the papers belonging to the case, he did not have the originals referred to, but stated that there were a lot of papers belonging to the Ellis family in Waco, and that these originals might be there, but, upon the notice given, he could not produce them at the trial. The defendant's counsel still urged their objection upon the ground that the original contract and specifications were the best evidence. The court overruled this objection, and allowed the plaintiffs to introduce in evidence copies thereof. It is true that, after this testimony was introduced, Cass Ellis, the defendant's agent, was on the stand as a witness, and did not deny that the original contract and specifications were delivered to him by Watson; but it was not shown by him or any other witness that they were then in the court room, or even in the city of Austin, where the case was tried. The rule is well settled that, in order to introduce secondary evidence of the contents of a written document shown to be in possession of the adverse party, notice to such party to produce the original must be given in such time as to enable him to do so. 1 Whart. Ev. § 155. Ordinarily the notice should be given before the trial begins, but if it be shown that the original document is in the court room, in possession of the adverse party or his counsel, notice at the time of trial will be sufficient. But this case does not fall within the exception referred to. The notice given did not afford sufficient time for the production of the originals, and the court should not have permitted, over the defendant's objection, secondary evidence of their contents.

The objection urged to the plaintiffs' introduction of their account book as evidence

is not well taken. The memorandum books from which the book in question was copied were shown to be lost. The objection in the brief, that it was not shown that the books were regularly and properly kept, does not appear to have been made in the court below.

Except as to the slight error in stating the time from which interest would be allowed, we do not think the court's charge is subject to the criticisms urged against it. The special charges asked by the defendant were properly refused, because they do not state the law correctly. Judgment reversed, and cause remanded.

#### W. T. ADAMS MACH. CO. v. LOONEY.

(Court of Civil Appeals of Texas. Nov. 9, 1896.)

##### CONTRACT OF PURCHASE—REPUDIATION—MEASURE OF DAMAGES.

For breach of contract, consisting in a countermand of an order for machinery, received before it was shipped, the measure of damages is the difference between the contract price and the market value of the machinery in the condition in which it was when the notice of repudiation was received.

Appeal from Milam county court; W. M. McGregor, Judge.

Action by the W. T. Adams Machine Company against Ike Looney. From a judgment for defendant, plaintiff appeals. Affirmed.

Hefley & Watson, for appellant. Moore & McBride, for appellee.

**FISHER, O. J.** This is a suit by the appellant to recover from appellee damages in the sum of \$155 for breach of a written contract concerning the sale and delivery of certain machinery by the machine company to appellee, Looney. The case was tried before the court below, and judgment rendered in favor of the defendant. The court found the following conclusions of fact and law:

"(1) The plaintiff is a foreign corporation, organized under the laws of the state of Mississippi, and has filed with the secretary of the state of Texas a copy of its articles of incorporation, and received from said officer a permit to do business in the state of Texas. (2) On the 12th day of February, 1896, the defendant, I. Looney, executed and delivered to the plaintiff his written order or contract, whereby he ordered of plaintiff certain machinery, agreeing to pay therefor the sum of \$650, less all freight to the town of Ben Arnold, Texas; the said machinery to be shipped on or about the 15th day of June, 1896. Under said contract, the plaintiff was to pay the freight on the machinery to Ben Arnold, Texas; and that was the place of delivery. (3) On the 21st day of February, 1896 (9 days after the giving of the order), the plaintiff received from the defendant a written cancellation or repudiation of the order. Said notice of repudiation was received

by the plaintiff at the place where its factory is situated,—Corinth, Miss. (4) The amount agreed to be paid by the defendant for the machinery was \$163.44 more than what the machinery would have cost the plaintiff delivered at Ben Arnold, Texas. (5) At the time the plaintiff received the notice of repudiation of the contract, the plaintiff had not taken any steps towards shipping the machinery, and had not shipped the same, or any part thereof. (6) There was no evidence whatever introduced to show what was the market value of the machinery at any time or place.

"Conclusions of law: (1) I conclude that the measure of damages for the plaintiff's recovery is the difference between the contract price for the machinery and the market value of same in the condition they were in when the plaintiff received from the defendant the notice of repudiation of the order. (2) I conclude the measure of the plaintiff's damage is not the difference between the contract price and what the machinery would have cost the plaintiff delivered at Ben Arnold, Texas. (3) I conclude that the plaintiff, not having made out its case under the correct rule for a recovery herein, is not entitled to recover; and I find for the defendant, I. Looney."

The assignments of error complain of the conclusion reached by the trial court upon the measure of damages. The appellant contends that it was entitled to damages for the profits that it lost by reason of the appellee countermanding the trade and refusing to accept the machinery. The recovery of profits for the breach of a contract of this character may be permitted in certain cases; but under the facts as found in the record, and as stated by the court, we believe that its conclusion as to the measure of damages in this case was correct. We find no error in the record, and the judgment is affirmed. Affirmed.

#### AKES et al. v. SANFORD.

(Court of Civil Appeals of Texas. Nov. 9, 1898.)

##### APPEAL BOND—EXECUTION AGAINST SURETIES.

Where a mandate of an appellate court directs plaintiff in error and the sureties on his bond to pay all costs in the court below, execution may issue against them for such costs, though pending the proceedings in error certain land was sold, under an order of sale, for a sum insufficient to pay the judgment, and which was applied by the sheriff to the payment of costs, as the sureties had no right to have such sum applied to their benefit, and not on the judgment proper.

Appeal from district court, Milam county; W. G. Tallaferrro, Judge.

Action by D. H. Sanford against Ike Akers. Judgment for plaintiff, and defendant brought error to the appellate court, which affirmed the judgment (39 S. W. 952), and rendered a judgment for costs against defendant and the

sureties on his writ of error bond. From an order directing execution against defendant and said sureties, they appeal. Affirmed.

W. A. Morrison, for appellants. N. H. Tracy, for appellee.

KEY, J. December 4, 1896, appellee recovered judgment against Ike Akes for the sum of \$156.53 and all costs of suit, amounting to \$27.05, with foreclosure of a lien on certain real estate. January 29, 1896, Akes perfected a writ of error to this court, with W. A. Morrison and Leonard Isaacs as sureties on his writ of error bond, which bond was conditioned "that the said Akes would prosecute his said suit with effect, and pay off and discharge all the costs that have accrued in the court below, or that may accrue in the court of civil appeals and in the supreme court." While the case was pending in this court an order of sale was issued in the court below for the sale of the land described in the judgment; and on March 7, 1896, the land was sold (appellee, D. H. Sanford, becoming the purchaser) for the sum of \$75. The sheriff who made the sale appropriated the sum of \$52.20 to the payment of the costs which had then accrued in the case, and credited the balance of the purchase money on the judgment. December 16, 1896, this court affirmed the judgment of the lower court, and rendered judgment against Akes, as principal, and Morrison and Isaacs, as sureties, for all the costs; and a mandate was issued by this court, and filed in the court below on the 27th day of March, 1897. On May 20, 1897, the plaintiff, Sanford, filed in the court below a motion asking the court to make an order directing the clerk to issue execution against Ike Akes, W. A. Morrison, and Leonard Isaacs for \$52.20. Akes and Morrison answered the motion by exception and by general denial. The judgment of the court, after reciting the facts as above stated, reads as follows: "It is therefore considered, ordered, adjudged, and decreed by the court that the plaintiff, D. H. Sanford, do have and recover of and from said Ike Akes, as principal, and W. A. Morrison and Leonard Isaacs, as sureties, the said sum of \$52.20, the amount of the said costs in this court,—they being liable by reason of said writ of error bond, and by reason of the fact that the property was not sold for enough to satisfy plaintiff's judgment,—for which the plaintiff may have his execution, and it is ordered accordingly. To which ruling of the court and judgment the said defendants, Ike Akes and W. A. Morrison and Leonard Isaacs, excepted, and in open court gave notice of appeal to the court of civil appeals of the Third supreme judicial district."

We do not think the appellants have any meritorious ground of complaint against the action of the court. It is not shown that they will be compelled to pay the debt twice.

The \$52.20 of the proceeds of the sale of the land, applied by the sheriff to the payment of the costs, reduced to that extent the amount that would have been applied as a payment to the plaintiff's debt. Therefore Akes still owes the plaintiff that amount of money. As to the sureties, Morrison and Isaacs, against whom judgment was rendered in this court for all costs, they have paid nothing; and, as the plaintiff's debt was secured by a lien on the real estate, they had no right to insist that any of the proceeds of the sale of the real estate shall be applied to the payment of costs, so as to release them from their liability. While the sheriff may have had the right to appropriate the \$52.20 to the payment of the costs, as between the plaintiff and the defendant Akes, and the sureties on his bond, the matter stands as though \$75, the entire amount for which the land sold, had been credited on his debt, and he had then paid the \$52.20 costs, in which event he would have been subrogated to the rights of the officers entitled to the costs, including the right to have an execution issued for said costs. The action of the court has attained the ends of justice, and the judgment will be affirmed. Affirmed.

#### SHIPPEY et al. v. HOUGH.

(Court of Civil Appeals of Texas. Oct. 2, 1898.)

##### HOMESTEAD—SELECTION BY WIDOW.

1. Where a husband and wife occupied as their homestead more than 200 acres of land at his death, and she continuously after his death asserted her right therein, on partition she is entitled to a homestead of 200 acres, although neither she, nor she and her husband, actually occupied and used 200 acres of the homestead, and she designated the 200 acres claimed as such after partition suit was commenced.

2. Where a husband and wife occupied as their homestead a tract of land exceeding 200 acres, the wife, on the death of the husband, may select any 200 acres of the land as her homestead, notwithstanding the remainder was left irregular in form.

Appeal from district court, McLennan county; Marshall Surratt, Judge.

Action by Martha M. Shippey and others against Nettie Hough for partition and to try the title to land. From the decree rendered, plaintiffs appeal. Affirmed.

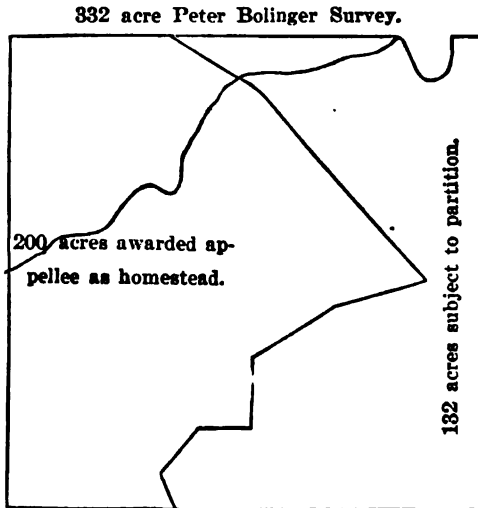
The nature and result of this suit is thus stated in appellants' brief:

"Appellants, Martha M. Shippey, C. W. Shippey, George W. Shippey, and Norman F. Hough, as plaintiffs in the court below, brought suit in trespass to try title and for partition against Nettie Hough, the appellee, claiming an undivided one-half interest in and to a tract of 320 acres of land, known as the 'Peter Bollinger Survey,' and also for other lands, not necessary to mention here. The respective interests of the appellants were alleged to be as follows: Martha M.

Shippey, an undivided one-third interest; Norman F. Hough, one-twelfth interest; George W. Shippey, one-twelfth interest,—making in all an undivided one-half interest of appellants. The appellee pleaded in the court below general demurrer, plea of not guilty, general denial, and further a special answer to the effect that all other property sued for, excepting the 320-acre survey, was the community property between herself and deceased husband, and there being no children born to them, nor no child or children of the said R. S. Hough surviving him, she inherited all of his community property under the statute; that, of the 320-acre survey sued for, she pleaded that a homestead of 200 acres, established on said land previous to and at the time of the death of the said R. S. Hough, was not subject to partition; and also pleaded a claim for improvements upon the same, but admitted that in view of the fact of her occupancy of the said land, which she alleged was not in opposition to the claim of these appellants, and in view of the claim that appellants made for rents and profits, that she was not entitled to pay for improvements, and appellants were not entitled to rents and profits; and claimed to have held, as a tenant in common with the appellants herein, the balance of said 320 acres of land, not her homestead, not adversely to the appellants; and prayed that 200 acres, homestead tract, be set aside to her, and not partitioned, and that one-half of said homestead tract in fee be set apart to her, so as to adjoin one-half of the remaining part of said land to be allotted to her in fee, so that it all might lie in one body, etc.; and further prayed that said homestead tract as described in Exhibit A, setting out same in metes and bounds, be set apart to her, for and during her natural life, etc. A jury having been waived, the cause was submitted to the court upon the law and fact, and judgment was rendered in substance as follows: That said Peter Bolinger survey contained 332 acres of land, which was the separate property of appellee's husband, R. S. Hough, at the time of his death; that, of said 332 acres of land, the appellee, Nettie Hough, should hold as her homestead 200 acres, which 200 acres were designated and surveyed out in accordance with the statute since the institution of this suit, leaving 132 acres subject to partition between appellants, who were entitled to one-half the same, and the appellee, who was entitled to the other half. Commissioners were appointed to report at the following term of court, and were directed to partition only the said 132 acres, setting apart, under the statute, one-half the same in value to these appellants jointly, and the remaining half to appellee. Which judgment was duly excepted to at the time it was rendered in open court, and notice of appeal given to this honorable court; and these appellants duly filed their appeal bond, assigned errors, and in all things duly perfected their appeal to this court.

"The cause was tried upon an agreed statement of facts, there being no issue or conflict in the testimony whatever, and the following is a statement of all the material evidence bearing in any manner upon the questions raised in this appeal: Appellee, Nettie Hough, married R. S. Hough, and they lived together as man and wife until August 25, 1885, when R. S. Hough died. No child or children were born to them, and the said R. S. Hough left no child, nor the descendant of any child, surviving him, but left, as his heirs at law, appellee, Nettie Hough, his wife, and ——— Hough, his mother, Martha M. Shippey, a sister, and his two brothers, Norman F. Hough and George W. Hough, these being all the brothers and sisters that are living, his father being dead. The mother of R. S. Hough conveyed all her interest, by warranty deed, in the estate of R. S. Hough, to appellant Martha M. Shippey. Prior to appellee's marriage with R. S. Hough, the 332 acres of land known as the 'Peter Bolinger Survey' was patented to R. S. Hough, and was his separate property. Appellee and her husband took possession of said tract of land in June, 1873, and lived upon it continuously as their homestead until the death of R. S. Hough, at which time some 30 or 40 acres of it was in cultivation, the balance not being in cultivation nor under fence. Since the death of R. S. Hough, appellee resided on same continuously until January, 1895. That the house burned down that she and her husband, R. S. Hough, lived in some six or eight years ago; and appellee received the insurance money on the house and contents, to the extent of about \$1,000, and built another house, at or near the same place, on said 332 acres of land that the first was built; also built a cistern, barn, and other outhouses, and inclosed the entire tract of 332 acres with cedar posts and barbed-wire fence, placed all of it, except 9 or 10 acres, in a good state of cultivation by tenants, and using the same as her own, and paid taxes in her name to this date. Prior to the filing of this suit, said appellee had never designated any particular portion of said 332 acres as a homestead, and that said R. S. Hough, prior to his death, had never designated any particular portion of said 332 acres as his homestead. Appellee has continued to use the property as her homestead ever since the death of Hough, has acquired no other, etc. It is agreed that all the other tracts of land sued for was the property of appellee, being community property between her husband and self; that since the institution of this suit, and shortly after it was filed, appellee designated and caused to be surveyed, as and for her homestead, out of the said Peter Bolinger survey, and including said homestead improvements, 200 acres in area, being the same described in her answer as Exhibit A, and set forth specifically in said agreed statement of facts by metes and bounds. This survey was made without any notice to appellants in this cause, and was a

voluntary survey, which appellee ordered and caused to be made for her homestead, and was made regardless of the interests of the parties to this suit, and was made so as to include in the 200 acres the best part of said land, and the remaining land left was intrinsically worth less in value per acre than that included in the homestead, and, owing to the shape of the land that was left, it was still further decreased in value, said survey of the homestead having been made without regard to the effect it would have on the remaining land. The following rough sketch will approximately show the survey of the homestead and the shape of the land remaining, one-half of which only was awarded to these appellants:



"It was admitted that the appellants were entitled, as the heirs at law of R. S. Hough, to an undivided one-half interest in his separate property; and it was further admitted that R. S. Hough during his lifetime had never designated any particular homestead on said 320 acres of land, and had never had any occasion to do so, but had simply improved a portion of it, and lived upon it, and claimed same as his homestead, and was so living there at the time of his death."

It is proper to state further that the decree adjudged the plaintiffs to be the owners of an undivided one-half interest in 200 acres set apart to the defendant as her homestead, subject only to her right to use the entire 200 acres as a homestead; and it provides, in the event of her death or abandonment of the homestead, that the same shall be subject to partition.

Clark & Bolinger, for appellants. D. A. Kelley, for appellee.

**KEY, J.** (after stating the facts). It is contended by counsel for appellants that appellee's homestead right, as against the claim of appellants, is limited to the 30 or 40 acres

of land in actual use by appellee and her husband at the time of the latter's death. We ruled against this contention on a former appeal in this case, and we see no reason to change the ruling then made. *Hough v. Shippey* (Tex. Civ. App.) 40 S. W. 332. It cannot be denied that if Hough were still alive, and asserting a homestead right, he could hold 200 acres of the land as a homestead, although he actually used less than that quantity; and we held on the former appeal, and still hold, that the right of the surviving spouse in the homestead is as great as that of husband and wife, if both were asserting the homestead exemption.

The further proposition is submitted that, if appellee had the right to select 200 acres as her homestead, she had not the right to run zigzag lines, leaving the remainder of the survey irregular in form, and secure thereby the most valuable part of the survey as a homestead. We must also rule against this contention. The right to select the homestead is not affected by the fact that the better land has been selected, and that of less value left subject to the claims of others. The law does not require the homestead to be in any particular form, and the right of selection necessarily means the right to take such as may be desired; and, as persons having the right to select usually take that believed to be the best, it is a reasonable supposition that, in allowing the right to select the homestead, it was in contemplation of the legislature that the best land would be selected for homestead purposes. Without further discussion, we cite *Ball v. Lowell*, 56 Tex. 583; *Cervenka v. Dyches* (Tex. Civ. App.) 32 S. W. 321; *Gilliam v. Null*, 58 Tex. 304; *Railroad Co. v. Winter*, 44 Tex. 614. The judgment is affirmed.

**NEW YORK & T. S. S. CO. v. WEISS et al.**  
(Court of Civil Appeals of Texas Oct. 26. 1898.)

**CARRIERS—EVIDENCE OF DELIVERY—DAMAGES—MARKET VALUE OF GOODS.**

1. A receipt given by the carrier to a transfer company, to whom consignor had delivered the goods, is sufficient to show a delivery by the consignor to the carrier.

2. In an action by the consignee against the carrier for failure to deliver goods shipped, where there was evidence that the goods had no market value at the place of delivery, it was proper to admit evidence of the amount paid for them in other cities, where it was also shown that the prices paid were those charged by dealers in such goods, and that the goods were reasonably worth the same amount at the place of delivery.

Appeal from district court, Bexar county: J. L. Camp, Judge.

Action by W. H. Weiss and others against the New York & Texas Steamship Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Carlos Bee, for appellant. *Lewy & Sehorn*, for appellees.

FLY, J. W. H. Weiss sued appellant to recover the value of a case of goods consigned to it in New York City, to be delivered at San Antonio, Tex., and which was never delivered. Appellant asked that the International & Great Northern Railroad Company be made a party, alleging a delivery of the goods to it. There was judgment against appellant for the value of the goods. Mrs. Weiss testified that she delivered the goods to the Union Square Transfer Company of New York, and it clearly appears that appellant gave a receipt to the transportation company for a case of goods consigned to A. B. Frank & Co. at San Antonio, of which firm W. H. Weiss was the general manager. The goods were never delivered. It reasonably appears that the goods were never delivered to the International & Great Northern Railroad Company by appellant. We think the testimony establishes the fact of the delivery of the goods to appellant. The transfer company was acting for Mrs. Weiss, and a receipt to it for the goods showed, under the facts, a delivery by the owner to appellant. It was in evidence that the goods sued for had no market value in San Antonio, and it was proper to allow proof of the amount paid for them in Paris and New York City; the testimony being to the effect that the prices paid were those charged by dealers in such goods, and that the goods were reasonably worth the same amount in San Antonio. We think the proof of value was sufficient. The judgment is affirmed.

#### NAFE et al. v. HUDSON et al.

(Court of Civil Appeals of Texas. Nov. 12, 1898.)

#### TRESPASS—PLEADING—DAMAGES.

1. In trespass quare clausum fregit for injuries not affecting the freehold, the defense that the premises were in the exclusive possession of a lessee must be specially pleaded.
2. In trespass quare clausum fregit, a plea in bar admits plaintiff's title and right of possession.
3. Nominal damages are recoverable for a trespass on lands, where no actual damages were sustained.

Error from district court, Haskell county; Ed. J. Hamner, Judge.

Trespass quare clausum fregit by H. Nafe and others against W. T. Hudson and others. There was a judgment for defendants, and plaintiffs bring error. Reversed.

H. R. Jones, for plaintiffs in error. Foster & Scott, for defendants in error.

TARLTON, C. J. On January 1, 1897, the plaintiffs in error (plaintiffs also in the court below) were the owners of a certain tract of 320 acres of land located in Haskell county. On the night of that day, W. T. Hudson

and other defendants in error entered upon the premises described, with about 300 head of cattle, and remained there during the night. This suit in trespass quare clausum fregit is to recover damages for the destruction of the grass upon the premises, and for injury to the soil. The defendants prevailed in the trial before a jury, and hence this writ of error.

The evidence is conflicting as to the condition of the inclosure about the land. The testimony on the part of the plaintiffs tends to show that the fence was in good condition. That on the part of the defendants tends, on the contrary, to show that it was so out of repair as that the premises were practically a part of the commons. It appears that at the date of the entry the premises were in the possession of one C. C. Riddle, as the tenant at will of the plaintiffs, and that after the entry Riddle approved and ratified the act of Hudson and his co-defendants who had made the entry. On the issue of damages the evidence indicates that the injury was slight, if not trivial. The court, among other matters, substantially charged the jury as to the nonliability of the defendants if the premises were in the possession of a tenant at will, and this instruction is complained of. The lessor cannot maintain an action for injury to premises in the exclusive possession of the lessee, unless the injury affects or lessens the value of the freehold. *Reynolds v. Williams*, 1 Tex. 311; *Railway Co. v. Smith*, 3 Tex. Civ. App. 483, 23 S. W. 89. To justify himself, however, under such a condition, the defendant must specially plead the tenancy by virtue of which the owner is deprived of the exclusive right of possession. In an action of the character here involved, the plea in bar does not put in issue the existence of the plaintiff's title, or of his right of possession. "In actions of trespass quare clausum fregit," says Mr. Chitty, "the plea of not guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession or right of possession of that place, which, if intended to be denied, must be traversed specially." 1 Chit. Pl. p. 520; *Carter v. Wallace*, 2 Tex. 207. The record, we think, excludes the existence of such malice or willfulness in the trespass complained of as would entitle the plaintiffs to the recovery of exemplary damages. Hence the defendants in error contend that, as no actual damages were sustained, the verdict and judgment should, without reference to any other consideration, be affirmed; but this suggestion we are unable to heed, because the law attaches to every trespass the consequence at least of nominal damages. The right to a recovery of damages for trespass cannot be denied, however inconsiderable the injury. The cause of action exists, though the damages may be nominal. *Champion v. Vincent*, 20 Tex. 311; *Farrar v. Talley*, 68 Tex. 352, 4 S. W. 558; *Brown v.*



Bridges, 70 Tex. 664, 8 S. W. 502. For the reasons stated, the judgment is reversed, and the cause is remanded.

**WESTERN UNION TEL. CO. v. SWEETMAN.<sup>1</sup>**

(Court of Civil Appeals of Texas. Oct. 19, 1898.)

**TELEGRAPHS—DELAY IN DELIVERY—DAMAGES—EVIDENCE—MENTAL ANGUISH.**

1. Mental anguish caused by negligence in delivering a telegram is an element of damages for which there can be a recovery, whether accompanied by injury to the person or not.

2. It is no defense to an action for negligently delivering a telegram that plaintiff did not pay for its transmission.

3. A telegraph company is charged with notice of the relationship between the addressee and a sick person concerning whom the telegram is sent, whether such relationship is disclosed therein or not.

4. A telegraph company receiving a message relating to serious sickness or death must take notice of the purpose for which it is sent as disclosed by it, and that the addressee has a serious interest in its prompt delivery; and this, though the latter had no contract with the company.

5. Where there was no demand at the sending or receiving office for extra pay for delivering a telegram outside the free limits, and no notice of such demand was noted on the envelope containing the message (it being stated thereon that none should be paid the messenger unless so noted), the company waived extra pay by accepting and attempting to deliver the message.

6. A charge that the company could have discharged its liability by delivering a telegram at the address indicated within a reasonable time, and, if this was beyond the free limits, it could demand further pay before it was bound to deliver there, is not on the weight of the evidence.

7. Where plaintiff, in an action for negligence in delivering a telegram, alleged that he had "suffered mental anguish, and was prostrated in body and mind," a charge stating that he had sued to recover for "injury to his feelings" would include both mental and bodily feelings.

8. The sender of a telegram is not charged with notice that the place of delivery is outside the company's "free limit," and his right to recover for negligence in delivery does not depend on his offering extra pay for delivery outside the free limit.

9. Even though the company notified the sender of a telegram that the place of delivery is outside its "free limits," it assumes responsibility, where it changes the point of delivery to within the free limit.

10. Evidence of the manager of the company in an action for negligence in delivering a message at the wrong place, to the effect that time was saved by delivering it there to be forwarded to plaintiff, and not holding it until extra pay was demanded, is not admissible, since that would not exonerate the company.

11. What the messenger said to the manager, after he delivered a telegram at the wrong place, is not admissible in an action against the company for such negligence, being hearsay.

Appeal from district court, Webb county; A. L. McLane, Judge.

Action by W. H. Sweetman against the

Western Union Telegraph Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Jno. A. Green, Sr., and Jno. A. Green, Jr., for appellant. E. A. Atlee and R. L. Randall, for appellee.

FLY, J. On July 23, 1895, between 7 and 8 o'clock a. m., Joseph Sweetman, the father of appellee, delivered a message to appellant, in Hempstead, Tex., addressed to his son, at the "roundhouse," in Laredo, Tex., as follows: "Come at once, if you can; my wife is dying,"—and paid the fee for the same. No demand was made at either end of the line for extra compensation for delivery of the message at a point beyond what is denominated the "free limits." No effort was made to deliver the message at the roundhouse, but the message was carried to the railroad depot, which was in the free-delivery limits, and there delivered to a person who was not authorized to receive it. This unauthorized person did not give the message to appellee until it was too late for him to catch the only train that left that day upon which he could reach Hempstead. The mother of appellee died on the day the message was sent, and, on account of the negligence of appellant in delivering the message, appellee was prevented from attending the funeral of his mother, and suffered much mental anguish thereby. By the exercise of ordinary care, the message could have been delivered in time for appellee to have attended the funeral.

The first assignment of error complains of the refusal of the court to sustain a general demurrer to the petition, on the ground that the demurrer was "improperly overruled because there was no allegation in the petition that the plaintiff paid anything for transmission of the message, or suffered any pecuniary loss or physical suffering by reason of the negligence in its delivery. The proposition, under the assignment of error, is to the effect that "neither mental pain nor anguish, unaccompanied by any actual damages, will give a cause of action." The proposition is untenable, for it is the law in this state "that mental anguish, whether accompanied by injury to the person or not, is a proper element of actual damages, and, when caused by the negligence of the telegraph company in failing to deliver a message, compensation therefor may be recovered by the injured party." *Telegraph Co. v. Coffin*, 88 Tex. 94, 30 S. W. 896. In the case cited the message was paid for by the sender, and this was noticed as influencing the decision. If the liability of telegraph companies for mental anguish caused by their negligence is made to rest upon proof of who paid the fee for the message, it rests upon a very insecure foundation, and, in fact, would be utterly indefensible. What has been said disposes of the second assignment of error as well as first.

<sup>1</sup> Writ of error denied by supreme court.

The third assignment is to the effect that the court erred in overruling the general demurrer, because the message set out gave no notice to the telegraph company of the relationship existing between the sick person and the plaintiff, and it is not alleged that the fact of the relationship was made known to the company when the message was filed. The Coffin Case, above cited, is the authority presented by appellant to sustain the assignment. It not only fails to sustain it, but, on the other hand, holds "that the telegraph company is charged with notice of the relationship which actually exists between the parties named, whether disclosed by the terms of the message or not."

The fourth assignment of error is to the effect that the court erred in overruling the general demurrer, because the telegraph company made no contract with the plaintiff, and assumed no liability to pay his damages, and received no compensation from him. It is well settled in Texas "that the person for whose benefit a telegraphic message is sent, and who is named in the message, or of whose interest therein notice is given to the company at the time, may sue upon it in case of injury from the negligence of the telegraph company"; and "that the company receiving the message must take notice of the purposes for which the message was sent, as disclosed by the language of the message, and, in case of messages relating to serious sickness or death, it must be held to know that the person for whose benefit it is sent has a serious interest in the prompt delivery of it." *Telegraph Co. v. Coffin*, above cited; *Telegraph Co. v. Carter*, 85 Tex. 586, 22 S. W. 961; *Telegraph Co. v. Linn*, 87 Tex. 7, 26 S. W. 490.

The fifth assignment of error, in addition to questions disposed of in the preceding assignments, attacks the proposition that mental anguish can form the basis for damages. That is not an open question in Texas, but has been settled adversely to the contention, through numerous decisions.

The charge of the court is as follows: "You are instructed that the defendant could have discharged its liability by delivering, or offering to deliver, the message at the roundhouse in Laredo, within a reasonable time after its receipt by the defendant, and, if the roundhouse was beyond the free-delivery limits of defendant's office, it could demand further pay to cover cost of such delivery before it was bound to leave the message there; and, if you believe that the defendant undertook to find the plaintiff at some place other than the roundhouse, then it was required to exercise reasonable care and diligence to find plaintiff, and to deliver the message to him within a reasonable time; so that if you believe that if the message had been taken to the roundhouse, or that if the messenger had looked for plaintiff in the yard it would have been received by the plaintiff at an earlier hour than he did receive it, and that he could

have caught the train to Hempstead, and you further believe that the plaintiff suffered any mental anguish or pain by reason of the delay in receiving the telegram, then you should find for plaintiff, and allow him such a sum as you believe will be a fair and reasonable compensation for his injured feelings. If, however, you believe that the plaintiff received the telegram from the hands of Leyendecker as soon or sooner than he would have received it from the hands of the messenger or if it had been left at the roundhouse, or if you believe that after plaintiff did receive it he had time to catch the one o'clock train for Hempstead, then you will find for the defendant."

The charge is attacked in the sixth assignment, because it informed the jury that appellant could have met its liability by a delivery or offer to deliver at the roundhouse in Laredo, when said roundhouse was out of the free-delivery limits, and when appellee was not at the roundhouse, and because it was upon the weight of the testimony. We do not think either of the objections meritorious. The message was directed to appellee at the roundhouse, and the delivery, or offer of delivery, would, as the court stated, have released appellant from liability. Appellant has no ground for objection to this plain statement. There was no demand at the sending or receiving office for extra compensation for delivering the message outside the free limits, and no notice of demand for extra compensation was noted on the envelope in which the message was inclosed, and it was distinctly stated thereon that none should be paid the messenger unless so noted. Appellant waived extra compensation by accepting and attempting to deliver the message. It can form no defense when the question is sprung for the first time after the negligence has taken place and the liability attached. The charge is not on the weight of the evidence. The charge of the court is not open to the criticisms stated, and is fully supplemented by special charges presenting to the jury every phase of the case made by the evidence.

Appellee alleged in his petition that he had "suffered mental anguish, and was prostrated and broken down in body and mind," and the court in his charge stated that appellee had sued "to recover damages for injury to his feelings." This is assigned as error. The term "injured feelings" would properly include both mental and bodily feelings. There is no authority to support the contention of appellant that, if the place of delivery was to be outside the free-delivery limit, the injured party could not recover unless the sender had paid or tendered the extra compensation, whether he had any notice that the point of delivery was outside the limit or not. The sender of the message was not charged with notice that the roundhouse was outside the free limit, and, if he had been notified, appellant voluntarily assumed the re-

sponsibility of the delivery by changing the point within the free limit. Appellant agreed with the sender to deliver the message to appellee at the roundhouse in Laredo for the amount charged, and when it was received by the agent in Laredo no effort was made to obtain extra compensation. In fact the question of extra compensation did not influence its action in any manner, and has, under the facts, no possible bearing upon the question of its liability.

The evidence of the manager excluded by the court was clearly inadmissible. That as to the effect that time was saved by not holding the message until extra compensation was demanded would not have tended to exonerate appellant from negligence, and the statement made by the messenger to the manager when he returned was hearsay. The messenger was on the stand, and all the material points in the excluded testimony were in evidence. There was evidence before the jury that justified the finding that the appellant was guilty of negligence in the delivery of the message, that appellee was thereby prevented from being present at the burial of his mother, and that he sustained damages in the sum found by the jury. We fail to discover any error requiring a reversal, and the judgment is therefore affirmed.

### WOESSNER v. H. T. COTTAM & CO., Limited.<sup>1</sup>

(Court of Civil Appeals of Texas. Nov. 9, 1898.)

FOREIGN CORPORATIONS—FRANCHISE TAX—CONSTITUTIONAL LAW—INTERSTATE COMMERCE—SALES OF MANUFACTURED GOODS.

1. Sayles' Rev. Civ. St. 1897, art. 5243i, provides, inter alia, that every foreign corporation doing business in the state, which fails to pay annually a specified franchise tax, shall forfeit its right to do business in the state, and shall be denied the right to sue or defend in any of the courts of the state. *Held*, that the act is unconstitutional and void, in so far as it attempts to tax interstate commerce.

2. An action on a note executed for goods sold to the buyer in Texas by the manufacturer, whose place of business was in Louisiana, relates to interstate commerce, so that the right to sue in the former state cannot be denied by such state for failure to pay a franchise tax.

Appeal from district court, Travis county.

Action by H. T. Cottam & Co., Limited, against Walter Woessner. From a judgment for plaintiff, defendant appeals. Affirmed.

This suit was instituted the 23d of May, 1898, by appellee, H. T. Cottam & Co., Limited, a corporation incorporated under the laws of Louisiana, against appellant on a note executed by him to appellee March 1, 1897, for \$1,130.30, due on or before the 1st day of April, 1897, payable in New Orleans, La., bearing 10 per cent. interest per annum from date, and providing for 10 per cent. attorney's fees for collection. Defendant answered, claiming that plaintiff was a foreign corpora-

tion; that on September 19, 1892, the company filed with the secretary of state a copy of its articles of incorporation, but that on May 1, 1898, it refused to pay to the secretary of state the franchise tax of \$110, due by it, as required by article 5243i, Sayles' Rev. Civ. St. 1897, notwithstanding demand for the tax was duly made, and that it still refuses to pay the tax; that on May 20, 1898, before suit, the secretary of state, because of the refusal to pay the tax, forfeited the right of appellee to do business in Texas, and to sue or defend in the courts of this state, as required by the article of the statutes before referred to. Prayer that no judgment be entered against defendant. The case was submitted to the court upon an agreed statement of facts, under article 1293, Sayles' Rev. Civ. St. 1897, and judgment was rendered for appellee in the sum of \$1,398.70, from which this appeal is taken.

The agreed statement of facts upon which the case was tried is as follows:

"(1) That H. T. Cottam & Co., Limited, is a foreign corporation, incorporated and existing under the laws of the state of Louisiana, its capital stock being \$200,000, and its office and place of business being in the city of New Orleans, in said state of Louisiana: that plaintiff has been so incorporated and existing ever since the 11th day of August, 1892, and that during all of such time it has been and is now engaged in the business of interstate commerce,—that is, dealing by the wholesale in goods manufactured by it and other parties in states other than Texas, and selling at and shipping such goods from New Orleans, La., into Texas, to merchants therein,—sometimes said goods being sold on orders taken by plaintiff's traveling salesmen in Texas, such salesmen sending such orders to plaintiff at New Orleans, La., to be accepted and filled by it there, and sometimes said goods being sold upon orders contained in letters written in Texas by merchants therein, to plaintiff at New Orleans, La., to be accepted and filled by it there, all of said orders, whether received through traveling salesmen or direct from Texas merchants, being subject to the approval, acceptance, and filling only by plaintiff in New Orleans, La.

"(2) That said H. T. Cottam & Co., Limited, has no office or place of business in Texas.

"(3) That during the entire months of February and March, 1897, said defendant, Walter Woessner, was a merchant at the town of Beeville, in the state of Texas; that on or about February 2, 1897, one of the traveling salesmen of plaintiff received a written order from defendant at Beeville, Tex., for thirty-five barrels of American Refinery granulated sugar, which sugar was manufactured by plaintiff in the state of Louisiana, and was worth \$565.15; that at the time of receiving such order said salesman forwarded the same, through due course of mail, to plaintiff, and that on or about February 4, 1897, plaintiff received and accepted said order in New Or-

<sup>1</sup> Application for writ of error dismissed for want of jurisdiction.

Leans, La., and, in compliance with same, shipped from New Orleans, La., to defendant at Beeville, Tex., said sugar, which was received by him on or about February 10, 1897.

"(4) That on or about February 15, 1897, defendant, at Beeville, Tex., wrote a letter to plaintiff, addressed it to New Orleans, La., asking it to immediately ship to him at Beeville, Tex., thirty-five additional barrels of sugar, which sugar was manufactured by other parties than plaintiff, in the state of Louisiana, but owned by plaintiff, and was of the value of \$565.15; that on receipt of said letter, to wit, on or about February 17, 1897, plaintiff, in New Orleans, La., accepted the order contained in said letter, and, in compliance therewith, shipped from New Orleans, La., to defendant at Beeville, Tex., said sugar, which was received by him on or about February 21, 1897.

"(5) That on March 1, 1897, the said Walter Woessner, at Beeville, Tex., for and in consideration of the seventy barrels of sugar described in paragraphs 3 and 4 of these facts, made, executed, and delivered to plaintiff his promissory note in writing, amounting to \$1,130.30, payable to the order of plaintiff at its office in New Orleans, La., on or before the 1st day of April, drawing interest from date at the rate of ten per cent. per annum, and providing for ten per cent. additional on the principal and interest as collection fees, if placed in the hands of an attorney for collection, or suit was brought thereon, said note being the same one herein sued on, and that the principal, interest, and collection fees specified in said note are unpaid, and are now due and payable by defendant.

"(6) That on the 19th day of September, 1892, plaintiff filed with the secretary of state of Texas a duly-certified copy of its articles of incorporation; that on or before the 1st day of May, 1898, plaintiff deliberately refused to pay said secretary of state the franchise tax of \$110, as required by article 5243i, Sayles' Rev. Civ. St. 1897, being a law passed by the regular session of the 25th legislature, c. 120, approved May 15, 1897 (page 168 of the Acts of said legislature), notwithstanding said secretary of state, at the proper time, duly demanded the payment of said tax; that plaintiff still refuses to pay said tax, or any part thereof, and now admits that it never will pay the same; that on the 20th day of May, 1898, and prior to the institution of this suit, said secretary of state, because of such refusal, forfeited the right of plaintiff to do business in Texas, which forfeiture was consummated, without judicial ascertainment, by said secretary of state entering upon the margin of the ledger kept in his office relating to foreign corporations the word 'Forfeited,' giving the date of such forfeiture, and which law provides that any corporation whose right to do business may be thus forfeited shall be denied the right to sue or defend in any of the courts of Texas.

"(7) That plaintiff refused to pay the tax

mentioned in paragraph 6 of these facts, upon the sole ground that it was engaged in interstate commerce, and that such tax was a tax upon interstate commerce, and therefore unconstitutional and void."

M. C. Granberry, for appellant.

COLLARD, J. (after stating the facts). The question presented by the record and briefs in this case is, was the appellee, a foreign corporation, prohibited from carrying on interstate commerce in this state, as was done, and from maintaining this suit, because of failure to comply with the statute (article 5243i, Sayles' Rev. St. 1897) in reference to payment of franchise tax? or is the statute referred to constitutional, as applied to interstate commerce? The act of the legislature containing the clause of the statute referred to was passed May 7, 1897, and became a law without the signature of the governor. The article reads as follows:

"Art. 5243i. Franchise Tax of Corporations. Each and every private domestic corporation heretofore chartered under the laws of this state shall pay to the secretary of state, an annual franchise tax of ten dollars on or before the first day of May of each year; and every such corporation which shall be hereafter chartered under the laws of this state, shall also pay to the secretary of state an annual franchise tax of ten dollars, the tax for the first year to be paid at the time such charter is filed, and the secretary of state shall not be required or permitted to file such charter until such tax is paid, and each succeeding tax shall be paid on or before the first day of May of each year thereafter: providing that any such corporation having an authorized capital stock of over fifty thousand dollars and less than a hundred thousand dollars, shall pay an annual franchise tax of twenty dollars; and every such corporation having an authorized capital stock of one hundred thousand dollars and less than two hundred thousand dollars shall pay an annual franchise tax of thirty dollars, and every such corporation having an authorized capital stock of two hundred thousand dollars or more, shall pay an annual franchise tax of fifty dollars. Each and every foreign corporation heretofore authorized to do business in this state under the laws of this state shall, on or before the first day of May of each year, and each and every such corporation which shall hereafter be so authorized to do business in this state, shall, at the time so authorized and on or before the first day of May of each year thereafter, pay to the secretary of state the following franchise tax: Every such corporation having an authorized capital stock of twenty-five thousand dollars or less, an annual franchise tax of twenty-five dollars. Every such corporation having an authorized capital stock of more than twenty-five thousand dollars and not exceeding one hundred thousand dollars, an annual

franchise tax of one hundred dollars. Every such corporation having an authorized capital stock of over one hundred thousand dollars, an annual franchise tax of one hundred dollars, and in addition thereto, an annual franchise tax of one dollar on every ten thousand dollars of authorized capital stock, over and above one hundred thousand dollars, and not exceeding one million dollars; and if such authorized capital stock exceed one million dollars, then such corporation shall pay a still further additional tax of one dollar for every one hundred thousand dollars over and above one million dollars. Any corporation, either domestic or foreign, which shall fail to pay the tax provided for in this article at the time specified herein, shall, because of such failure, forfeit its right to do business in this state, which forfeiture shall be consummated without judicial ascertainment by the secretary of state entering upon the margin of the ledger kept in his office relating to such corporations, the word 'Forfeited,' giving the date of such forfeiture, and any corporation whose right to do business may be thus forfeited, shall be denied the right to sue or defend in any of the courts of this state, and in any suit against such corporation on a cause of action arising before such forfeiture, no affirmative relief may be granted to such defendant corporation, unless its right to do business is revived, as provided in article 5243j of this chapter. All transportation companies now paying an annual income tax on their gross receipts in this state, shall be exempted from the franchise tax above imposed."

It cannot be doubted that the note sued on, being executed for purchases of goods sold to appellant in Texas by appellee in Louisiana, related to interstate commerce. *Miller v. Goodman*, 91 Tex. 41, 40 S. W. 718. It is too well settled now, by numerous decisions of this state and the supreme court of the United States, that the state legislature has no power to regulate interstate commerce, or to place restrictions upon it, to be longer an open question. *Miller v. Goodman*, supra, and authorities cited; *Allen v. Buggy Co.*, 91 Tex. 24, 40 S. W. 393, 714; *Crutcher v. Kentucky*, 141 U. S. 58, 11 Sup. Ct. 851, and authorities cited; *Pickard v. Car Co.*, 117 U. S. 34, 6 Sup. Ct. 635; *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592; *Hoadley's Adm'rs v. San Francisco*, 124 U. S. 640, 8 Sup. Ct. 659; *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1; *Stoutenburgh v. Hennick*, 129 U. S. 141, 9 Sup. Ct. 256; *McCall v. California*, 136 U. S. 104, 10 Sup. Ct. 881; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. 958.

The statute, in so far as it attempts to lay a tax on interstate commerce, is unconstitutional and void. There is an essential difference between this case and many where foreign corporations attempt to do business in

the state of a local character, as where they actually carry on a local business or trade, such as insurance business, loaning and building associations, manufacturing, and other business which must and can only be local in character, when it has been held that they cannot set up such business, and carry it on, without complying with the state laws. *Crutcher v. Kentucky*, 141 U. S. 59, 11 Sup. Ct. 851, and authorities cited. A foreign corporation doing a domestic local business in the state must become domiciled here by complying with the state laws and paying taxes, as is required of ordinary citizens. In so far as the statute in question relates to interstate commerce, it is void, and cannot be enforced. It cannot be applied to the transactions involved in this suit. The judgment of the lower court is affirmed. Affirmed.

# MARSHALL et al. v. ATASCOSA COUNTY et al.

(Court of Civil Appeals of Texas. Oct. 26, 1898.)

## APPEAL—ASSIGNMENTS OF ERROR.

1. Under the rules of the supreme court, an assignment of error in "sustaining defendants' general demurrer and four special exceptions" cannot be considered in reference to the special exceptions.

2. Although an assignment of error in sustaining a general demurrer and special demurrers is sufficient as to the general demurrer, the court will not consider it, as, even if the petition be good as against the general demurrer, there might have been no error in sustaining the special demurrers as to which there is no valid assignment of error.

Appeal from district court, Atascosa county; M. F. Lowe, Judge.

Action by W. M. L. Marshall and others against Atascosa county and others. From an order sustaining demurrers to the petition and dismissing the action, the plaintiffs appeal. Affirmed.

J. M. Eckford, for appellants. George M. Martin and W. O. Read, for appellees.

JAMES, J. In this case the only assignment of error is: "The court erred in sustaining defendants' general demurrer and four special exceptions, and dismissing plaintiffs' cause of action." Under rule 26 prescribed for the government of this court, it cannot be considered in reference to the special exceptions. The assignment would probably be sufficient in respect to the general demurrer, but it would be of no use for us to pass on that question, for, if the petition be held good as against a general demurrer, still the court may not have erred in sustaining the special demurrers, and there is, under said rule, no valid assignment here of error in respect to them. The judgment is therefore affirmed.

**BLOUNT v. LEWIS.**

(Court of Civil Appeals of Texas. Nov. 9, 1898.)

**APPEAL—STATEMENT OF FACTS—TIME OF FILING—  
MOTION TO STRIKE FROM RECORD—  
SUFFICIENCY OF SHOWING.**

1. Where a statement of facts is indorsed as filed in the trial court on a certain day, the affidavit of the clerk of such court is insufficient to show that it was filed at a later date, and dated back by order of the judge.

2. Where a statement of facts, although indorsed as filed within the time allowed, is shown by the certificate of the trial judge to have been filed after the expiration of that time, it will be stricken from the record.

Appeal from district court, San Augustine county; Tom C. Davis, Judge.

Action by Henry Lewis against E. B. Blount, in which the defendant appeals. Motion is made to strike the statement of facts from the record. Motion granted.

Price & Davis, for appellant. Geo. E. Gatling, for appellee.

NEILL, J. This is a motion to strike from the record the statement of facts in this case appearing therein, upon the ground that it was filed more than 10 days after the adjournment of the court in which the judgment was rendered. The term of the court ended on the 5th day of March, 1898. By order of the court entered upon its minutes, 10 days were given the parties after its adjournment to prepare and file the statement of facts. It appears from the record that the statement of facts was indorsed: "Filed March 15, 1898. W. J. Garrett, District Clerk." But an affidavit of said district clerk of San Augustine county accompanies this motion, which is, in effect, that the statement of facts was received by him on the 17th day of March, 1898, and by the order of the district judge indorsed filed on the 15th day of March, instead of the 17th day of March. If this affidavit was all, it would not be taken for the purpose of contradicting the date, appearing in the record, of filing the statement of facts. But the following certificate is appended to the statement of facts by the trial judge: "The foregoing contains a correct statement of facts which were proven on the trial of the above-entitled cause of Lewis vs. Blount. I have made up the same from statements furnished me by the plaintiff's and defendant's attorneys, they having failed to agree on a statement of facts. The different statements were handed me on Saturday, at six o'clock p. m. I had to go to Nacogdoches and convene court on Monday following, and I made up the statements Monday night,—the first opportunity I had to make them; and I forwarded them by mail, on Wednesday, as soon as I could get them in the mail. Tom C. Davis, Judge Presiding." The term of the district court of Nacogdoches county began on the tenth Monday after the first Monday in Jan-

uary. Article 22, Rev. St. 1895. That would be the 14th day of March, 1898, when the judge was required to convene the district court of that county. It was on the night of that day, as is shown from his certificate, that he made up the statement of facts. He forwarded them to the district clerk by mail on Wednesday, which was the 16th day of March, 1898. It thus appears from the record that the district clerk could not have received and filed the statement earlier than the 16th day of March, 1898, and that his indorsement as to the date of its filing is not correct. It therefore appearing from the certificate of the district judge attached to the statement of facts that it was filed more than 10 days after the court in which the judgment appealed from was rendered adjourned, the motion is granted, and the statement of facts is stricken from the record. *Hilburn v. Preston* (Tex. Civ. App.) 32 S. W. 703.

**A. B. FRANK CO. et al. v. BERWIND.<sup>1</sup>**

(Court of Civil Appeals of Texas. Oct. 12, 1898.)

**CORPORATIONS—ATTACHMENT BY A DIRECTOR—  
PREFERENCES.**

A director of a corporation in a state of insolvency, but yet a going concern, may, by attachment and levy on its property, gain a preference over other creditors for a debt incurred by such corporation in good faith to such director, since it was permissible for the corporation to voluntarily prefer one of its directors.

Appeal from district court, Uvalde county; Charles J. Gillespie, Special Judge.

The A. B. Frank Company intervened in an action by Edward J. Berwind against the Litho-Carbon Rubber Company. There was a judgment for plaintiff, and the interveners appeal. Affirmed.

Lewy & Sehorn, for appellants. Keller, Johnson & Williams, for appellee.

FLY, J. Appellants herein intervened in a suit instituted by appellee against the Litho-Carbon Rubber Company, alleging that appellee was a director and stockholder of the corporation he had sued, and whose property he had attached, and that they had subsequently attached the property of the corporation, and, by reason of the relation between Berwind and the corporation, that their claims should be held superior to his. It was adjudged that the proceeds arising from the sale of the personal property attached by Berwind should be applied to the payment of his debt. There is but one assignment of error, which is as follows: "The court erred in rendering judgment in favor of plaintiff, Berwind, directing the receiver to pay said Berwind the proceeds of the sale

<sup>1</sup> Writ of error denied by supreme court.

of the personal property which had been levied on by both plaintiff and interveners, because at the time of the levy of plaintiff's said writ of attachment the defendant Litho-Carbon Rubber Company was then an insolvent corporation, and the plaintiff, Berwind, was then a director of said company." The uncontradicted facts show that appellee was a director of the corporation; that he in good faith at different times loaned money to the corporation to enable it to carry on its business; and that while it was a "going concern," and still engaged in business, appellee, to secure payment of his debt, sued the corporation, and obtained a writ of attachment, and levied the same upon the personal property of the corporation. The good faith of appellee is not questioned, but, as stated by appellants in their brief, "the sole question presented by this record is whether or not a director of an insolvent corporation may gain priority of payment over other unsecured creditors of the corporation by suing the corporation, and attaching its property." We premise what we will say by the proposition of law that it is a general rule that an attachment will not lie against property unless the owner thereof could have given a voluntary preference thereon, had he so desired. The question would then arise, could the corporation, while in a state of insolvency, have given a preference to one of its directors to secure him in a debt that was bona fide and just? The weight of authority seems to answer the question in the negative; but it will be noted that in the states so holding there are either statutes forbidding such preference, or the doctrine prevails that, as soon as a corporation becomes insolvent, the directors ipso facto become trustees for the creditors. *Olney v. Conant* (R. I.) 18 Atl. 181; *Corey v. Wadsworth* (Ala.) 11 South. 353; *Clay v. Towle*, 78 Me. 86, 2 Atl. 852; *Haywood v. Lumber Co.*, 64 Wis. 639, 26 N. W. 184; *Gillet v. Moody*, 3 N. Y. 479; *Ingwersen v. Edgecombe* (Neb.) 60 N. W. 1032; *Roseboom v. Warner* (Ill. Sup.) 23 N. E. 339; *Wilkinson v. Bauerle* (N. J. Err. & App.) 7 Atl. 514; *Hays v. Bank* (Kan. Sup.) 33 Pac. 318. In Michigan, however, where it is provided by statute that, as soon as a corporation becomes insolvent, the directors become trustees for all the creditors alike, it has been held that preference may be given to a director or stockholder. *Bank of Montreal v. J. E. Potts Salt & Lumber Co.*, 90 Mich. 345, 51 N. W. 512. In New York, where there is a statute prohibiting preference as to directors, it is held not to apply to the director of a foreign corporation, and he is allowed the remedy of attachment when the corporation is insolvent. *Hill v. Power Co.* (Sup.) 18 N. Y. Supp. 813. Preferences are allowed to directors also in Virginia, West Virginia, Iowa, Missouri, Connecticut, and Vermont. In the late work of Mr. Clark on Corporations (section 244) it is said that, "so long as a corporation is doing

business, there is no privity whatever between the directors or other officers and its creditors." This is, in effect, the Texas doctrine. *Orr & Lindsley Shoe Co. v. Thompson*, 89 Tex. 501, 35 S. W. 473; *American Nat. Bank of Dallas v. Dallas Tinware Mfg. Co.*, 15 Tex. Civ. App. 631, 39 S. W. 955. Under the Texas doctrine the trust relation does not arise between the directors of an insolvent corporation until it has ceased to do business. If there is no trust relation, the director should occupy the position of any other creditor, except, perhaps, that his acts would be scanned more closely, in order that fraud might not be perpetrated. If the director, as in this instance, advanced money in good faith to the corporation to tide it over its difficulties, he should be allowed to use the same means accorded any other creditor to collect his debt. This doctrine is founded upon common sense and justice, although it is denounced as infamous by Mr. Thompson in his "Commentaries on the Law of Corporations" (sections 6496, 6499). Pages of that work are devoted to denunciations of what are styled "the mouthings of judges upon the subject," and yet in that same work (section 4068) it is, in the usual style, insisted that the doctrine must prevail that directors may enter into contracts with, and furnish money to, a corporation, take mortgages to secure the same, and enforce the same; but this seems to be lost sight of in the succeeding parts of the work, and courts are denounced that hold that, although insolvency may have supervened, the right to enforce is not lost. As long as the doctrine prevails in Texas that directors of corporations do not occupy the relation of trustees to creditors of insolvent corporations still engaged in business, just so long must the doctrine be recognized that a director can contract with the corporation, and that his right to enforcement of his contracts shall be the same as that of any other creditor. The expression in the opinion in *Rogers v. Lumber Co.* (Tex. Civ. App.) 33 S. W. 312, was not necessary in the decision of that case. There is no Texas case directly in point, but it has been held by the supreme court that a member of a corporation who is a creditor has the same right of action as any other creditor, and may even attach the property of the company. *Henderson v. Railroad Co.*, 17 Tex. 560; *Bank v. Cupp*, 59 Tex. 270. What we have said does not militate against the doctrine that a fiduciary relation exists at all times between the director and the corporation and stockholders, and that he will not be permitted to deal for his own advantage with the property or shares of the corporation. The case presented is one between outside creditors and a director, and it is sought to withhold from him the right to collect his debt from the corporation, merely because he is a director, and not because any fiduciary relation existed between him and the creditors. The judgment will be affirmed.

**REUTER v. SULLIVAN et al**

(Court of Civil Appeals of Texas. Oct. 12, 1898.)

**PROMISSORY NOTES—CONSIDERATION—PAYMENT BY EXECUTRIX—SET-OFF.**

1. The cancellation of a note made by her deceased husband is sufficient consideration for the widow's note, given while she was executrix of his estate.

2. Where bankers held two notes of a decedent, and had a deposit belonging to his estate, and his widow, who was executrix, gave her note in consideration of the cancellation of one of decedent's notes, such balance on deposit is not a proper set-off against her note.

Error from district court, Bexar county; R. B. Green, Judge.

Action by D. Sullivan & Co. against Emma Reuter. From a judgment for plaintiffs, defendant brings error. Affirmed.

Geo. C. Altgelt, for plaintiff in error. Ogden & Terrell and Geo. M. Hoffheimer, for defendants in error.

NEILL, J. This writ of error is prosecuted from a judgment obtained by the defendants in error against the plaintiff in error upon a promissory note executed on the 21st day of August, 1897, by Emma Reuter to D. Sullivan & Co. for \$500, with interest at the rate of 10 per cent. per annum from date, payable 30 days after date, without grace. The note upon which the judgment was obtained was executed in lieu and in consideration of the cancellation of a note made on the 30th day of June, 1897, by plaintiff's deceased husband, William Reuter, to defendants in error, for \$500, payable 60 days after date, without grace, with interest and attorney's fees. At the time the note first described was executed, plaintiff was the independent executrix of her deceased husband, and qualified as such. At that time William Reuter had on deposit in defendants in error's bank \$91.84, and D. Sullivan & Co. held another note against him, which was made on the 30th day of July, 1897, for \$500, due 60 days after date, upon which note the said deposit of William Reuter of \$91.84 was credited. The evidence fails to show that any undue influence was brought upon plaintiff in error to induce her to execute the note upon which the judgment was obtained, nor does it show that her condition of mind at the time the note was executed was such as to prevent her from fully contemplating and understanding the nature and consequences of the transaction. We are of the opinion that the consideration above stated was sufficient to support the note, and render plaintiff in error personally liable thereon, and that after its execution she was not entitled to offset the note by the deposit of \$91.84 by William Reuter in defendants in error's bank. The judgment of the district court is affirmed.

**BATTAGLIA v. STAHL**

(Court of Civil Appeals of Texas. Oct. 12, 1898.)

**EVIDENCE—NOTICE TO PRODUCE AN INSTRUMENT.**

Where an adverse party knows from the nature of an action that he will be charged with the possession of an instrument, and that it will be required in evidence, notice to produce it is unnecessary in order to prove its contents by parol.

Appeal from district court, Bexar county; R. B. Green, Judge.

Action by A. Battaglia against J. H. Stahl. There was a judgment for defendant, and plaintiff appeals. Reversed.

R. F. Blair, for appellant. Keller, Johnson & Williams, for appellee.

NEILL, J. This suit was brought by appellant against the appellee to cancel a certain alleged building contract and mechanic's lien provided for therein, alleged to have been executed by the former to the latter, and by him placed on record in the office of the county clerk of Bexar county. A breach of the contract was also alleged by appellant, and he prayed for cancellation of certain negotiable promissory notes made by him to appellee in consideration of the latter's undertaking to construct the building according to the terms of the contract. Damages were also asked for by the appellant. The case was tried by the court without a jury, and the trial resulted in a judgment in favor of appellee.

**Reasons for Reversal.**

Upon the trial, for the purpose of introducing it in evidence, appellant's counsel demanded of the attorneys of the appellee the original contract sought by the suit to be canceled, and, upon their failure to produce the same, offered to prove its execution and contents by parol evidence, which the court refused to admit, upon the ground that sufficient notice had not been given to appellee to produce the original document. This action of the court is assigned as error, and we think the assignment is well taken, for the reason that, as in this case, where the adverse party knows from the nature of the action that he will be charged with possession of the instrument, and it will be required in evidence, notice to produce it is not necessary. *Dean v. Border*, 15 Tex. 298; *Hamilton v. Rice*, Id. 385; *Greenl. Ev.* § 560. The certified copy of the contract was properly excluded. Reversed and remanded.

**LIMBURGER v. ENGLE**

(Court of Civil Appeals of Texas. Oct. 26, 1898.)

**PROCESS—EVIDENCE AS TO SERVICE.**

An officer testified that he delivered to defendant a citation, and told him what it was,



and that defendant replied that he knew what it was. Defendant's attorney spoke to him about it, and he again said that he knew about it. Defendant admitted that he knew about the suit, and did not positively deny that the officer had given him the citation, but said, "If the sheriff handed me a paper, I know nothing about it." Held to show defendant was duly cited.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action by Matthew Engle against Henry Limburger, Sr. From a judgment for plaintiff, defendant appeals. Affirmed.

Webb & Finley, for appellant. T. J. Newton, for appellee.

FLY, J. Appellee sued appellant to recover damages resulting from malicious prosecution. Appellant did not appear and answer, and, upon evidence introduced by appellee, judgment was rendered in his favor, in the sum of \$250. Two days afterwards, appellant filed a motion in arrest of judgment, on the ground that he had not been cited. The issue was tried by the court, and the motion overruled. The evidence establishes that appellant was, beyond doubt, duly cited to appear and answer the suit against him, and that he, without excuse, neglected the case, and permitted judgment by default. None of the assignments are well taken, and the authorities cited are decidedly against the position of appellant. The officer swore that he delivered the citation to appellant, and told him what it was, and appellant at the time replied that he knew what it was. His attorney spoke to him about it, and he again said that he knew about it. Appellant admitted that he knew about the suit, and did not positively deny that the officer had given him the citation, but said, "If the sheriff handed me a paper, I know nothing about it." This appeal was evidently perfected for delay alone, as suggested by appellee, and the judgment will be affirmed, with 10 per cent. damages.

#### MISSOURI, K. & T. RY. CO. OF TEXAS v. OVERFIELD.<sup>1</sup>

(Court of Civil Appeals of Texas. Oct. 19, 1898.)

#### CARRIERS OF PASSENGERS—NEGLIGENCE—RIGHT TO ALIGHT—PLEADING—DEMURRER.

1. An averment that in the nighttime, on approaching, but before reaching, a station, the porter announced it, and opened the door for passengers to alight; that the train had not in fact reached the station, but was on a trestle, through which plaintiff fell into the water in alighting; and that the conductor would not allow him a stop-over, and in continuing his journey he caught cold, resulting in sickness and disability,—sufficiently alleges that the injury occurred through the carrier's negligence.

2. A passenger is not obliged to remain on the train during the entire trip, but may tem-

porarily alight therefrom at intermediate points, for the time the train remains there, for any purpose not inconsistent with his character as a passenger.

3. In an action for injuries received by a passenger in alighting at an intermediate station, the sufficiency of an allegation that plaintiff got off for a temporary purpose is not raised by a demurrer that the complaint does not show that the alighting was for a purpose connected with the journey.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action by Henry Overfield against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

F. C. Davis and Floyd McGown, for appellant. Summerlin & Walling and Ed. Halton, for appellee.

JAMES, C. J. Plaintiff made the following allegations, in substance: That he took passage on appellant's train at Taylor for Greenville, Tex., which route carried him through the town of Temple. That, on approaching Temple, appellant's porter called out "Temple," and opened the door to allow passengers to get on or off, and thereupon the train stopped; and plaintiff, being thereby led to believe that the train was at the station, got off, as he supposed, upon the platform, when in fact the train had not reached the station, but had stopped on a trestle; and it being nighttime, and there being no lights, plaintiff, although exercising due care at the time, stepped out and fell into an excavation containing water, whereby he sustained bodily injuries, and all his clothing became drenched. That it was in January. That the car had been allowed to get cold, and his having to continue his journey under such conditions to his destination resulted in his severe sickness and permanent disability, for all of which he prayed damages. He alleged that he complained to the conductor of his drenched and cold condition, stating that he feared it would make him sick, and asked to be permitted to stop off until the next train, which was refused, and plaintiff, being without means to procure another ticket, was compelled to prosecute his journey. The petition alleged also that his injuries, which were set forth with detail, were caused by the negligence of defendant. He alleged that he desired to "temporarily leave said car at Temple," as his reason for attempting to do so. To the petition, defendant demurred, and here contends that it does not appear therein that defendant owed plaintiff any duty with reference to the station of Temple, in that it does not allege that plaintiff notified defendant's employes that he desired to get off at Temple, an intermediate station, and because it did not allege that he undertook to get off at Temple for some purpose essential to his journey, such as getting his ticket changed. There was another demurrer upon the ground that the petition has no express allegation

<sup>1</sup> Writ of error denied by supreme court.

that defendant "had been negligent either in announcing the station, or in stopping the train over a trestle, nor that the two acts concurring constituted the negligence which caused plaintiff's injuries." The latter ground of demurrer is not well founded. The petition charges that the injuries were occasioned by the negligence of defendant's servants, and sets forth the acts of its servants of which he complains as lending to his injuries. Therefore the petition, by unmistakable intentment, if not expressly, charges these acts as negligence. This disposes of the third assignment of error.

As to the other ground of demurrer, we are of opinion that a passenger is not required to remain upon a train, from the starting point to the point of destination, and permitted to alight at an intermediate station only for some purpose connected with his journey. Getting off at intermediate stations, from motives of either business or curiosity, has been held not to deprive one of his character as a passenger, or of his right to precautions for his safety as such. *Parsons v. Railroad Co.*, 113 N. Y. 355, 21 N. E. 146. We conceive the correct rule to be that he remains a passenger, on getting off at intermediate stations, so long as his object in doing so is not inconsistent with the character of passenger. In this state it has been held that he loses none of the rights of a passenger in getting off at such a station to deliver a private message to a person on the platform. *Railway Co. v. Cooper*, 2 Tex. Civ. App. 42, 20 S. W. 990. The refusal by the supreme court of a writ of error in the latter case, we think, settles against appellant the propositions made in its second, fourth, and ninth assignments of error. It also disposes of the fifth assignment, because it was immaterial what motive plaintiff had in alighting, as we will hereafter explain. If it should be held that the purpose of his getting off should have been more specifically alleged, still the special demurrer was not upon that ground, but upon the ground that it did not appear from the petition that he desired to get off for a purpose connected with the journey, and that it therefore appeared that defendant owed him no duty at that place in respect to egress. This ground of the demurrer was not good. We are of opinion that the defendant presumptively owes a passenger such duty in cases like this, where the injury is received in getting on or off a train at a station, and that the pleading need not, in such case, state the purpose for which the passenger leaves it, in order to state a case. But in the case we have before us—one where the injury is received in the very act of alighting at a regular station, not after he had alighted—the motive of the passenger is wholly immaterial; for the passenger has the undoubted right to alight at such place for the time the train remains there, or to leave the train altogether, if he desires, and while he is in the act of alighting

he is clearly a passenger, and entitled to be treated as such.

There is no merit in the ninth assignment. If the evidence is consulted, it appears that plaintiff sought to get off at Temple because he thought he changed cars there. The seventh and eighth assignments criticize the first paragraph of the court's charge, but we consider them not well taken. The sixteenth assignment of error we dispose of by saying that plaintiff stated in his testimony that he owed the sum of \$40 for medical attention, qualifying his previous statement that it was about that sum. The judgment is affirmed.

### SCHNEIDER v. LUCKIE.<sup>1</sup>

(Court of Civil Appeals of Texas. Oct. 19, 1898.)

#### JUSTICES OF THE PEACE—COUNTERCLAIMS—APPEALS —JURISDICTIONAL AMOUNT.

1. The amount in controversy in justice court exceeded \$20, where defendant's plea in reconvention was \$90, and plaintiff's demand was \$18, and hence plaintiff may appeal from a judgment that neither party take anything.

2. The district court's jurisdiction of an appeal from justice court, once acquired, is not defeated by the reduction of the amount in controversy to less than \$20 by defendant's withdrawal of his plea in reconvention.

3. Defendant does not abandon his plea in reconvention in justice court by failure to appeal from a judgment that plaintiff take nothing, even where the plea exceeds plaintiff's demand.

Error from district court, Bexar county; J. L. Camp, Judge.

Action by F. A. Schneider against Eugene Luckie in justice court. From an order of the district court dismissing an appeal from a judgment for defendant, plaintiff brings error. Reversed.

R. B. Minor and T. M. Watlington, for plaintiff in error.

JAMES, C. J. The case was tried in the district court upon a complaint seeking to recover of defendant, Luckie, damages in the sum of \$18, and upon a plea in reconvention for damages in the sum of \$90. There was no abandonment by defendant of his plea in the justice's court. The justice's judgment is founded upon a general verdict for the defendant, and adjudges that plaintiff recover nothing and pay the costs. The district court sustained a motion to dismiss the appeal, which motion urged (1 and 3) that the amount in controversy was less than \$20; (2) that the appeal bond misdescribes the judgment. In our opinion, the bond identifies the judgment, and the amount in controversy became more than \$20, by reason of the reconvention. Defendant could not defeat the jurisdiction of the district court by an abandonment of his plea in the district court, nor was his failure to take an

<sup>1</sup> Rehearing denied November 9, 1898.

appeal an abandonment of his plea. There is nothing here to show an abandonment of the plea in the justice's court, and the contrary appears to have been the case. Plaintiff was entitled to have the cause tried de novo in the district court, and the motion to dismiss should have been overruled. *Bledsoe v. Railway Co.* (Tex. Civ. App.) 25 S. W. 314.

Reversed and remanded.

### GALVESTON, H. & S. A. RY. CO. v. PATTERSON.

(Court of Civil Appeals of Texas. Oct. 26, 1898.)

#### APPEAL—REVIEW—CONFLICTING EVIDENCE.

1. A verdict based on conflicting evidence will not be disturbed.

2. Where, in an action against a carrier for mistreatment of plaintiff's wife on her journey, defendant introduces evidence that the wife made no complaint after her journey, evidence contradicting such testimony was admissible in rebuttal.

Appeal from district court, Presidio county; A. M. Walthall, Judge.

Action by W. J. Patterson against the Galveston, Harrisburg & San Antonio Railway Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Beall & Kemp, for appellant. Falvey & Davis and P. H. Clark, for appellee.

#### Conclusions of Fact.

NEILL, J. On October 24, 1895, Mary Patterson, the wife of appellee, was, with her children, a passenger on one of appellant's trains, she having purchased a first-class ticket, entitling her to first-class passage and accommodations over appellant's road from the station of Marfa to Spofford Junction. After purchasing the ticket, which was at night, a person, who, from the evidence, seems to have been one of the trainmen, took her valise, and carried it into the "smoker," where he set it down, and then met her on the outside, and told her she would find her valise in that car. Whereupon she entered the smoker, and after remaining there a few moments, finding out the kind of car she was in, went back in the next coach, which was the one for ladies holding first-class tickets. After taking a seat there, the conductor of the train, who had before punched her ticket, went to her, and in a peremptory manner, which indicated to her mind that she would be put off the train if she did not yield obedience, ordered her to get back in the car she had left. In obedience to this order, she went back in the smoker, and there remained all night with her children until the train arrived at Spofford. She was much humiliated by the manner of the conductor in ordering her from the ladies' car. While on the smoker, she was subjected to much incon-

venience, discomfort, and mental and physical suffering; she being compelled to inhale the fumes of whisky coming from the breaths of drunken men, to hear their coarse and profane language, to breathe the air laden with tobacco smoke, and to sit in sight of men as they came, with the fronts of their pants unbuttoned, from the water-closet; in consequence of which, she became sick, and suffered from headache, nervousness, hoarseness, and a cough, followed by spitting of blood. Her sickness continued several days, and she was a "good while" getting well.

#### Conclusions of Law.

1. As to the indignities imposed upon appellee's wife, and the injuries sustained by her, the evidence is conflicting. It was for the jury to find and declare the truth from the irreconcilable testimony of the parties; and as, in our opinion, the evidence is sufficient to sustain their findings, both as to the facts and the amount of damages, we cannot disturb the verdict.

2. The court did not err in sustaining appellee's objection to, and excluding, the testimony offered by appellant of the witnesses Allen and Van Vleck. Such testimony is hypothetical, argumentative, and irrelevant.

3. The testimony of the witness Clark, objected to by appellant, was in rebuttal of evidence introduced to show that appellee's wife made no complaint after her journey was over of mistreatment or of injuries sustained, and was properly admitted to rebut such testimony.

There is no error in the judgment appealed from, and it is affirmed.

### HOEFLING v. COURTNEY.

(Court of Civil Appeals of Texas. Oct. 26, 1898.)

#### NEW TRIAL—DISCRETION OF COURT—REVIEW.

A motion for new trial, based on unavoidable absence of counsel, is addressed to the discretion of the court, and cannot be reviewed, unless abuse of such discretion is manifest.

Appeal from district court, Bexar county; Robert B. Green, Judge.

Action between William Hoefling, Sr., and L. O. Courtney. From a judgment for Courtney, William Hoefling appeals. Affirmed.

T. M. Paschal, for appellant.

NEILL, J. The only error assigned in this case is the overruling of appellant's motion for a new trial. The ground of the motion is the unavoidable absence of appellant's counsel when the case was tried. The motion is such as addressed itself to the discretion of the trial judge, and his exercise of such discretion cannot be reviewed upon appeal unless its abuse is manifest. No such abuse appears from the record. Therefore the judgment is affirmed.

GERMANIA LIFE INS. CO. v. PEETZ.<sup>1</sup>

(Court of Civil Appeals of Texas. Oct. 19, 1898.)

INSURANCE—FORFEITURE OF POLICY—NONPAYMENT OF PREMIUMS—NOTICE—STATUTORY PROVISIONS—ADMINISTRATORS—POWER TO COMPROMISE CLAIMS—PLEADING—REVIEW.

1. A temporary administrator, authorized to "enter upon, collect, and take possession of all [the property of decedent]; to receive and receipt for all moneys due the estate," and continue the business of decedent,—has no power to accept a part payment on a policy of insurance on decedent's life in full satisfaction of the policy.

2. A statute of the state where an insurance policy is issued, requiring notice to the insured as a condition precedent to the forfeiture of the policy for nonpayment of the premiums, which is in force at the time of the issuance of the policy, becomes part of the policy.

3. A statute changing the law as to requirement of notice to an insured as a condition precedent to the forfeiture of the policy for nonpayment of premiums, as it existed under a previous statute, cannot affect a policy issued while the previous statute was in force, unless the policy by its terms expired at the end of each year unless the premium for the next year was paid.

4. Laws 1876, c. 341, § 1, which forbids the forfeiture of any insurance policy by reason of the nonpayment of "any annual premium or interest, or any portion thereof," without notice to insured, applies as well to policies providing for the payment of semiannual premiums.

5. When an answer to which a demurrer is sustained sets up a statute which had been amended, but makes no reference to the amendment, the appellate court can consider only the statute as set up in the answer, and not the amendment.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action by J. J. Peetz, administrator of the estate of Charles J. Langholz, against the Germania Life Insurance Company. Judgment for plaintiff, and defendant appeals. Judgment affirmed, and motion for rehearing overruled.

Franklin, Cobbs & McGown, for appellant. John A. Green, Jr., for appellee.

JAMES, C. J. Charles J. Langholz, of whose estate appellee is the administrator, was insured for \$10,000 with appellant company. He died in 1895. The main question is whether or not the policy was in force for the full amount when he died.\* The secondary question is whether or not a settlement with a temporary administrator by the company paying to him \$2,000 had the effect of settling the policy.

The application for the policy provided: "The entire contract contained in said policy and in this application, taken together, shall be construed and interpreted, as a whole, and in each of its parts and obligations, according to the charter of said company and the laws of New York; the place of the contract being expressly agreed to be the principal office of said company, in the city of

New York." The policy states: "The Germania Life Ins. Co., of the city of New York, in consideration of the representations made to them in the application for this policy, and of the payment to them of the premium, \$255.10, and of the payment, upon the receipt of the secretary of the company, of a like amount on or about noon of the 12th day of May and November of every year during the continuance of this policy, do hereby promise and agree to pay at their office in the city of New York the sum of ten thousand dollars to Charles John Langholz, of San Antonio, in the county of Bexar, state of Texas, on the 12th day of November, 1910, at noon, if he shall then be living; or, in case of his previous death, upon due notice and proof thereof, to his executors, administrators, or assignees, upon due proof of the interest of the claimant in this policy, if the same shall at the time be held by the assignee, or as a security." At the date of the policy there was a statute of the state of New York (that of 1876) in form as follows: "Section 1. No life insurance company doing business in the state of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed, by reason of nonpayment of any annual premium or interest, or any portion thereof, unless a notice in writing, stating the amount of said annual payments, or interest due, and when due on such policy, and place where said premium or interest may be paid, shall have been duly addressed and mailed by the company issuing such policy to the insured, postage paid, at his or her last known post-office address, not less than thirty nor more than sixty days next before such payment becomes due, according to the terms of such policy." Laws 1876, c. 341. The petition alleged that Langholz fully complied with the terms of his agreement in making payment of premiums.

The answer admitted the issuance of the policy, and the payment of premiums down to that maturing November 12, 1894, but denied defendant's liability, for the following reasons: (1) Because the policy had become forfeited prior to Langholz's death, in this: that the policy in express terms provides that the semiannual premiums of \$255.10 each should be paid to the company on the 12th day of May and November of each year, and the conditions on the back of the policy were by express terms a part of the contract, one of which was the following: "The policy shall cease, and be null and void and of no effect, and the company shall not be liable for the payment of the sum assured, or any part thereof, but all premiums previously paid shall be the absolute property of the company, without any account whatever to be rendered therefor: 1st. If the premiums mentioned within, or any of them, shall not be paid on or before noon of the special days stipulated for the payment thereof, respectively, or within three days thereof, respec-

<sup>1</sup> Writ of error denied by supreme court.

tively. 2nd. If the insurance applied for be granted by the said company, the policy will be accepted subject to all the conditions and stipulations contained in the policy, and that the entire contract contained in the said policy and in this application, taken together, shall be construed and interpreted, as a whole, and in each of its parts and obligations, according to the charter of the said company and the laws of the state of New York; the place of the contract being expressly agreed to be the principal office of the said company, in the city of New York." That at the date of said policy the act of New York of 1876 was in force, by which no policy could be forfeited without first giving the requisite notice, "not less than thirty nor more than sixty days before such premium becomes due according to the terms of the policy." That afterwards, in 1892, said act of May 15, 1876, was repealed by a subsequent act of the state of New York, and the following enacted in lieu thereof: "Sec. 92. No Forfeiture of Policy without Notice. No life insurance corporation doing business in this state shall declare forfeited or lapsed any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited, or lapsed, by reason of non-payment when due of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice, stating the amount of such premium, interest, installment or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment had been given to the corporation, at his or her last known postoffice address, postage paid, by the corporation, or by an officer thereof, or any person appointed by it to collect such premium at least fifteen and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment or portion thereof, then due shall be paid to the corporation or to a duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy, and all payments thereon will become forfeited, and void except as to the right to a surrender value or paid up policy as in this chapter provided." If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited, or lapsed, until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk or agent of the corporation, or of any one authorized to mail such notice,

that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that such notice has been duly given." Laws 1892, c. 690. That in accordance with the act of 1892, and not more than 25 days prior to the falling due of the premium of November 12, 1894, it duly addressed and mailed to Langholz, at his proper address, a notice as required by said act, notwithstanding which Langholz did not pay same when due, nor within 30 days thereafter, and said policy became thereby lapsed and forfeited; but thereafter he, desiring that it should be kept in force, was required by the company to stand a physical examination, and, the same proving satisfactory to the company, he was permitted to pay the premium on March 15, 1895, and thereupon the following receipt was issued to him: "Received the semiannual premium of two hundred and fifty-five  $\frac{10}{100}$  dollars, due on the twelfth day of November, eighteen hundred and ninety-four, on policy No. 84,903, assuring the life of Charles J. Langholz. It is expressly understood and agreed that the acceptance by the company of a premium subsequent to the day whereon the same was payable shall be deemed an act of courtesy only, and shall not be construed as a waiver of the conditions of the policy as to the payment of premiums thereafter. C. H. Florian, Agent. [Signed] H. Ollis, Secy." That by said proceeding the policy became renewed. That on the 12th day of May another premium became due, and on April 16, 1895, defendant, with reference thereto, mailed another such notice to Langholz, at his proper address, and nevertheless he failed to pay same at any time, by reason whereof, prior to the death of said Langholz, which occurred June 18, 1895, the policy became forfeited, except for the fractional part thereof based upon completed payments according to the terms of the policy. (2) Because the fractional amount due under said policy had been fully paid, in this: That by the terms of said policy it is provided "that if the same should lapse, as to its original amount, by nonpayment of the premium after it should have been three years or more in force, it should remain valid, subject to all its conditions, for an amount equal to a fraction of its original amount, found by the number of full years' premiums paid, divided by the number of years for which, by its terms, premiums were payable." That, when said policy lapsed and became forfeited, it had been in force more than 3 years; and when Langholz died, on June 18, 1895, the fractional amount due thereon was found by dividing the number of full years' premium paid (4) by the number of premiums payable (20), making  $\frac{4}{20}$  or  $\frac{1}{5}$ ; that  $\frac{1}{5}$  of \$10,000, or \$2,000, was due under said policy, and was paid to Frederick Kelly, who duly qualified as temporary administrator of Langholz's estate on June 28, 1895, with the following powers, to wit: "He shall

enter upon, collect, and take possession of all of the lands, tenements, goods, chattels, rights, and appurtenances belonging to the estate of the said Chas. John Langholz, deceased; to receive and receipt for all moneys due the said estate; to continue the manufacture of the material on hand in the saddle-manufacturing business; and to continue the sale of the merchandise on hand in the said store in San Antonio, Texas." And the policy was surrendered, and Kelly's receipt for said sum taken, in August, 1895. (3) Because the plaintiff is estopped to claim more from the defendant company under said policy, in this: That if there was more due from defendant company to the estate of Charles J. Langholz, under said policy, it was a disputed claim, and the same was compromised, the \$2,000 paid over, and the said money actually used for the benefit of the said estate. Then follow special defenses to the statutory penalty and attorney's fees claimed in plaintiff's petition, all of which are immaterial here, because their recovery is expressly waived by plaintiff.

Plaintiff filed a supplemental petition, setting up (1) a general demurrer; (2) and special exceptions, as follows: "(2) Plaintiff further excepts to that portion of said answer which attempts to set up a forfeiture of the policy for nonpayment of premium upon other causes than these mentioned in the law of New York. (3) Plaintiff further specially excepts to that part of the said answer which attempts to set up an amendment of the law of New York passed in 1892, because the said amendment was enacted after the issuance of the policy agreed on, and cannot affect the same in any way. (4) Plaintiff excepts to all that portion of the said answer which seeks to set up a compromise of the ten thousand dollar policy agreed upon for the sum of two thousand dollars, because the order of the court appointing the said Fred. Kelly temporary administrator of the estate of Chas. J. Langholz, as pleaded by the defendant, did not authorize a compromise by the said temporary administrator. (5) Plaintiff excepts to all allegations of a settlement of the \$10,000 policy for \$2,000, because, if the whole amount of the policy was due at the time of such alleged settlement, then there is no consideration for the giving away of \$8,000 of the estate's money by said temporary administrator. And of all these exceptions he prays the judgment of the court." (3) A general denial; and (4) a special plea of the waiver of the right to forfeit the policy by the defendant company, which plea is immaterial on this appeal.

The court sustained plaintiff's demurrers to the answer, and defendant refusing to amend, having admitted the issuance and delivery of the policy, and seeking to avoid liability by said special defenses, the court rendered a judgment against defendant for the full amount of the policy, less the \$2,000

that had been paid to the temporary administrator, from which judgment the appeal is prosecuted.

#### Conclusions of Law.

1. The powers of the temporary administrator, as defined in the order appointing him, did not authorize a settlement with the insurance company by acceptance of less than was due to the estate, in satisfaction thereof. So far as such act may have tended to surrender the policy and release the defendant, beyond the sum actually paid, it was without effect.

2. The statute of New York as it was at the date of the contract became a part thereof. *Phinney v. Insurance Co.*, 67 Fed. 493; *Mullen v. Insurance Co.*, 89 Tex. 259, 34 S. W. 606; *Baxter v. Insurance Co.*, 119 N. Y. 454, 23 N. E. 1048. As stated in the last case cited, "The statute was a part of the contract in question, and governed the rights and obligations of the parties in precisely the same way and to the extent as if all its terms and conditions had been actually incorporated into the policy." The policy involved in that case contained the condition that it should be void upon failure to pay the premium when due, similar to one of the conditions in this policy.

3. We are of opinion that the legislature of New York could not by subsequent acts abridge or take away the insured's right to the particular notice which the law of that state prescribed at the time of the contract. In *Carter v. Insurance Co.* (decided by the New York court of appeals in 1888) 17 N. E. 396, it seems to be decided that the payment of each annual premium constitutes a renewal of the policy, within the meaning of the term "renewed" as used in the insurance statutes of that state; and it was there held that the holder of a pre-existing policy which contained no provision as to notice concerning premiums became entitled to notice, after the act of 1876, requiring companies to give a notice in respect to policies thereafter issued or renewed. But we apprehend that the court did not intend by this to decide that, where a pre-existing policy is contracted with reference to a certain notice, the legislature would have power afterwards to dispense with or abridge that right, as would be the case here, if we should hold that the policy became governed by the provisions of the act of 1892 in respect to notice. We agree with appellee in the proposition that the legislature was without power by its subsequent enactments to amend the contract in question, to the detriment of this right of the policy holder to the notice contracted for, and to substitute therefor another notice not so ample; and inasmuch as there was no forfeiture or lapse of the policy, and therefore it at no time assumed the form of a new contract between the parties, the act of 1892 has no effect in the case. The notice prescribed by the law of 1876 was not given, and the policy was not

forfeited when Langholz died, unless it be true, as appellee insists, that the provision of the statute of 1876 was not intended to apply to policies calling for semiannual premiums.

4. Appellee contends that the fact that this policy provided for semiannual instead of annual premiums is immaterial, under the provisions of the act of 1876, above quoted, and cites *McDougall v. Society* (Sup.) 19 N. Y. Supp. 481; *Phelan v. Insurance Co.*, 113 N. Y. 147, 20 N. E. 827; *Baxter v. Insurance Co.*, 119 N. Y. 450, 23 N. E. 1048; and *De Frece v. Insurance Co.*, 136 N. Y. 144, 32 N. E. 556,—none of which decide the question. An examination of these cases shows that they were based on the act of 1876, as amended in 1877, which amendment, as it appears from said cases, required the notice to be given in reference to premiums, not using the word "annual." The answer which is demurred to does not mention any act of 1877, and it is not before us in this case; and, in order to affirm the judgment sustaining the demurrer, it must be that the proper construction of the act of 1876, standing alone, is as appellee contends. We are not aided by any decision on the subject that we can find. We incline to construe the provision as having reference to all policies, and to any installment of premium. It forbids the forfeiture of any policy, issued or renewed thereafter, by reason of the nonpayment of any annual premium, interest, "or portion thereof." If the premium during any one year be divided into installments,—which is the case of semiannual premiums,—each is a portion thereof; and we think the policy could not be forfeited for nonpayment of such portion, unless the notice provided was given in reference to it. The evident intent of the provision was that it should apply to all life policies issued or renewed thereafter, and not that it should be restricted in its scope to policies providing for a single annual installment of premium. Affirmed.

#### On Motion for Rehearing.

(Nov. 9, 1898.)

A further consideration of the case of *Carter v. Insurance Co.* satisfies us that what was said by the court on the subject of renewal had reference to the particular policy then being considered, and not to the form of policy before us. It contained no provision for notice by the company of the maturity of premiums in order to forfeit it. According to its terms, it expired at the end of the year, unless the premium for another year were paid. The policy in the present case was a contract which continued, by its own terms, indefinitely, if the defendant did not give the notice. We fail to perceive why the policy did not remain a contract, from its own terms, after each year, the notice it prescribed not having been given. And if the contract is to be read and

construed as if the statutory notice then prevailing were incorporated into the contract in terms, as was held in *Baxter v. Insurance Co.*, then we fail to see how this contract differs from any other, in that this right to notice could be prejudiced by any subsequent enactment of the legislature. If the record showed some constitutional or statutory provision of New York, in existence when this policy was issued, which authorized the legislature to affect policies in this manner, we would regard the question differently. But to so rule in this case would be admitting the power of the legislature, in the case of a contract stipulating for a certain notice, to deprive the insured of that contract right altogether. We are also still of the opinion that the premiums provided for in this policy, as they occur each year, are annual premiums, or portions thereof, in the meaning of the statute. The motion is overruled.

#### NANCE et al. v. CHESNEY et al.

(Supreme Court of Tennessee. Nov. 4, 1898.)

APPEAL—RECORD—EVIDENCE—BILL OF EXCEPTIONS—MINUTES.

1. Admissibility in chancery of excluded evidence cannot be reviewed unless it be made a part of the record by bill of exceptions.

2. Excluded evidence may be brought into the record for review by being included in the minutes with the rulings and exceptions thereon, but a mere reference to the evidence in general terms will not suffice.

Appeal from chancery court, Union county; H. B. Lindsay, Chancellor.

Bill by Julian Nance and others, executors, against Gordon Chesney and others. A decree for complainants was affirmed by the court of chancery appeals, and defendants appeal. Affirmed.

D. D. Anderson, for appellants. Samuel J. Ailar and Shields & Mountcastle, for appellees.

McALISTER, J. Complainants, as executors of John Nance, deceased, filed this bill to collect certain notes for purchase money of land which were executed by the defendant Gordon Chesney to his co-defendant William Kelly, and by the latter assigned to complainants' testator, John Nance. The facts as found by the court of chancery appeals are substantially, viz.: On the 24th November, 1888, said William Kelly conveyed by deed the tract of land in controversy to Susan Chesney and Gordon Chesney, to each an undivided one-half interest, for the consideration of \$1,500, \$900 of which was paid in full of the consideration due for the undivided interest conveyed to Susan Chesney; and for the balance of purchase money, to wit, \$600, Gordon Chesney executed his four notes, for \$120 each, maturing in one, two, three, and four years from date. A lien was retained in the face of the deed to secure

these notes on one-half of the land conveyed, which is not to include the dwelling on the land, as recited in the deed. A lien was also retained on the face of the notes. On the 24th April, 1889, William Kelly assigned and transferred these notes to John Nance (complainants' testator), and guarantied payment of same, waiving demand and notice. S. N. Kelly, son of William Kelly, also signed the assignment, and guaranty of these notes. Credits amounting to \$87 are entered on the notes, and this bill is filed to collect the balance, and to subject the land as security. Susan Chesney was also made a party defendant, with a view of partitioning the land. Defendant Gordon Chesney answered the bill, and averred that John Nance, after the transfer of the notes to him, made S. N. Kelly, son of William Kelly, the former's agent, and authorized him to collect the notes; and that defendant Gordon Chesney, with the knowledge, authority, and consent of John Nance, had made various payments to Kelly, which had not been credited on these notes, and that the notes had thereby been paid and satisfied. The chancellor pronounced a decree in favor of the complainants, and against Gordon Chesney and William Kelly, for the sum of \$791.66, balance due of principal and interest on said notes, after crediting them with amounts indorsed on first note. This amount was decreed a lien on Gordon Chesney's one-half interest in the land, and the same was ordered to be sold for the satisfaction of said decree. The court of chancery appeals in its opinion finds that certain evidence was excluded by the chancellor which tended to show further payments by Chesney on these notes, and the question presented was whether this excluded evidence was properly preserved by bill of exceptions or otherwise, so that the action of the chancellor in excluding it might be reviewed. The decree of the chancellor recites that, on the trial of this cause, complainants excepted to that part of the testimony of defendants Gordon Chesney and William Kelly which related to, or purported to detail, any transaction with, or statement by, John Nance, deceased. They (complainants) also objected to that part of the testimony which purported to give any contract with, or statement by, S. N. Kelly, or any payments to said Kelly, because such evidence was mere hearsay, being had in the absence of John Nance, etc. Further, if Kelly was agent of John Nance, deceased, as insisted by defendant Gordon Chesney, then Chesney could not testify as to any conversation or transaction with, or statements by, S. N. Kelly. These exceptions were sustained by the court. Complainants also objected to that part of the testimony of James M. Sharp, James A. Dyer, W. E. Collett, Linville Damewood, and W. R. Kelly purporting to detail statements of John Nance, deceased, in regard to notes which said Nance held against each of them, as being irrelevant and immaterial to the issues

in this case. Complainants also objected to that portion of the evidence detailed by these witnesses and Susan Chesney and William Kelly in regard to the payments made to S. N. Kelly, or any contract Chesney had with Kelly to the effect that he was to pay the notes with farm products, on the ground that the evidence was wholly irrelevant and immaterial to these issues, and because, if made at all, they were made in the absence of John Nance; and, further, because the notes sued on in this case were transferred to John Nance before due, and, if Chesney made any payments to Kelly, he did so at his peril; and the decree recites, "all of which objections were sustained by the court."

The court of chancery appeals, without determining the competency and relevancy of the testimony excluded by the chancellor, adjudged that it could not be considered on appeal, for the reason it had not been preserved and made a part of the record by bill of exceptions. This ruling was in accord with the settled practice of the court. When evidence offered in a chancery cause is excluded upon objection, the correctness of the ruling cannot be challenged on appeal unless the excluded evidence be made a part of the record by bill of exceptions. *Anderson v. Railroad*, 91 Tenn. 54, 17 S. W. 803; *Steele v. Frierson*, 85 Tenn. 438, 3 S. W. 649; *Kelley v. Fletcher*, 94 Tenn. 5, 28 S. W. 1099; *Perry v. Pearson*, 1 Humph. 431; *Spurlock v. Fulks*, 1 Swan, 291; *Aymett v. Butler*, 8 Lea, 453. The court of chancery appeals, therefore, held that, in the absence of portions of the excluded evidence, there would not be sufficient evidence to justify it in finding in favor of the defendant Chesney for the credits claimed by him. It is true that if the excluded evidence had been spread upon the minutes, with the exceptions and the action of the court thereon, this would have served the place of a bill of exceptions; for the signature of the chancellor to the minutes would have been an authentication of the action of the court, and the evidence excluded would in this way have been precisely identified. In *Wynne v. Edwards*, 7 Humph. 418, this court, while announcing the general rule that extraneous matter, to be available in this court, must be made a part of the record by bill of exceptions, held it would be sufficient if it were spread upon the minutes, since the minutes must necessarily be signed by the judge. So, in *Weakley v. Pearce*, 5 Heisk. 415, it was held an entry upon the minutes ordering a change of venue was a sufficient bill of exceptions; citing *Wynne v. Edwards*, supra; *Jones v. Stockton*, 6 Lea, 133. In *Jones v. Stockton* the same rule is recognized. The reason, says Judge Cooper, is that the judge thereby authenticates the fact or the paper precisely as if it had been embodied in a bill of exceptions signed by him. "But," continues the judge, "a mere reference to a document in



an entry signed by the judge is not sufficient." It will be observed in the present case the excluded evidence is not set out in the decree, and it is only referred to in general terms. For instance, the decree recites that complainants objected to that part of the testimony which purported to give any contract with, or statement by, S. N. Kelly, or any payments to S. N. Kelly, upon the ground that, if Kelly was the agent of Nance, the testimony of these parties was incompetent, John Nance being deceased. If this court should hold that payments made to the agent of deceased could be proved by defendant Chesney in a suit against him by the executor of John Nance, deceased, the decree does not show the amount of said payments, or that they were made on the particular notes in the suit. Again, if we should hold that Gordon Chesney is a competent witness to prove contracts with, and statements made by, S. N. Kelly, agent of John Nance, deceased, the particular contracts and statements are not set out in the decree. It results that the decree was correct, and is affirmed.

#### HAMBY et al. v. REID et al.

(Supreme Court of Tennessee. Nov. 2, 1898.)

##### TRUSTEES—SURETIES—LIABILITY—LIMITATIONS.

1. Shannon's Code, § 4472, providing a six-year limitation on actions against the sureties of guardians, executors, administrators, sheriffs, clerks, and other public officers, and "actions on all contracts not otherwise expressly provided for," includes actions against sureties of a trustee.

2. Where a trust was created to sell a small stock of goods, and collect a small amount of accounts, a bill against a surety of the trustee for the principal's default, filed 10 years after the trust was created, is barred by Shannon's Code, § 4472, requiring such an action to be brought within six years after the cause of action accrues.

Appeal from chancery court, Campbell county; W. R. Hicks, Special Chancellor.

Action by James M. Hamby and others against J. Henderson Reid and others. From a decree of the court of chancery appeals affirming a decree for defendants, complainants appeal. Affirmed.

J. E. Johnston, for appellants. Jourolman, Welcker & Hudson, for appellees.

WILKES, J. This cause came to us by appeal of complainants from the decree of the court of chancery appeals, affirming the decree of the chancellor, and the main question presented is in regard to the right of the sureties of a trustee to rely upon a statute of limitation in bar of a right to recover from them for their principal's default. Complainants insist that there is no limitation in such case, but that it is a case of express trust, not enforceable or cognizable in a court of law, and as to which there is no limitation

by statute. The sureties insist that they are released by a statute of six years (Shannon's Code, § 4472), which protects the sureties on bonds of guardians, executors, administrators, sheriffs, clerks, and other public officers against nonfeasance, misfeasance, and malfeasance in office, as actions on contracts not otherwise expressly provided for. The argument is not that trustees or the sureties of trustees are expressly named in the act, but that it contemplates the sureties of all officers, whether public or private, and though they may be classed as trustees executing express trusts; and that this idea is re-enforced by the provision for "action on all contracts not otherwise expressly provided for within six years after the cause of action accrued." The chancellor and court of chancery appeals took this view of the matter, and held that the sureties of trustees and assignees under mortgages and deeds of trust were contemplated and embraced by the statute, and in this view we concur. While sureties of trustees are not expressly named in the statute, we think that they are embraced within its general provision "for action in all contracts not otherwise expressly provided for." It is said trustees ought not to be held to be included, inasmuch as they execute an express trust. But this is so also as to guardians, administrators, and other express trustees; and the construction in this case makes a harmonious holding in all such cases. A practical difficulty arises in applying the law. Granting that the statute protects the sureties of a trustee, it does so only after the expiration of six years after the cause of action accrued. The question is, when does the cause of action accrue? The court of chancery appeals hold that it was the duty of an assignee or trustee to proceed with all reasonable diligence to execute its trusts according to its terms, convert the assets into money, and pay over and account for the same, and that the right of the beneficiary is to proceed against him after such reasonable time has elapsed. In this case the trust was made in 1885, and the bond was then given, but the trust was only partially executed. Some of the assets were not collected, and some of the collections not paid out, and no report or settlement was made. The bill was filed in July, 1895, or after a lapse of 10 years, and, inasmuch as the trust was only to sell a small stock of goods, and collect a small amount of accounts, that no great time was required, and that under these facts the statute had run. We are content with this view and holding of that court, and affirm their decree in this feature of the case.

Another error is assigned as to the confirmation of a report filed in the court below by the clerk and master, but we think that the court of chancery appeals have disposed of this properly, and so as to reach the equities of the case. The decree of the court of chancery appeals is affirmed.

# MERCHANTS' & PLANTERS' BANK v. PENLAND.

(Supreme Court of Tennessee. Nov. 2, 1898.)

BANKS—NOTICE TO CASHIER—NOTES—BONA FIDE PURCHASER.

1. Where the cashier of a bank has full authority to make loans and discounts, notice to him of equities against a note discounted by the bank is notice to the bank.

2. A bona fide purchaser of a note, although he knew that it was given for the purchase of land against which there was a lien, the enforcement of which would cause a partial failure of consideration, is not chargeable with the equities against the note caused by the enforcement of such lien after the purchase.

Appeal from chancery court, Cocke county; John P. Smith, Chancellor.

Action by the Merchants' & Planters' Bank against W. H. Penland, in which defendant filed a cross bill. From the decree both parties appeal. Reversed, and decree directed for complainant.

H. N. Cate, for complainant. W. J. McSweeney, for defendant.

**WILKES, J.** This is an action to recover against defendant, Penland, two notes, for \$66.66 each. The notes were given by Penland to the Newport Development Company, and by it indorsed, and complainant claims to be an innocent holder for value of the same. Penland answered the bill, and filed a cross bill, in which he seeks to avoid the notes, and rescind the contract out of which they arose, upon the ground that they were obtained by the fraudulent representations of the bank and development company that the lot for which they were given was free of all incumbrance and liens; that the bank had notice of the liens held by the parties who sold to the development company, and took the notes subject to the equities of Penland against the development company. The court of chancery appeals find that the bank had notice of the lien of the Newport Real-Estate Company upon this lot, and was affected, in consequence, with all Penland's equities against that part of the lot purchased from that company, but that a portion of the lot was purchased from one Denton, and the bank did not have such notice of a lien in favor of Denton as would affect it. Hence that court canceled one note, and entered a credit on the other, and gave judgment against Penland for the balance, the idea being to release Penland from liability for so much of the lot as was bought from the Newport Company, but hold him for so much as was bought from Denton by the development company. Both parties have appealed, and in this court it is insisted for complainant that Penland should be held for the whole of both notes, and for defendant that he should be released from both.

Disposing of complainant's assignments first, it is insisted that the court of chancery appeals erred in holding that notice to the

cashier of complainant bank was notice to the bank, and the contention is that the bank would only be affected by notice to one of its discount committee or directors. The court of chancery appeals finds as a fact that the cashier of this bank was allowed full liberty, and the widest authority, to make loans and discount paper, and that the discount committee and board of directors rarely met, and did not look after the discounts, as was their duty. Having given full authority to the cashier to make discounts, the bank cannot be heard to say that notice to him was not notice to the bank in the discounting of notes.

The next assignment is that Penland knew of the defects in his title, and took warranty deed to protect himself therefrom, and hence it is no defense to him that the bank had notice of these defects and liens. Nor can it avail him anything that the development company afterwards became insolvent. In the same connection, it is said that Penland, having taken a deed with covenants of warranty, has no equitable defense against the note, unless he show fraud, but his only protection is the covenants in his deed. The court of chancery appeals find that, while fraud is charged in the cross bill, it is not shown in the proof. That court reports, also, that the fact of the insolvency of the development company is set up in the answer, and that the cross bill, in effect, charges that Penland has been evicted, and these facts are proven; but they are not alleged to have been in existence when the note was received by the bank.

Upon this statement of facts, the question recurs, is the bank a bona fide holder and innocent purchaser of the notes or is it affected by the equities between the original parties? It took the notes before maturity, as collateral, it is true, but as security for money then advanced. If there were nothing else in the case, this would make it an innocent holder. *Bank v. Stockell*, 92 Tenn. 256, 21 S. W. 523. Does the mere fact that it knew the notes were given for land, and that there was a lien on the land for unpaid purchase money, and that there might thereafter occur a partial failure of consideration by an enforcement of the lien, render the bank subject to all the equities that might thereafter arise between the original parties. The court of chancery appeals was of opinion it did, and they cite *Ingram v. Morgan*, 4 Humph. 66, and *Ferriss v. Tavel*, 87 Tenn. 386, 11 S. W. 93, in support of their holding. But in both of these cases the holder of the notes in controversy took them to secure a pre-existing debt, and could not be called an innocent holder. And the cases referred to in 4 Am. & Eng. Enc. Law (2d. Ed.) p. 198, are based upon a similar state of facts. But this partial failure of consideration cannot be asserted against a bona fide holder for value, for such a holder takes the title free from the equities between the original parties. 4 Am. & Eng. Enc. Law (2d. Ed.) p. 198; *Bank v. Stockell*, 92 Tenn. 256, 21 S. W. 523. In ad-

dition, it does not appear that these equities existed between the original parties at the time these notes were indorsed to the bank. The purchaser, Penland, had not then been evicted, and, so far as the record shows, the insolvency of the company had not then been made manifest. The defense, in order to be set up against the indorsee, must be an equity that existed when the indorsement was made. *Bearden v. Moses*, 7 Lea, 459; *Alderson v. Cheatham*, 10 Yerg. 304. We are of opinion that, upon the facts as found by the court of chancery appeals, the bank was the bona fide innocent holder of these notes, and entitled to enforce their collection free of any equities arising between the original parties after it received them, and the court should have so decreed. The decree of the court of chancery appeals is reversed, and judgment will be entered in favor of complainant against defendant for both notes and interest, and 10 per cent. attorney's fees, as provided in the notes, and all costs.

#### CORBETT v. J. ALLEN SMITH & CO.

(Supreme Court of Tennessee. Oct. 15, 1898.)

##### DEMURRER TO EVIDENCE—INJURY TO EMPLOYE—ASSUMPTION OF RISK.

1. If plaintiff's evidence is insufficient, it is proper to dismiss his suit on a demurrer to the evidence interposed before defendant offers any evidence.

2. A millwright directed to put a feeder in place was denied his request to do so while the mill was not in operation, when it would be less dangerous. When his task was completed, the mill superintendent removed a moving belt from a pulley which operated the feeder, and the millwright, understanding the increased danger occasioned thereby, acted on his own volition in undertaking to place the belt where it would not be dangerous, when it quartered out, and injured him. *Held*, that he assumed the risk.

3. Evidence unfavorable to a plaintiff will be considered on a demurrer to his evidence, if it is not shown by the other evidence to be incorrect.

Error to circuit court, Knox county; Joseph W. Sneed, Judge.

Action by A. M. Corbett against J. Allen Smith & Co. Judgment for defendant, and plaintiff brings error. Affirmed.

Templeton & Cates and Clarence Templeton, for plaintiff in error. Jourolman, Welcker & Hudson and Welcker & Barker, for defendant in error.

**WILKES, J.** This is an action for personal injuries. The plaintiff introduced his evidence, when defendant demurred to it, and issue was joined. The court was of opinion there was no case of liability made out against the defendant on plaintiff's showing, sustained the demurrer, and dismissed the suit, and plaintiff has appealed, and assigned errors.

It is said first that it was error to consider the evidence in the meager light in which the

court below was compelled to consider it in order to sustain the demurrer. If we understand this assignment, it is that, plaintiff having introduced his proof, and, presumably, all he had, and the defendant having introduced none, it was error in the court to decide the case, because the evidence was too meager. Certainly, if the plaintiff cannot make out his case by his own witnesses, uncontradicted and unquestioned, and with all legitimate inferences from their testimony, he cannot make out his case at all. He cannot complain that defendant has put the case upon his version of it, and rested it there.

It is said that it was error for the circuit judge to hold plaintiff's evidence insufficient, since in so doing he must pass upon questions of fact, which are exclusively within the province of the jury. The practice of demurring to evidence, and having the judgment of the court thereon, is established in this state, and we are not disposed to reopen the question. *Hopkins v. Railroad Co.*, 96 Tenn. 420, 34 S. W. 1029.

It is said it was error to hold the plaintiff not entitled to recover, and to sustain the demurrer and dismiss the suit. This presents the case on its merits. Plaintiff was in defendant's employ as a millwright. Miller was the superintendent of the mill. Poole was the head miller. Through the superintendent and head miller, plaintiff was directed to place what is called a "feeder" in a certain place, while the mill was in operation. The work to be done was dangerous, and plaintiff protested, and asked that it be deferred to some time when the mill was stopped. This defendant declined to do, being behind with orders, and desiring to see the operation of the new feeder, which was designed to mix flour and meal. Plaintiff thereupon went to work on Sunday morning, February 1, 1897, and continued on Monday, with the mill running. By Thursday the work was all done successfully except placing two boards in place. Plaintiff took the measure for them, and went to dinner, leaving a belt around the pulley which operated this feeder. It was easier to place this belt on while the machinery was running than to remove a loose belt while running. The place where the work was done was close, dark, and dangerous. While plaintiff was absent at dinner, Miller, the superintendent, went to the place to examine the work, and in order to do so threw off the belt. Being thus thrown off, the belt would flap around a shaft near by, then suddenly loosen, and fly off obliquely, making the place still more dangerous. The superintendent, seeing the increased danger, retreated a few steps, and took his stand behind a lot of spouts. Plaintiff returned, with his planks, and passed by the superintendent, who gave him no warning. Plaintiff, in order to reach the place, had to crawl around and among the fixtures, carrying his planks with him, and did so successfully until he came suddenly to where the loose belt was.

He was astonished to find it off, and asked, "Who threw this belt off?" Miller, the superintendent, replied, "I did." Plaintiff then asked him, "What did you do it for?" and he replied, "I was afraid it would catch my clothing." The plaintiff said it ought not to have been done, or, if done, it ought to have been thrown off the small pulley. Miller replied, "What are you going to do now?" Plaintiff replied he believed he could cut the belt off, to which Miller made no reply. Plaintiff, however, became convinced he could not cut it with the small knife he had, and did not try to do so, but wound the belt up on the shaft with a board. This he did of his own volition, and not at Miller's direction. Plaintiff states that his object was to get the belt off, and put on a new one; but this was not Miller's suggestion. Plaintiff states that he knew that the belt being loose made the situation very dangerous, and would have known it even though he had not been hurt, and knew it before he went in to do the work, but did not say to Miller that it was dangerous, but merely that he ought not to have thrown the belt off. Miller did not direct him to go on, and put in the planks. Poole was not present at the time, and had given no instructions, after Saturday, before the work commenced on Monday. At the time the accident occurred there were no commands given, and no requests made, and what plaintiff did he did of his own volition. When the loose belt wound round the shaft, it came loose suddenly, quartered out, and caught plaintiff's left arm, and pulled it off.

It is said it was negligence to order the work done while the mill was running; that it was negligence also to increase the danger while the work was being done. Both these propositions are granted, without considering whether the last was personal or official negligence. It is said the plaintiff was not guilty of contributory negligence, and that he did not assume the risk when he undertook to do the work, nor when he remained after the new danger had arisen, and finished the work. If these latter contentions be correct, then plaintiff is entitled to recover. But are they correct? It will be observed, in the first place, that the injury in this case did not happen while the work on the feeder was being done. That was successfully finished, and the plaintiff then undertook to take off the old belt, and put on a new one, and in attempting this was hurt. This was a matter of his own suggestion; necessary, no doubt, to the proper operation of the feeder, but not ordered to be done. He adopts his own plan to effect his purpose, and in so doing is injured. It cannot be denied that he was fully aware of his dangerous surroundings, and the danger of the work, and that he made no objection to finishing the feeder, or throwing off the belt, when he knew of the peril attending it. He cannot recover because he was required to work in a dangerous position originally, even though he pro-

tested, if, nevertheless, he proceeded to do the work. In such case he assumes the risk, unless there is a promise to remedy the danger, and he relied on it. *Railroad Co. v. Elliott*, 1 Cold. 611; *Knox v. Coal Co.*, 90 Tenn. 548, 18 S. W. 255. And the same rule will apply when he undertakes to complete the work after the hazard has been increased, if he is aware of it, and fails to object, or even if he does the work under protest. It is not a case of sudden emergency, when the plaintiff is compelled to act, or when he finds himself in a situation of peril, and is forced to act, or when his retreat is cut off. Of all the persons connected with the management, plaintiff was most competent to know, and did actually know, more than any one else, of the danger of his employment and situation. He was a skilled millwright, and knew the details and dangers of his work. He goes into a situation which it was evident the superintendent considered dangerous, and, so considering, evidently thought himself incompetent to direct or advise. It is said, if the evidence is conflicting, only that must be looked to which is most favorable to plaintiff, on demurrer to evidence. This is not a correct statement. The evidence must be looked to as a whole, and all reasonable inferences drawn from it in plaintiff's favor, but none of it must be excluded simply because unfavorable, but only if shown by other evidence to be incorrect. We are not able to see upon what theory or legal ground the principal in this case can be held liable for this unfortunate accident, and, if there was negligence in the matter, as distinguished from a pure accident, it must be held to be that of the plaintiff in attempting to perform an act of the dangerous character of which he was most aware, and best competent to judge. The judgment must be affirmed, with costs.

### HAMILTON v. STATE.

(Supreme Court of Tennessee. Oct. 26, 1898.)

JURORS — QUALIFICATION — RELATIONSHIP — CRIMINAL LAW — NEW TRIAL — MURDER — DEGREES — EVIDENCE — SUFFICIENCY.

1. The statute disqualifying a juror, where he is related to a prosecutor "within" the sixth degree, disqualifies a juror related in the sixth degree.

2. The fact that, unknown to accused, one of the jurors was related to the prosecutor, does not entitle accused to a new trial as a matter of right.

3. Defendant fired at deceased several times, when deceased began to retreat, and, as he was dodging behind a barn, defendant fired again. One of the shots was fatal. Three eye-witnesses testified that the last shot was the fatal one, while a witness for defendant testified that the fatal shot was fired before the retreat. Engineering experts testified that defendant could not have shot deceased while retreating, because of an intervening fence. *Held*, that the last shot was the fatal one.

4. While bad blood was existing between defendant and deceased, defendant armed himself with a pistol, and went where deceased was working in his shirt sleeves, and they began

to quarrel. Deceased put his hand in a pocket containing a knife in a menacing manner, when defendant shot and killed him. A friend was with defendant, and deceased was alone. *Held*, that the murder was not done in self-defense.

Appeal from criminal court, Knox county; T. A. R. Nelson, Judge.

Ezra Hamilton was convicted of murder, and he appeals. *Affirmed*.

Samuel G. Helskell and L. O. Houk, for appellant. G. W. Pickle, Atty. Gen., for the State.

**WILKES, J.** Defendant is convicted of murder in the second degree, and sentenced for 20 years, and has appealed. It is objected that one of the jurors who tried him was related within the sixth degree to the prosecutor, who was also an important witness. No challenge was made of the juror when offered, but, on motion for a new trial, defendant made affidavit of the fact, and that he did not know of it when the juror was sworn. A juror is disqualified to serve when he is related to the defendant or to the prosecutor within the sixth degree, computing by the civil law. It is conceded that the juror was related in the sixth degree to the prosecutor. The term "within," as a limit of time or space or degree, embraces the last day or degree or entire distance covered by the limit. 29 Am. & Eng. Enc. Law, 524; 28 Am. & Eng. Enc. Law, 4; Union Trust Co. v. Chattanooga Electric Ry. Co., 100 Tenn. —, 47 S. W. 423. The juror was therefore incompetent. Can this avail the defendant on his motion for new trial and on appeal to this court? If a partial juror serves on the panel, it is ground for new trial, if the partiality was unknown to defendant when the juror was sworn. *Riddle v. State*, 3 Helsk. 401; *Brakefield v. State*, 1 Sneed, 215; *Norfleet v. State*, 4 Sneed, 340; *Goodall v. Thurman*, 1 Head, 209; *Johnson v. State*, 11 Lea, 47; *Draper v. State*, 4 Baxt, 246; *Cartright v. State*, 12 Lea, 620; *Parrish v. State*, Id. 655; *Hoard v. State*, 15 Lea, 318; *Spence v. State*, Id. 539. But if the fact is known to the defendant, and no objection is made before the jury is sworn, it is not ground for new trial. *Cantrell v. State*, 2 Shannon, 249; *Tinkle v. Dunivant*, 16 Lea, 503. But our cases are uniform that after the jury is sworn new trial will not be granted because of the want of general qualification of the juror, "propter defectum"; and this is held, even though the defendant was ignorant of the fact when the juror was selected. *McClure v. State*, 1 Yerg. 206; *Gillespie v. State*, 8 Yerg. 507; *Ward v. State*, 1 Humph. 253; *Calhoun v. State*, 4 Humph. 477; *Cartright v. State*, 12 Lea, 620. The latter case is directly in point, and draws the distinction between the cases when a juror is incompetent "propter defectum" and when he is incompetent because he has prejudged the case. Page 628. It might have been within the sound discretion of the trial judge to have granted a new trial, upon this or any

other-ground which in his opinion prejudiced the defendant's right to a fair and impartial trial; but there appeared no evidence of partiality to the prosecutor, or collusion with him, or of prejudice against the defendant in the selection of this juror, and in his denial of relationship, to the prosecutor, as it is made to appear that he mistook the name of the prosecutor, when it was called, upon his examination, and, moreover, the fact of relationship was of so little consequence to him that he could not state whether he was related or not, except from rumor or hearsay.

It is next insisted the defendant is not guilty, but that he killed his antagonist in self-defense. The case has been to this court before, when a death sentence for the offense was reversed for an inadvertent error in the charge of the court. See case reported in 97 Tenn. 452, 37 S. W. 194. Upon the remand there was a mistrial, and then the present conviction. The homicide was committed in October, 1895. The deceased, Walter Hansard, and the defendant were paying attention to the same young lady, and bad blood had developed in their rivalry, and had continued for a year or more, during which time they had quarrels. The homicide occurred on Monday. On Sunday night previous each of the young men had gone to the same country church, each with a different young lady. The defendant and the young lady he was with were sitting next to a window, when deceased approached from the outside, and turned the slats in the blinds. The defendant moved over next to the window, between it and the young lady, and spat out of the window. The deceased thereupon called him a "son of a bitch." Defendant got up, and went out of the church, and he and the deceased went off into the woods together to settle their quarrel, but they returned without having any difficulty. After service was concluded they each started home with his young lady, but defendant, after going with his a short distance, left her, and went a road that did not lead to her home nor to his, but by the home of the deceased. The parties were both armed, but defendant did not intercept the deceased, and no further trouble occurred that night. On the next day defendant went to a store in the neighborhood, bought some cartridges, and freshly loaded his pistol. He then passed along the public road by where deceased lived. This was not his direct road home. Deceased was engaged near the road handling some hay or fodder at his uncle's barn. Defendant was accompanied by a friend named Butcher. He called to the deceased to come down to the road, and deceased came in his shirt sleeves. Some words passed. Defendant asked deceased if he meant the night before to call him a "son of a bitch." Deceased replied that he did, and he was one; adding an additional epithet. Up to this point there is no material difference in the testimony. There were four eyewitnesses to the killing, three

of whom were related to deceased and testified for the state. One, the man Butcher, testified for the defendant. The theory of the defendant is that when deceased came down to the road, and the quarrel was renewed, that deceased put his hands upon the fence, and mounted it, and, throwing one leg over it, turned his side to defendant, and ran his right hand in his pants pocket in a menacing manner, whereupon he shot. There were five shots fired by the defendant. Deceased was not armed, except that in his right pocket he had an ordinary knife. The theory of the state is that the deceased merely placed his hands on the fence, but did not attempt to cross it, when defendant drew his pistol. Deceased thereupon ran off up the hill towards the barn and other houses, and defendant fired at him as he ran, and when deceased reached a point opposite the barn he turned to the left to get behind the house, and at this point the last of the five shots was fired. Two shots took effect,—one was in the leg, entering directly behind; the other in the side, passing through the fore part of the arm into the body, and this was the fatal one.

An ingenious argument is made to support defendant's contention and statement, in which he is largely, but not entirely, supported by Butcher; one contention being that the direction of the wound in the side and the range of the shot demonstrate that it could not have been done while the deceased was retreating up the hill, or the wound would have been directly in the back, and that it could only have been done when deceased was on the fence, with his side turned to defendant. A survey was made of the premises, and we have the testimony of engineering experts that from the place where defendant was standing he could not have shot the deceased running up the hill because of an intervening fence obstructing the view and range of the shots. These witnesses also testify that the range of vision of the principal witness was obstructed by a building, so that the deceased could not have been seen by the witness when it is said the fatal shot was fired. On the other hand, the state insists that the theory that deceased was shot while on the fence is contradicted by three eyewitnesses, and the shot in the rear of the leg shows it was made while deceased was retreating up the hill, and that the fatal shot was fired while deceased had his side somewhat turned to the defendant, as he attempted to get behind the house, and was so immediately fatal that the deceased could never have reached that point if the wound had been inflicted at the fence. It is not very definitely shown where defendant stood. That he did shoot five times there is no question, and he either shot at deceased as he ran, and because he saw him, or he aimed at the intervening fence, if he could not see him. Unquestionably one of the shots was fired while deceased was retreating, and most probably both of them that took effect.

But, in any event, defendant cannot justify his action upon the ground of self-defense, even on his own theory. It is apparent there was bad blood between the young men, and they were ready to fight when occasion might offer. Defendant prepared himself for such an occasion, and brought it about. He went by the place where deceased was, and called him to the road. Even on his own theory, he was not in imminent danger. The deceased was in his shirt sleeves, and it was apparent to sight that he had no pistol on, and, at most, could have had but a knife. They were not in close quarters, so as to make the danger imminent. Defendant had a companion with him while deceased was alone. Under these circumstances, he was not justified in shooting when he says he did. But we are satisfied the version of the state in this matter is correct, and that the shots were fired while deceased was in full retreat, they were continued as deceased fled up the hill, and the fatal shot was fired while deceased was turning to get behind the barn and shelter himself. In that position he would have his side to defendant, and it is reasonable to infer that he would also have his body turned somewhat to look at his antagonist as he fled. We are satisfied with the evidence, there is no error in the proceedings, and the judgment is affirmed.

#### ROGERS v. STATE.

(Supreme Court of Tennessee. Oct. 29, 1898.)

COMMISSIONERS OF WORKHOUSE—POWERS—DISCHARGE OF PRISONER.

The imprisonment of a defendant sentenced to a term in the workhouse was suspended. While so suspended, defendant never having been sent to the workhouse, the commissioners thereof discharged him, under Shannon's Code, § 7423, providing that the commissioners may discharge a prisoner when satisfied that he is physically unable to labor. *Held* that, the court still having control of the prisoner, the discharge was unwarranted.

Appeal from circuit court, Union county; W. R. Hicks, Judge.

D. F. Rogers was convicted of an assault, and he appeals. Affirmed.

Rogers & Ailor, for appellant. G. W. Pickle, Atty. Gen., for the State.

WILKES, J. In this case there was a conviction of assault and battery, with sentence of \$50 fine and six months' imprisonment in the workhouse. The imprisonment was suspended until the next term after the final judgment. While thus suspended, the defendant never having been sent to the workhouse, the commissioners of the workhouse made an order releasing and discharging him. The "Workhouse Law," as it is called, provides that the commissioners may discharge any prisoner when satisfied, from the certificate of the physician in charge, that he or she is physically unable to do labor, or for any cause when they may deem

it best for the institution and public good. Shannon's Code, § 7423. It is insisted by the state that this provision of the workhouse law is invalid and unconstitutional; that it is an exercise of the pardoning power, which is alone vested in the governor. Const. art. 3, § 6. And we are called upon to pass upon the constitutionality of this provision. We are of opinion we cannot do so in the present case, as the commissioners clearly exceeded their authority, even if the act were valid and constitutional. In no event could they release a defendant from the custody and sentence of the court before he had ever been delivered to and placed in the workhouse, and under their control and charge. They had acquired no jurisdiction of the defendant, even if the law were valid. Their act was an unwarranted interference with the judgment of the circuit court, while that court still had control of the prisoner and of the judgment, the sentence being reversed. It appears that the commissioners issued two pardons, presumably on the idea that, if one was not sufficient, two might be. The first was issued on the day after the judgment of suspension was ordered, and was presented in open court at the next term before the suspension terminated. The court refused to release the prisoner, and the counsel of defendant thereupon presented the second release, issued as of that date. The court refused to honor either release, and directed that defendant be placed in the county workhouse for six months, and from this order the defendant appealed. The release or order of discharge issued by the board recited that the discharge of the defendant was for the best interests of the institution and the public. The action of the circuit judge was entirely correct for the reasons we have stated, and his judgment is affirmed, with costs.

**McCLURG et al. v. McSPADDEN et al.**  
(Supreme Court of Tennessee. Nov. 2, 1898.)  
**FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE**  
**—SALE PENDING ACTION.**

1. A judgment creditor, who files a bill to set aside a trust deed as fraudulent, does not acquire such a lien on the trust property as to render void a sale of it by the trustee pending the suit, where the charge of fraud is not sustained.

2. Pending an action to set aside a trust deed as fraudulent, the complainant, in consideration of another trust deed, agreed to continue the case, and that, if the property should be sold under the first trust deed, it might also be sold under the latter. The bill did not seek to enjoin a sale under the first deed. *Held*, that the complainant cannot have such a sale set aside upon the mere ground that it was made at a private sale, without order of court, where it is not shown to be fraudulent, or that the property did not bring its full value.

Appeal from chancery court, Jefferson county.

Bill by William McClurg and another

against L. T. McSpadden and others. From a decree of the court of chancery appeals finding for defendants, the complainants appeal. Affirmed.

Noble Smithson, for appellants. Washburn, Pickle & Turner, for appellees Manard and Turner.

**WILKES, J.** On the 28th of July, 1896, Andes conveyed the real estate in controversy to Manard, to secure a note for \$287, due at six months. There was a power of sale at maturity unless the note was paid. On 20th of November, 1896, complainants filed this bill attacking the conveyance as fraudulent and usurious. They claim to be judgment creditors, with nulla bona returns, and by virtue of their bill they contend that they acquired a lien on the land, or Andes' interest therein, subordinate to the rights of Manard, if the deed to him should be sustained. Manard answered the bill, admitted usury to the amount of \$7.50, but denied all fraud. A few days before this answer was filed the complainants took from Andes and the McSpaddens a trust deed on certain real estate to secure two judgments due them, being the same made the basis for relief in this case. This latter trust deed provides that unless half of the two judgments and all costs of the justice of the peace and of this cause should be paid by 15th of June, 1897, the trustee should sell the property. It also provided that this cause should stand continued until that time, and, if payment was made as provided, the cause should be dismissed; and, further, that if the property was sold under the Manard mortgage, then that the complainants should be foreclosed at the same time, and the surplus, after satisfying the Manard debt, should go to the McClurg debt. Manard was no party to this deed of trust, nor was he enjoined by the bill from selling under his trust deed, and on March 20, 1897, he did sell under it, when W. R. Turner bought the land at \$288.96, and paid the purchase money. Thereupon complainants filed a supplemental bill, making Manard and Turner parties. It charged, among other things, that Manard agreed to postpone any sale under this trust deed until June 15, 1897, and on this account they had taken the second mortgage, and given the time specified; that the sale made was in violation of this agreement, and without notice to them until too late to stop the sale, and then refused to postpone at their request, and on their promise to pay the Manard debt. These charges the court of appeals report were all proven except the one that Manard agreed to postpone, and this was disproven. It was also charged in the supplemental bill that Turner was not an innocent purchaser, but bought for Manard, but the court of chancery appeals report that fact not proven. It also charges that the sale was not made in accordance with the power of sale in the

trust deed that the land sold for an inadequate price, but the court of chancery appeals found these statements not proven, and that the entire proceeds were necessary to the satisfaction of the Manard debt and the expenses of the trust.

The contention was and is that by the filing of the bill and bringing Manard before the court, the complainants put the land in custody of the law, and acquired a lien on it, and Manard thereafter and pending the suit made a valid sale. This contention was not well taken. If the bill had been sustained as one to set aside the conveyance to Manard, then a lien would probably have attached, under the doctrine of *Epperson v. Robertson*, 91 Tenn. 407, 412, 19 S. W. 230, and cases cited; but the court of chancery appeals report that the charge of fraud is not sustained by the fact. It is also true that a creditor who has execution and nulla bona returns acquires a lien upon the defendant's equity in real estate by the filing of his bill, and in this case the complainants, if proof had been made of judgment and return of nulla bona, might have impounded the surplus. But in this case there is no surplus if the sale is allowed to stand, so that the question whether Manard could proceed to execute his trust out of court under the provisions of his trust deed, instead of under the orders of the court, is the question at issue. This exact question is involved in the case of *Porter v. Duke*, 99 Tenn. 24, 41 S. W. 361, where it was held that a judgment creditor, who seeks to foreclose a mortgage and subject the surplus without impounding the property or obtaining receiver or injunction, cannot have relief upon a mere showing that the property was sold, pending the litigation, at private sale, as authorized by the deed of trust, when no surplus is realized, and it is not shown that the sale is fraudulent, or that the property was sacrificed, or did not bring full value. This case does not in any wise conflict with the cases of *Fulghum v. Cotton*, 6 Lea, 590, and *Schultz v. Blackford*, 9 Lea, 431, as the effort in these cases was to force a sale, and not to prevent it. Moreover, in the present case it appears that complainants, for a valuable consideration, had bound themselves to delay until June 15, 1897. The complainants, not having agreed to such delay, cannot be postponed till that time. In addition, it is also agreed in the last trust deed that, if the property is sold under the Manard mortgage, it might also be sold under the latter. This was a clear concession that Manard might sell under his mortgage, and complainants in that event were to have the surplus. The fact that Manard has requested the sale, and that complainants offered, if he would do so, they would pay his debt, cannot matter, as no tender was made, and Manard was under no obligations to delay the sale or accept the promise. The court holds, therefore, that there is no error in the decree of the court of chancery appeals, and it is affirmed.

JONES v. WESTERN UNION TEL. CO.  
(Supreme Court of Tennessee. Nov. 2, 1898.)  
TELEGRAPH COMPANIES—DEGREE OF DILIGENCE—  
APPEAL—RENDITION OF FINAL JUDGMENT.

1. Telegraph companies, in the transmission of messages, are bound to a very high degree of diligence.

2. On reversal of a judgment for defendant in an action for damages tried to a jury, where the evidence is clear that only nominal damages were sustained, judgment will be entered without remanding the case.

Error to circuit court, Roane county; John J. Blair, Judge.

Thomas Jones brought this action to recover damages from the Western Union Telegraph Company for its alleged negligent delay in the delivery of a telegram sent to him. Verdict and judgment were for the defendant, and the plaintiff appealed in error. Reversed.

H. P. Stephens, for plaintiff in error. Otto Fischer, for defendant in error.

CALDWELL, J. The trial judge erroneously instructed the jury that the defendant was under legal obligation to exercise only such diligence in the delivery of the telegram "as an ordinary, prudent, and diligent man would exercise in the discharge of his own business under like circumstances." Telegraph companies are, in a large sense, public corporations, endowed with many rights and privileges that individuals do not possess and cannot enjoy. They are allowed the functions of eminent domain, and are protected by the public laws in a quasi public occupation. Their obligations in respect of their business are, therefore, more exacting than those of a private individual. "Considerations of public policy demand that they shall be held responsible for a very high degree of diligence." *Marr v. Telegraph Co.*, 85 Tenn. 538, 3 S. W. 496; *Telegraph Co. v. Mellon*, 96 Tenn. 68, 69, 33 S. W. 725. For this error in the charge of the court the judgment is reversed.

After reversal, shall the case be remanded for a new trial, or shall it be finally decided by this court? Ordinarily, the former course would be pursued, the trial below having been before a jury, and not by the court without a jury. This is an exceptional case, however, and calls for an exception to the ordinary rule. The testimony of the defendant shows, conclusively, that it breached its contract, in that it did not exercise that degree of diligence devolved upon it by the law. By that breach the defendant, inevitably, becomes liable for some damages. The testimony for the plaintiff discloses with equal certainty that he sustained only nominal damages. Then the defendant is liable for nominal damages; no more, no less. This being so, nothing could be accomplished to the advantage of either party by a remand and new trial. The plaintiff, in no event, can be entitled to more than nominal damages; the defendant, in any event, is liable for that much. No other result, in whatever court,



would meet the demands of the law, upon the conceded facts of the case; and, if a different result were reached in the lower court upon a remand and new trial, this court, upon another appeal in error, would be compelled to reverse again. Such being true, this court directs that a judgment be now entered here in favor of the plaintiff, and against the defendant, for one dollar and all costs.

**MAYOR, ETC., OF CITY OF CHATTANOOGA v. DOWLING.**

(Supreme Court of Tennessee. Oct. 8, 1898.)

**MUNICIPAL CORPORATIONS—SEWERS—NUISANCE—SUCCESSIVE ACTIONS.**

The owner of lands where a sewer discharges may bring successive actions, against a city maintaining it, for the nuisance thereby created; it being abatable by an extension of the sewer to a proper place of outflow, for there can be no entire recovery in one action.

Appeal from chancery court, Hamilton county; Thomas M. McConnell, Judge.

Bill by the mayor and aldermen of Chattanooga against William Dowling. There was a decree for defendant, and complainant appeals. Affirmed.

Shepherd & Frierson, for appellant. Daniels & Garwin, for appellee.

**BEARD, J.** The defendant is the owner of a lot in the city of Chattanooga, very near which terminates a sewer, constructed by that city at much expense, through the mouth of which much loathsome sewage is deposited upon the defendant's land, greatly depreciating its rental value, as well as the value of the soil upon it, theretofore used by its owner for the purpose of making brick. The record discloses that in three different suits instituted by Dowling from time to time he had made recoveries against the municipality for the injuries resulting to this land, as from a continuing nuisance, and that when the present bill was filed he had begun a fourth suit to recover for the same nuisance such damages as had accrued to him since the commencement of the third and last action. The present bill was filed upon the theory that Dowling's injury, if any had been received by him, was permanent in its character, and that the recoveries already obtained by him, as a matter of law, precluded him from maintaining another action for the same injury. Especially was it insisted that this was the effect of the third suit and recovery, as it was averred that the measure of damages then set up and obtained was for a permanent injury. Accordingly complainant asked that he be enjoined from prosecuting the then pending suit, or any other suit against the complainant for the same cause of action. So far as the recovery in the third of these successive actions is concerned, it is only necessary to say that it is clear from the record that it embraced only the damage sustained by

Dowling up to the commencement of that action, and the use of the word "permanent" in his declaration was not intended to, and did not, carry his claim further than that; and there is no pretense that the other suits did anything more. The insistence, however, is made, that, whatever may have been the purpose of his previous litigation, yet such is the character of the work done by the city in the construction of the sewer, as well as its lawfulness under its charter, that a recovery, as a matter of law, could be made only on the basis of a permanent injury, and that Dowling is estopped from maintaining his present suit, even if he had heretofore failed to recover his entire damages. It clearly appears that the sewer in question formed a part of a plan or system projected for the city of Chattanooga; that the purpose of the authorities was to extend it to a place very much beyond the property of Dowling, where its contents would be discharged into a creek, and thence into the Tennessee river, but, for reasons satisfactory to these authorities, it was left in its present unfinished condition; that, as far as the work has progressed, it has been well and regularly done, in a form that is permanent, and under the authority of law. It may be taken for granted that the power of the city of Chattanooga to construct this sewer did not involve the right to so construct it as that its offensive contents would be frequently, if not continuously, discharged upon Dowling's land. The authorities agree that a municipality, in pursuing a public work, is not privileged to commit a nuisance, to the special injury of the citizen, and, if it does, it must, as would a private individual, respond in damages therefor. *Burton v. Mayor, etc.*, 7 Lea, 739; *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Eaton v. Railroad Co.*, 51 N. H. 504; *Rowell v. City of Lowell*, 7 Gray, 100; *Noonan v. City of Albany*, 79 N. Y. 470; *Dill. Mun. Corp.* § 1047. But the question here presented is, conceding the liability of the city to suit for the injury complained of, should all the damages have been recovered in one action by the injured party, or can he maintain successive suits, until the nuisance is abated? *Carriger v. Railroad Co.*, 7 Lea, 388, was an action against a railway company for so carelessly constructing its road as to cause the plaintiff's land to overflow. The embankment, which impeded the natural flow of the water, and threw it back on the land of the plaintiff, was built on the company's right of way under the authority of its charter, and it was permanent in its character; yet it was said by this court that "each overflow caused by the negligence, carelessness, or want of skill of the defendant or its agents is an independent wrong, and a cause of action for the damages resulting therefrom to the crops and other property of the rightful possessor of the soil or premises." In *Harmon v. Railway Co.*, 87 Tenn.

614, 11 S. W. 703, it was held that if a railway company, lawfully located upon a street in a city, under its charter, and by permission of the local government, uses the street beyond what is necessary for the proper running of its trains, and by such excessive and improper use substantially destroys the easement of way and of ingress and egress appurtenant to an abutting lot, the owner of such lot can maintain successive actions for such nuisance, recovering the damages that have accrued up to the time each action is instituted, and a recovery in one action will not bar a subsequent one brought for a continuance of these wrongs. The opinion in that case was rested largely upon the leading case of *Uline v. Railroad Co.*, 101 N. Y. 98, 4 N. E. 536, in which it was held that where a railroad corporation or municipality, under proper authority, erects an embankment in a street, if the work be carefully and skillfully done, it cannot be made liable for the consequential damages to adjacent property, but, if it be carelessly and unskillfully done, it can be made liable, in successive actions, until the nuisance is abated. But, if any doubt remained as to the rule in cases of this sort in this state, we think, it was set at rest in *Nashville v. Comar*, 88 Tenn. 418, 12 S. W. 1027. In that case the city of Nashville had constructed a sewer along one of its streets, the supposed defect of which seemed to be that it had not capacity sufficient to carry off the storm water flowing into it, so that upon occasions the pressure of accumulated sewage and storm water had been so great as to back or throw the contents of a smaller and tributary sewer of Comar on his premises. On the trial the circuit judge told the jury that in such a case the measure of damages was "the difference in market value of the property before and since the building of the sewer." This charge of the trial judge was maintained in argument by the counsel of Comar as correct, upon the suggestion that the sewer was a permanent improvement, and whatever damage it occasioned was of a permanent character; and it was therefore insisted that for this reason he could only bring one action, rather than successive actions, and must recover damages once for all. This view was rejected by this court, as being based upon "the assumption that the premises of Comar will for all time to come be subjected to the same disgusting invasions of sewage as have heretofore occurred." Continuing, this court said: "The complaint is not that the city has been guilty of any misconduct in erecting a sewer where this has been constructed, but that its servants have so unskillfully built it that upon the occurrence of unusual conditions it discharges its contents upon the premises of defendant in error. Now, upon what authority is it to be assumed that the negligence or unskillfulness of the servants of the city in the construction of this

sewer will not be remedied?" After a careful examination of the cases, and a repudiation of the measure of damages adopted by the trial judge, that opinion announces "that the true rule deducible from the authorities is that the law will not presume the continuance of wrong, nor allow a license to continue a wrong, when the cause of the injury is of such a nature as to be abatable either by the expenditure of labor or money, and that, where the cause of the injury is one not presumed to continue, that the damages recoverable from the wrongdoer are only such as have accrued before action brought, and that successive actions may be brought for the subsequent continuance of the wrong or nuisance." The principle here so distinctly stated disposes of the contention of complainant in the case at bar; for the insistence of Dowling is not that the city of Chattanooga had no right to erect this sewer, nor that it is not expensively and permanently done, as far as it has gone, but rather that the sewer has been negligently and unskillfully stopped at its present point of termination, so that the necessary result is to flood his land with its contents, to his serious detriment. To hold that for such a nuisance the injured party could have only one action, in which he must recover all his damages, past and prospective, would not only be to assume that the wrongdoer will always persist in his misconduct, but would be, in effect, to give him a license to continue in it. The courts will do neither. Without prolonging this opinion by an analysis of the cases cited by complainant as holding to a contrary view, we are satisfied that the court of chancery appeals was right in reaching this conclusion, and the decree of that court is therefore affirmed.

#### ROGERS et al. v. ROGERS et al.

(Supreme Court of Tennessee. Oct. 29, 1898.)

JUDICIAL SALE—TAXES—APPEAL—REVIEW—ADMINISTRATION—CONVERSION—COSTS—TAXATION.

1. Shannon's Code, § 969, provides that when real estate is sold under decree the judge shall, before confirmation, ascertain whether there are any taxes unpaid, and, if so, direct payment out of the proceeds of such sale. *Held*, that taxes accruing after the sale of the land, but before confirmation, should be paid out of the proceeds.

2. Where no exception was taken to a master's report, an assignment of error that certain items set out therein were improperly charged is not available.

3. An heir owed the estate, and, in order to save the debt, the estate bought in his interest in realty, which he failed to redeem. *Held*, that the amount so invested, and interest thereon, should be distributed as personal assets.

4. Where costs were adjudged against a party on appeal, and a certified statement thereof was properly made and returned, it was not improper on another trial to charge such costs in a lump.

Appeal from chancery court, Claiborne county; Hugh G. Kyle, Judge.

Suit between John P. Rogers and others and S. I. Rogers and others. There was a decree, which was affirmed by the court of chancery appeals, from which an appeal was taken. Modified.

Jesse L. Rogers, for complainants. S. I. Rogers, for defendants.

WILKES, J. This case is before us on appeal from a decree of the court of chancery appeals affirming the chancellor's decree.

The first question presented under the assignment of errors is whether the vendor or purchaser under a sale made by the chancery court is liable for state and county taxes upon land, which taxes accrued after the sale, but before the confirmation of the same. The lands in controversy were decreed to be sold at April term, 1894. The sale was made August 22, 1894. It was reported to the October term, 1894. The biddings were then opened, and left open until January 16, 1895, when the sale was confirmed. In the meantime the taxes for 1895 had accrued. The question presented is, who is liable for these taxes? The chancellor held the vendor estate liable, and ordered the taxes paid out of the proceeds of sale, and not the purchaser, and the court of chancery appeals affirmed this decree. We think the law is clear that no title to land sold under decree of the chancery court vests in the purchaser until the sale is confirmed to him by the court. He is not entitled to either possession or rents until after confirmation. And he is not liable for loss or injury by fire or otherwise which may happen to the property after it is sold, and before it is confirmed. *Childress v. Hurt*, 2 Swan, 487; *Shields v. Thompson*, 4 Baxt. 227; *Armstrong v. McClure*, 4 Heisk. 80. Nor does the confirmation have any retroactive effect, so as to relate back to and vest title in the purchaser at the day of sale, even though the purchaser's notes bear that date. *Houston v. Aycock*, 5 Sneed, 412; *Armstrong v. McClure*, 4 Heisk. 80; *Ellis v. Foster*, 7 Heisk. 131. The chancellor and court of chancery appeals are therefore correct in decreeing that these taxes be paid out of the proceeds of the land sold as provided by statute; the day of sale being the day when the sale becomes complete and effective by confirmation. Shannon's Code, § 969.

The second assignment is that certain items set out in the report of the master are lumping charges. The court of chancery appeals reports that the items are not lumping charges, as a matter of fact, and, moreover, that no exception on this ground was made to the master's report. This assignment is not good, therefore.

The third assignment is that it was error to treat an item of about \$456 as part of the real estate, instead of the personal estate; appellant having, as he claims, a greater in-

terest in the latter than in the former, and being therefore prejudiced by treating this fund as realty and not personalty. The court of chancery appeals reports that no grounds were stated nor reasons given for this insistence. It does report, however, that appellant's interest in the real estate was sold for about this amount, and he failed to redeem it. It was bought in for the estate, and in this way swelled the real property of the estate to that extent, and in which appellant was entitled to share in the same proportion as the other heirs. In other words, the appellant owed the estate about \$456, and in order to save the debt the estate bought in his interest of one-ninth in the real estate, and he failed to redeem it. It thus occurred that \$456 of the personal assets were invested in the real property of the estate. Treating it as thus changed into real property for the benefit of the estate, appellant's share would be only one-ninth of one-ninth, whereas, treating it as still personal assets, his interest would be one-ninth. We are of opinion appellant's contention on this point is correct. It is true that the \$456 debt due from appellant was bid on the land, but it was purely and solely to secure the debt; and it was not the purpose, nor would have been within the province, of the administrator to change it into real assets, but only to resell the land and realize the amount bid upon it, and this amount would, when realized, be personal assets, and belong to the distributors, and not to the heirs. *Roberts v. Jackson*, 3 Yerg. 79; *Johnson v. Patterson*, 13 Lea, 626; *Grimstead v. Huggins*, Id. 728. Appellant is entitled to have this amount and the interest on it treated as personal assets, instead of real property, and to share in it on that basis.

It is next insisted that it was error to charge appellant's share in the estate with \$177.75 costs. The objection seems to be that these costs are charged in a lump. This is not correct, as found by the court of chancery appeals, and is not improper, in any event. These costs were adjudged against him in this same suit upon a prior appeal to this court. The items appear on the proper books and dockets of the court, and it was not necessary for the clerk to detail the items. There was a certified statement of these costs, all properly made out, so that there was no error in this feature of the case.

This disposes of all the assignments which are properly before us and have any merit in them. The decree of the court of chancery appeals is so far modified as to treat the item of \$456 and interest as part of the personal estate, and not as part of the real assets of the estate of D. F. Rogers; and, with modification, it is affirmed, and the cause will be remanded for correction and such further orders as may be necessary. The costs of the appeal will be divided,—one-half paid by appellant and one-half by the estate.

**FORSHEE v. WILLIS et al.**

(Supreme Court of Tennessee. Nov. 2, 1898.)

**ASSIGNMENT FOR BENEFIT OF CREDITORS — DESCRIPTION OF PROPERTY — APPEAL — EXCEPTIONS.**

1. An assignment for benefit of creditors of "all the grantor's stock in and at the Forshee Tannery, in the town of Mossy Creek, and property elsewhere, together with all his notes and accounts, of every description," to which is annexed a schedule of "my entire stock or lot of goods or property," consisting of certain quantities of tan bark, corn, oil, horse and wagon, plows, hogs, and stock of hardware, not stating where such property is to be found, is void, under Acts 1881, c. 121, § 4, requiring the assignor to annex to the assignment a complete inventory or schedule of all the property of the assignor, as it is too indefinite as to description and location.

2. An assignment for benefit of creditors, in which the property is insufficiently described, located, and identified, is not cured by the fact that the property has been delivered to the assignee.

3. A schedule of accounts, attached to a general assignment, in the following form, is insufficient:

Mitchell	\$2.10
Tate	1.15

1. An objection that the court of chancery appeals, after holding an assignment for creditors void, should have given the debtor exempt property, made for the first time in the supreme court, is not available.

Appeal from chancery court, Jefferson county; John P. Smith, Judge.

Action by M. A. Willis and others against M. A. Forshee. From a decree of the court of chancery appeals reversing a decree for defendant, he appeals. Affirmed.

C. T. Rainkin, for appellant. Park, King & Park, for appellees.

**WILKES, J.** The controlling question in this cause is the validity or invalidity of a general assignment under the act of 1881, as against an attacking creditor. The court of chancery appeals reversed the chancellor, and held the assignment invalid and void, and that complainants are entitled to satisfaction of their debt out of the property conveyed. The court of chancery appeals held that there was nothing either in the conveyance or schedule that in any manner indicated where the greater part of the property was to be found, nor that gives any means or mode of identifying it. The conveyance describes the property as "all the grantor's stock in and at the Forshee Tannery, in the town of Mossy Creek, and property elsewhere, together with all his notes and accounts, of every description whatever, and hereby delivers the same to the master, whereof a full and complete inventory or schedule is hereto annexed, marked 'A,' and made part hereof. The said schedule contains all the property, of every kind and description, owned by me [the grantor], and I hereby deliver the same into the possession of the master." Schedule A describes the property thus: "My entire stock or lot of goods or property, consisting of about 125 cuds of tan bark; about 50 bushels of corn;

a one-horse wagon, and horse; two plows; three head of hogs; about 25 gallons of oil; about 200 pounds of tallow; about 150 bushels of lime; entire stock of hardware, consisting of buckles, reins, bits, tacks; one saddle; entire stock of hides,—about 40 or 50; one —; one lot of horse collars; one lot of whips; one lot of halters." Schedule B is a list of accounts, embracing some 35 in number, of which the following is a sample.

Mitchell	\$2.10
W. M. "Tate	4.20
	1.15

Now, from this conveyance and schedule it might perhaps be inferred that some of the property specified in Schedule A would be found at the tannery,—that is, such as would make up part of a tannery stock,—though it is not so stated expressly. But that all the property was not there is apparent from the conveyance itself, which refers to the stock at the tannery, and adds, "And property elsewhere." Where the corn, wagon and horse, plows, and hogs are to be found, is not stated or indicated; nor is there any definite description, such as would serve to identify them, given, to enable the assignee or others to locate them. We think this objection is fatal to the assignment. There must be such a description as will enable the assignee to take possession, and, if he really has possession delivered, it must be so definite as to description and location as that creditors, as well as the assignee, may know where it has all been taken charge of. We think the case falls fairly under the rule in *Scheibler v. Mundinger*, 86 Tenn. 674, 9 S. W. 33. It cannot suffice, to do away with a sufficient description, location, and identification, to say that the property is or has been delivered to the assignee. If this were so, then the schedule would not be at all necessary, but the debtor could simply say, "All his property, all of which he had delivered to the assignee." Certainly this rule cannot be held good. We are of opinion there is no error in the decree of the court of chancery appeals, and it is affirmed. We may add that Schedule B is also wholly insufficient, in its description of the accounts, and persons owing them.

It is said that the court of chancery appeals, after holding the conveyance void, should have given the debtor such property as is exempt to mechanics. This exception and claim is made for the first time in this court, and cannot be available now.

**FORD v. STATE.**

(Supreme Court of Tennessee. Nov. 2, 1898.)

**CRIMINAL LAW — FAILURE TO PROVE AN ALIBI — INSTRUCTIONS — QUESTION OF IDENTITY — JURY — JUDGES OF THE LAW — REVERSIBLE ERROR.**

1. Where an accused unsuccessfully attempts to establish an alibi, it is only a circumstance against him, when it appears to have been made in bad faith.

2. An alibi may be considered for what it is worth, if it renders it very improbable that defendant was present, and it was improper to charge that, if it was possible that he could have been at both places, the proof of the alibi is of no value whatever.

3. Where a sentence practically equivalent to a life sentence may be given, a special charge on the identity of the accused should be given, where that is the issue.

4. Const. art. 1, § 19, declaring that "the jury shall have the right to determine the law and facts under the direction of the court in libel as in other criminal cases," makes the jury, and not the court, the judges of the law in criminal cases.

5. Under the constitutional provision making the jury the judges of the law under the direction of the court in a criminal case, it is error to charge that the jury are judges of the applicability of the law as given them in charge to the facts of the case.

6. Failure to tell the jury in a criminal case that they are the judges of the law is not reversible error, unless the defendant might have been prejudiced thereby.

7. Where the judge charged the law inaccurately in one respect, and did not sufficiently and fully state it in others, his failure to charge that the jury were the judges of the law was reversible error, since the defendant may have been prejudiced thereby.

Appeal from circuit court, Hamilton county; Floyd Estell, Judge.

Henry Ford was convicted of rape, and he appeals. Reversed.

John O. Benson, for appellant. G. W. Pickle, Atty. Gen., for the State.

SNODGRASS, C. J. Indictment and conviction of rape, and sentence of 21 years in the penitentiary. Appeal by defendant. The guilt of defendant depended on proof of his identity. The evidence on that subject was that of the little negro girl upon whom the offense was alleged to have been committed by the negro Ford, plaintiff in error. There was no other evidence implicating him. She could not see him (the offense, if committed, being committed in the dark), but testified to his identity because of "the way he felt and changed his voice." The defendant testified that he was not guilty, was not in fact there, and offered other evidence of an alibi. The evidence of alibi was not conclusive, but it bears no special indication of being manufactured, fraudulent, or fabricated. In this condition of the record, the court charged, among other things: "Where a defendant interposes the defense of an alibi, and fails to establish it, it is a circumstance against him, but is not conclusive evidence of his guilt." This is error. It is not always a circumstance against a person charged with an offense that he merely fails to establish an alibi which he attempts to prove. 2 Am. & Eng. Enc. Law (New Ed.) p. 59. The jury may look to it or not, according to surroundings. *Sawyers v. State*, 15 Lea, 694-696. A perfectly innocent man might make such an attempt in good faith, and fail for lack of evidence to establish it. It could only be a circumstance against him if it appeared to have been made in bad faith, manufactured, fabricated, or false.

The court further said: "Proof of an alibi should cover the whole time of the transaction in question; for, if it be possible that the prisoner could have been at both places, the proof of the alibi is of no value whatever." This is too strong. It need not exclude the absolute possibility of presence at the time and place of the offense to be of some value. It can be admitted and considered for what it may be worth, if it renders it very improbable that defendant could have been present. This is the soundest rule. 2 Am. & Eng. Enc. Law (New Ed.) pp. 57, 58, and notes. See, specially, *Creed v. People*, 81 Ill. 565. It can only be conclusive when, taken as true, it shows that there was no possibility of defendant's presence, where that is necessary. Id.

The court wholly omitted to give any special charge on the question of identity. There was no request, but the sentence is practically equivalent to a life sentence, and, as it was the question in the case, we think it should have been given.

The court charged: "The jury are the exclusive judges of the testimony and the credibility of the witnesses. The court is the judge of the law, but the jury are the judges of the applicability of the law, as given them in charge, to the facts of the case." This is error. Const. art. 1, § 19. We have nowhere gone so far as to say that in criminal cases the court is the judge of the law. The constitutional declaration that the jury shall have the right to determine the law and facts, under the direction of the court, in libel as in other criminal cases, has been uniformly held to make the court not the judge of the law. Nor are the juries as broadly judges of the "applicability of the law" as is implied. If so, the court could judge alone of the law applicable to a particular case, and give it to them, and they might determine it was not applicable at all. This would fritter away the constitutional provision, and make it mean precisely what it does not. It is the duty of the court to direct the jury what the law is, and it is the duty of the jury to apply it, under the direction of the court, so far as he has directed, to the facts in evidence. They must treat it as applicable to the facts, and apply it as they determine the facts to be. The court is a witness to them what the law is, and the jury should adjudge it to be as given them, but, if the jury adjudges what is given in charge to be law, they cannot adjudge it to be inapplicable. The judge may not charge all the law. So far as he does charge anything to be law or not to be, the jury should take his statements as law, but, at last, they have the right to judge of what is or is not law. They cannot properly disregard his instruction, and should take the law, as far as given by the court, as the law of the case, and not assume to set up any knowledge of their own as against his. But it is true that in many cases the court does not and cannot, in any reasonable limit, give all the law which is applicable to all the facts

and phases of every criminal case, and the defendant is in some way entitled to it. He may get the benefit of it by requests, but that is not the only way, even if it were always practicable. Under our practice, his counsel have the right to read and argue the law of his case to the jury. *Hannah v. State*, 11 Lea, 201. We can see no practical good that could result to him from this if the jury might not respond to it, by considering and giving him the advantage of it. Of course, we are not to be understood as meaning that, when the court gives them the law on a particular proposition, they should not follow it. On the contrary, we think the law to be correctly settled that they should not set up their own supposed knowledge of the law against that of the court, whether they assumed to have that knowledge of their own, or to have acquired it from counsel in argument; but where there is no direction by the court, or not a full direction in points involved, they should not be limited to an application of only such law as is given them by the court if there be yet other, and not contradictory, to that thus given, which they may understand from the argument or know for themselves. On the general subject whether and to what extent the jury are the judges of the law there has been in this state, as in others, much controversy and some confusion of decision. For many years there was no question raised against the view that the jury were the exclusive judges of the law, under the direction of the court, as of the facts which he permitted to be proven. In an early day it was decided that a qualification of it as follows was made too strongly: "The court was to be the judge of the law, and it is the duty of the jury to receive it as laid down and expounded by the court, and that the jury were not the exclusive judges of the law." *McGowan v. State*, 9 Yerg. 185-194. Following this, a charge of the circuit judge that "the jury are the judges of the law as it applies to the facts. They are the exclusive judges of the facts, but in making up their verdict they are to consider the law in connection with the facts, but the court is the proper source from which they are to get the law. In other words, they are the judges of the law as well as the facts, under the direction of the court,"—was held to be substantially correct. *Dale v. State*, 10 Yerg. 551. Afterwards a charge was held correct, and as containing no error of which a defendant could complain, couched in the following words: "The jury are not only the judges of the facts in the case, but they are the judges of the law. The court is a witness to them of what the law is. After the court has stated the law to them, then, if they believe it to be different, they can disregard the opinion of the court." *Nelson v. State*, 2 Swan, 482. Yet later the court said it was not error to charge that the jury could not arbitrarily disregard the instructions given them as to the law. *Robertson v. State*, 4 Lea, 425. In some of these cases it was said the jury could deter-

mine the law differently from the court, and, it was said, they should not do so. The power was conceded to be given them; the right to do so was practically denied. It serves no purpose to discuss these cases, or to attempt to harmonize them, or to harmonize the result of these views with the condition to which it brought the question between power and right. They make their own explanation, so far as any is to be made. Thus stood the law (in some confusion, it must be admitted) until 1881, when it again came before the court, when, after much discussion of the subject, it was practically adjudged that juries are judges of the law "only under the direction of the court, and have no right to disregard the law as given to them by the court. They are to receive the law from the court, and are to judge the law as it applies to the facts." The court held a charge of the circuit judge to be erroneous in which he said: "The jury are the judges of the law. Should you conclude that the court has not given you the law correctly, and should you conclude you know the law is otherwise than is given you by the court, then you may pass upon the case as you know it." This court then proceeded to lay down the correct rule, and in that connection indicated a proper form of charge therefrom, deduced as follows: "A proper charge is: The jury are the judges of the facts, and the law as it applies to the facts. In making up their verdict they are to consider the law in connection with the facts, but the court is the proper source from which they are to get the law. In other words, they are judges of the law as well as the facts, under the direction of the court." *Harris v. State*, 7 Lea, 538. This was the charge in its exact language, held to be substantially correct in *Dale v. State*, 10 Yerg. 551. It is observable that the court says they are judges of the law "as it applies to the facts," not judges of the "applicability of the law" given them in charge, which is not by any means precisely of the same meaning, though elsewhere in the same opinion the judge delivering it so uses the words. "As it applies to the facts" merely means that the jury are to apply it to the facts they find. "To judge of the applicability" of the law would include the power not only to judge and apply, but to judge whether or not it applied at all, to the case, and would involve the right to disregard the whole charge as inapplicable. This was not intended. They are to decide the facts, and apply the law to this or that state of facts as they may determine the result of the evidence establishing the facts they find. In this case the court assumes that "there had been opinions and dicta not in accord with the rule here laid down," and cites one case in accord (*MSS. Jackson*), opinion by Judge Turney. Of these opinions and dicta the court says they are "overruled." How many of them there were it is impossible to say. There were at least two then enrolled, and published in the *Legal Reporter*. *Withers v. State*, 3 Leg. Rep. (Tenn.) 106; *Derman v.*

State, Id. 184. The first of these cases was a misdemeanor case. The judge charged the jury: "You are the judges of the facts, but you are not the judges of the law. You must receive the law as charged to you by the court, and find your verdict in accordance with the law so given. The rule is different in felony and misdemeanor cases. In the former you are judges of both the law and the facts, but in the latter of the facts only." This was held to be reversible error. The rule was the same, and was incorrectly given. The opinion in this case was by Judge Turney. Judge Freeman, who subsequently delivered the opinion in the 7 Lea case, dissented, and vigorously combated the correctness of the rule in felony cases, and bitterly fought its extension. The second case approved the first, and again reiterated that it was reversible error to charge that juries must receive the law as given by the court. These cases must therefore be considered as overruled, so far as they held unqualifiedly that juries are judges of the law, but not, of course, in extending or applying whatever rule exists in felony cases to misdemeanor cases. We note one other case, in which the court held "that it does not constitute reversible error for the court to charge that juries were judges of the law as well as the evidence, and had the legal right to disregard the instructions of the court." It is so correctly digested by the reporter. *Hannum v. State*, 90 Tenn. 648, 18 S. W. 271. In so deciding, the language of Judge Lea was broader than the point involved. He said: "The charge is confessedly incorrect. The jury are not judges of the law, but must take the law as charged by the court in criminal as well as civil cases." The judge delivering this opinion was the reporter who wrote the headnotes for the 7 Lea, 538, case, in which it was stated that juries are not judges of the law, and he cites this case as authority. But we have already seen this case went to no such extent. It was too strongly digested in this respect in the headnotes, and the error was repeated in the dictum of the 90 Tenn. 648, 18 S. W. 269, case, which escaped the observation of the court. What was in fact decided in the *Hannum* Case we have shown by quotation of the charge held erroneous, but not to contain reversible error, because it did not appear to have been, or that it might have been, injurious to defendant; repeating on this point, also, the holding in the 7 Lea, 538, case. It will thus be seen that we have no case going so far as to say, in the face of the constitutional provision, that juries are not judges of the law (in some form), however vague it may have been made as a rule in fact, and this court will go no further. No other case changes or extends the rule laid down in the *Harris* Case. It remains the law.

But we have seen that in the *Hannum* Case and in the *Harris* Case it was held that such an error is not reversible, it not appearing that defendant might have been

prejudiced thereby. It was also so held in *McGowan's Case*. The contrary holding in *Withers' and Derman's Cases* has been overruled, as we have seen. It has also been held that mere failure to tell the jury that they are judges of the law is not necessarily reversible error. It is worth noting here that Judge Nicholson, who delivered the opinion, regarded it as so well settled that they were so under the constitution that he said they would be presumed to know it. *Butler v. State*, 7 Baxt. 35. The law, therefore, remains that, where no injury could have resulted to defendant, it is not reversible error. Such a case is one where, whoever judged of the law, it was sufficiently and accurately charged, and as fully as should have been. We have seen in this case that the law was not accurately charged in one respect, and not sufficiently and fully charged in others. It follows, therefore, that the charge in this respect may have been prejudicial to defendant. It so appears to the court, and hence also constitutes reversible error. The judgment is therefore reversed, and the case remanded for a new trial.

#### PRYOR et al. v. PENDLETON et al.

(Supreme Court of Texas. Nov. 14, 1898.)

WILLS—ADVERSE CLAIMS—ESTOPPEL—ACTS OF LEGATEE—ELECTION.

1. The act of a daughter of testator in receiving from the estate, after his death, property not disposed of by the will, but which she would have received if no will had been made, does not estop her from claiming adversely to the will.

2. A legatee's recognition of the executor named in the will by executing an order on the executor to pay a third person a specified sum, where the legatee herself received nothing therefrom, and the money was paid from a fund undisposed of by testator, does not constitute an election to take under the will, so as to estop the legatee from denying its provisions, where such act caused no injury to the other legatees.

Error to court of civil appeals of Fifth supreme judicial district.

Action by Kannie Pryor and her husband against S. C. Pendleton and others for a partition of the separate property of the deceased mother of the parties, and of her interest in the community property. From a judgment of the court of civil appeals affirming a judgment for defendants, plaintiffs bring error. Reversed.

Geo. Hardin and Head, Dillard & Muse, for plaintiffs in error. G. R. Smith, J. M. Pearson, M. H. Garnett, and R. O. Merritt, for defendants in error.

BROWN, J. Elizabeth Robinson and Charles Robinson were husband and wife, residing in Collin county, Tex., with three children, to wit, Kannie Pryor, S. C. Pendleton, and T. P. Robinson, all of whom survived both of the parents. During the marriage, the property hereinafter mentioned was ac-

quired, and was community property, except a tract of 50¼ acres of land, which was the separate property of Elizabeth. She died on June 1, 1892, intestate, and on her estate no administration was ever had. Charles Robinson died on January 10, 1895, leaving a will, in which E. H. Pendleton, the husband of Mrs. S. C. Pendleton, was appointed executor. The will disposed of the real property belonging to the community of Charles Robinson and wife, as well as the tract of land which was the separate property of the deceased wife, by bequeathing to each one of the children a particular tract of land. It contained the following clause: "My intention is to make absolute and final partition between my three children of all of said property, as well what they are entitled to from their mother as well as from me. So that, when my son receives property hereafter bequeathed to him, he takes it in full of his mother's community interest in and to all of said property. When my daughter S. C. Pendleton takes the property bequeathed to her in this will, she takes it in full of her mother's community interest in and to all of said property. Likewise, when my daughter Kannie Pryor receives the property herein bequeathed to her, she takes it in full of her mother's community interest in and to all of said property." The executor applied for the probate of the will in the probate court of Collin county; and, while the application was pending, Mrs. Pryor and Mrs. Pendleton went to the house of the deceased, and divided between themselves and their brother, who was then in California, all the household and kitchen furniture, it not being disposed of by the will. The executor did not object to this disposition of the property, there being sufficient personal property besides to pay all of the debts. He did not know at the time that there was any objection to the will. On March 8, 1895, Mrs. Kannie Pryor and her husband executed and acknowledged the following instrument: "The State of Texas, County of Collin. Whereas, Charles Robinson, deceased, expressed the wish in his lifetime that Mrs. Lacy King should receive from his estate the sum of \$250, but this bequest is not contained in the will, now, therefore, in order to carry out his wishes on the subject, and in consideration of the sum of one dollar to us in hand paid by said Mrs. Lacy King, and for other good and sufficient reasons, we, Kannie Pryor, joined by her husband, W. T. Pryor, citizens of Collin county, Texas, and legatees named in the last will of said Charles Robinson, deceased, which has been duly probated, do direct, require, and order E. H. Pendleton, the executor of said will, to pay over to said Mrs. Lacy King the sum of two hundred and fifty dollars out of any money belonging to said estate, or out of any proceeds from sales of property belonging to said estate yet to be made, and receipt of the said Lacy King to him for such sum of money shall be and operate as our re-

ceipt to him for said sum. Witness our hands, this, the 18th day of March, 1895. Kannie Pryor. W. T. Pryor." When the above instrument was presented to him, the executor paid \$250 to Mrs. King, which payment was by him reported to the probate court, and approved. Mrs. Pryor testified, in substance, that the instrument above copied was executed at the instance of D. P. Johnson, an attorney and notary public, who brought it to her house at night, and that Johnson told her that the instrument was to authorize Pendleton, the executor, to pay Mrs. Lacy King \$250 out of the Charles Robinson estate; that her husband asked Johnson if it would in any way affect his wife's right in reference to the will of Charles Robinson, and said, if it would, they would not sign it, to which Johnson replied that it would not, and upon this assurance she and her husband signed the instrument. Kannie Pryor, joined by her husband, instituted this suit on December 9, 1895, against S. C. Pendleton and her husband, E. H. Pendleton, who was also executor, and T. P. Robinson, seeking a partition of the separate property of their mother, and also her mother's interest in the community property. Among other things, the defendants pleaded that Mrs. Pryor had elected to take under the will, and was estopped to deny its provisions; also, that the estate of Charles Robinson had not been fully administered, and was not ready for partition. The trial was had before the court, which gave judgment for the defendants, which judgment was affirmed by the court of civil appeals.

To constitute an election that would work an estoppel upon her, Mrs. Pryor must have received from the estate of her father some benefit given to her by his will which otherwise she would not have been entitled to. Receiving from the estate property not disposed of by the will, and which she would have received if no will had been made, would not estop her to claim adversely to that instrument. *Smith v. Butler*, 85 Tex. 130, 19 S. W. 1083; *Philleo v. Holliday*, 24 Tex. 45; *Carroll v. Carroll*, 20 Tex. 745. A recognition of the executor as such by Mrs. Pryor would not constitute an election to take under the will, nor estop her to deny its provisions, because such act caused no injury to the other legatees. *Carroll v. Carroll*, supra. In the case last cited, the testator, by general terms, devised all of his estate equally to his wife and children, share and share alike. He appointed his wife executrix, and his two sons and another person executors, exempting them from the control of the county court. The executrix and executors returned an inventory of the property of the estate, in which it was described as the separate property of the testator. In fact, the estate was principally community property of the testator and his wife. In the partition of the estate, the wife claimed her half of the community property. It was contended by



the children that she was estopped to claim one-half of the community, having elected to take under the will; but the supreme court held that her acts did not constitute an election.

When Mrs. Pryor, with her sister, divided the household and kitchen furniture equally between themselves and their brother, she received nothing by the terms of the will, because that property was not disposed of by that instrument. She took only what she would have received if her father had made no will, which was an equal share of that property, as his heir and heir of her mother.

By the execution of the order in favor of Mrs. Lacy King for \$250, Mrs. Pryor recognized the executor, but she received for herself nothing, nor was the money paid out of any fund which was devised to Mrs. Pryor by her father, but out of a fund not disposed of by the testator. While that was a recognition of the existence of the will, and of the fact that she is named as a legatee in it, as well as the authority of the executor, it is not so strong a recognition as were the acts of the wife in the case of *Carroll v. Carroll*, who accepted the appointment of executrix, and exercised the authority conferred upon her. In neither case were the other legatees put in worse position, which is an essential element of estoppel upon which the doctrine of election rests. The district court erred in holding that Mrs. Pryor was estopped to claim her interest in her mother's half of the estate, and the court of civil appeals erred in affirming that judgment. It is therefore ordered that the judgments of the district court and of the court of civil appeals be reversed, and this cause be remanded.

**QUISENBERRY et al. v. J. B. WATKINS  
LAND-MORTGAGE CO. et al.**

(Supreme Court of Texas. Nov. 10, 1898.)

**WILLS—CONSTRUCTION—POWER OF DEVISEE—  
MORTGAGE.**

A testator bequeathed land to his son, "with the right to sell, devise, or exchange said land," subject to the condition that, if he should die without having made such sale, devise, or exchange, it should descend to his heirs. Another provision of the will was: "My object in these provisions is to give [his son] the right to dispose of the land as he pleases during his life." *Held*, that the son could not mortgage the land.

Error to court of civil appeals of Fifth supreme judicial district.

Action by Pattie B. Quisenberry and husband against the J. B. Watkins Land-Mortgage Company and others to set aside a mortgage. From a judgment of the court of civil appeals reversing a judgment for plaintiffs, they appeal. Reversed, and judgment of district court affirmed.

McKinnon & Carlton (Robert T. Quisenberry, of counsel), for plaintiffs in error. W. H. Ford and Watts, Aldredge & Eckford, for defendants in error.

BROWN, J. O. Beatty resided in Kentucky, and owned a tract of land in the state of Texas. He had two children,—the plaintiff Pattie B. Quisenberry, who resided in Kentucky; and Charles R. Beatty, who lived in Hill county, Tex. On the 21st day of June, 1890, O. Beatty made a will, the provisions of which are hereafter copied, and died on the next day. The will was duly probated in the state of Kentucky, and recorded in Hill county, Tex. October 1, 1890, Charles R. Beatty and wife, L. C. Beatty, made and delivered to Henry Dickinson a bond for \$2,000, due in five years, with five coupon notes, for \$200 each, representing the interest of each year, and on the same day Charles R. Beatty and wife made a deed of trust to J. B. Watkins upon the land in controversy to secure the bond and notes above described. The bond and the interest notes were afterwards transferred to the J. B. Watkins Land-Mortgage Company, and are unpaid, except two of the interest notes. Before the institution of this suit the land and mortgage company was put in the hands of a receiver, and T. W. Ford appointed receiver thereof. The deed of trust was not foreclosed, and C. R. Beatty died on June 21, 1892, leaving neither children nor widow, his wife having died at a date prior thereto. J. H. Finks was appointed administrator of C. R. Beatty's estate, which is insolvent. Pattie B. Quisenberry is the only heir of Charles R. Beatty, deceased.

The provisions of the will of O. Beatty involved in this litigation are as follows: "I give and bequeath to my son, Charles R. Beatty, now of Hill county, Texas, the aforesaid tract of land, with the right to sell, devise, or exchange said land, subject to the following conditions: If he should die without having by sale, bequest, or exchange, or in any other lawful way, dispossessed himself of the title, then it is my will that at his death the land shall go to his lawful widow and children or descendants, if he should leave such, in such manner and proportion as the laws of the commonwealth in which the land lies would prescribe. 2d condition: If he would [should] leave lawful children or descendants, but no in law, then it is my will in the manner as above (1st condition) the property shall be divided among them in such manner and proportion as the laws of the commonwealth in which the land lies shall prescribe. 3d condition: If he should leave a lawful widow, but no lawful children or descendants, then it is my will that the said widow shall have a life interest in the said land, and at her death the land shall revert to my daughter, Pattie B. Quisenberry, of Danville, or her heirs and devisees. My object in these provisions is to give my son, Charles R. Beatty, the right to dispose of the land as he pleases during his life, or by will at his death, but, in the event of his failure to do this, it is my intention to give the absolute title to his lawful children or descendants, with provisions as stated in provision 1 for his widow,

with no attempt to control it further; but if a widow only survives my son, then to limit her right to a life interest in the land. I have under several conditions under the first clause expressed my will as to the disposition of a tract of land I own in Hill county, Texas. By reference to these it may be seen that it may ultimately revert to my daughter, if my son to whom I will it shall die before he alienates the title, leaving neither legal heirs, issue of his body, nor making testamentary disposition of the land. In event of its thus reverting to my daughter, it is my will that this tract of land shall pass to the trustees of the Center College of Kentucky, at Danville. If my daughter, P. B. Quisenberry, should outlive my son and his representatives described in clause 1, then I will this Texas land to my daughter for her natural life, and at her death to the Center College of Kentucky. Should my daughter's death occur before the fulfillment of the conditions which would entitle her to become the possessor of this land, then the fulfillment of these conditions, that would have entitled her to become the owner of the land had she lived, shall, if she be not living, inure to the benefit of the said college, which shall then become the full owner of, to do with it what the trustees may choose to do for the advancement of the interest of the college. Should the title vest in my daughter, she may, while she yet lives, or by testamentary bequest, designate the special object to which the fund thus derived may be dedicated. If she declines to designate any particular object, then the board of trustees shall have full power to use it in whatever way to them seems wisest and best."

On February 18, 1896, the plaintiff in error, joined by her husband, instituted a suit in the district court of Hill county against the J. B. Watkins Land-Mortgage Company, T. W. Ford, the receiver, J. H. Finks, the administrator, and Center College of Kentucky, seeking to set aside and annul the mortgage given by Beatty and wife to J. B. Watkins upon the land in controversy, and to remove from the title of the plaintiff the cloud cast upon it by the mortgage, and also praying for a construction of the provisions of the will before copied. The land-mortgage company and the receiver answered, setting up the mortgage, and asking a foreclosure upon the 320 acres of land described therein. The case was tried before the judge, who filed conclusions of fact, and entered judgment for the plaintiff in that suit, holding that Beatty had no power under the will to make the mortgage. The court of civil appeals reversed the judgment of the district court, and rendered judgment foreclosing the mortgage lien, and ordering that the surplus, if any, of the money derived from the sale of the land, be paid to the administrator of Charles R. Beatty, deceased.

The sole question presented by the application for the writ of error is, did the will of

O. Beatty authorize Charles R. Beatty to make the mortgage? It is contended for the defendant in error that, by the use of the terms "sell" and "dispose of," the power to make the mortgage was given. It is true the word "sell," as well as the phrase "dispose of," has been held to include the power to make a mortgage, but in the cases which so hold the purposes of the instruments were such that the power to make a mortgage was implied. *Faulk v. Dashiell*, 62 Tex. 642. No such implication can arise in contravention of the intention of the parties. *Loebenthal v. Raleigh*, 36 N. J. Eq. 169. The only language that confers authority upon the legatee to dispose of the land is found in the first sentence of the first clause copied herein, and each subsequent use of words that might indicate such power is clearly referable to those first used, and explanatory of them. The contention of defendant in error is rested mainly upon this language: "My object in these provisions is to give my son, Charles R. Beatty, the right to dispose of the land as he pleases during his life, or by will at his death, but, in the event of his failure to do this, it is my intention to give the absolute title to his lawful children or descendants." This language does not confer general power to "dispose of" the land, but has the effect to make it clear that he may "sell, exchange, or devise it" as he might choose, without restraint, confining him to the exercise of authority before conferred.

Power to make the mortgage cannot be derived from the authority to "exchange or devise," and, if it be sustained, it must be under the authority to "sell." The best test of the validity of that instrument is to ascertain (1) what effect upon the title a proper execution of the power would have; (2) does the mortgage fulfill the requirement? The usual effect of a sale is to pass the title to the property, and the word "sell" must be so construed, unless a different intent appears. But the testator took away the power of the court to construe that word, prescribing that the character of the sale must be such as to dispossess C. R. Beatty of the title; to alienate the title from him. No right in remainder is limited upon any disposition that might be made, but any disposition authorized would terminate the rights of all parties under the will, which confirms the conclusion that the sale must pass the title. If the contention of the defendants in error be correct, the legatee was empowered to encumber the land, but the will expresses the intent to pass the absolute title to the children of the son, and not an incumbered estate. By the will, C. R. Beatty had the right only to pass the title to the land in one of the ways specified. The mortgage did not dispossess him of nor alienate the title, and was therefore unauthorized and void. We do not think it necessary to discuss the proposition that C. R. Beatty took a fee simple in the land. The court of civil appeals erred in reversing the judgment of

the district court, and rendering judgment for the mortgage company; and is ordered that the judgment of the court of civil appeals be reversed, and the judgment of the district court be affirmed.

### TABER v. CHAPMAN et al.

(Supreme Court of Texas. Nov. 14, 1898.)

#### TRANSFER OF CAUSES BY SUPREME COURT.

Gen. Laws 1895, p. 79, providing that the supreme court shall once a year equalize the business on the dockets of the courts of civil appeals by directing the transfer of causes from such courts as may have the greater number to those having a less number, does not apply to a pending motion to affirm a judgment on certificate.

Certified question from court of civil appeals of Third supreme judicial district.

Action between Samuel H. Taber and W. & E. Chapman. There was a judgment, from which the former appeals to the court of civil appeals for the Fifth supreme judicial district. The appeal was transferred to the court of civil appeals for the Third supreme judicial district, which certifies a question to the supreme court. Question answered.

Kearby, Muse & Oeland and G. G. Wright, for appellant. Belsterling & Titterington, for appellee.

GAINES, C. J. The following question has been certified for our decision: "There is now pending in the court of civil appeals of the Third supreme judicial district of Texas, on its motion docket, a proceeding styled 'Samuel H. Taber vs. W. & E. Chapman,' in the nature of a request to this court to affirm the judgment of the court below upon certificate of the record of the trial court, under the seal and signature of the county clerk of Dallas county, Tex. This cause reached this court on a transfer from the court of civil appeals of the Fifth supreme judicial district, by order of the supreme court, which was heretofore made. Now, the court of civil appeals of the Third supreme judicial district of Texas certifies to the supreme court of Texas the following question for its answer: Did the supreme court have jurisdiction to enter the order transferring a motion or request to affirm a judgment of the court below upon certificate? In other words, is a proceeding of this nature a case, within the meaning of the law that authorizes the supreme court to transfer cases from one court of civil appeals to another court of civil appeals?"

The statute in question provides, among other things, that "it shall be the duty of the supreme court to equalize as nearly as practicable the amount of business upon the dockets of the different courts of civil appeals by directing the transfer of cases from such of said courts as may have the greater number of cases upon their dockets to those

having a less amount of business upon their dockets; such transfers to be made as soon as practicable after the passage of this act, and thereafter at least once a year, in such manner and under such rules and regulations as the supreme court shall provide." Gen. Laws, 1895, p. 79. We are of opinion that an application to affirm a judgment upon certificate is not a case, within the meaning of this law. Article 1016 of the Revised Statutes of 1895 reads as follows: "In case the appellant or plaintiff in error shall fail to file a transcript of the record, as directed in this chapter, then it shall be lawful for the appellee or defendant in error to file with the clerk of said court a certificate of the clerk of the district or county court in which any such appeal or writ of error may have been taken, attested by the seal of his court, stating the time when such appeal was perfected or such citation was served, whereupon it shall be the duty of the courts of civil appeals to affirm the judgment of the court below, unless good cause can be shown why such transcript was not filed by the appellant or plaintiff in error. If a copy of the bond accompanies such certificate of the clerk of the district or county court, the judgment shall in like manner be affirmed against the sureties on such bond." Now, the purpose of the law directing the transfer of causes from one court of civil appeals to another was to equalize the labors of such courts, and to facilitate the disposition of the causes pending therein. It is clear that the law contemplates that an application to affirm on certificate shall be promptly disposed of, without reference to the ordinary causes pending upon the docket of the court. It is a summary proceeding, and requires but little time or labor. Rule 44 of the rules for the courts of civil appeals directs that, "when affirmance is asked upon certificate filed, there need be nothing more than a request for affirmance, signed by the party or his counsel. It shall not be submitted sooner than one week after being filed, if the court should be in session that length of time." It is obvious, therefore, that neither time nor labor is to be saved by the transfer of such a proceeding, and hence that it does not come within the scope of the legislative intent, as manifested by the statute in question.

On the other hand, a good reason exists why such a proceeding should not be transferred. Article 1017 of the Revised Statutes of 1895 provides, in substance, among other things, that, after a judgment has been affirmed under article 1016, the court may at any time within 15 days after such affirmance, upon good cause shown, permit the transcript to be filed and the case to be tried upon its merits. The transcript must be filed in the court of the district in which the case was tried; and no authority is given for filing it in the court of any other district. Therefore, if the application for a summary affirmance be transferred, we may have the anomaly of a motion to affirm in one court, and an appeal

or writ of error to reverse the same judgment in another; that is to say, we will have two courts exercising appellate jurisdiction over the same case at the same time. Not only this; but, if the application be transferred, the court to which it is sent may affirm, although there may be pending at the time a motion to file the transcript in the court from which the transfer was made. The rule already quoted provides, in effect, that, in order to an affirmance, nothing more is necessary than to accompany the certificate with a written request therefor duly signed. This means that it is only necessary to file a motion with the certificate. It is simply a motion for summary action, and should be docketed as such; and such, we understand, is the practice in the court which has certified this question. Presumably, a different practice prevails in the court in which the request to affirm was originally filed. The statute already quoted applies only to "cases upon the dockets" of the courts of civil appeals, and means cases properly upon the general docket. The case appeared in the report of cases standing upon the docket of the court of civil appeals for the Fifth supreme judicial district, made by the clerk of that court in obedience to our order, as a regular cause there pending, and there was nothing to indicate that it was not such. It was therefore inadvertently transferred. We answer the question certified in the negative; and are of opinion that the court of civil appeals for the Third supreme judicial district should strike the motion from its docket, and cause the papers relating thereto to be returned to the court in which it was originally filed.

JACKSON, City Judge, v. SWAYNE, County Attorney.

(Supreme Court of Texas. Nov. 10, 1898.)

MANDAMUS TO JUDGE—PROSECUTION OF OFFENSES—COUNTY ATTORNEY.

1. The invalidity of a municipal ordinance under which offenses likewise punishable by statute are being prosecuted in a city court is no ground for mandamus to compel the court to permit the county attorney to take charge of the prosecution, since there is in fact no prosecution pending if the ordinance be void.

2. The writ will not be awarded in such case because the legislature had no authority to create the court wherein the prosecution is pending, since there is no court in that event.

3. If the ordinance be valid, and the court legal, its jurisdiction would not be exclusive, and the county attorney would, by filing a complaint in justice's or the county court, have an adequate legal remedy; hence the writ will be refused, in spite of Const. art. 5, § 21, making it the duty of the county attorney to represent the state in all prosecutions in the district and inferior courts of his county.

Error to court of civil appeals of Second supreme judicial district.

Petition by James W. Swayne, county attorney of Tarrant county, for mandamus to J. H. Jackson, city judge of Ft. Worth, to compel relator to take charge of certain prosecutions pending before him, and to file certain criminal complaints. A judgment awarding a peremptory writ was affirmed by the court of civil appeals (45 S. W. 619), and defendant brings error. Reversed.

William D. Williams, for plaintiff in error.  
Jas. W. Swayne, pro se.

William D. Williams, for plaintiff in error.  
Jas. W. Swayne, pro se.

BROWN, J. James W. Swayne was and is the duly elected and qualified county attorney of Tarrant county, there being no district attorney in the judicial districts embraced in said county. J. H. Jackson was and is the duly qualified judge of the city court of the city of Ft. Worth, a municipal corporation in Tarrant county, chartered by special act of the legislature of the state of Texas; and William D. Williams was and is city attorney of the said city. The city council of the city of Ft. Worth passed, in due and proper form, ordinances which declared certain acts to be offenses against such ordinances, and liable to punishment as prescribed therein, which acts were also made penal and liable to punishment by the penal laws of the state of Texas. At divers times before the institution of this suit, complaints had been made and filed in the city court before Judge Jackson, charging the defendants with certain acts in violation of the ordinances of the city, the prosecution being conducted in the name of the city of Ft. Worth; and the acts therein charged were likewise made penal offenses and subject to punishment by the penal laws of the state. The county attorney, Mr. Swayne, or his deputy, appeared in the city court from day to day, and demanded the right to prosecute all cases which were presented in the said court by affidavit or complaint, charging the defendants with acts which constitute an offense against the laws of the state of Texas, whether the complaint be made in the name of the state or in the name of the city of Ft. Worth; and, at the same time, said county attorney or his deputy offered to file in each one of the cases, in the name of the state of Texas, a complaint charging the defendant with the same acts as violations of the laws of the state. Judge Jackson refused to permit the county attorney to prosecute in those cases in which the complaint had been filed in the name of the city of Ft. Worth, charging a violation of the ordinances of the said city, and refused to permit the county attorney to file complaints, in the name of the state of Texas, against such persons, charging them with the same acts as a violation of the laws of the state, when such persons already stood charged in his court, by complaint upon the same facts, with a violation of the ordinances of the city. The city judge did not refuse to permit the county attorney to prosecute, by complaint in the name of the state, in the city court, any person who was charged to be guilty of a violation of the laws of the state, and against whom no charge previously had been filed in his court under the or-

dinances of the city and in the name of the city. The county attorney filed this suit, seeking a mandamus against the judge of the city court of the city of Ft. Worth, to compel him to permit the plaintiff, as county attorney, to prosecute all cases in his court in which the defendant stood charged with acts which constituted an offense under the laws of the state, and to compel the city judge to permit him, the said county attorney, to file complaints and prosecute persons charged with such offenses in his court, although a prosecution might be at the time pending for the same acts, in the name of the city of Ft. Worth, under a charge of violating the ordinances of said city. The district judge granted the writ as prayed for, and entered judgment that the writ of mandamus issue, which judgment was by the court of civil appeals affirmed.

The defendant in error contends for the affirmation of the judgment herein for the following reasons: (1) Under section 12 of article 5 of the constitution of the state, all prosecutions are required to be conducted in the name of the state of Texas, and the ordinances of the city of Ft. Worth which authorize and require prosecution in the name of the city of acts which are in violation of the laws of the state are void; (2) that the city of Ft. Worth had no authority to enact ordinances which declared acts committed within the limits of the city to be offenses against the municipal ordinances, when such acts constitute offenses under the penal laws of the state of Texas, and all such ordinances are void; (3) the city court of the city of Ft. Worth was created prior to the adoption of the amendment to the constitution which empowered the legislature to create such courts, and the law creating it is void; (4) that, under section 21 of article 5 of the constitution of the state of Texas, it was the duty of the county attorney to represent the state of Texas in all cases in the district and inferior courts of that county.

If the ordinances of the city of Ft. Worth which declared the acts complained of to be offenses against the city, and authorized prosecution in the name of the city, were void, then no prosecution in law was begun when such charges were filed in the city court, and the county attorney had no authority to appear in a case which was inaugurated and prosecuted contrary to the constitution.

If the law which created the city court for the city of Ft. Worth was enacted at a time when the legislature could not create it, then it is no court, and the county attorney had no right to appear in it to prosecute any case pending, or to inaugurate a prosecution.

If the city court had jurisdiction of the cases, and the ordinances of the city were valid, the county attorney had no authority to prosecute a case in the name of the city of Ft. Worth. That duty was imposed by law upon the city attorney. If the city court had jurisdiction to try offenses against the laws

of the state, and the county attorney had the right to file complaints therein in the name of the state upon facts constituting such offenses, its jurisdiction was not exclusive, but the same cases might have been prosecuted by the county attorney in the justice's court, or in the county court of that county. This would have furnished an adequate, convenient, and effective remedy for the wrong done him by the judge of the city court, if it be a wrong, by refusing permission to file his complaint in the city court; and, having such adequate and efficient remedy at law, the writ of mandamus cannot be lawfully issued. *Association v. Benson*, 76 Tex. 552, 13 S. W. 379; *Ewing v. Cohen*, 63 Tex. 482. The wisdom of that rule is well vindicated by the history of this case, in which much time has been spent and costs incurred in an attempt to force a judicial officer to surrender his convictions upon a vexed question of law, when the prosecutions would not have been questioned in other courts. The judgments of the district court and of the court of civil appeals are reversed, and this cause is dismissed.

#### DOTY et al. v. BARNARD et al.

(Supreme Court of Texas. June 6, 1898.)

ESTOPPEL BY DEED.

Where a person holding part of a head-right survey under a deed of doubtful validity because of an indefinite description obtained a deed of a definite portion of the survey from the heirs of his predecessor, which recited that it was given to supply imperfections and deficiencies in his title, he and his successors became estopped from claiming any land under the former deed not included in the latter.

Error to court of civil appeals of Fifth supreme judicial district.

Trespass to try title by J. W. Doty and others against H. B. Barnard and others. A judgment for plaintiffs was reversed by the court of civil appeals, and they bring error. Reversed.

Davis & McKoy, for plaintiffs in error. English, Ewing & Walker, for defendants in error.

BROWN, J. At some time prior to 1860, M. P. Ellis, being then married to Sarah Ellis, acquired 836 acres of land in the Thomas Chandler survey, situated in Johnson county. The land was community property of Ellis and wife. On December 26, 1862, Ellis conveyed to G. M. Pierce 250 acres by metes and bounds off of the northwest and west part of his tract, not, however, reaching the south boundary line of the tract. Afterwards Ellis conveyed 320 acres of land, described by metes and bounds, to M. Fournoy, intending to convey that much out of his tract in the Chandler survey, but the field notes actually embraced only 256 acres of that survey, the remainder of the 320 acres extending onto an adjoining survey, not owned by Ellis. Ellis

thought that he had conveyed 320 acres of the Chandler survey. In May, 1868, Ellis voluntarily went into bankruptcy in the circuit court of the United States for the Western district of Texas, at Tyler, Tex. He was duly discharged by the court. The records of the court concerning the bankrupt estate were destroyed by fire. G. W. Whitmore was registrar in bankruptcy for that court, and on November —, 1868, conveyed to J. K. Williams, as assignee, all of the estate of M. P. Ellis not exempt by law from forced sale. May 7, 1869, J. K. Williams, as assignee of M. P. Ellis conveyed to Francis Odom land in the Thomas Chandler survey described as follows: "All the estate, right, title, and interest which the said M. P. Ellis had on the 29th day of May, 1868, or at any time afterwards, of, in, and to the following described premises, viz.: 266 acres of land in Johnson county, the headright of Thomas Chandler, and further described in the original schedule of said bankrupt." This deed recites that it was made in pursuance of an order of the circuit court of the United States for the Western district of Texas, dated the 1st day of January, 1869. M. P. Ellis died in 1876, leaving no children or their descendants. Sarah, his wife, survived him, and in 1880 married J. W. Doty, one of the plaintiffs. She died in 1886, leaving plaintiffs in error her only heirs. J. W. Doty and wife, Sarah, formerly Sarah Ellis, made a quitclaim deed to H. H. Rowland, conveying by metes and bounds 266 acres of the Thomas Chandler survey, which deed does not include the land in controversy. The deed of Doty and wife to Rowland contains the following recital: "Know all men by these presents that we, J. W. Doty and wife, Sarah H. Doty, formerly Sarah H. Ellis, of the county of Johnson, state of Texas, in consideration of the sum of — dollars, paid by H. H. Rowland, of the county of Smith, in said state, and for the purpose of supplying any imperfection or deficiency in the title of the said Rowland to the tract of land hereinafter described, caused by the burning and destruction by fire of the records of the federal district court at Tyler, Texas, together with the records and papers in the bankrupt proceedings of Morgan P. Ellis, deceased, had in said court, have granted, sold, and conveyed, and by these presents do grant, sell and convey, and quitclaim unto the said H. H. Rowland, of the county of Smith and state of Texas, all that certain tract or parcel of land in said county of Johnson, part of the Thomas Chandler survey, lying about five miles west of the town of Buchanan, being 266 acres of the said survey sold by J. K. Williams as the assignee of Morgan P. Ellis in bankruptcy to F. Odom by deed bearing date May 17, 1869, and recorded in Book G, page 593, more particularly described as follows,"—giving the field notes of the tract to which the quitclaim deed was made. The deed from Doty and wife to Rowland was dated and duly acknowledged on

the 26th day of June, 1885, and recorded in the proper records of the said county on that day. It was agreed that the circuit court of the United States entered the order referred to by J. K. Williams in his deed, and that it was in due form, and authorized the said sale. The defendants showed a regular chain of title from J. K. Williams down to them for all of the land embraced in the deed made by him. H. H. Rowland conveyed the land in controversy to F. T. Vickers, dated March 13, 1889, duly acknowledged and recorded, and Vickers conveyed the same land to H. B. Barnard, December 11, 1895, which was duly acknowledged and recorded. H. H. Rowland conveyed to E. P. McFarlain 266 acres of the Thomas Chandler survey, described by metes and bounds, the same as the land conveyed by J. W. Doty and wife to the said Rowland. The deed from Rowland to McFarlain was dated August 31, 1885, and acknowledged and recorded in September of that year. The case was tried before the court without a jury, and judgment was rendered in favor of the plaintiffs, which judgment was by the court of civil appeals reversed, and judgment rendered for the defendants in error H. B. Barnard and F. T. Vickers.

If the deed from J. K. Williams, assignee of M. P. Ellis, to Francis Odom, was not void because of uncertainty in the description of the land attempted to be conveyed, it was at least of doubtful validity. The deed from J. W. and Sarah Doty to H. H. Rowland was made to correct the defects and imperfections of the deed above referred to, and had the same effect upon the rights of the parties that a judgment of court would have had if entered at the suit of Rowland. *Hutchinson v. Railway Co.*, 41 Wis. 550, 551. By accepting the deed from Doty and wife, and selling the land within a short time according to the description given in the said deed, Rowland estopped himself to claim under the deed from Williams to Odom any land not included in the deed from Doty and wife to him. 2 Herm. Estop. & Res. Jud. § 1028; 2 Devl. Deeds, § 850c; *Chloupek v. Perotka*, 89 Wis. 551, 62 N. W. 537; *Fox v. Windes*, 127 Mo. 502, 30 S. W. 323; *Hutchinson v. Railway Co.*, 41 Wis. 550; *Emeric v. Alvarado*, 64 Cal. 587, 2 Pac. 418. In *Fox v. Windes*, cited above, Justice Sherwood quoted approvingly from Herman on Estoppel and Res Judicata, as follows: "The doctrine of election is founded upon the principle that there is an implied condition that he who accepts a benefit under an instrument must adopt the whole of it, conforming with all of its provisions, and renouncing every right inconsistent with them. The principle is recognized and established in this country almost precisely the same as in England, and rests upon the equitable ground that no man can be permitted to claim inconsistent rights with regard to the same subject, and that any one who claims an interest under an instrument is bound to give full effect to that instrument as far as

he can. A person cannot accept and reject the same instrument, or, having availed himself of it as to part, defeat its provisions in any other part; and this applies to deeds, wills, and all other instruments whatsoever." This reasonable and just rule applies with full force to the present case. The recitals in the deed from Doty and wife to Rowland constitute a clear declaration on the part of the grantors, and by acceptance an admission on the part of the grantee that the land sold by Williams was the 206 acres embraced in the last deed, and that the land sued for was not embraced in the assignee's deed. It would be inequitable to allow Rowland, after availing himself of the benefits of the correcting deed, to repudiate it so far as it imposed an obligation upon him, and claim the land in controversy by virtue of the deed from Williams to Odom, which he virtually abandoned by accepting the deed from Doty and wife. All persons claiming under Rowland by conveyance subsequent to the deed from Doty and wife to him are bound by the recitals contained in the latter deed, and could acquire no right under the deed from Williams, assignee, to Odom, to land not embraced in the substitute deed from Doty and wife to Rowland. *Hardy v. De Leon*, 5 Tex. 243. It being determined by the deed as corrected that Williams, assignee, did not sell the land in controversy, it belonged to Mrs. Doty, formerly Ellis, after her first husband's death, and her heirs, the plaintiffs in error, were entitled to recover it in this action. The court of civil appeals erred in reversing the judgment of the district court, and in rendering judgment for the defendants in error. It is therefore ordered that the judgment of the court of civil appeals be reversed, and that the judgment of the district court be affirmed.

#### BUILDING & LOAN ASS'N OF DAKOTA v. CUNNINGHAM et ux.

(Supreme Court of Texas. June 20, 1898.)

#### REMOVAL OF CAUSES—AMOUNT IN CONTROVERSY— REVIEW—PRESUMPTIONS.

1. In reviewing an order refusing to remove a cause, on the ground that the amount in controversy was not large enough, the entire record may be examined to ascertain the value of the matter in controversy.

2. A debt secured on land will be presumed to be for the sum named.

3. A petition alleged that defendant claimed \$3,200 on a bond executed by plaintiff for that amount, which was secured by a trust deed upon her land; that the bond was really given for a loan of \$1,375.80; that by the payment of usurious interest, which should be applied on the principal, it had been reduced to \$723; that plaintiff was entitled to \$652 as penalty for usury; that defendant had sold the land under the trust deed. The prayer was for cancellation of the sale and lien, and for judgment for the penalty. Defendant filed a general denial. The sale and lien were set aside, and judgment entered for plaintiff for \$336. *Held*, that the amount in controversy was \$3,200.

4. Where the amount in dispute in an action

to cancel a lien exceeds \$2,000, the defendant has a right to have the cause removed to the federal court, although the evidence may show that he is entitled to less than that sum.

Error to court of civil appeals of Fifth supreme judicial district.

Action by J. F. Cunningham and wife against the Building & Loan Association of Dakota to set aside a sale under a trust deed, and cancel the lien of the deed, and to recover a penalty for usury. From a judgment of the court of civil appeals affirming an order refusing to allow a removal of the cause to the United States circuit court, the defendant brings error. Reversed.

Starling & Irish, for plaintiff in error. T. E. Conn, for defendants in error.

BROWN, J. J. F. Cunningham and Ann M. Cunningham filed this suit in the district court of Dallas county against the Building & Loan Association of Dakota, the petition alleging, in substance, that the plaintiffs were husband and wife, and resided in Dallas county, Tex., and that the Building & Loan Association of Dakota is a corporation created under the laws of South Dakota, which on the 9th day of November, 1889, being entitled to do business in the state of Texas, established its domicile in the city of Dallas, Dallas county, Tex., with C. W. Starling as vice principal representing the said corporation. The petition alleges that on the 1st day of December, 1890, James M. Browder and Ann M. Browder, now Ann M. Cunningham, executed and delivered to the defendant a bond or contract in which they agreed to pay to the said corporation \$3,200. The petition attaches the bond as an exhibit, but, for the purposes of this case, it is not necessary to state more at length its contents. It is alleged that upon said contract the corporation loaned to James M. Browder the sum of \$1,375.80, and the said James M. Browder and his then wife, Ann M. Browder, made, executed, and delivered to the corporation a deed of trust upon lands described in the petition to secure the payment of the said contract. It is alleged that the land was at the time the separate property of Ann M. Browder, and that the said contract was made in the sum of \$3,200 for the purpose of enabling the said corporation to evade the usury laws of Texas, and to charge a greater rate than 12 per cent. interest upon the money actually loaned by it to the said James M. Browder. It is also alleged that in his lifetime James M. Browder paid to the said corporation, as interest upon the said contract, the sum of \$650, and that, the said contract being usurious, the payment as interest should be credited upon the amount of the loan. It is also alleged that since the 11th day of April, 1895, plaintiff Ann M. Cunningham has paid to the said corporation the sum of \$326.40 usurious interest upon the said contract, and under the statute she is entitled to recover from the defendant the sum of \$652.80 penalty for tak-

ing and receiving usurious interest. The petition also alleges that the plaintiffs are informed that the defendant had sold the said land under the deed of trust, and had purchased the same for the sum of \$50. There is no offer on the part of the plaintiff to pay any part of the debt, nor is it admitted that Mrs. Cunningham is liable personally for any part of it. The petition prayed that all clouds be removed from the title of Ann M. Cunningham to the land described, for judgment for \$652.80, and for general relief. The defendant filed a general denial, and in due time filed its petition, properly sworn to, and bond, as required by law, for the removal of the cause to the circuit court of the United States. The petition for removal contains this allegation: "Your petitioner, the Building & Loan Association of Dakota, respectfully shows to this honorable court that it is the defendant in this suit, which is of a civil nature, and that the matter and amount in dispute exceed the sum or value of two thousand dollars, exclusive of interest and costs." All other allegations necessary to entitle the party to removal are contained in the petition. The district court refused to allow the removal of the cause, for the reason, expressed in its judgment, that the court was of opinion that the amount in controversy does not exceed two thousand dollars, exclusive of interest and costs." The trial was had before the court without a jury, and judgment was entered in favor of the plaintiff Mrs. Cunningham for \$336 penalty, and that the lien upon the land described in the petition, and the sale made of it by the defendant, be canceled and set aside, and that all clouds be removed from the title of Ann M. Cunningham.

The only question necessary for us to decide is, did the court rightly refuse the application to remove this cause to the circuit court of the United States? It will not be necessary to decide whether the petition for removal sufficiently alleges the value of the matter in dispute independently of other parts of the record, because the entire record may be looked to in order to ascertain what the value of the subject of controversy is, and if, from the whole record, it appears to exceed \$2,000, interest and costs, then the court erred in refusing the removal, because that is the sole objection made to the right of the defendant to remove the cause. *Reed v. Hardeman Co.*, 77 Tex. 165, 13 S. W. 1024.

The allegations of the plaintiffs' petition present the following issues: (1) That the defendant claims against Mrs. Cunningham a bond for \$3,200, which was executed when she was a married woman; (2) to secure that bond, it holds a lien by deed of trust upon land which is her separate property; (3) that the contract is usurious, and by payments of

interest has been almost satisfied. The petition alleges that the defendant really loaned upon the bond the sum of \$1,375.80; that the contract is usurious; and that all payments made for interest upon the bond should be credited upon the principal, which would reduce the amount to \$723; also that Mrs. Cunningham had paid usurious interest upon the bond, and was entitled to recover the statutory penalty, amounting to \$652. The petition also presented the issue that the defendant had unlawfully sold the land, and purchased it for \$50, and prayed that the sale and the lien upon the land be canceled, and for judgment for the penalty. The defendant denied all of the allegations, and we think that the petition and answer put in controversy the contract for \$3,200 as a personal obligation upon Mrs. Cunningham, and the lien of the deed of trust on her separate property to secure that sum. It will be presumed that a debt secured upon land is worth the sum named. The judgment of the court more conclusively establishes that these matters were in controversy than any argument that we can make; for by that judgment Mrs. Cunningham was released from any personal liability upon the obligation, and recovered \$336, had judgment against the defendant canceling its lien upon her property, and setting aside the sale of the land described in the petition. According to the pleadings, the defendant went into the court claiming \$3,200 secured by lien on land, and came out by the judgment with nothing of its claim left and a judgment against it for the sum of \$336. What the plaintiff gained and the defendant lost must have been in dispute; otherwise the court could not have adjudicated upon their rights in reference to those matters.

The court of civil appeals, as well as the trial court, seems to have assumed that there was no more in controversy between the parties than the amount of money actually loaned, as alleged by the petition and shown by the evidence; but it matters not how clear the evidence may be that the contract was usurious, and that the plaintiff was entitled to recover, yet the matter was in dispute between these parties, and, being of value exceeding \$2,000 besides interest and costs, the defendant had the right to remove the same to the circuit court of the United States. The district court erred in not removing the cause, and the court of civil appeals erred in affirming the judgment of the district court. It is therefore ordered that the judgments of both courts be reversed, and that this cause be remanded to the district court of Dallas county, with instruction to enter an order removing the same to the circuit court of the United States for the Northern district of Texas.



**MOORE et al. v. WACO BLDG. ASS'N.**

(Supreme Court of Texas. Nov. 14, 1898.)

**MANDAMUS—PETITION TO SUPREME COURT—COURTS OF CIVIL APPEALS—CONCLUSIONS OF FACT.**

1. An application to the supreme court for mandamus to compel a court of civil appeals to find additional conclusions of fact comes too late after the refusal of a writ of error.

2. Mandamus will lie to compel a court of civil appeals to file conclusions of fact where it wholly fails to do so in a case in which the supreme court has jurisdiction to grant a writ of error, but not to correct insufficient or erroneous conclusions.

3. Where a court of civil appeals makes erroneous conclusions of fact, the remedy, except where its findings are conclusive on the supreme court, is to show, on application for writ of error, by reference to the transcript of the trial court, that such conclusions are erroneous.

4. The supreme court will consider a petition for mandamus before ordering citation, and will dismiss it without process, when clearly of opinion that it should not be granted.

Petition for mandamus by James I. Moore and others to compel the court of civil appeals for the Third supreme judicial district to find additional conclusions of fact in a suit between petitioners and the Waco Building Association. Dismissed.

W. W. Evans and Chas. A. Jennings, for relators.

GAINES, C. J. At a former day of this term, the relators in this proceeding applied to this court for a writ of error to the court of civil appeals for the Third supreme judicial district to revise a judgment of that court (45 S. W. 974, 1131), which affirmed a judgment of the trial court in favor of the Waco Building Association against them. The application was refused. Notwithstanding the refusal of the writ, the applicants for the writ of error now apply to this court for a mandamus to compel the court of civil appeals to find additional conclusions of fact. The petition for the writ of mandamus must be denied.

1. In the first place, the petition for the writ comes too late. If a mandamus had been proper, and our attention had been called to the fact by a request for time, we would have delayed action upon the application for the writ of error until the petition for the writ of mandamus had been filed and disposed of. We see no sufficient excuse for delaying the proceeding until the application for the writ of error was refused.

2. It may occur that a seeming hardship is imposed upon an applicant for a writ of error by what he may conceive to be the incomplete or erroneous findings of the court of civil appeals. But we have ruled that we can give him no relief by a writ of mandamus. It is the duty of that court, in a case in which this court has jurisdiction to grant a writ of error, to file conclusions of fact and law at the request of the party who de-

sires to apply for the writ. In case they should wholly fail to perform that duty, it would be proper to compel performance by a writ of mandamus. But the preparation of "the conclusions of fact and law" calls for the exercise of the judgment and discretion of the court. One court might consider that a very brief statement of a case in an opinion is all that is necessary to disclose a point which, in its judgment, is necessarily decisive of the case. Another might conclude that the same case would require a very full and elaborate statement of their conclusions upon all the points. We cannot direct the court of civil appeals what they shall write; nor say, upon petition for a writ of mandamus, that their conclusions are not sufficiently full, and command them to file additional conclusions. They have a discretion in the matter, and this court cannot control that discretion. Such is the law; but, if it were not the law, we should hesitate long before we would countenance a practice productive of the confusion and delay which would necessarily ensue from it, and which would result in no substantial good. *Railway Co. v. Douglass*, 87 Tex. 297, 28 S. W. 271. When the applicant for a writ of error may deem the statement of the case made by the court of civil appeals deficient or erroneous, he is not without a remedy. The court of civil appeals cannot, by an imperfect or erroneous statement of the record, change the case or make a new one. They have power, when the evidence is conflicting, to say that a finding of the trial court or of the jury is against the great weight of the evidence, and to set it aside. Their action in that particular is conclusive upon us. In all other respects we must try the case when it comes to us upon the record made in the trial court, provided the applicant in his petition shows, by reference to the transcript of the trial court, that the statement made by the court of civil appeals, or their conclusions of fact, are either imperfect, inaccurate, or erroneous.

3. But if we had power to require the court of civil appeals to revise its findings of fact, and to find additional conclusions, we could not grant the relief prayed for in this case. For example, we are asked to compel the appellate court to state upon what evidence, as shown by the record, they base a certain conclusion of fact. Clearly, it was not the duty of that court to do this. The other findings which we are asked to compel the court to make are of the like character.

It is the practice of this court to consider a petition for a mandamus before ordering citation to issue, and to dismiss it without process, provided we are clearly of opinion that it should not be granted. *Hume v. Schintz*, 90 Tex. 72, 36 S. W. 429. We think it clear that the petition in question fails to make a case for the grant of the writ of mandamus, and it is therefore dismissed.

## ILLG v. GARCIA et al.

(Supreme Court of Texas. Nov. 14, 1898.)

CO-TENANCY—REPUDIATION OF CLAIM—EVIDENCE  
—ADVERSE POSSESSION—ESTOPPEL.

1. Repudiation of claim of a co-tenant and notice thereof may be shown by circumstances, and, where all the parties are dead, such facts may be inferred from long-continued possession under claim of exclusive ownership and nonassertion of claim by the other tenant.

2. Plaintiffs cannot urge recital, in partition deed between G. and L., that G. and L., as assignees of plaintiffs, were joint owners of the lot, as an estoppel against the claim that the prior possession of G. was adverse to them, but can use it only as any other declaration of G. while in possession, explanatory of the nature of his holding.

3. Though a will giving land to one was not probated as required to make it effective as a muniment of title, it is admissible as evidence that he did not take possession of the land as tenant in common with other heirs of the testator, but always held it adversely.

Error to court of civil appeals of Fourth supreme judicial district.

Action by Maria De La Luz Garcia and others against John Illg. Judgment for plaintiffs was affirmed by the court of civil appeals (45 S. W. 857), and defendant brings error. Reversed.

Franklin & Cobbs, for plaintiff in error. T. M. Paschal, Joseph Ryan, and H. E. Vernor, for defendants in error.

DENMAN, J. This suit was brought November 20, 1894, by Maria De La Luz Garcia, joined by her husband and her sister, Josefina Jewett, against John Illg, to recover the title and possession of a lot in San Antonio, Tex., and, in case they should recover less than the entire lot, for partition. By amended petition filed December 17, 1896, plaintiff Josefina Jewett declined further to prosecute the suit, and the same proceeded with said Maria De La Luz Garcia and her husband as sole plaintiffs. Defendant, Illg, pleaded not guilty. Also "that defendant, and those whose title he holds, have had peaceable and adverse possession of the property in controversy, cultivating, using, and enjoying the same, for more than ten years next after plaintiffs' cause of action accrued, and prior to the filing of this suit. Wherefore he says that plaintiffs' right of recovery herein is barred by the statutes of limitation of ten years." Also, in substance, that, if plaintiffs ever owned any interest in the land in controversy, same was a part of a larger lot; that they claimed the same by inheritance from their mother, and now assert that she was a tenant in common with one Jose Gutierrez; that, if said tenancy ever existed, more than 60 years ago Gutierrez disaffirmed same by asserting title to the whole of the lot exclusive in himself, and occupying the same continuously down to 1874, when he conveyed to Conrad Lehman adversely to plaintiffs and their said mother, claiming title to the same exclusive-

ly in himself openly and notoriously, paying taxes and erecting improvements thereon; and that, as heretofore averred, his title to the whole of said property was complete under the statutes of limitation at the time of the execution of said deed to Lehman. By supplemental petition, plaintiffs replied to defendant's pleas of limitation that Maria De La Luz Garcia and her husband, who joined her in said petitions, were lawfully married in November, 1862. There were other issues presented by the pleadings of the parties which we deem it unnecessary to notice. On the trial the court instructed the jury to find for plaintiffs an undivided one-fourth of the land in controversy. From a judgment rendered upon the verdict corresponding to said charge, Illg appealed to the court of civil appeals, assigning said charge as error, and, said court having affirmed the judgment, he has brought the case to this court upon writ of error complaining of the charge.

In order to determine the propriety of the charge, it will be necessary to make a general statement of the evidence. Plaintiff introduced a deed from Domingo Perez to Clara Ximenes, dated February 14, 1839, conveying a lot 11 varas wide, in San Antonio, Tex., bounded west by Laredo street, south by the street that leaves the city by the lower end of Military Plaza, and east by the San Pedro creek. Plaintiff testified that Clara Ximenes and her husband, Jose Antonio Gutierrez (the first), left only one child, Jose Antonio Gutierrez (the second), who married Josefa Silva, and left at his death, in 1816, as his only children, Jose Antonio Gutierrez (the third) and Concepcion Gutierrez, wife of Diego Jewett; that said Concepcion died in Mexico in 1855, leaving, as her only children, plaintiffs, Josefina and Maria De La Luz, who married her present husband, Garcia, in Mexico, in 1862; that said Josefa Silva, about 1818, soon after the death of her said husband, Jose Antonio Gutierrez (the second), moved to Monterey, Mexico, leaving her son, said Jose Antonio Gutierrez (the third), with his grandmother, said Clara Ximenes, in San Antonio, Tex., and died in Monterey in 1870, at the age of 82 years; that, when said Josefa Silva left San Antonio, she left no power of attorney with her said son, as he was but a child, and was left in charge of his grandmother Clara Ximenes. Plaintiffs next introduced in evidence, for the purpose of proving common source of title only, a deed from themselves to Conrad Lehman, dated October 20, 1875, which instrument, it is admitted, did not convey plaintiffs' title, because her husband did not join therein. Plaintiffs next introduced in evidence a partition deed between said Jose Antonio Gutierrez (the third) and Conrad Lehman, dated January 18, 1876, which instrument set apart to Lehman the eastern portion, and to Jose Antonio Gutierrez the western portion, of the lot conveyed by Perez to Clara Ximenes, as aforesaid, but no reference is

made to said first deed in the latter. Plaintiffs next introduced a deed from Conrad Lehman to John Illg, dated January 18, 1876, conveying to Illg the lot set apart to Lehman in said partition deed. One of the sons of said Jose Antonio Gutierrez (the third), for defendants, at the age of 70 years, testified that his father was 84 years old when he died, 16 or 17 years ago; that his said father got the property (referring to the entire lot partitioned between his father, Jose Antonio Gutierrez, and Lehman, as aforesaid) from Jose Antonio De La Garza, who died about 1835, and who was the husband of Clara Ximenes, but could not say whether Clara Ximenes had been previously married to Jose Antonio Gutierrez (the first); that Jose Antonio De La Garza left the property to his father, who claimed it all as his; that in 1836 there was a jacal in the corner, and after that his father built a house there, about 50 years ago; that his father lived there, and fenced the property, the fence being there from 1836 up to lately; that his father paid the taxes; that no claim was ever made against his father for the property until about the time the said deed between his father and Lehman was executed; that witness was born on the property, and lived there after he was married, and that his father kept horses and cattle on the lot all the time; that Conception Gutierrez was his father's sister, but he never knew her children, plaintiffs in this case, nor did he know his grandmother, Josefa Silva; that his father was not the agent or attorney for his aunt, but Lehman was; that he does not know whether his father acted as such for his grandmother Josefa Silva; that his father never told him about it. Witness did not know the husband of Josefa Jewett; never heard his name; that his father claimed that his grandfather Jose Antonio De La Garza left the property to him. He had no difficulty with it at all. His father gave Lehman property in the partition deed because he wanted to do it. He wanted to give it to him for Maria De La Luz Garcia and Josefa Jewett.

From the testimony of this witness for defendant, the jury might have concluded that his father, Jose Antonio Gutierrez, claiming under Garza, had peaceable and adverse possession of the entire lot, using and enjoying same from 1836 to the date of the deed to Lehman in 1875, and that in fact there never was any common source or co-tenancy between him and any one claiming under Clara Ximenes, who does not appear to have had any claim to the land until the deed from Perez to her, in 1839, in which event plaintiff could not have recovered upon her alleged common source. Again, if the jury had not so found, but had concluded that he was mistaken as to the source of his father's claim, and the time he took possession, and had further concluded that his father originally acquired the property from Clara

Ximenes after she received the deed from Perez, in 1839, we are of opinion that they might have found that he, in the beginning of his possession, repudiated any claim of his mother or sister, and that they had notice thereof. Upon the death of his father, in 1816, his mother and sister, leaving him with his grandmother Clara Ximenes, abandoned the old home, and took up their permanent abode in Monterey, where his sister married and raised a family, consisting of these plaintiffs. There seems to have been little communication between the two branches of the family. No claim by his mother or sister during their lives was made upon him for any portion of the property which he was openly claiming, using and paying taxes upon as his own, and upon which he had raised his family. Certainly, repudiation of the claim of a co-tenant, and notice thereof, may be shown by circumstances; and in cases like this, after all the parties are dead, the jury may infer such facts from long-continued possession under claim of exclusive ownership and nonassertion of claim by the other tenant.

If the jury had found that Gutierrez had acquired the entire title by limitation at the time the deed between him and Lehman was executed, plaintiff could not have recovered; for if such deed, as she contends, was void under the doctrine of *Davis v. Agnew*, 67 Tex. 211, 2 S. W. 43, 376, for the reason that Lehman had no title upon which to have based a partition, then the legal title remained outstanding in Gutierrez, and if, on the other hand, it passed Gutierrez's title thus perfected by limitation to Lehman, Illg has a perfect title. The coverture of plaintiff, beginning in 1862, would not affect these questions, nor would it prevent Illg, under his evidence of limitation in the record, which we have not deemed it necessary to quote, from having acquired from Gutierrez whatever title he owned at the date of the deed to Lehman, and did not pass thereby.

It is contended, however, that the recital in said partition deed, to the effect that Gutierrez and Lehman, as assignees of plaintiffs, were joint owners of the lot, and had agreed upon a partition, shows that the prior possession of Gutierrez was not adverse to the interest of plaintiffs. Plaintiffs, not being parties or privies to this deed, and therefore not bound thereby, clearly could not urge such recital as an estoppel, but could only use it as evidence, just as they could any other declaration made by Gutierrez while in possession, explanatory of the nature of his holding. In view of another trial, we do not deem it proper to comment upon the comparative probative force of this recital and the other testimony bearing upon the nature of Gutierrez's possession. Having reached the conclusion that the one does not control the other as a matter of law, it follows that we are of the opinion that the question of limitation should have been submitted to the

jury. For error in giving said charge the judgments will be reversed, and the cause remanded.

If, on another trial, it should be shown that the paper purporting to be the will of Garza came from such custody, and was surrounded by such circumstances, as would make it admissible as an ancient instrument, if it had been a deed, and if it be shown that it relates to the land in controversy, or was claimed by Jose Antonio Gutierrez to have been the source of his title thereto, we think it should be admitted, as tending to show that Gutierrez never in fact took possession of or held the lot as tenant in common with plaintiff's mother, but all the time held it adversely to her. It would be evidence on such issue, though it be conceded that, under the law then in force, a will must have been probated to make it effective as a muniment of title.

#### IRVIN v. EDWARDS, Sheriff.

(Supreme Court of Texas. Nov. 14, 1898.)

##### SALE — VESTING OF TITLE—TAXATION.

Title passes at the date of contract, so that the seller is not thereafter liable for taxes, under a contract reciting: "Witnesseth: That I, has this day bargained and sold, and hereby agrees to bargain, sell, and deliver, to J. all of his steer beeves now located and hereafter to be kept in his pasture, \* \* \* which said steer beeves shall be in number about 1,500 head, more or less, and all of them shall in the spring \* \* \* be 4 years old and upwards," and providing that I. should pasture them till a certain time, and exercise reasonable and proper care in managing them, though only part of the purchase price is paid at the time, and the balance is to be paid in installments as the cattle are delivered.

Error to court of civil appeals of Fourth supreme judicial district.

Action by W. C. Irvin against S. V. Edwards, sheriff and tax collector of Lasalle county, to enjoin the collection of a tax. Judgment for plaintiff was reversed by the court of civil appeals (45 S. W. 1026), and plaintiff brings error. Reversed.

Lane & Hicks, for plaintiff in error. C. C. Thomas and C. A. Davies, for defendant in error.

BROWN, J. W. C. Irvin sold to W. H. Jennings, Jr., all of the beef steers upon the ranch of the former, and executed and delivered to Jennings the following bill of sale: "The State of Texas, County of Bexar. This memorandum of agreement made and entered into on this, the 18th day of September, 1894, by and between W. C. Irvin, of Lasalle county, Texas, party of the first part, and W. H. Jennings, Jr., of San Antonio, Bexar county, Texas, party of the second part, witnesseth: That the said party of the first part has this day bargained and sold, and hereby agrees to bargain, sell, and deliver, unto the party of the second part, all of his steer beeves now located and hereafter to be kept in his pas-

ture in the county of Lasalle and state of Texas, which said steer beeves shall be in number about fifteen hundred (1,500) head, more or less, and all of them shall in the spring of 1895 be 4 years old and upwards. No cattle herein sold shall include any cattle known as 'big jaws' or 'cripples.' Also, all of his steer cattle which shall be 3 years old in the spring of 1895, and being in number about two hundred (200) head, more or less, all of which shall be good, merchantable steers. Also, all the fat cows, bulls, and stags which the said Irvin can conveniently gather, of such character that they shall be fat and in good shipping condition for beef. All of said cattle being in the following brands: SO side, hip, E U G side, hip, hip, V. K. side. In consideration of the above sale, said W. H. Jennings, Jr., has agreed, and does hereby agree, to pay to said W. C. Irvin for the said 4 year old steers, and older, the sum of eighteen (\$18) dollars per head; for the said 3 year old steers, the sum of thirteen (\$13) dollars per head; and for the said cows, bulls, and stags, the sum of ten (\$10) per head; and has this day paid upon such purchase money, in cash, the sum of six thousand (\$6,000) dollars; the balance of said purchase money to be paid when the cattle shall have been delivered. The said W. C. Irvin agrees to pasture and care for all of said cattle from the present time up to the 15th day of June, 1895, and to deliver the same to the said W. H. Jennings, Jr., his heirs or assigns, in train-load lots, in the shipping pens at Cotulla, Texas, if so desired by the said Jennings, upon ten days' notice being given by said Jennings to said Irvin of the time at which said Jennings desires said cattle to be put in the shipping pens by said Irvin, ready for shipment. That, in the application of the payments of said purchase money under this agreement, it is agreed that, as cattle are delivered, the said W. H. Jennings, Jr., shall pay unto the said W. C. Irvin the price hereinbefore stated for each head of cattle delivered, on the day on which they are delivered to him by said Irvin in the shipping pens at Cotulla, Texas; the \$6,000 to be applied as a payment upon the last delivery or deliveries of said cattle as hereinbefore provided for. It is further agreed and understood that in the pasturing of the cattle, and the care of them, from this date until the date of their delivery, the said Irvin shall exercise proper and reasonable care, and in handling said cattle from the pasture to the shipping pens the said Irvin will handle them with the care generally used in handling cattle for shipment to market for beef. It is further agreed and understood by the parties hereto that the said W. H. Jennings, Jr., will himself, or by his agent, proceed to the pasture of the said Irvin, and classify, pass upon, and accept the cattle to be delivered to him upon this contract, before the said Irvin shall be required to drive them, or any of them, from his pastures to the shipping pens at Cotulla, Texas. And it is further understood and

agreed that the said Jennings shall only be required to accept such fat cows, bulls, and stags as may be in such condition as will warrant their being shipped to market as beeves. Witness our hands this, the 18th day of September, 1894. W. C. Irvin. W. H. Jennings, Jr." Jennings paid at the time \$6,000 upon the purchase, and paid the balance upon the delivery of the cattle, none of which were delivered, however, until after the 1st of January, 1895. Irvin owned a ranch in Lasalle county, upon which he had at the time several thousand head of cattle; and in 1895 he listed for taxation in said county all of the cattle that were upon his ranch on the 1st day of January, 1895, except 1,200 head of steers which he had sold to W. H. Jennings. S. V. Edwards was the sheriff and tax collector of that county, and, by order of the commissioners' court, placed upon the supplemental tax rolls of Lasalle county for the year 1895 the 1,200 head of steers, as the property of W. C. Irvin, and assessed against the said steers a tax amounting to \$147, which has never been paid. This suit was brought by W. C. Irvin against Edwards to restrain him from enforcing the collection of the said tax, and the district court issued a temporary writ of injunction, which upon final hearing was perpetuated. The court of civil appeals reversed the judgment of the district court, and dissolved the injunction.

The beef steers sold by Irvin to Jennings were sufficiently identified to pass the title, and the language used in the first clause of the bill of sale clearly shows an intention that the title should then pass and vest in Jennings. The court of civil appeals held that, construing the whole instrument, the intention thus manifested was shown not to exist in fact, but that the parties intended the title should not vest until delivery should be made. It is true that only a part of the purchase money was paid at the time, and the contract prescribed that the remainder of the purchase money should be paid in installments as the cattle should be delivered. This does not prove that the parties intended the title to remain in Irvin until delivery. It was not at all unusual in such transactions to so provide, but it was a reasonable arrangement for completing the payments of the price. The provisions of the contract whereby Irvin agreed and bound himself to pasture and care for the cattle to the 15th day of June, 1895, and to deliver them to Jennings upon notice from him, binding himself also to exercise reasonable and proper care in pasturing and caring for and in moving them from the pasture to the shipping pens, show that the steers had become the property of Jennings, and Irvin was acting as the agent of the former in the care and handling of the stock. If the cattle belonged to Irvin, why should he contract with Jennings for the exercise of care in handling and managing property that belonged to himself? If Jennings was entitled only to such cattle as might be delivered to him by

Irvin, a failure by Irvin to exercise proper care in pasturing and driving them could have been of no interest to Jennings, and a service to be performed by Irvin for his own benefit would have been a novel subject of contract between those parties. Title to the steers passed to Jennings at the time the bill of sale was delivered. The 1,200 beef steers which were assessed in the name of the plaintiff in error were not his property on the 1st day of January, 1895, and he was not liable for the taxes so assessed. The court of civil appeals erred in reversing the judgment of the district court, and in rendering judgment dissolving the injunction which had been previously issued. It is therefore ordered that the judgment of the court of civil appeals be reversed, and that the judgment of the district court be affirmed.

#### STRICKLAND v. STATE.

(Court of Criminal Appeals of Texas. Nov. 16, 1898.)

#### INTOXICATING LIQUORS—LOCAL OPTION—ILLEGAL SALE.

1. The local option law cannot be put into operation unless the result of the election adopting it be published, either in a newspaper or by posting notices thereof.

2. On being asked to sell a quantity of liquor, accused said he had none, but wrote out an order to be sent to another county, which he required the buyer to sign. When tendered a bill, he said he had no change, but would furnish the money, and the buyer could pay him when he called for it the next day. The liquor was delivered the day following. *Held*, that the question whether accused merely acted as agent for the buyer was for the jury.

On rehearing. Rehearing granted, and judgment reversed.

For prior report, see 47 S. W. 470.

DAVIDSON, J. On a former day of the present term of this court, this case was affirmed, without reference to the statement of facts, because the record disclosed that the same was not filed in the court below. On motion for rehearing, satisfactory evidence is produced showing that said transcript is incorrect in this particular, and that said statement of facts was properly filed in said trial court. The case is now before us for consideration as presented with the statement of facts in the record.

Appellant reserved a bill of exceptions to the court's failure to charge the jury that the law prohibiting the sale of intoxicating liquor was in effect in Delta county. If it was an uncontradicted fact that said law was in force, the court would be justified in stating it to the jury. If there was an issue upon this question, of course he could not solve that issue against defendant by so instructing the jury. We have examined this record in this connection, and there is not a word of evidence in the statement of facts showing, or tending to show, that the order declaring the result in favor of local option was ever pub-

lished in a newspaper, or by posting notices, as required by the statute. Had the court, under this state of case, instructed the jury that said law was in effect, it would have been clearly wrong, because he would have been assuming as proved a fact upon which the statement of facts is absolutely silent.

The court charged the jury as follows: "If you find and believe from the evidence before you, beyond a reasonable doubt, that defendant, J. R. Strickland, on or about the 12th day of April, 1898, in Delta county, did deliver to E. O. Ellington one gallon of whisky, and at the same time received \$4 from said Ellington in payment for said whisky, he would be guilty as charged, and you should so find; otherwise, you should acquit him." A bill of exceptions was reserved to this charge, and the following charge requested, which was refused, and exception reserved to this refusal: "You are further instructed that, in order to constitute the offense charged in the information herein, the party must be the seller. If you find from the evidence before you that the defendant, J. R. Strickland, acted as the agent of E. O. Ellington in getting the whisky for said Ellington, the defendant, in that case, would not be guilty of selling whisky, and you must find him not guilty." In order to determine whether or not this charge should be given, it is necessary to give a brief statement of the facts in this connection. The evidence discloses that Ellington went to the defendant at his place of business, and sought to purchase from him one gallon of whisky for some friends, to take with them on a fishing excursion. Defendant denied having any whisky, and said he desired to have nothing to do with it; that one Chile was watching him for the purpose of prosecuting him. He finally, however, wrote out an order, which was signed by Ellington, for a gallon of whisky; said order to be sent to Ladonia, in the adjoining county, some 12 miles distant. This was during the day of the 11th of April. The next morning, Ellington called upon the defendant, and secured the gallon of whisky, and paid him \$4 for it. At the time he made the order, he tendered a currency bill to the defendant, remarking that he did not have the change; and defendant said he did not have any change, and that he would furnish the money, and that he (Ellington) could pay him when the whisky came. Under this state of facts, the question of agency was suggested. If defendant bought the whisky in Ladonia as the agent of Ellington, or of Ellington's friends through Ellington, then he would not be guilty as a seller. If, however, by his acts, he proposed to cover up an evasion of the law, and avoid detection in the sale to Ellington, then he would be guilty, for in that case there would be no agency, and he would himself be the seller. So, upon another trial, the evidence being the same, this view of the law should be given in charge. This question is not a novel one in cases of this character before this court. In

order to sustain a conviction for violating the local option law, the party charged with its violation must be a seller. It is true that resort is had to many evasions to avoid responsibility; yet these acts, being subterfuges and evasions, must be shown to be such by the testimony. The special charge asked by defendant presented a phase of the law to which appellant was entitled, and we are of opinion that the charge as given by the court above quoted is not correct. The mere delivery, under the facts of this case, of the whisky, and the handing to appellant by Ellington of the \$4, as charged, was misleading. If handing the whisky to Ellington and the payment of the \$4 were a sale, of course appellant was guilty; but this charge omitted entirely the defendant's defense of agency, and the charge of appellant on this question should have been given. The court should have given a charge defining what it took to constitute a sale.

We would also call attention to the fact that the evidence does not show that the result of the election was published in either of the modes required by the statute. Until this has been done, the law cannot be put into operation. *Jones v. State* (Tex. Cr. App.) 43 S. W. 981; *Armstrong v. State* (just decided) 47 S. W. 981.

For the reasons indicated, the motion for rehearing is granted, and the judgment is reversed, and the cause remanded.

HURT, P. J., absent.

### BYRD v. STATE.

(Court of Criminal Appeals of Texas. Nov. 2, 1898.)

CRIMINAL LAW—CONTINUANCE—ABSENT WITNESS,  
—REMARKS OF COUNSEL—MANSLAUGHTER.

1. A continuance because of an absent witness is properly refused where the witness is unknown in the county, and where his whereabouts are unknown, and a search of that and surrounding counties fails to show that he has ever been in any of them, and defendant's counsel is the only person professing to be acquainted with him.

2. The absence of a witness is no ground for a continuance where, at least 20 days before the trial, accused knew of her whereabouts beyond the jurisdiction of the court, and made no effort to obtain her presence.

3. The absence of a witness for the state whom accused desired to use is no ground for a continuance where he did not join in the subpoena, or make known his intention of so using such witness.

4. A conviction will not be set aside because of prejudicial remarks of the prosecuting attorney, where accused did not ask any special charge in reference thereto.

5. Where the state's evidence tends to show that shortly before the homicide accused was assaulted by deceased's wife, in his presence, and the evidence is conflicting whether deceased made a similar assault, an instruction that the killing was manslaughter if done while accused was in a passion, and incapable of cool reflection, produced by the assault on him by deceased, or by abusing and cursing him, or caused by any other circumstance in the evi-

dence, is erroneous, as limiting the jury to assaults made by deceased, and excluding assaults made by his wife which he abetted.

Appeal from district court, Milam county; W. G. Taliaferro, Judge.

Albert Byrd was convicted of murder in the second degree, and appeals. Reversed.

R. Lyles, A. P. Taylor, and J. E. Yantis, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 25 years; hence this appeal.

The court overruled appellant's motion for a continuance, to which he reserved his bill of exceptions. The motion was predicated on the absence of one John Nevils and Miss Eveline Wilder. The residence of John Nevils is stated to be unknown, and he is described as an Irishman and a day laborer, and it is alleged that he was present at the homicide, within 60 feet of the defendant and deceased at the time of the shooting; that he would testify, if he were present, that the defendant was walking up Belton street, and Alexander (deceased) was sitting on the south platform of the San Antonio & Aransas Pass depot in said town of Cameron, and, when defendant got opposite to deceased, deceased stood up, and raised a stick in a striking attitude towards the defendant, and that defendant then shot him. The diligence used for this witness was by issuing process to Milam, Bexar, Williamson, McLennan, Falls, and Robertson counties, all of which was returned "Not found." In connection with this witness, it does not appear that he was known in Milam county. So far as the record discloses, R. Lyles, one of the attorneys in the case, is the only person about Cameron, or in that vicinity, who professed to be acquainted with this man Nevils. His whereabouts in the application is stated to be unknown; and the whole country including the surrounding counties has been searched to secure his attendance. He was not only not found, but no suggestion is made by the officers that he has been in either of said counties. No doubt the court below thought he was either a fictitious person, and that it was not at all likely that his presence could ever be secured at the trial, or that, if present, he would testify as stated in the application. We do not believe the court erred in overruling the application on account of the absence of this witness. As to the witness Miss Eveline Wilder, it occurs to us that the least effort on the part of appellant would have ascertained her residence to be in the state of Arkansas. Certainly, he was charged with notice that she was with her parents at Spadra, in said state of Arkansas, at least 20 days before this trial, by the return indorsed on the process returned by the sheriff of Bexar county. And yet during all this time no effort whatever was

made to procure her deposition. We would also state in this connection that it does not appear that there was any intention on the part of appellant to use this witness prior to his motion for a continuance. The state had process issued for her to San Antonio, but defendant does not appear to have joined therein. If defendant proposed to use the state's witness, he should certainly make this intention known prior to his application for a continuance, in order that there be no question as to his good faith in the premises. Where, however, he does not make the fact known that he desires said witness, he will not be allowed to complain of the state's lack of diligence to secure the attendance of such witness. Looking at the record in this case, we consider it exceedingly improbable that the witness would testify as is claimed by appellant.

On the trial of the case appellant reserved a bill of exceptions to certain remarks of J. C. Scott, the district attorney, denunciatory of the defendant. Among other things, he applied to him the epithets "assassin," "murderer," "vulture," and also went out of the record to state "that it might be the law at Waco, where they are now shooting down men like they were dogs, to shoot a man down because his wife had horsewhipped him; but it was not the law in Milam county." It appears that the court reprimanded the district attorney, and told him to confine himself to the record. No special charges were asked by the appellant on this subject, and none were given. Under the rule laid down by this court, a case will not ordinarily be reversed because of denunciatory remarks made by the district attorney, unless a charge on the subject is asked, and refused by the court. While the case will not be reversed on this ground, yet we again reiterate our condemnation of this vicious practice. It is neither proper, much less praiseworthy, for the district attorney to abuse a defendant who is utterly helpless, as far as he is concerned, to resist such attack when on trial before the jury. District judges should adopt stringent measures to prevent this practice, too often resorted to in the courts.

Appellant complains of the action of the court in refusing to give the special instruction requested by him on the subject of manslaughter. In order to present this issue fairly, we will quote substantially so much of the evidence and charge of the court as bears on this subject. The homicide appears to have been occasioned by an altercation that occurred between defendant, deceased, and his wife, at the residence of the deceased, between 15 and 30 minutes preceding the killing. Deceased and his wife lived on Belton street, about two blocks west of the Aransas Pass depot, in the city of Cameron. With them lived their daughter, Miss Florence Maddox, a young lady about 15 years of age; and at the time Miss Eveline Wilder, a young lady about 17 years old,

whose home was in Arkansas, was visiting them. Appellant and his brother, Cleburne Byrd, lived with their parents, just across the street from the deceased. Defendant at the time was running an ice cream parlor about four or five blocks from his residence, east from the Aransas depot. The killing occurred immediately in front of and south of the Aransas depot on Belton street, between 12 and 1 o'clock at night. It appears that about 8 o'clock on the night of the homicide appellant and one Will English met the two young ladies, and were taking a walk. The proposition was made to go to a camp meeting, about six miles in the country. Miss Maddox objected, because she said her mother would not permit her to go. They agreed, however, to go and see Mrs. Alexander, to gain her consent for the young ladies to go to the camp meeting. They went to the residence of the latter, and met deceased and his wife there, about 9 o'clock. They refused to permit the young ladies to go to the camp meeting, stating that their daughter was too young to go out with young men, and it was too late, and the camp meeting was too far out. On further importunity Mrs. Alexander consented that the young men might take the girls to a meeting that was going on in the city of Cameron, but to bring them immediately back home. The parties—defendant with Miss Wilder and English with Miss Maddox—immediately left the residence of the deceased, and went to the ice-cream parlor of the appellant; the young ladies in the meantime having consented to go to the camp meeting. Miss Maddox stated that she would explain the matter to her mother the next morning. The young men went to the livery stable, and procured buggies, and carried the young ladies to the camp meeting. Just before getting to the camp ground, they met the people returning to town, and English and Miss Maddox turned back, stating that it was not necessary to go further, that the meeting had broken up. Appellant and Miss Wilder, however, proceeded to the camp ground, then turned back, and subsequently overtook the other parties, and all came into Cameron together, arriving there about 12 o'clock. It was suggested, after arrival by the young ladies, that the buggies had better be put up, and they walk home, in order to allay suspicion that they had been to the camp meeting. This was accordingly done. The young ladies remained at the ice-cream parlor in the meantime. English and Miss Maddox, on the way home, walked in advance of the other two parties. When they got to the gate, they discovered that deceased, Alexander, and his wife, were up, sitting on the gallery. They came out to the gate, meeting the parties. English did not go in, as, from the bearing of Alexander and his wife, he apprehended trouble. The state's testimony shows at this point that Mrs. Alexander immediately began whipping her daughter. Nothing was done to English,

as he did not come in at the gate, but immediately left. English, however, states that deceased (Alexander) struck at him over the fence with what he took to be a shotgun. He dodged the blow, and immediately ran back; that on the way he met appellant and Miss Wilder, and told appellant not to go down there, as there was trouble in the air. Appellant and Miss Wilder, however, proceeded on to the gate. The state here shows by the witness Mrs. Florence Alexander and her daughter, Miss Florence Maddox, that Mrs. Alexander was just outside of the gate at the time these parties came up, and that Alexander was with Miss Maddox, close to the steps of the house, inside of the yard; that just before Byrd got to the gate, he turned off to leave. And Mrs. Alexander testified as follows: "I then said to him, 'Wait a minute, Mr. Byrd. Give an account of yourself.' I said, 'Where have you been with these girls so late?' He replied, 'We have been riding around, having a good time.' I said, 'Didn't I tell you you could not carry the girls off?' He replied, 'I haven't hurt your God damned girls.' I then hit him with the whip, and began whipping him. I did this because he used this language. I did not intend to whip him when I went out, but intended to whip the girls. When I hit with the whip, he said, 'Stop that.' I hit him several times; do not know how many. During this time Alexander was trying to get to me, and the little girl was hugging around him, tussling with him. Alexander finally got to me as I raised the whip the last time; and grabbed the whip out of my hand, and said: 'Stop that, Florence. This is scandalous. I am ashamed of you.' Byrd walked off, when Alexander grabbed the whip out of my hand. Alexander made no attempt to strike Byrd, either with the whip or with anything else, at any time. When Alexander had grabbed the whip, he went at once back in the yard, and into the house. As Byrd walked off, he remarked to me, 'God damn you, I will fix you before morning.' We went in the house, and nothing further was said or done." Appellant himself testified as to the circumstances immediately attending this difficulty, as follows: "English and Miss Maddox were ahead of Miss Wilder and myself. When I got nearly to the Alexander house, Mr. English came running by us, going towards town. He said, 'For God's sake, don't go up there; there is trouble in the air.' I decided that it was my duty to deliver the young lady home. She was scared, and I thought it would be treating her badly to abandon her in the street; so we just went on. When we got some little distance from the gate that goes into the Alexander yard, Alexander came out, and said to me, 'Do you consider yourself a man?' Miss Wilder ran, and got in the yard, when Mrs. Alexander was whipping Miss Maddox. I said, 'Yes, I consider myself a man.' He said, 'You are a God damned cur,' and hit me with his fist



in the head, then struck me with a club he had in his hand. Mrs. Alexander then came out, and whipped me with a buggy whip. She struck me a number of licks. I do not know how many; somewhere between ten and twenty. A part of the time she was whipping me, Alexander was holding me. He was a very large man, and I am very small. I am thirty-one years old, and weigh about 140 pounds. Mrs. Alexander and Mr. Alexander both cursed me. He did not try to stop her from whipping me. He did not take the whip from her, or offer to do so. I pulled away from them, and left." The brother of the appellant, who states that he was across the street, in full view of the parties, testified on this point substantially as did the appellant. The killing, as stated before, occurred between 15 to 30 minutes after this altercation at Alexander's house. Alexander being a switchman at the Aransas depot, and the train coming in about 1 o'clock, shortly after the altercation he left his home, and went to the depot, which was about two blocks east, and was sitting on the south side of the passenger platform, talking with one W. L. Burton in regard to the loss of a trunk. Defendant and his brother in the meantime had left their home, and gone down to the ice-cream parlor, for the purpose, as they state, of getting his pistol, as he apprehended another attack on him by the deceased. On their way home from the ice-cream parlor they passed near where deceased and Burton were sitting on the platform. The testimony for the state here shows that when defendant got opposite to where they were sitting, and about 15 feet from the platform, he and his brother stopped. Appellant put his head forward, and looked at Alexander, the deceased, and at the same time drew from his pocket a pistol, and said, "You damned son of a bitch, I have got you now," and fired. After he fired the first shot, he "sorter" played around the deceased, and fired the second shot. "Deceased was in the act of falling when he fired the second shot. I [Burton] then said to the defendant, 'Don't shoot him any more; you have already killed him,' and the defendant said, 'He beat me up once to-night, and he is not going to do it again.' Defendant and his brother then walked off in the direction of town." J. R. King, who states that he was sitting on the same platform, further east, coincides in the main with the witness Burton as to the circumstances attending the killing. Defendant and his brother state the circumstances somewhat differently: That, as they passed near where the parties were sitting on the platform,—perhaps within three feet of them, Cleburne walking next to the platform,—just as they got opposite to Alexander, he rose up with a stick in his hand; that he had the stick grasped by one end with both hands. As Alexander rose up, Albert halted, and drew his pistol, and said, "You damn son of a bitch, I've got you now," and he im-

mediately fired. Alexander advanced a step or two, and fell. As he fell, Albert fired at him the second shot. "I then said to him, 'Bud, don't shoot any more, but go surrender to the officers,' and we started to go. When Alexander rose before he was shot, he held the stick in a striking attitude,—that is, he had it grasped by one end by both hands, and had the other end off the ground, and raised away from his body, as though he intended to strike with it; but Albert did not give him time. He shot too quick to allow him to strike. I did not see Alexander make any effort to strike, because I had passed on, not expecting there would be any trouble." Albert Byrd (appellant) stated: "That at the time we first saw them, we were about 75 feet from them, and we were going west down Belton street. We continued in the direction we had started until we got within about fifteen feet of them [deceased and Burton]. I looked at Alexander, and saw he had a stick. He arose, and raised his stick in a striking attitude, and I shot him. I started to shoot him again, and did shoot a second time; but, as I saw him falling, I threw the pistol up, and caused it to miss him. Some one said, 'Don't shoot any more.' My brother said, 'Come on, and give up to the officer,' which I did. When I shot Alexander, I thought he intended to beat me up again with the stick, which was large enough that he could have killed me with it. When he was sitting down on the platform he had the stick between his legs, and his lantern at his side. He arose, holding the stick in both hands by one end, and raised the other end off of the ground, and held it out from him in a striking attitude. He had not gotten entirely straight when I shot him, but nearly so. I thought he was going to strike me, and I said, 'You damned son of a bitch, I have got you now,' or, 'I have got an even break with you now,' or something of that kind. I was very much excited at the time." There was other evidence in the case, showing that a stick was found on the ground near where the homicide was committed, about three inches through one way and about one inch through the other way, and about three feet long.

On this state of case, the court gave a charge on murder in the first and second degrees, manslaughter and self-defense. The charge on manslaughter, so far as applicable to the question here raised, is as follows: "Manslaughter is voluntary homicide, committed under the immediate influence of sudden passion, arising from an adequate cause, but neither justified nor excused by law. (1) The act must be directly caused by the passion arising out of the provocation. (2) The passion intended is either of the emotions of the mind known as anger, rage, sudden resentment, or terror, rendering it incapable of cool reflection. (3) By the expression 'adequate cause' is meant such as would commonly produce a degree of anger, rage, resent-

ment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection. In order to reduce a voluntary homicide to the grade of manslaughter, it is necessary, not only that adequate cause existed to produce the state of mind referred to,—that is, of anger, rage, sudden resentment or terror, sufficient to render it incapable of cool reflection,—but also that such state of mind did actually exist at the time of the commission of the offense. You are further instructed that the following are also deemed adequate causes: (1) An assault and battery by the deceased, causing pain. (2) Any condition or circumstance capable of creating, and which does create, sudden passion, such as anger, rage, sudden resentment, or terror, rendering the mind for the time incapable of cool reflection, whether accompanied by bodily pain or not; and in this connection is applicable only to the phase of the law of manslaughter presented in this subdivision of the court's charge. You are instructed that the provocation causing the sudden passion must arise at the time of the killing, or must have been so recent, and so strong, that sufficient time had not elapsed for the mind of the slayer to cool, and for him to deliberate upon the character of the act before the killing takes place; and, although the law provides that the provocation causing the sudden passion must arise at the time of the killing, it is your duty, in determining the adequacy of the provocation (if any), to consider, in connection therewith, all the facts and circumstances in evidence in the case; and if you find that by reason thereof the defendant's mind at the time of the killing was incapable of cool reflection, and that said facts and circumstances were sufficient to produce such state of mind in a person of ordinary temper, then the proof as to the sufficiency of the provocation satisfies the requirements of the law; and so, in this case, you will consider all the facts and circumstances in evidence in determining the condition of the defendant's mind at the time of the alleged killing, and the adequacy of the cause (if any) producing such condition. If you believe from the evidence, beyond a reasonable doubt, that the defendant killed L. C. Alexander by shooting him with a pistol, and that the killing was not done in self-defense; and you further believe and find from the evidence that prior to the killing the said Alexander committed an assault and battery upon the defendant, causing pain; that such assault and battery created in the mind of the defendant sudden passion, such as anger, rage, sudden resentment, or terror, which rendered him at the time incapable of cool reflection; that such assault and battery was so recent, and the passion caused thereby was so strong, that such sudden passion existed at the time of the killing, and rendered the defendant's mind incapable of cool reflection,—if you so believe, you will find him guilty of manslaughter. Or should you be-

lieve, from the evidence, that prior to the killing, at or near the house of L. C. Alexander, the said Alexander cursed and abused the defendant and made an assault or an assault and battery (whether accompanied by bodily pain or not) on the defendant; that the acts done and the words spoken by said Alexander were capable of creating, and did create, in the mind of the defendant sudden passion, such as anger, rage, sudden resentment, or terror, that rendered him at the time incapable of cool reflection; and that such provocation was so recent, and the passion caused thereby was so strong, that such passion existed at the time of the killing, and rendered the defendant's mind incapable of cool reflection,—if you so believe, you will find him guilty of manslaughter. Or should you believe, from the evidence, that prior to the killing, at or near the house of L. C. Alexander, the said Alexander cursed and abused the defendant, or that he cursed and abused the defendant, and made an assault or an assault and battery (whether accompanied by bodily pain or not) on the defendant; that subsequently, at the time of and before the killing, the said Alexander made an assault on the defendant, or did any act which, alone or when coupled with the previous words and acts of said Alexander, were capable of creating, and did create, in the mind of defendant sudden passion, such as anger, rage, sudden resentment, or terror, which for the time rendered him incapable of cool reflection, and that while laboring under such sudden passion, he shot and killed said Alexander; and you further believe from the evidence, beyond a reasonable doubt, that such assault or acts done by said Alexander (if any) at the time were not such as to constitute an unlawful and violent attack on the defendant, made in such manner as to produce a reasonable expectation or fear of death or serious bodily injury,—you will find the defendant guilty of manslaughter. If you believe from the evidence, beyond a reasonable doubt, that the defendant killed L. C. Alexander as charged, and that the same was not done in self-defense; and you further believe from the evidence that at the time of the killing the defendant was laboring under such a transport of passion, produced by either or all of the adequate causes explained and submitted to you in the preceding charges, or caused by any other condition or circumstance in evidence which was capable of creating, and which did create, such sudden passion as rendered the mind of the defendant incapable of cool reflection at the time of the killing,—you will find the defendant guilty of manslaughter."

The charge requested by appellant, which was refused by the court, is as follows: "If you believe from the evidence that Florence B. Alexander was the wife of Lawson C. Alexander, and that the said Florence B. Alexander committed an assault and battery upon the defendant with a whip, in the street

near the residence of said Lawson C. Alexander, on the night of July 12, 1897, and that the said Lawson C. Alexander was present at the time and place and where the assault and battery was committed upon the defendant by Florence B. Alexander, and the said Lawson C. Alexander knew of the unlawful intent of the said Florence B. Alexander, and that he aided her by acts or encouraged her by gestures to commit said assault upon the defendant, then the said Florence B. Alexander and Lawson C. Alexander were principals in said assault, and the said Lawson C. Alexander was as much responsible for said assault as if he had committed it alone, and unaided by his wife, the said Florence B. Alexander."

Now, the question arises whether or not the charge of the court on the subject of manslaughter, as applicable to the facts proven, was full enough; in other words, was there a phase of the case not covered by the court's charge, and which the requested charge did cover? It is urged that the court's charge to the effect that any condition or circumstance capable of creating, and which does create, sudden passion, such as anger, etc., rendering the mind incapable of cool reflection, etc., is sufficiently comprehensive to cover all the points at issue, and to authorize the jury to find the defendant guilty only of manslaughter, if they believed that the assault was committed by Mrs. Alexander, and not by him. And it is further insisted that the jury would know, without an instruction to that effect, that an assault committed by Mrs. Alexander, when he was present, aiding and encouraging her in such assault, would be an assault by him as a principal, and that the charge as given was sufficient without charging specifically on the doctrine of principals in connection with an assault committed by Mrs. Alexander. The first contention might be correct if the court's charge had been general. For instance, if the court had charged, if they believed appellant had been assaulted at the house of Alexander by them, which caused his mind to be excited, and sufficient cooling time had not elapsed, and he subsequently killed deceased, he would only be guilty of manslaughter. But such was not the charge of the court. The charge, as given, confined the adequate cause to an assault and battery by the deceased, causing pain; and then predicated throughout the charge on manslaughter an assault made by deceased, L. C. Alexander. The jury would naturally conclude from this that they could only consider, with reference to adequate cause, an assault made on appellant by L. C. Alexander, and not by his wife. If there was no controversy in the record as to an assault being made by L. C. Alexander at his house on appellant, then, of course, the charge given would not be misleading. Appellant, in his testimony, claims that both L. C. Alexander and his wife assaulted him, deceased participating actively

in such assault; indeed, that he began it. If the state's testimony concurred with this, there could be no possible error. But, as we understand it, the state's evidence converts this proposition. Mrs. Alexander and her daughter both testify that she alone made the assault on appellant with the buggy whip, that deceased did not participate in said assault, and that she alone committed the assault. For aught that we know, the jury may have believed this version of the affair. The charge, however, circumscribed and limited them to an assault made by the deceased, and we are nowhere told that the assault made by the wife of the deceased, which he aided and encouraged, would be an assault by him, and might be adequate cause to reduce the offense to manslaughter. We believe the charge as given eliminated adequate cause superinduced by an assault made on appellant by the wife of the deceased, in which he joined by acts or words, and restricted them solely to an assault made on appellant by deceased. They may not have believed the testimony of the appellant and his brother on this point, but may have believed the testimony of the wife and daughter of the deceased, or a part of that testimony, and a part of appellant's testimony. If they believed the latter, they were restricted by the court's charge from giving appellant the benefit thereof. Under the facts and circumstances of this case, we believe the requested charge ought to have been given, and for the refusal of the court to give the same the judgment is reversed, and the cause remanded.

HURT, P. J., absent.

#### Additional Opinion.

(Nov. 18, 1898.)

DAVIDSON, J. In the opinion delivered in this case at a former day of this term, in connection with the witness Nevills, for whom a continuance was sought, this language is found: "In connection with this witness, it does not appear that he was known in Milam county. So far as the record discloses, R. Lyles, one of the attorneys in the case, is the only person about Cameron or in that vicinity who professed to be acquainted with this man Nevills. His whereabouts in the application is stated to be unknown; and the whole country, including the surrounding counties, have been searched to secure his attendance." It will be noticed that in this opinion the statement is made that "R. Lyles, one of the attorneys in the case, is the only person about Cameron or in that vicinity who professed to be acquainted with this man Nevills." Since the rendition of this opinion, it has been called to our attention that this is not a correct and full statement of the record in this connection; and, after a careful examination of the record, we find that this portion of the opinion incorrectly states the record on this point.

The witness Thomas Ford testified on the trial as follows: "I live in Cameron, Texas. Have lived there many years. I knew John Nevills. I saw him in Cameron about the time of the killing of L. C. Alexander. I saw him several times. He was an Irish laborer. I do not know where he is now. I think he was a sort of a tramp." It may be further stated in this connection that the record also discloses that Terry saw Lyles talking to some one; and, in a conversation with Lyles in regard to that person, Lyles stated to Terry that it was Nevills to whom he was talking. For two reasons we desire to file this additional statement, to be considered along with the opinion in this case: First, to correct the opinion in regard to the statement that Lyles was the only witness who professed to be acquainted with Nevills; and, second, to correct any wrong impression that may be gathered from the opinion itself in regard to the witness Lyles. We make this correction in order to conform the opinion in the case to the record, and in order that no injustice may be done to the parties mentioned.

### JOHNSON v. DYER.

(Court of Civil Appeals of Texas. Nov. 9, 1898.)

#### VENDOR AND PURCHASER—INNOCENT PURCHASER— VENDOR'S LIEN—LIMITATIONS.

1. A purchaser of lots inquired of the vendor about his title, and was informed that it was perfect, and an examination of the records confirmed the statement. The records showed, however, that the vendor had assumed purchase-money notes made by his grantor, for which no lien was retained by the deed, and against which limitations had apparently run; and on inquiry the vendor informed him that they were paid, and the maker also informed him that the payee, who was absent from home, had told him the notes were paid. The purchaser's examination of the lots showed no one in possession, and he paid value for a deed. *Held*, that he was an innocent purchaser, entitled to protection against a prior unrecorded deed from his vendor to one who took up the notes, and against the vendor's lien.

2. Where a vendor's lien is not reserved in a deed, and the purchase-money note has become barred, the lien cannot be enforced.

Appeal from district court, McLennan county; Sam R. Scott, Judge.

Action by J. L. Dyer, Jr., against Mary L. Johnson. From a judgment for plaintiff, defendant appeals. Affirmed.

This is a suit brought by appellee, John L. Dyer, Jr., February 17, 1898, against Mrs. Mary L. Johnson, to recover lots 5, 6, and 7 in block 4 of the Walton subdivision of the Burney homestead, in Waco, Tex. Plaintiff alleged that defendant was claiming the land under a deed of date the 4th day of December, 1890, by John L. Dyer, Sr., to Mary L. Johnson, which was filed for record the 4th day of January, 1898, of which plaintiff had no notice at the time he acquired the lots. Mrs. Johnson answered by plea of not guilty, and specially asked that John L.

Dyer, Sr., her vendor, be required to defend her title, as her warrantor. Further, that when she purchased the property on the 4th day of December, 1890, it was incumbered by two vendor's lien promissory notes, for \$327.50 each, executed by E. C. Hatton to Thomas B. Dockery on January 16, 1890, which fell due, respectively, January 16, 1891 and 1892, which notes she assumed to pay; that these notes are recited in the conveyance of Thomas B. Dockery to E. C. Hatton, of same date as the notes, and also recited in the conveyance of E. C. Hatton to John L. Dyer, Sr.,—the latter assuming to pay the same,—of all which John L. Dyer, Jr., had notice at the time of his purchase from John L. Dyer, Sr. Mrs. Johnson's answer also shows that she paid off and discharged the notes at maturity, and about the 18th day of January, 1892, said Dockery executed a release to her, conveying to her all the legal and equitable title he had in the land by virtue of the lien; that she became subrogated to all the rights of Dockery in the land; that she is such lienholder in possession; and that she be so adjudged, and that plaintiff be required to pay off the lien before he recover the land. Plaintiff replied that the notes were barred by the statute of limitations of four years; that the notes were a part of the purchase price defendant agreed to pay for the lots, and she could not be subrogated to the lien in favor of Dockery. He also replied that he purchased the lots in good faith, denied that he had any notice that the notes were unpaid, and alleged that at the time he purchased the property he made diligent inquiry, and was informed and led to believe that the notes had been paid off and discharged. The case was tried by the judge without a jury, and resulted in judgment for plaintiff for the lots, and against John L. Dyer, Sr., in favor of Mrs. Johnson, for amount of notes, principal, interest, and attorney's fees,—\$1,894,—and costs. The defendant, Mrs. Johnson, has appealed.

We find the facts established on the trial as follows: The lots in suit were conveyed January 16, 1890, by Thomas B. Dockery to Ed. C. Hatton, by deed duly recorded on the same day, reciting consideration as cash \$450, "and the further consideration of two promissory notes, bearing even date herewith, for the sum of \$327.50 each, due and payable in one and two years, and bearing interest at the rate of ten per cent. per annum from date. Said notes are executed in part payment for the hereinafter described piece of land." The notes themselves were read in evidence, and each recited: "This note is given in part payment of the purchase money of lots 7, 6, and 5, of block 4, Walton's subdivision to the city of Waco, this day deeded to me by Thomas B. Dockery, of Waco, Texas; and for the payment hereof, together with the interest hereon, according to the tenor and reading hereof, a vendor's lien is hereby acknowledged." Defendant read in evidence a war-

ranty deed of Ed. C. Hatton to John L. Dyer, Sr., dated August 28, 1890, conveying the lots to Dyer, Sr., in which deed John L. Dyer, Sr., assumed the payment of the two notes mentioned in the conveyance of Dockery to Hatton. On the 4th day of December, 1890, John L. Dyer, Sr., conveyed the lots to defendant, Mrs. Johnson, by warranty deed of that date, filed for record in McLennan county the 4th day of January, 1898, for a cash consideration of \$1,237, which deed also recited, "and the further consideration that the said Mary L. Johnson assumes the payment of, and pays off, two certain promissory notes, dated January 16, 1890, given by Ed. Hatton to Thomas B. Dockery, for \$327.50 each, due January 16th, 1891, and January 16, 1892, with interest from date thereof at ten per cent. per annum. Said Johnson assumes the payment of the accruing interest on said notes, \$57.85. Said notes being further described in a deed recorded in Book 70, page 376, and which reference to Book 70, page 376, is record volume and page of a deed from Dockery to Hatton." On the 18th of January, 1892, Thomas B. Dockery executed a release to Mrs. Mary L. Johnson of all claim in him by virtue of the vendor's lien notes, reciting that she had that day paid the notes to him. The release was not recorded. It was shown that W. R. Dunnica, acting for Mrs. Johnson, paid to Dockery the amount due on the notes, and they were delivered to him, as was the release. December 17, 1897, John L. Dyer, Sr., conveyed the lots to John L. Dyer, Jr., by warranty deed of that date, for a cash consideration of \$1,200, paid at the time, which deed was duly filed for record in McLennan county on the day of its date. John L. Dyer, Sr., is the father of John L. Dyer, Jr. The two vendor's lien notes were not recorded.

The trial judge filed conclusions of fact and law, and found the facts as above stated, and then, upon evidence sufficient to support the findings, also found the following facts, which are true: "I further find that before the said John L. Dyer, Jr., purchased the lots in controversy herein from John L. Dyer, Sr., on December 17, 1897, that he employed one R. S. Vaughan, an abstractor, of Waco, Texas, to examine the title from the state, down to December 17, 1897, to said lots, and tell him (John L. Dyer, Jr.) the condition thereof. I find that the said Vaughan made the said examination, and reported to John L. Dyer, Jr., that the title was perfect, except as to the two notes given by Ed. C. Hatton to Thomas B. Dockery (being two notes of \$327.50 each), and a deed of trust for \$250 given by John L. Dyer, Sr., to W. W. Seley, dated August 25, 1897. I further find that John L. Dyer, Jr., had said Vaughan take a car and go and look at the lots in controversy, and see if any one was in possession thereof, and that the said Vaughan did go and examine the said lots, and came back and reported to the said John L. Dyer, Jr.,

that he found the premises inclosed by fence; that same was in bad repair, being down in several places, and that a road crossed the lots; and that they appeared to be vacant and unoccupied city lots,—and that the said Vaughan made inquiries of persons living adjacent to said lots in controversy herein, and was told by them that the lots had been lying there for six or seven years, and did not know who owned them. I further find that thereupon said Vaughan made an abstract for the said John L. Dyer, Jr., to the said property, on December 17, 1897, and which abstract was completed and delivered to the said John L. Dyer, Jr., about 2:25 p. m. on December 17, 1897, and that upon delivery of the abstract to John L. Dyer, Jr., by said Vaughan, and after an examination thereof by the said John L. Dyer, Jr., the transaction between the said John L. Dyer, Sr., and John L. Dyer, Jr., was closed by the said John L. Dyer, Jr., paying to the said John L. Dyer, Sr., \$1,200 for the property in controversy herein, and out of which said sum so paid to John L. Dyer, Sr., the note of \$250 held by W. W. Seley, secured by a deed of trust upon the property in controversy, was paid off. I find that before said payment, and before the deed was made to John L. Dyer, Jr., and while Vaughan was gone to inquire into the possession of said lots, John L. Dyer, Jr., asked John L. Dyer, Sr., in reference to said notes given by Ed. C. Hatton to Thomas B. Dockery,—as to whether same had been paid off,—and was told by said John L. Dyer, Sr., that they had been paid off; that the said John L. Dyer, Sr., made a search among his receipts to find the notes, but failed to do so, and stated to the said John L. Dyer, Jr., that he was of the opinion, between himself and Ed. C. Hatton, Hatton had paid off said notes, and that same were in his possession; that the said John L. Dyer, Jr., and the said John L. Dyer, Sr., called upon the said Hatton, and was told by Hatton that he did not have the notes in his possession, and that probably John L. Dyer, Sr., was mistaken about he (Hatton) having paid same off, but that he (Hatton) remembered something about them, and it was his recollection that John L. Dyer, Sr., had paid same off, and said Hatton stated to them that he was sure said notes had been paid off, as Thomas B. Dockery had several years previously told him that the notes had been paid off. I further find that on August 25, 1897, John L. Dyer, Sr., was desirous of borrowing some money on said lots (being the lots in controversy herein), and requested W. W. Seley to loan him \$250 for ninety days, and offered him a deed of trust upon the property herein involved, to secure same; and on this date Seley went to John L. Dyer, Jr., and requested him to examine the title to said property as far back as seven or eight years, and, if the title was good to the property, to then prepare a deed of trust upon the property in controversy herein. I find: That John L. Dyer, Jr., did make an examination

of the title as far back as January 30, 1888; and in his examination he found that on January 16, 1890, Thomas B. Dockery conveyed to Ed. C. Hatton the property in controversy herein, and which said conveyance from Dockery to Hatton, as part of the purchase money for said property so conveyed to him, and as part of the consideration, were mentioned two notes, of \$327.50 each, due in one and two years, with ten per cent. interest from date thereof. That no vendor's lien was specially retained in said deed to secure the payment of said two notes. And in said examination so made by said John L. Dyer, Jr., for W. W. Seley, he found that Hatton had conveyed by warranty deed the property in controversy herein, on August 28, 1890, to John L. Dyer, Sr., and in which conveyance the said John L. Dyer, Sr., assumed the payment of said two notes given by the said Hatton to the said Dockery. That John L. Dyer, Jr., in said investigation of said title, found no release of the two notes for \$327.50 each on record in McLennan county, Texas, and the said John L. Dyer, Jr., reported to W. W. Seley that the title to said property (being the property in controversy herein) appeared, as far back as 1888, to be good, except the two notes of \$327.50 each, which had not been released. Upon receipt of this information the said Seley requested the said John L. Dyer, Jr., to call upon the said Dockery and Hatton in reference to the notes. That he, the said John L. Dyer, Jr., called at Dockery's office, and found him absent from Waco. That he went to see said Hatton, the payor in said notes, and was told by him that Dockery had told him three or four years previous that said notes had been paid off and discharged. I also find that the said John L. Dyer, Jr., asked the said John L. Dyer, Sr., if the said notes had been paid off, and was assured that they had; that all of said information was reported by said John L. Dyer, Jr., to the said Seley; also, that the said notes appeared to be barred by the statute of limitation, and that no vendor's lien had been specially retained in the deed to secure the payment thereof; and, upon receipt of this information, Seley made the loan upon said lots. (9) I also find that during the year 1897 Thomas B. Dockery was absent from Waco on a great many occasions,—at times being gone for three or four weeks; that at the time the loan was made by Seley, and at the time that John L. Dyer, Jr., purchased the lots in controversy herein, the said Thomas B. Dockery was absent from Waco. (10) I further find that one W. R. Dunnica was the agent for the defendant, Mary L. Johnson, and that he, as agent for her, paid off the two notes of \$327.50 each to Thomas B. Dockery; that he took a release from the said Dockery; that he, as agent for Mrs. Mary L. Johnson, the defendant herein, had the deed in his possession from the said John L. Dyer, Sr., and that said deed, or the release, had been placed of record in McLennan county,

Texas, at the time John L. Dyer, Jr., purchased the property in controversy; that the release has never been placed of record; that the said deed was filed for record by the said W. R. Dunnica on January 4, 1898. I further find that the defendant Mary L. Johnson is the widow of T. Johnson, deceased, and was frequently called 'Mrs. T. Johnson,' and the release was to her. (11) I further find that shortly after December 17, 1897, John L. Dyer, Jr., called upon Thomas B. Dockery in reference to securing a release to the two notes given by Ed. C. Hatton to him, and was told by Dockery that he did not remember whether same had been transferred to some one else, or had been paid off, but his memory was that same had been paid off and released. I find that John L. Dyer, Jr., spoke to said Dockery several times about securing a release of said two notes, and on the 2d day of January, 1898, Dockery told him that he did not remember anything about any transaction in reference to the notes, but would look in the notary public book at the Waco State Bank, and see if any memorandum appeared in said notary public record of any transaction or release to said notes; that said Dockery did go to a notary public record of the Waco State Bank, and found that he had released the lots to Mrs. T. Johnson; that Dockery saw W. R. Dunnica, agent for Mrs. Johnson, the defendant herein, and called his attention to the matter, and the said Dunnica told him (Dockery) that Mrs. T. Johnson had a deed from John L. Dyer, Sr., and went to his safe and secured the deed and release, and showed them to the said Dockery, stating that he was going immediately to file the deed for record. I further find that Thomas B. Dockery knew nothing of the transaction in reference to the paying off of said notes and the execution of the release, and could not call to mind anything concerning same until he had examined the notary public book at the Waco State Bank. (12) I further find that it was agreed in this suit that the common source of title was in John L. Dyer, Sr., except so far as it was modified in the deed in evidence from Dockery to Hatton, and the deed in evidence from Hatton to John L. Dyer, Sr. (13) I further find that John L. Dyer, Sr., sold the lots in controversy to Mrs. Mary L. Johnson on December 4, 1890, for the cash consideration of \$1,237, and the further consideration of her assumption of said two notes of \$327.50 each; that at the time said John L. Dyer, Sr., conveyed the property to John L. Dyer, Jr., that he had no knowledge that he had conveyed the property to Mrs. Mary L. Johnson; that the said John L. Dyer, Jr., questioned the said John L. Dyer, Sr., about the title in reference to said notes of \$327.50 each, and was given every assurance by the said John L. Dyer, Sr., that the said notes had been paid off, and the title was good. (14) I further find that at the time John L. Dyer, Jr., purchased the lots in controversy herein from

John L. Dyer, Sr., he had no notice of said notes of \$327.50 each so given by the said Hatton to the said Dockery, otherwise than as appeared by the recitation of said notes in the deed from Dockery to Hatton, and from Hatton to John L. Dyer, Sr., and that no notice was afforded by the recitations in the deed from Dockery to Hatton, and from the deed from Hatton to John L. Dyer, Sr.; that said notes acknowledged the retention of a vendor's lien, and said notes were not of record, and the said John L. Dyer, Jr., had never seen the notes before he purchased the lots from John L. Dyer, Sr., and had no constructive or actual notice of the contents of said notes, and that the only notice whatsoever of said notes was in the recitation in the deed from Dockery to Hatton, and from Hatton to John L. Dyer, Sr.; and that the recitation in said deed concerning said notes in said deed were full and complete, and gave the date of the notes, the amount, when due, and the rate of interest, and there was nothing in said deed to denote that said notes were secured by the retention of an express vendor's lien."

There is evidently a mistake in the conclusions of fact filed by the court. In one place he says, "and that said deed or release had been placed of record in McLennan county, Texas, at the time John L. Dyer, Jr., purchased the property in controversy." Evidently the court intended to say that the deed or release had not been placed of record, for such is the fact, and further findings make clear the real finding of the court.

It appears from the testimony of John L. Dyer, Sr., that he had forgotten that he at any time owned the lots, or that he had sold them to Mrs. Johnson. He testified: "I sold the land in controversy to Mrs. Johnson, as shown by my deed which has been placed in evidence; and I had forgotten that fact, and it had been utterly obliterated from my memory. In fact, I had forgotten all about the lots until James L. Moore was making up a block book of the city of Waco. He called my attention to the fact that I owned the lots. I did not believe it. In fact, I had forgotten all about ever purchasing the lots. Moore having told me that I bought the same from Hatton, I went to see Hatton, and he told me that he sold same to me. I thereupon requested an abstractor at Waco to see if I was really the owner, and report the status thereof; and he stated the title to the property was in me; that nothing had been done in reference to same since my purchase from Hatton. After my purchase from Hatton, I forgot the transaction, and the lots had wholly escaped my memory. I had forgotten that I owned them until Moore called my attention to the matter. In August, 1897, I was needing some money. Being told by the abstractor that the title to the property was in me, and having no knowledge or recollection that I conveyed it

to Mrs. Johnson, I gave W. W. Seley a deed of trust upon it for \$250. December 17, 1897, I sold and conveyed to my son, John L. Dyer, Jr., the lots in controversy, for the cash consideration of \$1,200, and made a deed to the property; and I would not have done so, had I any knowledge I had sold the same to Mrs. Johnson. When I mentioned selling the property to my son, John L. Dyer, Jr., he questioned me very closely about the title, and I gave him every assurance that the title was good, and I told him I was positive that the notes mentioned in the deed from Dockery to Hatton had long since been paid off; and, further to assure him, he and myself went to see Ed. Hatton, who has recently died, and Hatton stated that Dockery told him the notes had been paid off, and that he (Hatton) was sure they had been paid off, for he had never been called on to pay the same, and had not heard anything of them. I also stated to my son, John L. Dyer, Jr., that I had either paid the notes myself, or else Ed. Hatton had paid same off. In conversation with him, I told him that, in some arrangement between Hatton and myself, that Ed. was to pay the notes off; and, thinking Hatton might remember something about such a transaction, I called upon him with my son. Hatton, in the conversation, stated that he thought I was mistaken about having arranged with him to pay off the notes, and that he did not remember of having done so. I then told my son, if Hatton had not paid them off, as I supposed he had, then I paid them myself; and it was upon my representation that the notes had been paid off that my son purchased the property." The deed of Dyer to Dyer was dated December 17, 1897. Dockery was absent from Waco on a great many occasions during the year 1897.—sometimes two or three weeks at a time,—and he was absent on the 17th day of December, 1897. Moore inquired of him about the Hatton note to Dockery prior to that date; but after his return to Waco, after the 17th of December, 1897, the younger Dyer came to him, and asked him about the payment of the notes, and he stated that he thought the notes had been paid off. The elder Dyer had stated to his son that he thought he had paid them off. Dockery told the younger Dyer that he did not recollect whether the notes had been transferred to some one else, or had been paid off, and he (Dockery) had released, but his memory was that they had been paid off, and he had released. Dockery says: "He spoke to me about it two or three times about the 2d of January. I told him I would look at the notary public book at the Waco State Bank, and see if anything appeared in said notary public book to indicate transfer or release." He states that he did examine the book and found that he had released the lots to the defendant, Mrs. Johnson, who had paid off the notes, and he informed plaintiff of this

about the 4th of January, 1898. This was a fact. W. R. Dunnica, Mrs. Johnson's agent, had the release in his possession, and the deed of Dyer, Sr., to Mrs. Johnson, both then unrecorded. Dunnica then had the deed recorded, but the release was not recorded at any time. These inquiries to Dockery were made after Dyer, Jr., had purchased the lots and paid for them. No one was shown to be in possession of the lots.

Alexander & Atkinson, for appellant. Henry & Stribling, for appellee.

COLLARD, J. (after stating the facts). The court below concluded from the facts that Dyer, Jr., the plaintiff, was an innocent purchaser, in good faith, for a valuable consideration, without notice of defendant's rights, and that he used all the diligence required of him, by inquiry, to ascertain the status of the title to the property, and that the notes were barred by limitation at the time of plaintiff's purchase, and he had the right to presume that they had been paid. The court decided several other questions in favor of plaintiff; holding his title valid as against Mrs. Johnson, and unaffected by the lien of the notes she had paid off. We agree with the court below that plaintiff is shown to be an innocent purchaser of the lots, and should be protected. Plaintiff prosecuted inquiry as to the Hatton notes to Dockery until he ascertained that they had been paid. He was not bound to know that Mrs. Johnson was the person who paid the notes, and acquired thereby the rights she asserts. Such rights were shown by her deed from John L. Dyer, Sr., and the release executed to her by Dockery. Plaintiff knew nothing of any of these facts, and no fact that should have put him upon inquiry. If he had seen Dockery before his purchase, and Dockery had informed him that the notes had been paid, that information would not put him on inquiry of the fact that Mrs. Johnson had paid them; having purchased the lots from John L. Dyer, Sr., and securing a release from Dockery. These rights were evidenced by writings which are subject to the laws of registration, and persons dealing with the apparent owner, as shown by the records, in good faith, should be protected. The plaintiff was affected with constructive notice of the facts recited in the deed of Dockery to Hatton, and of Hatton to Dyer, Sr., that notes had been given for part of the purchase price of the lots, and that Dyer, Sr., had assumed payment of the notes. No lien was expressly retained in the deeds, and it appeared that the notes were barred by the statute of limitation of four years at the time plaintiff purchased the land. In such case he purchased the land free from the lien expressed in the notes, of which he had no actual or constructive notice. By the facts brought home to the purchaser by the record of the deeds, the lien expressed in the notes, of which he had no

notice, was lost by the statute of limitation, even had he known that Mrs. Johnson had become the owner of the notes, to pay which there was but an implied lien by the deed on the lots. The court below correctly so held. It is a settled rule in this state that when a vendor's lien is not expressed in a deed to land, and the note has become barred, the lien cannot be enforced against the land. *Rindge v. Oliphint*, 62 Tex. 685; *Hale v. Baker*, 60 Tex. 217; *Perkins v. Sterne*, 23 Tex. 562; *Pitschki v. Anderson*, 49 Tex. 3.

Now, reviewing all the facts (that the plaintiff made inquiry as to the notes, to ascertain if they were still outstanding; the information he received,—that they had been paid off, and that he was told that Dockery had so stated; coupled with the period of time that had elapsed after maturity of the notes), we cannot say the lower court was in error in holding that plaintiff exercised sufficient diligence to show good faith, and to relieve the lots in his hands of the lien, even if the lien could be enforced, though apparently barred. The rule adopted by the supreme court in *Hill v. Moore*, 85 Tex. 335, 19 S. W. 162, as to diligence required of one who has been put upon inquiry, has been satisfied.

Mrs. Johnson was not shown to be in possession of the lots, and no question is raised of what her rights to defend her possession would be.

What has been said in the foregoing decides all material questions in favor of appellee. From the findings of fact by the court below, we conclude that the judgment should be affirmed, and it is unnecessary to discuss other questions. The judgment is affirmed.

#### GALVESTON, H. & S. A. RY. CO. v. CLEMONS.

(Court of Civil Appeals of Texas. Oct. 18, 1898.)

#### LIMITATION OF ACTIONS—APPLICATION OF STATUTE.

An action against a carrier for failure to deliver goods lost in transit, for which a bill of lading was taken, is within Rev. St. 1895, art. 3354, providing that actions for conversion of personal property shall be brought within two years, and not article 3356, providing that actions for indebtedness founded on written contract shall be brought within four years.

Appeal from district court, El Paso county; A. M. Walthall, Judge.

Action by Bye De R. Clemons against the Galveston, Harrisburg & San Antonio Railway Company. Judgment was for plaintiff, and defendant appeals. Reversed.

Beall & Kemp, for appellant. Patterson & Wallace, for appellee.

NEILL, J. The appellee, Bye De R. Clemons, brought this suit in the district court of El Paso county, Tex., on the 13th day of March, 1897, against appellant, the Galveston, Houston & San Antonio Railway Com-



pany, and the Mexican Central Railway Company, as common carriers, and connecting lines with other roads, especially the New York, Lake Erie & Western Railway Company and the Queen & Crescent Railway Company, alleging, in substance, that on the 24th day of September, 1894, appellee delivered to defendants, through the New York, Lake Erie & Western Railway Company, their agent at Cleveland, Ohio, certain household goods, freight, and merchandise consigned to V. P. Safford, to be carried and delivered to him at Escalon, Mexico; that one large box of the shipment containing certain specific goods was, by the negligence of defendants, and by their failure to deliver it, as they were bound by their written contract of shipment and duty as common carriers to do, totally lost, to plaintiff's damage in the sum of \$611. Plaintiff also claimed that by reason of the delay in delivering the goods at their destination, and the loss of the box containing them, he "suffered great mental pain, moral degradation, and shame, and by reason thereof could not appear in society, to his damage in the sum of \$1,000." Appellant answered by specially excepting to the petition upon the grounds: (1) That damages could not be recovered for mental pain, moral degradation, shame, etc.; (2) that plaintiff's cause of action was barred by the two-years statute of limitations; and by the following pleas: The general denial, the two-years statute of limitations, and certain stipulations in the bill of lading exempting it from liability. The Mexican Central Railway Company, after filing its answer, was dismissed from the suit. The court sustained the special demurrer first referred to, but overruled the second, raising the question of limitation, and also refused to submit the question of limitation to the jury. The trial of the case resulted in judgment against the appellant for the sum of \$387.10, from which it has appealed to this court.

The evidence shows that the goods were shipped from Cleveland, Ohio, on the 24th day of September, 1894, on which day appellee delivered them to the initial carrier, the New York, Lake Erie & Western Railway Company, and received from its freight agent, J. N. Booth, a bill of lading of that date, whereby said company agreed to carry plaintiff's goods to their destination, Escalon, Mexico, if on its road, otherwise to deliver to another carrier on the route to said destination; that the goods were delivered and received by appellant as a connecting carrier, to be transported and delivered to appellant at Escalon; that the goods were lost in transportation by appellant, and never reached their destination, nor received by appellant; that the goods, in the regular course of transportation, should have reached their destination on the 4th day of November, 1894.

The only errors assigned are the court's action in overruling appellant's special demurrer, and refusing to submit the question of limitation to the jury. Article 3354, Rev. St.

1895, provides that "there shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description: (1) Actions of trespass for injury done to the estate or the property of another. (2) Actions for detaining the personal property of another, and for converting such personal property to one's own use. (3) Actions for taking or carrying away the goods and chattels of another. (4) Actions for debt where the indebtedness is not evidenced by a contract in writing." Article 3356 provides that "there shall be commenced and prosecuted within four years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description: (1) Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing. (2) Actions for the penalty or for damages on the penal clause of a bond to convey real estate. (3) By one partner against his co-partner," etc.

We think the article first quoted applies to and governs actions of this character. The shipping receipt or bill of lading imposed no duty upon the appellant except that which arises from the common law, i. e. to safely transport the goods with reasonable dispatch, and deliver them to the consignee at the point of destination. The duty would have been the same had there been no shipping contract. Its failure to discharge this duty, after receiving the goods for transportation, was in law a conversion of appellee's property, and his cause of action was one of tort founded upon such conversion, rather than of debt founded upon contract in writing, and should have been commenced and prosecuted within two years after appellant failed to deliver the goods as required by law, for it was then that appellee's cause of action accrued. *Railway Co. v. Roemer*, 1 Tex. Civ. App. 195, 20 S. W. 843; *Martin v. Telegraph Co.*, 6 Tex. Civ. App. 619, 26 S. W. 136. As it appears from appellee's own pleadings and the uncontroverted evidence that the cause of action was barred by the statute of limitations when the suit was instituted, the judgment of the district court is reversed, and judgment here rendered in favor of appellant.

#### PATTERSON v. SEFTON.<sup>1</sup>

(Court of Civil Appeals of Texas. Oct. 12, 1898.)

JUDGE—DISQUALIFICATION—SERVICE BY PUBLICATION—GARNISHMENT—SERVICE OF WRIT—COSTS—ASSIGNMENT OF ERROR.

1. The judge's relationship with one summoned as garnishee does not disqualify him from hearing the main action.

2. Service by publishing a citation for four consecutive weeks prior to the January term is sufficient, where the cause is not heard until the March term.

3. The garnishee cannot attack the judgment

<sup>1</sup> Writ of error denied by supreme court.

in the principal suit for irregularities not rendering it void.

4. Where all members of a firm are parties to the main action, personal service of the garnishment notice on one of them is sufficient.

5. Where the garnishee litigates his liability, he is not entitled to an attorney's fee for defending the suit.

#### On Rehearing.

6. District and county court rule 101 (20 S. W. xviii.), requiring assignments of error to be filed in the trial court, applies to assignments of cross error.

Appeal from district court, El Paso county; A. M. Walthall, Judge.

Action by O. G. Seeton against H. L. Detwiler and others as defendants, and Millard Patterson as garnishee. From a judgment for plaintiff against garnishee, he appeals. Affirmed.

It appears that O. G. Seeton filed a suit, numbered 2,500, in the district court of El Paso county, on September 9, 1896, against H. L. Detwiler, T. N. Detwiler, and H. C. Park, as partners composing the firm of Detwiler Bros. & Park, and against H. C. Park, in reference to a partnership debt, as alleged, against said firm, as held by plaintiff, Seeton. Personal service was had on one of the Detwilers, the other appeared as a party, and Park was cited by publication as a nonresident; which citation by publication was issued on December 5, 1896, requiring Park to appear on the first Monday in January, 1897, the 4th day thereof, the beginning of the January term. This citation appeared in the newspaper on the 6th, 13th, 20th, and 27th days of December, 1896, being published for 28 days prior to the 4th of January. Judgment was not rendered until the March term, 1897. At the time of filing said suit plaintiff sued out a writ of garnishment, the garnishee being Millard Patterson, this appellant, which was docketed as a separate suit, as the statute requires, and numbered on the docket 2,501. The cause No. 2,500 was tried before Judge Buckler, a brother-in-law of Mr. Patterson, the latter having married the judge's sister. The judgment rendered by Judge Buckler in No. 2,500 does not in any wise adjudicate, or attempt to adjudicate, issues properly pertaining to the garnishment suit, as is shown by the following clause thereof: "It is therefore ordered, adjudged, and decreed by the court that plaintiff, O. G. Seeton, do have and recover of and from defendants Detwiler Bros. & Park, and H. L. Detwiler and T. N. Detwiler and H. C. Park, the sum of two thousand two hundred and sixty-seven and <sup>55</sup>/<sub>100</sub> (\$2,267.55) dollars, with interest thereon from this date at the rate of six per cent. per annum until paid, and together with all costs in this behalf expended, including the sum of \$50 allowed as attorney's fee to W. M. Coldwell for defending this suit; for all of which plaintiff may have his execution against said firm of Detwiler Bros. & Park, composed of H. L. Detwiler, T. N. Detwiler, and H. C. Park, and against H. L. Detwiler

and T. N. Detwiler. No execution shall issue on this judgment against defendant H. C. Park individually, but as to said Park this judgment shall be satisfied only out of and to the extent of funds in the hands of, or the indebtedness owed by, garnishee, Millard Patterson, that may belong or be due to said H. C. Park or Detwiler Bros. & Park, and shall not be collectible as against said H. C. Park for any balance that may be due on this judgment in case such funds or indebtedness shall not satisfy the same. It is further ordered that the officers of this court shall have and recover of each of the parties hereto, save and except defendant H. C. Park, the costs by them, respectively, incurred, for which they may have their execution." Judgment was rendered against the garnishee, from which he appeals.

W. B. Brack, for appellant. Falvey & Davis, for appellee.

JAMES, C. J. (after stating the facts). Proceeding to the assignments of error:

1. Was the judgment in No. 2,500 void, because rendered by the garnishee's brother-in-law? We think not. Mr. Patterson was not a party to said suit. Before the enactment of the statute requiring the garnishment proceeding to be docketed separately, a trial in such cases was often a complex proceeding, involving the hearing of two distinct controversies, the garnishee having no concern with the main controversy. Evidently it was for the relief of parties as well as the convenience of the courts that the act referred to was passed. Its effect was to eliminate the garnishee from the main case. That he is not in any sense a party to such case is evident when we bear in mind that he is not concluded by the judgment in respect to any issue he may properly raise, nor could such judgment so bind him if it professed to do so, nor would he be a proper party to an appeal from such judgment. He is not concerned in what may be adjudicated between the plaintiff and defendant, except to know that it is not a void judgment, and this issue he is always at liberty to raise in the garnishment proceeding, and it appears he has taken the precaution to do so in this instance; but, in our opinion, the judgment was not void by reason of garnishee's relationship to the judge.

2. It is also contended, by the second assignment of error, as rendering the judgment void, that service by publication was not perfected against H. C. Park in time to warrant the rendition of the judgment at the March term, 1897. As the citation was published for four weeks prior to the January term, and the case was tried at the March term, we perceive no defective service in this respect. We may add, in passing, that there are cases holding a judgment rendered prematurely not to be void. *Tobar v. Losano*, 6 Tex. Civ. App. 699, 25 S. W. 973, and cases cited.

3. The third and fourth assignments relate to alleged defects or irregularities in the proceeding in No. 2,500,—matters which do not render the judgment void, and therefore with which the garnishee has no concern. The parties thereto might have prevailed in such matters, but the judgment now concludes even them, as it appears to be final and unappealed. Under the fourth assignment appellant states that there was a difference between the statement of the case given in the publication and that in the petition. This is not embraced in any assignment, but is evidently relied on as showing inadequate service on Park. If we should consider this at all, we think there is nothing substantial in the objection. The subject of the sixth assignment is a matter determined by the judgment in the main action, and not an issue to be raised by the garnishee. We conclude, further, that there is no merit in the fifth assignment.

Having disposed of the several assignments, we will summarize our conclusions by stating that the judgment in No. 2,500 was duly had upon proper citations, and is valid as to the defendant Park, who was cited by publication, because it makes no personal adjudication against him, but confines its operation to a fund in garnishment, and to that extent a judgment can properly be rendered on published service. The existence and extent of this fund the judgment leaves to be litigated in the separate proceeding. The judgment in No. 2,500 against Park, to be made out of such fund, if at all, was within the jurisdiction of the court, and he is effectually concluded by such judgment and by the judgment in the garnishment proceeding.

In addition to this, the judgment in this case, on an issue raised by the garnishee, adjudicates that the fund he held was due to the firm of Detwiler Bros. & Park, and not to Park individually. If in fact it was due to the firm, and therefore property of the partnership, personal service on one of the firm, as was the case in No. 2,500, was sufficient to subject it, without any service on Park. It might have been necessary for the garnishee, in order to fully protect himself, to make Park a party to the garnishment proceeding, on the issue of whether it was money due to Park or to the firm, if Park had not been cited in the main case. As, however, Park was a party thereto, and plaintiff's judgment was against him as well as the others in reference to this fund, it seems to us that the garnishee is fully protected in either event.

Appellee has a cross assignment complaining of that portion of the judgment which gives the garnishee a judgment against plaintiff for costs, including the sum of \$50 as attorney's fee, and compensation for answering herein. We are of opinion that the garnishee, having become a litigant concerning his liability in this case, and being unsuccessful, is liable for the costs, under the following decisions: *Moursund v. Priess*, 84 Tex. 554, 19

S. W. 775; *Kelly v. Gibbs*, 84 Tex. 143, 19 S. W. 380, 563. To this extent the judgment will be reformed. Reformed and affirmed.

On Rehearing.

(Nov. 16, 1898.)

We are informed by this motion that we should not have considered appellee's cross assignment. The record does not show that the cross assignment was filed in the district court, and there is no indorsement on appellee's brief showing a copy thereof to have been filed in the district court; but it is apparent, from an agreement among the papers, that the brief of neither party was filed in that court. Rule 101 for the district and county courts, 20 S. W. xviii. The cross assignment should not have been considered. Therefore the reformation of the judgment by this court will be set aside, and the judgment of the district court affirmed in all things. The motion for rehearing in other respects is overruled.

LONDON et al. v. MILLER.

(Court of Civil Appeals of Texas. Oct. 28, 1898.)

VENUE—NATURE OF ACTION.

An action by a mortgagee of cattle against their purchaser on execution against the mortgagor, brought by sequestration, before maturity of the note secured by mortgage, for foreclosure of the mortgage, does not become an action of trespass, so as to be maintainable in a county other than that in which said purchaser resides, where the sequestration is dismissed, and the complaint is amended to allege that said purchaser replevied the cattle, and gave bond not to remove them out of the county, and to hold them to abide the decision of the court; that he loaded them on a train to be shipped out of the county; that while en route they were killed in a train wreck; and that thereby said purchaser and the parties on his bond became liable to plaintiff.

Appeal from district court, Gonzales county; M. Kennon, Judge.

Action by R. L. Miller against R. W. London and others. Judgment for plaintiff. Defendants appeal. Reversed.

On the 8th day of November, 1897, the appellee, R. L. Miller, filed his original petition in the district court of Gonzales county against O. B. Robertson and appellant R. W. London, in which he alleged, in substance, that on the 11th day of October, 1897, the defendant Robertson executed to him his certain promissory note of that date for \$2,500, payable six months after date, with interest at 8 per cent. per annum from October 1st of that year; that at the date of execution of said note, for the purpose of securing the same, Robertson executed to him a chattel mortgage on 186 head of mixed cattle, specifically described in said mortgage; that on the same day said mortgage was duly filed and registered in the register of chattel mort-

pages of Gonzales county; that on the 26th day of October, 1897, the sheriff of said county, by virtue of an execution issued out of the district court of Dallas county in the case of Parlin & Orendorf Co. against O. B. Robertson et al., levied upon the cattle upon which said mortgage was given, and advertised the same to be sold on the 8th day of November, 1897, to satisfy the judgment in said cause, amounting to the sum of \$1,348.15, and all costs of suit; that defendant R. W. London was, at the time plaintiff filed his petition, in possession of said cattle, claiming title to the same by virtue of a bill of sale made him by the sheriff of Gonzales county by virtue of the execution and levy aforesaid; that said bill of sale was executed and delivered to London after said chattel mortgage was executed and registered, of which defendant London had due and special notice; that the note secured by the mortgage was not due. The plaintiff prayed judgment for his debt, interest, etc., together with a foreclosure of his mortgage lien upon the cattle. Application was also made for a writ of sequestration, which was issued and executed on the day the suit was filed by the sheriff's seizing and taking possession of the mortgaged cattle. On the 13th day of November, 1897, R. W. London replevied the cattle, Guy Sumpter and C. R. Buddy being the sureties on the replevin bond. On January 7, 1898, prior to the time the sequestration proceedings were quashed, plaintiff filed his first amended original petition against O. B. Robertson and R. W. London, alleging that the latter is a resident citizen of Dallas county, Tex., in which, after alleging the execution of the note and mortgage, and its registration, as in his original petition, he, in substance, makes the following allegations: That on the 26th day of October, 1897, the sheriff of Gonzales county, acting under authority of a writ of execution issued out of the district court of Dallas county in a certain cause therein pending, styled "Parlin & Orendorf Company vs. O. B. Robertson et al.," levied on 171 head of said cattle described in said mortgage, which is the only security plaintiff has for the payment of said note at its maturity, and advertised the same for sale to satisfy said judgment, amounting to the sum of \$1,348.15; that on the 8th day of November, 1897, said sheriff sold said cattle at public outcry in the town of Gonzales, at which sale R. W. London became the purchaser; that thereupon said sheriff made London a bill of sale to said cattle, and delivered him possession thereof; that plaintiff was present at said sale, and, through his attorney, announced in the presence and hearing of defendant London that he had a chattel mortgage on said cattle, stating the amount of the debt secured thereby; that on the — day of November said sheriff, by virtue of the same writ, sold the remaining 10 head of the 186 head of mortgaged cattle, which were all of said cattle then in existence, the other five head having been killed by the

sheriff in taking them into possession; that on the 8th day of November, 1897, plaintiff filed his suit for foreclosure, and made affidavit for a writ of sequestration to protect his said security, and a writ of sequestration was issued and levied on said cattle by the sheriff of Gonzales county; that afterwards, on the 13th day of November, 1897, defendant R. W. London, with Guy Sumpter and C. R. Buddy as his sureties, executed and delivered to R. M. Glover, sheriff of Gonzales county, Tex., their certain replevy bond, in which said London and his said sureties acknowledged themselves jointly and severally bound to pay plaintiff the sum of \$8,000, conditioned that defendant R. W. London would not remove said cattle out of the county of Gonzales during the pendency of said suit, and that he would have said property, with the value of the fruits, hire, or revenue thereof, forthcoming to abide the decision of this court, or that he would pay the value thereof, and of the fruits, hire, or revenue of the same, in case he should be condemned to do so, which bond was approved by the sheriff, and filed among the papers of this case; that thereafter, on the — day of November, 1897, defendant London loaded said cattle at the town of Gonzales on the cars of the San Antonio & Aransas Pass Railway Company to be shipped to the town of Henrietta, Tex., a point 500 miles distant from the town of Gonzales, with the avowed purpose of selling them on open market, and converting them to his own use; that while the cattle were on the train en route to Henrietta, and while said train was at the town of Itasca, Hill county, Tex., said train was wrecked, and the cattle maimed and killed, so as to be of no value whatever; that thereby the said London, with full notice of plaintiff's mortgage, did, since the institution of this suit to foreclose plaintiff's lien, appropriate and unlawfully convert said cattle to his own use and benefit, and while the cattle were in his possession, obtained as aforesaid, they were so maimed and destroyed that plaintiff's mortgage cannot be foreclosed, and that thereby London has deprived plaintiff of his said security and the remedy prayed for in his original petition; that defendant O. B. Robertson was, at the institution of this suit, and is now, wholly insolvent, and that by reason of the unlawful conversion by R. W. London of said cattle plaintiff has been deprived of his security, and London has become liable to him for the reasonable value of said cattle to an amount sufficient to pay plaintiff's debt; that by reason of the violation of the conditions of the replevy bond the said London and his sureties thereon, Guy Sumpter and C. R. Buddy, are liable to plaintiff to the amount of the appraised value of said cattle, not exceeding plaintiff's debt secured by said chattel mortgage; and that by reason of the said wrongful acts of R. W. London there is now no property within the jurisdiction of this court upon which plain-

tiff's lien can be foreclosed. The prayer contained in the petition is that plaintiff have judgment against London for the value of said cattle, not exceeding his debt, and against Guy Sumpter and C. R. Buddy, its sureties on said replevy bond, in accordance with the terms thereof, for the amount of the judgment rendered against London, and for such other and further relief as, under the facts alleged, the court may deem plaintiff entitled to. No judgment was asked for against Robertson. The defendant London, by his first amended original answer, filed February 10, 1898, after excepting to plaintiff's amended original petition upon the ground that it shows upon its face that the district court of Gonzales county has no jurisdiction of his person, it appearing therefrom that he is a resident of Dallas county, and that the wrongs complained of were not committed in the county where the suit was brought, interposed a general demurrer, and special exceptions to the effect that said petition showed a misjoinder of actions and of parties defendant. Guy Sumpter and C. R. Buddy, the sureties on London's replevy bond, were not cited, nor did either answer or enter an appearance in the case. Upon the 10th day of February, 1898, the writ of sequestration was, upon motion of defendant London, quashed, and upon the refusal of the court to then dismiss the plaintiff's suit defendant London excepted. The exceptions of defendant London to plaintiff's first amended original petition were overruled. The case was tried by the court without a jury, and judgment was rendered for plaintiff against London and Guy Sumpter and C. R. Buddy, as sureties on his replevy bond, for \$2,829.43, the amount due on the note described in plaintiff's petition, with interest and attorney's fees, and the case was dismissed as to defendant Robertson. From this judgment London has appealed to this court. After the judgment was rendered against them, Guy Sumpter and C. R. Buddy filed a motion to set aside the judgment against them, on the grounds: (1) Because neither had been cited to answer plaintiff's cause of action, nor had either appeared in said cause; (2) because, the sequestration proceedings having been quashed, and plaintiff having, by his pleadings, abandoned the sequestration proceedings, the court had no jurisdiction over either to render judgment against him. This motion was overruled, and from the judgment against them Sumpter and Buddy have also appealed.

U. F. Short and Atkinson & Abernethy, for appellants. Harwood & Walsh, for appellee.

NEILL, J. (after stating the facts). Under our view of the law, the appeal of Mr. London may be properly disposed of by considering only the assignments of error which complain of the court's refusal to sustain his exception to appellee's first amended original petition,

which points out, as a defect in said pleading, that it shows upon its face that at the time the suit was instituted, and the amended pleading filed, appellant resided in Dallas county, Tex., and that from the nature of the action he was entitled to be sued in the county of his residence; and of the action of the court in refusing to dismiss the suit upon quashing the writ of sequestration. It will be observed from our statement of the case that before the sequestration proceedings were quashed appellee had filed his amended petition charging London with the conversion and destruction of his mortgage security. If a petition negatives all the exceptions which, from the character of the parties and nature of the action, may be interposed to the general rule which prohibits an inhabitant of this state from being sued out of the county in which he has his domicile, we can see no reason why a party sued in a county other than that in which he has his domicile cannot avail himself of his privilege of being sued in the county of his residence by a special exception pointing out the defect in the pleading, as was sought to be done in this case. When a suit is brought by attachment or sequestration upon a demand before it is due, and the writ of attachment or sequestration is quashed, the action should be dismissed, for it is only by such process that jurisdiction of such a suit is obtained. If, however, at the time such process is quashed, the demand has matured, or a cause of action arising from the subject-matter of the suit has supervened, and this has, by an amended pleading, been made to appear, the cause of action disclosed by the amendment may be prosecuted, notwithstanding the quashal of the process by which jurisdiction was originally obtained. But it will be regarded as a new suit, and dates from the filing of the amended pleading. The questions arising from these principles of law are: Did appellee's first amended original petition state a cause of action against appellant London, and, if so, could it be maintained in Gonzales county, in view of the exception urged to it? One exception to the rule which prohibits an inhabitant of this state from being sued out of the county in which he has his domicile is: "Where the suit is for foreclosure of a mortgage or other lien, in which case suit may be brought in the county in which the property subject to such lien or a portion thereof may be situated." Another is: "Where the foundation of the suit is some crime, or offense, or trespass for which a civil action in damages may lie, in which case suit may be brought in the county where such crime, or offense, or trespass may be committed, or in the county where the defendant has his domicile." From the very nature of this action, these are the only possible exceptions to the general rule which are not negatived by appellee's pleadings. It is obvious that the one first quoted does not obtain. The debt not being due which the mortgage sought to be foreclosed by the original petition was given to secure, and no foreclosure being

sought by the amended original petition, the suit to foreclose the mortgage terminated upon the writ of sequestration being quashed, and the action against London, disclosed by the amendment, was one for damages for the conversion and destruction of mortgaged property. The question, then, is, does the exception last quoted authorize the maintenance of such action in Gonzales county? The facts charged in the amendment show that foundation of the suit is not a "crime" or an "offense," nor do we think it discloses that a "trespass" is the foundation of the action. "Trespass," within the meaning of the statute under consideration, is any intentional wrong or injury to the person or property of another. *Hubbard v. Lord*, 59 Tex. 384; *Armendiaz v. Stillman*, 54 Tex. 623. For one to maintain an action for conversion, he must be the general owner, or have some special property in the subject of the action. He must have, also, the actual possession or a right to its present possession at the time of the conversion. *Suth. Dam.* § 1108. Robertson, the mortgagor of the cattle, was the legal as well as the equitable owner of the property, and, as against the mortgagee, had the right to its possession until default was made in the payment of the debt it was mortgaged to secure. His title to the property, as well as his right to its possession, passed to the appellant London, subject only to a foreclosure of the mortgage, upon its purchase by him at execution sale. His taking the property in possession was the exercise of a right, and cannot, in any sense, be considered a wrong or trespass; for it is well established that a chattel mortgagee out of possession has no title to the goods, and cannot maintain an action for their conversion against the purchaser under the mortgagor. *Tool Co. v. Oliver* (Tex. Civ. App.) 33 S. W. 689. The injury to the cattle did not occur in Gonzales county, and no jurisdiction over the person of London would attach there on that account. Besides, the killing and maiming of the animals were the result of an accident, and not of an intentional wrong done by the appellant. We conclude, therefore, that appellant's exception to appellee's first amended petition should have been sustained, and that, when the writ of sequestration was quashed, as no cause of action independent of the sequestration was shown against London, or could accrue until the maturity of the note which the mortgage was given to secure, the suit should have been dismissed. This conclusion disposes of the appeal of Guy Sumpter and C. R. Buddy in their favor. Besides, it has been held by the supreme court that the liability of sureties upon a replevy bond ceases upon the quashal of the sequestration proceeding. *Mitchell v. Bloom*, 45 S. W. 558; *Id.* (Tex. Civ. App.) 46 S. W. 406. Therefore the judgment of the district court is reversed, and the cause is dismissed, without prejudice to the appellee's right to proceed on his remedy, in the proper jurisdiction, against London, in default of payment of appellee's debt after its maturity.

47 S.W.—47

## GREER et al. v. LAFAYETTE COUNTY BANK.

(Court of Civil Appeals of Texas. Oct. 19, 1898.)

## CONVERSION—TITLE TO PROPERTY.

Where judgment is obtained for conversion of property, satisfaction thereof vests title to the property in defendant as of the time when the conversion occurred.

Appeal from district court, El Paso county; A. M. Walthall, Judge.

Action by the Lafayette County Bank against Kittle J. Greer and others. Judgment for plaintiff. Said Kittle J. Greer appeals. Affirmed.

J. D. Showalter and Beall & Kemp, for appellant. B. Wells and Falvey & Davis, for appellee.

FLY, J. This suit was instituted by the Lafayette County Bank against the State National Bank of El Paso and Kittle J. Greer and her husband, Robert L. Greer, for 20 shares of stock in said bank, and all dividends and profits accrued since appellee became the owner. The cause was tried by the court, and judgment rendered for appellee. Kittle J. Greer alone appeals.

There being no statement of facts, the findings of fact of the district court necessarily become, and are adopted as, the conclusions of fact of this court. From those findings it is shown that appellee, Lafayette County Bank, is a duly incorporated bank, doing business in Lafayette county, state of Missouri; that Kittle J. Greer, being the owner of 20 shares of the capital stock of the State National Bank of El Paso, Tex., deposited the same with appellee to secure the payment of a debt of \$1,500 which she owed appellee. Appellee disposed of the bank stock, and was sued in one of the circuit courts of Missouri by appellant for conversion, and judgment was prayed for the certificate of stock or its value; and judgment was recovered against appellee and one George Wilson, who claimed the certificate, and who was a party defendant, for \$3,000, as the value of the 20 shares of stock. The judgment was affirmed by the supreme court, on the ground that the sale of the stock by appellee was fraudulent and fictitious, and concocted for the purpose of cheating Kittle Greer, and defrauding her of her stock. 30 S. W. 319. After the affirmation of the judgment by the said supreme court, appellee and George Wilson sued defendants Greer in a court of competent jurisdiction, in Missouri, alleging that they were insolvent, and had nothing except the judgment against them, and praying that the debt due by Kittle J. Greer to Lafayette County Bank be allowed as a credit on the judgment against them; and they tendered into court the balance due on the judgment. Judgment was obtained against said defendants as prayed for. Kittle J. Greer after-

wards received the balance due on the judgment in full satisfaction of the amount due by the bank and Wilson. The latter transferred his interest in the stock to Lafayette County Bank.

It is contended by appellant that, because the stock was fraudulently and illegally converted by Lafayette County Bank and George Wilson, payment of the damages adjudged against them by the Missouri courts would not give the parties guilty of the conversion title to the property converted. Appellant cites many authorities, but none that tend in the least to sustain any such proposition. The authorities cited have no application whatever to the case before this court. It is too well settled to admit of discussion that, where a judgment is obtained for the conversion of property, satisfaction of the judgment vests the title in the defendant, and the title, by relation, vests as of the time when the conversion occurred. Cooley, Torts, p. 537, and authorities cited in notes.

It is argued that the supreme court of Missouri has decided that the property was fraudulently acquired, and that the Lafayette County Bank had no title to it, and, consequently, that fixed the status of the property, and due respect for the courts of a sister state would require the courts of Texas to hold, in a case of conversion, that, although the wrongdoer had paid all the damages assessed against him for the conversion of the property, he must also lose the property. The courts of Missouri would not tolerate such doctrine, but, on the other hand, would hold, as they have heretofore done, that payment of the judgment passed title in the converted property to the defendant. *Mitchell v. Shaw*, 53 Mo. App. 652. A further discussion of the matter is unnecessary.

The fact that Kittle J. Greer may have tendered the amount of the debt to the bank after the conversion of the stock, and that the tender was refused, does not alter the status of this case. The fact still remains that a judgment was obtained for the value of the converted property, and that the same was paid, and that the law thereby vested title to the property in the person who had converted it. There is no merit in the appeal, and the judgment is affirmed.

#### MULBERGER v. MORGAN et al.

(Court of Civil Appeals of Texas. Nov. 16, 1898.)

##### ACTION ON NOTE—BURDEN OF PROOF.

1. In an action on a note by an assignee, who acquired it before maturity, defended on the ground of failure of consideration between the maker and the original payee, the burden of proof is on defendant to show that no value was paid therefor by plaintiff.

2. Where a note was obtained or put in circulation by fraud, the burden is on the holder, seeking to recover thereon, to show that he paid value therefor.

Supplemental opinion. For former opinion, see 47 S. W. 379.

KEY, J. In order that no misunderstanding may arise, we add to our former opinion, filed October 12, 1898, the following:

The answer of the defendants embraced two distinct defenses, to wit: (1) Failure of consideration, by reason of the fact that the horse in payment for which the notes were given, though warranted to be sound, was diseased and worthless; and (2) fraud on the part of the original payees in obtaining possession of the notes, without the consent of the defendants. It is on the first of these issues that we hold the court below erred in reference to the burden of proof. When an assignee of a negotiable instrument sues to recover upon such instrument, acquired before maturity, and the defense is failure of consideration between the maker and the original payee, the burden of proof rests upon the maker to show that no value was paid by such assignee. *Herman v. Gunter*, 83 Tex. 68, 18 S. W. 428. It is held, however, that when possession of the negotiable instrument is obtained by a fraud, or it is fraudulently put in circulation, the burden rests upon the holder to show that he paid a valuable consideration for it, etc. *Hart v. West*, 91 Tex. 184, 42 S. W. 544. On this latter point our former opinion is not as clear as it should have been, and for this reason this supplemental opinion is filed.

#### ABEEL v. TASKER.

(Court of Civil Appeals of Texas. Nov. 16, 1898.)

##### APPEAL—FINDINGS OF FACT.

A trial court's findings of fact will not be disturbed where there is evidence in the record to sustain them.

Appeal from district court, McLennan county; Sam R. Scott, Judge.

Action by J. E. Tasker against Alfred Abeel, receiver. From a judgment for plaintiff, defendant appeals. Affirmed.

A. F. McCormick, for appellant. Richard I. Munroe and R. L. Johnson, for appellee.

KEY, J. Appellee sued appellant, as receiver, operating a railroad, to recover damages for personal injuries sustained by his wife while a passenger on the railroad. He alleged in his petition that the employees operating the train were guilty of negligence in failing to stop the train a sufficient length of time to enable his wife to get off at the end of her journey. The case was tried before the court without a jury, and judgment rendered for the plaintiff for \$3,000. The conclusions of fact filed by the trial judge, which we adopt, in effect find that the railroad employees were guilty of negligence, as alleged in plaintiff's petition; that the plaintiff's wife

was not guilty of contributory negligence; and that, as a result of the negligence of the employes operating the train, the plaintiff's wife sustained injuries entitling plaintiff to recover \$3,000.

We have considered all the questions presented in appellant's brief, and find no ground for reversal. There is evidence in the record that sustains the trial court's findings of fact. Appellant sought a new trial, among other grounds, on account of newly-discovered evidence; but, in view of the counter affidavits filed by appellee, we do not think any error was committed in overruling the motion for a new trial. Judgment affirmed.

### CECCATO v. DEUTSCHMAN.<sup>1</sup>

(Court of Civil Appeals of Texas. Oct. 12, 1898.)

#### DIVORCE—ATTORNEY'S FEES OF WIFE—LIABILITY OF HUSBAND.

1. A husband is liable for reasonable attorney's fees incurred by the wife in the prosecution of a bona fide suit for divorce, based on justifiable grounds, where the wife has no separate property, and the suit was dismissed through the collusion of the husband and wife, without the knowledge of her attorney.

2. There being no provision in the statute giving alimony for attorney's fees, a proceeding to recover them of the husband is not ancillary to the main suit.

Appeal from district court, Bexar county; Robert B. Green, Judge.

Action by Selig Deutschman against Carlos Ceccato. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Bryan Callaghan and Chas. L. McGill, for appellant. Nat. B. Jones, for appellee.

FLY, J. This suit was instituted by appellee to recover of appellant the sum of \$500, alleged to be due appellee for services rendered the wife of appellant, as her attorney in divorce proceedings instituted by her against her husband. Appellee obtained a verdict and judgment for \$150. Appellee is an attorney at law, and, at the instance and request of the wife of appellant, instituted a suit for divorce and alimony against appellant. The suit was instituted in good faith by the wife, on justifiable grounds. An order granting alimony was obtained, but, before the matter of divorce was tried, the husband and wife became reconciled, and, on his promise of future good treatment, she returned to his house. Without knowledge or consent of appellee, the divorce suit was dismissed by appellant and his wife. The wife has no separate property, but the community property was valued at \$6,000. There was ample proof to show that the services were worth the amount found by the jury.

The only question presented by the record is as to the liability of the husband for reasonable attorney's fees incurred by the wife

in the prosecution of a bona fide suit for divorce, based upon reasonable grounds. In England it is uniformly held that the husband is liable for attorney's fees if the suit is conducted in good faith and on probable cause; and in a recent English case it is said: "Where there is reasonable apprehension of violence, a divorce may be the most effectual protection, and it may be necessary within the rule which authorizes a wife who has left her husband from apprehension of cruelty to pledge his credit for what is necessary to her." And in another English case it was said: "She had a right to appeal to the law for protection, and she must have the means of appealing effectually. She might therefore charge her husband with the expense of the proceeding, as much as for the necessary food and raiment." Nels. Div. & Sep. § 876, and references. The author of the above work, in the cited article, commenting on the English doctrine, says: "It may be considered well-established law that legal services rendered the wife are within the definition of necessities, and it is difficult to assign any good reason why such services, when rendered in a suit for divorce, are not necessities." It is true that in a majority of the American authorities it is held that the husband is not liable for attorney's fees incurred by the wife in connection with divorce proceedings; and, strange to say, the ground usually given for so holding is that, by the common law, the contract of marriage was indissoluble, and therefore the husband could not be held liable for any expense incurred in an attempt to dissolve it, while the courts of England, from which the common law is derived, uniformly hold exactly the reverse. Some of the American courts, however, adopt the English doctrine. Conant v. Burnham, 133 Mass. 506. In this state there has been but one decision directly on the point involved, and that follows the cases which hold the husband liable for the attorney's fees under the circumstances of the case now before the court. McClelland v. McClelland (Tex. Civ. App.) 37 S. W. 350. We believe the question is properly decided in the opinion in that case. Under the statute of Texas, the wife is authorized to institute suits for divorce; and the right would be shorn of all efficacy if she was denied the means of getting into the court, as would be the effect in most instances if the husband could not be held liable for the expenses of the suit. There is no provision made, in the statute giving alimony, for attorney's fees; and the proposition that they are ancillary to the divorce proceeding, and must be obtained in that proceeding, and no other, cannot arise in this state. It is on that ground that suits like the present have been in some states held untenable, notably in Nebraska. Yeiser v. Lowe, 69 N. W. 847. It is, however, intimated in the case last cited that if it should be shown that the divorce proceedings had been dismissed without the knowledge of

<sup>1</sup> Rehearing denied November 16, 1898.



the attorney, and through the collusion of the husband and wife, that a different decision would be made. We see no error in the judgment, and it is therefore affirmed.

**SANGER et al. v. TEXAS GIN & COMPRESS CO.**

(Court of Civil Appeals of Texas. Nov. 16, 1898.)

**ATTACHMENT—PETITION—AFFIDAVIT—VARIANCE—EVIDENCE.**

1. A variance in the petition and the affidavit for attachment in the amount claimed, though small, is fatal to the writ.

2. On motion to quash the writ for variance between the petition and affidavit for attachment, the variance cannot be corrected by evidence.

Appeal from Milam county court; W. M. McGregor, Judge.

Action between Sanger & Co. and the Texas Gin & Compress Company. There was a judgment, from which the former appeals. Affirmed.

Henderson, Streetman & Freeman, for appellant. Terry & Ballinger, Montá J. Moore, and Hefley, McBride & Watson, for appellee.

COLLARD, J. There was no error in quashing the attachment, upon the ground of fatal variance in the amount claimed to be due in the original petition and accompanying affidavit and the amended petition. The original petition states that \$217.45 was due on the account sued on, as did the affidavit for attachment filed at the same time. The writ issued for that amount, and was levied upon property to make the same. The amended petition, subsequently filed, showed and alleged that \$212.75 were due on the account,—\$4.70 less than the amount for which the attachment was sued out. The amount of difference is small, but, in a resort to this severe process, the statute must be strictly pursued. A variance in the amount claimed in the petition and the affidavit for attachment is fatal to the writ, for which it ought to be quashed. *Joiner v. Perkins*, 59 Tex. 302. It was held in *Stewart v. Heidenheimer*, 55 Tex. 648, that a variance in the affidavit of three dollars less than the amount claimed in the petition, the writ issuing for the smaller amount, was immaterial. It has also been held that a mistake of a small amount, clearly arising from miscalculation of interest apparent upon the pleadings, was not fatal. *Hat Co. v. O'Neal*, 82 Tex. 337, 18 S. W. 570. In the present case, we cannot say that the amount of variance is immaterial. The writ issued and was levied for an amount in excess of the amount shown to be due by the amended petition. The variance is not corrected by anything else contained in the pleadings. There were no exhibits filed with the original petition. The exhibits filed with the amended petition and the itemized account sued on, as well as the

positive averments, clearly show that the affidavit claimed an excessive amount, and that the writ was issued and levied for the excess. The writ should have been quashed. *Marshall v. Alley*, 25 Tex. 343; *Moore v. Corley*, 4 Willson, Civ. Cas. Ct. App. § 138, 16 S. W. 787; *Brown v. Martin*, 19 Tex. 344; *Moore v. Bank*, 82 Tex. 437, 18 S. W. 657; *Hamblen v. Tuck* (Tex. Civ. App.) 45 S. W. 175; *Lutterloh v. McIlhenny Co.* (Tex. Sup.) 11 S. W. 1063.

On motion to quash, the matter objected to cannot be corrected by evidence. *Hill v. Cunningham*, 25 Tex. 33; *Wright v. Smith*, 19 Tex. 298. The lower court ruled correctly on the point. There is no error in the judgment of the lower court, and it is affirmed. Affirmed.

**WINSTON v. CITY OF FT. WORTH.**

(Court of Civil Appeals of Texas. Nov. 12, 1898.)

**MUNICIPAL INDEBTEDNESS—CREATION—ISSUANCE OF BONDS—VALIDITY—MONEY OBLIGATIONS—BURDEN OF PROOF.**

1. The power given to the city council in Ft. Worth City Charter, §§ 87, 87a, to borrow money on the city's credit, and issue bonds therefor, authorizes it to borrow gold coin of the United States of the present standard of weight and fineness, and to issue bonds payable in that medium, discrimination in the kind of money borrowed being incident to the execution of the power.

2. Bonds payable in gold coin of the United States, of the present standard weight and fineness, are money obligations, and not obligations for delivery of specific articles.

3. Bonds issued under Ft. Worth City Charter, §§ 87, 87a, authorizing its council to issue bonds, are not invalid because they are negotiable.

4. Where ordinances providing for the issue of bonds recite that they were issued to pay an outstanding floating debt, incurred for public improvements, and to discharge certain accrued city indebtedness, there is nothing to show that the debts were invalid, because their payment was not provided for at the time they accrued, as required by Const. art. 11, § 7, or that they were not to be satisfied out of the current revenues, or out of some fund within the immediate control of the city.

5. A valid debt may be created by a city without complying with Const. art. 11, § 7, requiring that it provide for payment at the time it is created, where it has a fund on hand under its control, from which it contemplates the debt shall be paid, though it was not in fact paid therefrom, and it remained unpaid and unprovided for until the passage of a subsequent ordinance.

6. One attempting to escape the payment of a tax on the ground that municipal debts are invalid has the burden of proving it.

7. Where a city council contracted for the purchase of waterworks, and the erection of additions thereto, and, by a resolution of even date, directed the preparation of an ordinance providing for the issuance of bonds to pay for the same, the contracts, resolution, and ordinance will be regarded as one transaction, in determining the time of the creation of the waterworks debt, and provision for its payment.

Appeal from district court, Tarrant county; Edward Gray, Special Judge.

Action by the city of Ft. Worth against J. K. Winston. From a judgment for plaintiff, defendant appeals. Affirmed.

Wallace Hendricks, Hyde Jennings, and Ball & Tempel, for appellant. Wm. D. Williams, for appellee.

CARSWELL, J. This suit was instituted by appellee to recover of appellant certain taxes alleged to be due by him to appellee for the year 1895, and to foreclose the tax lien upon certain real estate belonging to him. Appellant, contesting the suit, contended that the greater portion of the tax sought to be recovered was levied to raise money to pay interest and provide a sinking fund to satisfy certain bonds issued by appellee, which bonds he averred were void—First, because made payable in gold coin of the United States of the present standard of weight and fineness; second, because said bonds were made negotiable and payable to bearer, and were sold in the open market to the highest bidder for cash; and, third, because a portion of said bonds specified were invalid, because the debts they were designed to raise money to pay were illegal, in that at the time they were created no provision was made for their payment, as required by section 7 of article 11 of the constitution, for which reason he contended the tax levied on account of said bonds was illegal and not recoverable. The balance of the tax was tendered. Appellee replied to said contention by alleging, among other things, "that it sold said bonds for moneys and credits in bank, which credits were realized upon by it in money or its equivalent, and that said moneys and credits were of equal value, dollar for dollar, with gold coin of the United States of the standard of weight and fineness in which said bonds were made payable, and were at all times exchangeable for gold coin without cost to it, and that it could at any time have had gold coin for such moneys had it so desired"; and, further, that said bonds were in the hands of innocent holders. Judgment was rendered for the entire tax sued for, and the lien foreclosed, and appellant prosecutes this appeal.

The facts are undisputed, and, so far as material to this decision, are substantially as follows:

Appellee is a municipal corporation, and was prior to the 20th of March, 1880, and during the period covering all the transactions involved, incorporated, by having accepted the provisions of title 17, cc. 1-10, inclusive, of the Revised Statutes of 1879, and by a special charter granted on the first-mentioned date, incorporating it as a city of more than 10,000 people. The taxes sued for were regularly levied and assessed, and the cost of levying and advertising appellant's property was incurred, as alleged by appellee, and it is entitled to recover the entire amount unless its contention as to the legality of the bonds is sustained. That part of the or-

dinance making the tax levy, material to this case, reads as follows, to wit: "There shall be levied and collected an annual direct special ad valorem tax of  $\frac{90}{100}$  of one per cent. of the cash value thereof, in lawful currency of the United States, on all real and personal property owned or situated in the city of Fort Worth on the first day of January, 1895, except so much thereof as may be exempted by the constitution and laws of the state of Texas, said special tax being for the purpose of paying the interest on the outstanding bonded indebtedness, to wit: \$158,000 first series redemption bonds. \$96,000 second series bonds. \$275,000 third series bonds. \$90,000 fourth series bonds. \$100,000 fifth series bonds. \$125,000 sixth series bonds. \$300,000 seventh series bonds. \$175,000 eighth series bonds. \$650,000 Fort Worth waterworks mortgage bonds. Also for creating a sinking fund for the payment of said bonds, as provided in Ordinances Nos. 345, 491, 403, 501, 502, 542, 562, 566, and 614 of said city. The assessor and collector shall, in paying over to the city treasurer the amounts collected by him for the said interest and sinking funds, distribute the same in the following proportions, to wit: First series redemption bonds, interest and sinking fund, 8 per cent. Second series bonds, interest and sinking fund, 6 per cent. Third series bonds, interest and sinking fund, 13 per cent. Fourth series bonds, interest and sinking fund, 4 per cent. Fifth series bonds, interest and sinking fund, 5 per cent. Sixth series bonds, interest and sinking fund, 6 per cent. Seventh series bonds, interest and sinking fund, 14 per cent. Eighth series bonds, interest and sinking fund, 9 per cent. Fort Worth waterworks mortgage bonds, interest and sinking fund, 35 per cent."

In further statement of the evidence, we adopt the following from appellant's brief, to wit: "That portion of section 87 of appellee's special charter, embodying the power to borrow money and issue coupon bonds, is identical in language with article 420 of the Revised Statutes of 1879, and they read as follows: 'Art. 420. (Sec. 87.) Power over Finances of the City. To appropriate so much of the revenue of the city, emanating from whatever source, for the purpose of retiring and discharging the accrued indebtedness of the city, and for the purpose of improving the public markets and streets, erecting and conducting city hospitals, city hall, school houses, waterworks, sewers, and other public improvements, as they (the city council) may from time to time deem expedient, and in furtherance of these objects they (the city council) shall have power to borrow money upon the credit of the city and issue coupon bonds of the city therefor, in such sum or sums as they may deem expedient, to bear interest not exceeding [in article 420] ten per cent. and [in section 87] six per cent. per annum, payable semi-annually, at such place as may be fixed by ordinance: provid-

ed, that the aggregate amount of bonds issued by the city council shall at no time exceed six per cent. of the value of the property within said city subject to ad valorem tax.' An amendment to appellee's charter, approved April 3, 1891, added section 87a, under which the authority to issue said series of waterworks mortgage bonds is claimed, which reads in part as follows: 'Waterworks Bonds. The city council shall have power to issue bonds, to be known as the Fort Worth waterworks bonds, to the extent of one million dollars,'—the word 'coupon' being omitted in this amendment. The same act also added section 87c, under which the power to issue the bonds denominated 'First Series Redemption Bonds' is claimed, and which reads as follows: 'The city council shall have the power at any time to issue bonds for the purpose of paying off and retiring outstanding bonds against the city, and such bonds, issued for this purpose, shall not be construed or considered in determining whether, at any time, the amount of bonds issued by the city is in excess of the limit of six per cent. of the value of the property within the city, subject to ad valorem tax, as provided by section 87 of this charter. Such bonds shall state upon their face the purpose for which they were issued, and the moneys realized from their sale shall be used only for the purpose of paying off and retiring other bonds of the city.' The bonds denominated in said tax levy ordinances 'First Series Redemption Bonds' were, by the ordinance directing their issue, authorized to be drawn, and were drawn and issued, payable to bearer, and 'in gold coin of the United States of America, of the present standard of weight and fineness,' and no other medium of payment. The second series bonds were authorized to be drawn, and were drawn and issued, payable to bearer, and 'in gold coin of the United States of America of or equal to the present value,' and in no other medium of payment. The bonds denominated 'Fort Worth Waterworks Mortgage Bonds' were also authorized to be drawn, and were drawn, payable to bearer, and in gold coin of the United States of America, of the present standard of weight and fineness, and no other medium of payment. Each and all the remaining series of bonds named in said section 3 of the tax levy ordinance were drawn, and authorized to be drawn, by the several ordinances directing their issuance, payable to bearer, and in gold coin of the present weight and fineness as fixed by the laws of the United States now in force, and in no other medium."

Ordinance No. 566, under which the \$650,000 waterworks bonds were issued, was passed January 27, 1892, and, as far as material, was as follows, to wit:

**"Ordinance No. 566.**

"An ordinance authorizing the issuance of waterworks bonds under Sec. 87a of the charter of the city of Fort Worth, for wa-

terworks purposes in said city, and to provide for the interest and create a sinking fund for the payment of the principal of said bonds, and authorizing a mortgage to be placed upon the property and income of the waterworks and electric light plant of the city of Fort Worth as an additional security to provide for the payment of the principal and interest of said bonds.

"Whereas, the city of Fort Worth has heretofore entered into certain contracts for the erection, construction and enlargement of the waterworks system owned and operated by said city, within said city. And whereas, on the 22d day of December, 1891, and at the time when said contracts were authorized by said city council of said city, the following resolution was regularly adopted by the city council of said city at a regular meeting of said city council, to wit: 'Whereas, the city of Fort Worth has this day entered into two contracts, one with McArthur Brothers of Chicago, Illinois, for constructing waterworks, and the other with the Holly Manufacturing Company of Lockport, New York, for the construction and erection of two pumps for said waterworks; and whereas, of the bonds heretofore issued by the Fort Worth City Waterworks Company, secured by mortgage on the property and plant afterwards purchased of said last-named company by the city, there can be taken up by the city the sum of fifty thousand dollars, now bearing interest at the rate of seven per cent. per annum; and whereas, it is necessary that provision shall be made at this time for the payment of said contracts and land; and whereas, it is to the interest of the city to take up said fifty thousand dollars of bonds with other waterworks bonds bearing a lower rate of interest: Therefore, be it resolved, that the mayor, finance committee and city attorney be, and they are hereby instructed to prepare the necessary ordinances providing for the issuance of a sufficient amount of bonds, to run thirty years, at either five or six per cent. interest (as they may deem best), to meet said payments made necessary by said contract and said purchase of said land and to take up said fifty thousand dollars of said waterworks company bonds. Be it further resolved, that the mayor and finance committee are hereby authorized to negotiate for the sale of said bonds, even before they have been printed and registered, subject to the legal conditions of the charter.' And whereas, section 87a of the city charter of the city of Fort Worth reads as follows, to wit: 'Section 87a. Waterworks Bonds. The city shall have the power to issue bonds, to be known as the Fort Worth Waterworks Bonds, to the extent of one million dollars, including the bonds heretofore issued by the Fort Worth Waterworks Company, the payment of which has heretofore been assumed by the city, and one hundred thousand dollars of bonds heretofore issued by the city for waterworks purposes, and to provide for the payment of

interest and sinking funds for the bonds to be hereafter issued under the provisions of this section by pledging the credit of the city and the income and property of the waterworks plant and the electric light plant now owned by the city; provided, that the bonds mentioned in this section shall not be construed or considered in determining whether at any time the amount of bonds issued by the city is in excess of the limit of six per cent. of the value of property within the city subject to ad valorem tax, as provided by section 87 of this charter. Any money realized from the sale of bonds under this section shall be appropriated and used only for the improvement and extension of the waterworks plant and the electric light plant owned by the city and the retirement or taking up of any of the waterworks bonds mentioned in this section.' And whereas, the city council of said city has never issued, or caused to be issued, any bonds under said section 87a. And whereas, under section 87c of the charter of said city, the city council of said city is authorized to issue bonds for the purpose of retiring other bonds of the said city heretofore issued, and bearing a high rate of interest. And whereas, the said city council contemplates the purchase of certain land within said city for waterworks purposes: Now, therefore, be it resolved by the city council of the city of Fort Worth:

"Section 1. That the mayor and finance committee of said city be and they are hereby authorized to have prepared, and when prepared, the mayor and city secretary are hereby authorized to execute under the corporate seal of this city, for the purposes hereinbefore set forth, six hundred and fifty bonds of one thousand dollars each, payable to the Mercantile Trust Company, or bearer, dated on the 1st of February, A. D. 1892, and payable on the 1st day of February, A. D. 1922, with interest at the rate of six per cent. per annum, payable on the 1st days of February and August each year, the principal and interest of said bonds to be payable in gold coin of the present weight and fineness, as fixed by the laws of the United States now in force; said bonds to be designated as 'Fort Worth Waterworks Second Mortgage Bonds,' and shall be numbered from 1 to 650, both inclusive, and marked waterworks mortgage bonds, each bond to have sixty coupons, signed by the mayor and countersigned by the secretary of said city; each coupon to represent one semi-annual installment of interest."

All the bonds except those of the third and eighth series made reference to and disclosed in their respective faces the ordinance by which they were respectively issued; and it is admitted that they were made payable to bearer, and sold upon the open market; and, while appellee did not receive gold thereon, it received money of equal value, dollar for dollar, and was at the time exchangeable at

par with the gold coin specified in the bonds. And it was also admitted that the holders of said bonds were purchasers for value and without notice, except in so far as the law imputes notice from the recitals in the bonds and the ordinances under which they were issued.

The ordinance under which the third series of bonds were issued, in so far as material, reads as follows:

"An ordinance authorizing the issuance of bonds for the purpose of paying off the floating debt of the city of Fort Worth, and to provide for the interest and create a sinking fund for the payment of said bonds.

"Whereas, a large amount of public improvement has been made in the city of Fort Worth in the way of paving and beautifying the public streets of said city, and doing other work of public necessity, thereby creating a floating debt outstanding against said city; and whereas, it becomes necessary to create a debt to obtain the means to pay off said floating debt; and whereas, under its charter, the city of Fort Worth is authorized to borrow money on the credit of the city and to issue coupon bonds therefor, to bear interest not exceeding six per cent. per annum, payable semi-annually and at such place as may be fixed by ordinance; provided, that the aggregate amount of bonds issued by the city council shall at no time exceed six per cent. of the value of the property within this city subject to the ad valorem tax; and whereas, there is now over fifteen million nine hundred thousand dollars worth of property in the city subject to such ad valorem tax, as shown by the assessment rolls of the city; and whereas, the present bonded indebtedness of the city amounts to only the sum of two hundred and seventy-five thousand dollars: Therefore, be it ordained by the city council of the city of Fort Worth.  
\* \* \*

The ordinance under which the eighth series of bonds were issued, in so far as material here, reads as follows:

"An ordinance authorizing the issuance of bonds for the purpose of retiring and discharging certain accrued indebtedness of the city of Fort Worth, and for general street, sewer and building improvements in the city of Fort Worth, and to provide for the interest and create a sinking fund for the payment of the principal of said bonds.

"Whereas, the city of Fort Worth has heretofore contracted certain debts in the administration of affairs of the city government; and whereas, the said city contemplates the erection and construction of certain improvements authorized by section 87 of the charter of said city; and whereas, the finance committee of the city council of said city, on December 1, 1891, in a report presented to

said city council, fully set forth the purposes to which the proceeds of the bonds herein-after authorized shall be applied; and whereas, said report of said finance committee was ratified and adopted by the said city council of said city at a regular meeting of said city council held on the 1st day of December, 1891; and whereas, said city desires, and it becomes necessary, to create a debt to obtain means for the purposes of retiring and discharging said accrued indebtedness of the city, for the purposes of constructing and erecting said improvements authorized by said section 87 of said charter, and to carry out the purposes and interest (intent) of said report of said finance committee; and whereas, under the charter of the city of Fort Worth the city is authorized to borrow money on the credit of the city and to issue coupon bonds of the city therefor, to bear interest not exceeding six per cent. per annum, payable semi-annually at such place as may be fixed by the city council of said city, and shall at no time exceed six per cent. of the property within said city subject to ad valorem tax; and whereas, there is now over \$23,900,000 worth of property within the city subject to said ad valorem tax, as shown by the assessment rolls of said city; and whereas, the present bonded indebtedness of the city amounts only to the sum of \$1,144,000: Therefore, be it ordained by the city council of the city of Fort Worth. \* \* \*

Each of the ordinances under which said bonds were issued duly provided for interest and sinking fund, as required by the constitution, and provided that they were to be made negotiable, and, when issued, to be sold on the market.

In further explanation of the case, we copy from the agreed statement of facts as follows: "It is further agreed that the contracts mentioned in the ordinance authorizing what are denominated the 'Waterworks Mortgage Bonds,' aggregating \$650,000, were duly made by plaintiff with McArthur Brothers, and with the Holly Manufacturing Company. Each of these contracts bears date of 22d day of December, 1891. The contract with McArthur Brothers was for the construction and delivery to plaintiff of part of plaintiff's waterworks system for the sum aggregating about four hundred and thirty thousand dollars, and work was to be completed under this contract within not to exceed one year after its date. The contract with the Holly Manufacturing Company was for the construction and delivery to plaintiff of two pumping engines for use in its waterworks system, and the engines are to be finished and delivered to plaintiff on or before May 1, 1893. The amount to be paid to the Holly Manufacturing Co. under its contract was \$148,975. The ordinance authorizing said waterworks mortgage bonds was passed January 27, 1892; and prior to its passage neither McArthur Bros. nor the Holly Manu-

facturing Co. had done anything more than preliminary work getting ready to carry out their respective contracts, and nothing had been turned over or delivered to plaintiff under either of said contracts. Said contracts were authorized and entered into pursuant to a resolution of plaintiff's city council passed on the 22d day of December, 1891, by the terms of which resolution the mayor and finance committee of plaintiff's city council and the city attorney were authorized and instructed to prepare the necessary ordinance for the issuance of bonds to meet all payments under said contract. The ordinance of January 27, 1892, was prepared and submitted under said resolution. Except as herein stated, no provision was made on or before January 27, 1892, for the payment of any of the sums of money that might and did accrue under said contracts. The \$500,000 of waterworks company bonds referred to in said ordinance of January 27, 1892, were issued by a private waterworks company, which some years before was the owner of the waterworks company's system in use in the city of Fort Worth. While the owner of said system, said private corporation issued and sold its mortgage bonds for more than \$50,000, and \$50,000 of such bonds were outstanding and unpaid on January 27, 1892. To secure these bonds, the issuing private corporation, at the time of or before their issue, executed a valid mortgage or trust deed on its entire waterworks plant or system. The city of Fort Worth bought said waterworks plant from said private corporation, and, as part of the purchase price, agreed to pay said fifty thousand dollars of bonds, but no provision was at that time made for levying taxes for interest and sinking fund on such purchase-money debt. Neither the trust deed nor the vendor's lien on said waterworks had been released on or at any time prior to January 27, 1892. Plaintiff was then using the waterworks plant which it had bought in the manner aforesaid from said private corporation, and said waterworks plant was incorporated in and formed part of its waterworks system. The land referred to in the resolution of December 22, 1891, and the ordinance of January 27, 1892, was bought by plaintiff in September, 1891, and is now used by it as a part of its waterworks system. Plaintiff agreed to pay twenty thousand dollars for said land. No part of this was paid in cash, nor had any part of the purchase money been paid on January 27, 1892. No provision was made at the time of the purchase of said land for the levy of a tax for the payment of interest, and to provide a sinking fund. It was agreed that, of the taxes sued for, the sum of \$17.50 was taxes assessed against the real estate of appellant described in appellee's petition; 9 cents were taxes against his personal estate; \$1 was poll tax; and \$2.50 was chargeable against him as costs,—making the total amount sued for \$21.09. It was admitted

that every year after the issuance of the bonds a tax was levied to pay interest, and provide a sinking fund to pay the same, and that the interest on same has been regularly paid."

The first assignment of error involves two distinct propositions of law, ably and ingeniously presented by appellant's counsel. The first proposition is that the power given in appellee's charter "to borrow money on the credit of the city, and issue coupon bonds therefor," and "to issue bonds," does not authorize its council to borrow "gold coin of the United States of the present standard of weight and fineness," or to issue bonds payable in that medium; and the second proposition is that bonds payable in gold coin of the United States of the present standard weight and fineness are, in legal effect, obligations for the delivery of specific articles, and hence are not money obligations, and, as appellee has only authority to enter into the latter class of contracts, it had no authority to make the bonds.

The verbiage in the different series of bonds is somewhat different, but it seems to be conceded by counsel that the legal effect of the language is the same, and we will so treat it. Upon the first proposition we find considerable conflict in the authorities, and we will not attempt to reconcile them, or distinguish the cases, or argue the question. We hold that the power to borrow money on the credit of the city, and to issue bonds, given by the charter, is a general power, investing the authorities of the city with the discretion of determining the means to be used in the accomplishment of the end desired. And as, at the time, there existed and were current in the United States different kinds of money of equal legal tender qualities, a discrimination as to the particular kind of money to be borrowed, or as to the particular medium of payment, was necessarily incident to the execution of the power granted. We think this conclusion is supported by the weight of authority and reason, and cite the following cases as sustaining it: *Woodruff v. Mississippi*, 162 U. S. 291, 16 Sup. Ct. 820; *Judson v. City of Bessemer*, 87 Ala. 240, 6 South. 267; *Ferson, Leach & Co. v. Board of Com'rs of Sinking Fund of Louisville*, 97 Ky. 119, 30 S. W. 17; *Packwood v. Kittitas Co.*, 15 Wash. 88, 45 Pac. 640; *Kenyon v. City of Spokane (Wash.)* 48 Pac. 783; *Hellbron v. Mayor, etc. (Ga.)* 23 S. E. 206; *Skinner v. City of Santa Rosa (Cal.)* 40 Pac. 742; *Moore v. City of Walla Walla*, 60 Fed. 961; *Young v. Railway Co.*, 2 Woods, 606, Fed. Cas. No. 18,166; *Polar v. City of Pleasant Hill*, 3 Dill. 195, Fed. Cas. No. 11,253; *Burnett v. Maloney (Tenn. Sup.)* 37 S. W. 689 (see dissenting opinion); *Hogue v. Williamson*, 85 Tex. 553, 22 S. W. 580; *Pom. Spec. Perf.* § 56.

As to the second proposition, we do not understand that, in the "Legal Tender Cases" cited by appellant, the supreme court of the United States held that, in order to be a

money obligation, a bond must be payable in money generally. The court was discussing the constitutionality of the legal tender act of 1862, and, in holding that it did not impair the obligation of prior contracts in providing an additional medium of payment, merely announced the rule that a contract solvable in money generally could be legally satisfied in any medium recognized as money by law at the time payment is to be made. We do not believe that that court ever intended to hold, in any of its decisions cited by appellant, that an obligation specifically payable in a particular kind of money current, and recognized by law as a legal tender at the time the contract was made, was not a money obligation, and was governed by the same rules of law in every respect as a contract to deliver specific property. The burdens of contracts payable in gold, such as the ones in question, may be greater than if payable in money generally; and some of the rules of law governing their forced collection may be the same as the rules governing the enforcement of contracts for the delivery of specific property; but they are, nevertheless, money demands, as distinguished from contracts for the delivery of specific property, and we believe their execution is authorized under a general power to execute bonds for money. Such bonds were lawfully solvable in legal tender money when executed, and it is the law in force at the date of the execution of the contract that controls its validity. *Chrysler v. Renois*, 43 N. Y. 209; *Hogue v. Williamson*, 85 Tex. 553, 22 S. W. 580; *Hart v. Flynn*, 8 Dana, 191. We therefore overrule appellant's first assignment of error.

The second assignment of error challenges the validity of the bonds, because the ordinances contemplate and provide for the issuance and sale of negotiable bonds on the open market, and they were so issued and sold. We think this contention is sufficiently answered by the supreme court in the case of *City of Austin v. Nalle*, 85 Tex. 542, 543, 22 S. W. 668, 960, and that assignment is overruled.

We come now to the third and last assignment, which, we think, presents the most serious question involved in this case. This assignment impeaches the validity of the three series of bonds known and called the "Waterworks Bonds" and the "Third Series" and "Eighth Series" of bonds, because the debts upon which they were respectively predicated were invalid against appellee, on the ground that, when they accrued, no provision was made for their payment, as required by section 7 of article 11 of the constitution. The bonds of the third and eighth series recite, by number, the sections of the charter under and by virtue of which they were issued, and the further statement that "all the requirements of the law having been complied with." The waterworks bonds contain substantially the same recitals, but are more elaborate in describing the section of

the charter under which they were issued, and also recite the caption of the ordinance by virtue of which they were issued. As it is admitted that these bonds were owned by innocent purchasers, unless notice is imputed by law, we are unable to distinguish this case from the cases of *Andes v. Ely*, 158 U. S. 312, 15 Sup. Ct. 954, and *City of Evansville v. Dennett*, 161 U. S. 434, 16 Sup. Ct. 613, in which the supreme court of the United States holds that purchasers of bonds containing similar recitals are not required to look further, and may presume that the recitals are true. But the supreme court of Texas seems to hold, in the case of *Mitchell Co. v. City Nat. Bank of Paducah, Ky.*, 43 S. W. 888, that a purchaser is bound to know the contents of the ordinance authorizing the issuance of the bonds. But, granting that the latter rule is the law, we are unable to find any recital in either of the ordinances authorizing these bonds sufficient to carry notice that the debts upon which they were predicated are invalid. The debts recited in each of said ordinances to pay which the bonds are ordered may, so far as the recitals are concerned, have been legally contracted. There is nothing in said ordinances to show that the payment of said debts was not provided for at the time of their accrual, as required by the constitution, or that the debts are not otherwise valid, under the rule announced in *McNeal v. City of Waco*, 89 Tex. 83, 33 S. W. 322. Indeed, there is nothing in the evidence tending to show the illegality of said debts, unless it is the debt of \$20,000 for land recited in the waterworks ordinance. The evidence shows that this land was bought in September, 1891, appellee agreeing to pay \$20,000 for it; and nothing had been paid at the adoption of the ordinance, and no provision was made at the time of the purchase for a tax to pay interest or raise a sinking fund. But this could be true, and the debt be valid. The appellee might have had a fund on hand under its control at the time of said purchase, from which it was then reasonably contemplated such purchase should be paid. If so, the debt was valid; and it matters not, we think, that the debt was in fact not paid out of said funds, and remained unpaid or provided for until the passage of the ordinance. *McNeal v. City of Waco*, 89 Tex. 83, 33 S. W. 322. In this case the burden is on appellant to show the invalidity of the debts, and every reasonable and fair intentment should be indulged against such invalidity. The ordinances all recite these as debts against the city. It has always recognized them as debts, and has been endeavoring to satisfy them in the manner provided by law. As to the waterworks ordinance, we are mindful of the recitals therein as to the contracts of *McArthur Bros.* and the *Holly Manufacturing Company*, and as to the \$50,000 of the bonds of the *Ft. Worth Waterworks Company* that had been assumed. We think that a reasonable interpretation of that

transaction is to hold that the resolution of December 22, 1891, which is relied on to evidence said contracts, contemplated the ordinance of January 27, 1892, as a part of it, and the transaction was not complete without the ordinance; in other words, that they were not completed and binding contracts until the ordinance was adopted. The two were contemporaneous acts, in law. These conclusions, we believe, are not at variance with the doctrine announced by the supreme court in the case of *Howard v. Smith*, 38 S. W. 15; and we believe that that court is not disposed to extend the doctrine of that case any further than is absolutely necessary to enforce the mandate of the constitution. The third assignment is therefore overruled, and, finding no error in the judgment, it is affirmed.

All of the regular judges being disqualified, this cause was heard before a special court, composed of Hon. E. C. SMITH, Chief Justice, and Hons. R. E. CARSWELL and H. P. BRELSFORD, Associate Justices.

#### SHAPIRO v. MICHELSON.

(Court of Civil Appeals of Texas. Nov. 16, 1898.)

**ACTION FOR ASSAULT AND BATTERY — PLEADING AND PROOF — EXEMPLARY DAMAGES — EVIDENCE.**

1. Recovery cannot be had for an assault under a complaint pleading damages for an assault and battery, where the evidence shows an assault only, on the ground that assault and battery includes an assault.

2. An averment that defendant unlawfully assaulted plaintiff avers a legal conclusion; and, without pleading the facts constituting the assault, recovery cannot be had therefor.

3. Under an issue of exemplary damages, in an action for assault and battery, evidence that plaintiff, shortly before the act complained of, sent an insulting message to defendant's wife, was admissible.

Error from district court, Travis county; R. E. Brooks, Judge.

Action by J. Shapiro against A. Michelson. From a judgment for defendant, plaintiff brings error. Affirmed.

John Dowell, for plaintiff in error. Fiset & Miller, for defendant in error.

**FISHER, C. J.** This is an action by Shapiro against Michelson for damages arising from an alleged assault and battery by the defendant in error upon Shapiro. In the trial below, judgment and verdict resulted in favor of defendant Michelson. Plaintiff's petition states his cause of action as follows: "That on the 26th day of December, 1896, the said defendant wantonly, willfully, and maliciously, and intentionally, to debase, injure, ill treat, stigmatize, and damage petitioner in the community in his character, and to injure him in his business and standing as a man, and to inflict upon him disgrace and contempt, and to also inflict upon him

serious bodily harm and gross injustice and oppression, came into the store of petitioner, on Sixth street, in the city of Austin, in said county and state, and, without any cause or provocation therefor, publicly assaulted and struck this plaintiff on the side of his face, and on his body, some four or five times, with his hands and fists, and spit in the face of petitioner, and called him a damned son of a bitch several times, in a loud voice, in the presence and hearing of other people; and, when remonstrated with by plaintiff not to treat him so, said, in a loud and contemptuous voice, to plaintiff, 'Oh! I can pay a ten-dollar fine.' As the result of the alleged assault, the petition avers plaintiff sustained physical and mental suffering, and asked a recovery for actual damages in the sum of \$5,000, and exemplary in the sum of \$10,000.

The court, in charging the jury, submitted the case to them only upon the theory that they could find for plaintiff in the event that a battery was committed upon him, as charged in the petition, and refused to give, at the request of the plaintiff, the following charge: "An assault and battery includes an assault, and, if you believe from the evidence that the defendant assaulted the plaintiff, then you will find for the plaintiff. The use of any unlawful violence upon the person of another with intent to injure him, whatever be the means or degree of violence used, is an assault and battery. Any attempt to commit a battery or threatening gesture, showing in itself, or by words accompanying it, an immediate intention, coupled with an ability, to commit a battery, is an assault. If the defendant was guilty of an assault, or an assault and battery, then you will find for the plaintiff." The refusal of the court to give this charge presents, in the main, the errors that are relied on for reversal. If the issue presented by this requested charge had been raised in the pleading, there is evidence in the record which would have authorized the court to submit this question to the jury. And, in this connection, we find the evidence authorized the verdict of the jury, and that it can be supported on the ground that the evidence justifies a finding to the effect that a battery was not committed upon the plaintiff by the defendant, as alleged. Evidently, the reason why the court below refused to submit to the jury the question whether the defendant was guilty of an assault, unaccompanied with a battery, is because there is no pleading raising that issue, other than so far as an assault may be included within a battery, or in so far as the expression "assaulted," as stated in the pleading, presents that issue. It is true that, under an indictment charging one with the commission of a battery, a conviction may be had for an assault; but the rules of pleading that govern in criminal prosecutions cannot apply in a civil action. The statutes of this state, together with the numerous decisions that have construed them, require the plaintiff, in stat-

ing his cause of action, to state the facts showing he is entitled to recover. Now, independent of the allegations alleging the battery, there is no averment in the petition charging facts which constitute in law an assault upon the plaintiff. The use of the expression "assaulted" is not the averment of a fact, but is simply a statement which expresses the conclusion of the pleader; and, as said in *Stivers v. Baker*, 87 Ky. 508, 9 S. W. 491, where that court had before it, for construction, averments similar to those in the petition in this case: "The term 'assault' has a legal meaning, as much as the word 'trespass.' The petition in this instance does not state what the party did upon which the appellant bases his charge of assault, but merely avers that he was unlawfully assaulted. Whether the acts of a party authorize the legal conclusion that he has committed an assault is to be determined by the court, and it cannot do so unless they are stated. As well might it be said that a petition for trespass is sufficient, although it merely avers that the defendant trespassed upon the plaintiff's premises."

The allegations of fact, as stated in the petition, to which alone the court may look in determining whether a cause of action is alleged, present in this case only the issue whether or not a battery was committed upon the plaintiff, and the court, having clearly and fairly submitted that issue to the jury, presented for their determination all that they were entitled to consider. While it is true an assault may be included within a battery, still, if the plaintiff desires solely to recover upon a state of facts which show that only an assault has been committed, the pleadings should be shaped to this end, and the petition, by a proper count, present that issue.

The court admitted the evidence of the defendant and his son to the effect that the plaintiff had sent an insulting message to the wife of the defendant. A short time before the assault, the defendant was informed of this message by his wife; and, upon his meeting with the plaintiff, the alleged altercation occurred. Under the issue of exemplary damages raised by the petition, this was clearly admissible. We find no error in the record, and the judgment is affirmed.

#### SLAYDEN v. STONE.

(Court of Civil Appeals of Texas. Nov. 16, 1898.)

#### PLEADING—VARIANCE—CONTRACTS—TRIAL—SUBMISSION TO JURY.

1. There was no variance between an allegation that plaintiff's assignor and defendant made a contract, whereby the former was to operate the latter's hotel for a stipulated compensation, and a writing in evidence, signed by such assignor, proposing substantially the same terms, which writing, it was shown, the defendant accepted, but did not sign.



2. Omission by the court to submit to the jury, under instructions, whether a provision in a contract declared on was for a penalty, or for liquidated damages, was not error, unless a proper charge on that issue was asked and refused.

Appeal from district court, McLennan county; Marshall Surratt, Judge.

Action by J. E. Stone against S. W. Slayden. From a judgment for plaintiff, defendant appeals. Affirmed.

M. C. H. Park and Dyer & Dyer, for appellant. A. C. Prendergast, for appellee.

FISHER, O. J. Appellee's brief tersely states the issues presented in this case, and the result thereof, as follows: "Stone sued Slayden for a balance of \$1,168.51 and interest alleged to be due upon a contract made and entered into between one N. B. Sligh and said Slayden, and assigned by Sligh to Stone, in terms and upon the following circumstances: That, in the year 1894, Slayden owned the Hotel Palmo property in Waco, Texas, and was anxious and desirous of selling it, and with that end in view, and for that purpose, desired to get some one to run and operate the hotel, in order to build up the business thereof, thereby making it more desirable and profitable as an hotel, so as to be an inducement to some purchaser to buy it. That, during the fall of 1894, said Slayden began negotiations with said Sligh, who was an hotel man with considerable experience, and then engaged in the hotel business in Dallas, to induce him to take charge of the said hotel, and to conduct it. That, after negotiations pending between them for some time, about December 1, 1894, they made a contract, which is fully set out in plaintiff's pleadings. The material point of said contract in dispute in this case was that said Sligh was to take charge of and run said hotel, and conduct the business thereof, without charge for his services and those of his wife, except a guaranty by said Slayden to said Sligh of the sum of \$50 per month, and that no rent was to be charged said Sligh for the hotel, and the net profits were to be divided between them, as set out in said petition, which contract was to run for a year, but that Slayden was to have the right to sell said property at any time within said year, and, in case he did so, was to pay said Sligh \$2,000, unless said Sligh could make a suitable arrangement with the purchaser. Stone alleged the full performance of this contract by Sligh, and that Slayden, within said year, sold said property, delivered the possession to the purchaser, and that Sligh could not and did not make a suitable deal with the purchaser, whereby Slayden became liable under said contract to pay said Sligh said \$2,000, which he had not done, except a small portion thereof. Slayden denied making any such contract with Sligh. He also pleaded the statute of frauds, which he abandons, and pleads that the \$2,000 was

a penalty, and that Sligh had sustained no damages, and could not recover a penalty. There was a trial before a jury, and verdict and judgment for Stone for the amount sued for, with interest."

We find the facts substantially as stated by the plaintiff in his petition, and that they are sufficient to authorize the verdict in favor of the appellee.

The appellant's second assignment of error is as follows: "The court erred in admitting as testimony the writing offered by plaintiff, which is not dated, but written on Pacific Hotel paper, and is signed by N. B. Sligh only. This does not meet the allegations of the plaintiff's petition as to the defendant's liability upon the contract declared upon, and is not binding upon plaintiff." The instrument here objected to was a written proposition, made and signed by Sligh, stating in effect the terms and conditions of the contract set out by plaintiff in his petition. The evidence shows that this written instrument was submitted to Slayden, and he accepted its terms and conditions. It is true that he did not sign it; but, when he accepted its terms, he became a party to the instrument as effectually as if he had signed it. *Martin v. Roberts*, 57 Tex. 564; *Grove v. Hodges*, 55 Pa. St. 515. There was no variance between the averments and the proof upon this subject.

Appellant's fourth assignment of error is as follows: "The court erred in not submitting to the jury the issue, as made by defendant's answer, that the stipulation in the contract declared on by the plaintiff was a penalty, and not liquidated damages, and in failing to give any charge upon this subject." The court did leave it to the jury to determine whether such a contract was made as alleged by the plaintiff, and whether Sligh was bound thereon. There is no complaint made of this charge, but the objection is that the court failed to submit to the jury any question whether the stipulation in the contract provided for a penalty, instead of liquidated damages. No charge of this kind was requested by the appellant, and, if he had desired this issue presented, he should have requested a proper charge upon that subject. The failure of the court to give the charge upon the subject was not reversible error. If the court had attempted to give a charge upon the question, and had incorrectly stated the law applicable to that issue, it would have been reversible error; but the failure to give the charge upon that subject is an act of omission, which only becomes reversible error upon refusal to give a charge properly framed, requesting the submission of the issue.

We think the evidence clearly justifies the verdict of the jury upon the ground that the intention of the parties was to treat the sum mentioned in the contract as liquidated damages. Slayden became bound for this sum in the event that Sligh failed to make a suit-

able deal with the purchaser to whom Slayden might sell the hotel property. The testimony shows that Sligh failed to make an arrangement with the purchaser to continue the occupancy of the hotel; and, in response to the third proposition under the fifth assignment of error, it is sufficient to say that the evidence of Sligh shows that the contract for the occupancy of the hotel was not finally entered into until the time he took possession, in December; and the sale made by Slayden of the hotel property was within less than a year from that time. We find no error in the record, and the judgment is affirmed. Affirmed.

**SAN ANTONIO & G. S. RY. CO. et al. v. RYAN.<sup>1</sup>**

(Court of Civil Appeals of Texas. Oct. 19, 1898.)

**RECEIVERS—INTERVENTION—SETTLING STATUS OF CLAIM—SCOPE OF MASTER'S REPORT.**

1. Where, pending an action against a company and others for services rendered, the company goes into the hands of a receiver, and a master is appointed to determine the validity and classify claims against the company, and make report thereon, and plaintiff intervenes in the receivership proceedings, and subsequently excepts to the classification of his claim, it is not error for the court to settle, in the pending action, the status of plaintiff's claim as against the company.

2. The report of the master on a claim against a company in the hands of a receiver, stating that certain persons are primarily liable for the claim, but giving claimant judgment against the company for its amount, is not competent evidence of said persons' liability in an action by claimant against them on the debt, where the duties of the master were simply to determine the validity of claims presented, and their legal and equitable classifications.

Appeal from district court, Bexar county; Robert B. Green, Judge.

Action by John J. Ryan against the San Antonio & Gulf Shore Railway Company and others. From a judgment for plaintiff, certain of the defendants other than the railway company appeal. Reversed as to appellants.

Franklin & Cobbs, W. W. King, John R. Shook, and Upson, Bergstrom & Newton, for appellants. Houston Bros., for appellee.

**JAMES, C. J.** It appears that appellee, Ryan, contracted with S. Massey & Co., who were railroad contractors, to construct the telegraph line required by the railway company along its line; and this suit is for an unpaid balance of the contract price, and for the cost of two telegraph poles alleged to have been ordered by the railway company. The railway company went into the hands of a receiver; and on November 1, 1895, Ryan intervened with his claim, and it was allowed by the master and classified in the following language of the master's report: "I am of

opinion that the debt for said contract, materials, etc., was primarily the debt of the so-called 'Construction Company,' a partnership composed of John Ireland, J. C. Davis, George Dullnig, H. O. Engelke, and John Scott, but that intervener is entitled to judgment against said railway company for the sum of \$3,533.75, with interest at legal rate from the 1st day of January, 1895, until paid, and costs of suit, and that he is also entitled to an equitable lien on the said railroad and equipment in the hands of the receiver, and that such lien be declared foreclosed, and that the said aforesaid claim be ordered to be paid as a claim of the eighth class. To the classification of said claim intervener excepted." Prior to said intervention, and prior to the receivership, the present suit had been instituted, to wit, on January 23, 1895, in the Thirty-Seventh district court, the same in which the receivership was pending. The case was tried on a third amended original petition, filed February 2, 1898. The suit was brought against the railway company, and against John Ireland (represented at the time of trial by his independent executors), George Dullnig, H. O. Engelke, J. C. Davis, and John Scott, who were alleged to constitute what was known as the San Antonio & Gulf Shore Construction Company, and who were alleged to have assumed or guaranteed to pay plaintiff; and the prayer was for a judgment for the sum of \$3,634, interest and costs, for a lien on the railroad tracks, equipments, etc., with foreclosure, for classification of plaintiff's claim as a claim of the seventh class, and for proper order enforcing same, and general relief. It is not necessary to state the defendants' pleadings. The court decreed plaintiff a judgment against the members of the said construction company (except Scott, who was dismissed because not served), for the sum of \$4,189.23 and costs, with execution; also, a judgment in his favor against the railway company for the same sum, with provision that it be paid by the receiver as a claim of the eighth class, and, if the same should not be paid out of the receivership funds, then the plaintiff might have execution against said individuals for any unpaid balance; also, that, in case the railway company or its receiver should pay the same or any part thereof, said railway company, or its receiver, should have execution against the said construction company and said individuals composing it. The appeal is prosecuted by George Dullnig and H. O. Engelke, and by Ireland's executors.

The first assignment of error, complaining of the so-called "consolidation" of plaintiff's intervention in the receivership proceeding with this case, is without merit. The intervention was made pending this suit, and had reached the stage of the master's report, with exception taken by Ryan as to the classification. The district judge could at any time have settled the status of this claim, and it was proper, in view of the pleadings, to do

<sup>1</sup> Writ of error denied by supreme court.

so on this occasion, and, in fact, the pleadings rendered such action necessary in this case.

We think that none of appellants' assignments Nos. 2, 3, 4, 7, and 8 could affect the judgment; and, in view of our disposition of the case in favor of appellants, we need not consider them.

The fifth and sixth assignments are well taken. The only testimony that is in the nature of evidence of a personal liability on the part of Dullnig, Engelke, Ireland, and Davis is the report of the master in the intervention of Ryan, in so far as it recites that the master was of the opinion that the debt was primarily the debt of these individuals. The pleading of Dullnig, Engelke, and others in the matter of the original appointment of a receiver contains nothing which can be construed into an admission that they had assumed the payment of plaintiff's claim. No witness testified that they assumed it.

Objection was made by appellants to the master's report as evidence so far as their liability was sought to be affected by it. Appellants were not parties to the proceeding before the master, nor did the order of the court defining the latter's powers authorize him to do more than determine (1) the validity of claims, and (2) their several legal and equitable classifications, and make report thereon as soon as may be. It is clear that his report is not competent evidence of their liability for the debt, and the judgment holding them liable, apparently based on said report, is unwarranted. The case appears to be fully developed.

Judgment is rendered by this court not disturbing the judgment as to Davis, who does not appeal, and affirming it also so far as it relates to plaintiff's recovery against the railway company and its receiver, but reversing it in all other respects, and adjudging that plaintiff and the receiver take nothing against appellants, and that appellants recover costs of both courts against plaintiff.

#### **THERRIAULT v. COMPERE.**

(Court of Civil Appeals of Texas. Nov. 16, 1898.)

**HUSBAND AND WIFE—COMMUNITY PROPERTY—INNOCENT PURCHASER—REVIEW—FINDING OF FACT—SALE OF WIFE'S SEPARATE PROPERTY—ASSIGNMENT OF ERROR—APPEAL—DISMISSAL.**

1. Where a husband sells community property in payment of a community debt, the question whether the buyer is an innocent purchaser in buying property, and paying for it with a pre-existing debt, does not arise.

2. Where the jury and court have agreed on the sufficiency of evidence to support a finding of fact, the finding will rarely be reversed.

3. Without her consent, a wife's separate property cannot be appropriated by others with her husband's permission.

4. A wife may, when her husband abandons her, herself dispose of her separate property.

5. Where one makes a pretended sale, an innocent purchaser from the buyer, without notice, will be protected.

6. An assignment that the court erred in its charge, which fails to specifically point out the error, will not be considered.

7. An appeal will not lie from a judgment not final.

Appeal from McLennan county court; J. N. Gallagher, Judge.

Action by Mrs. S. A. V. Therriault against C. C. Compere. From a judgment for defendant, plaintiff appeals. Affirmed.

Jas. E. Yeager, for appellant.

**COLLARD, J.** We have given this case careful consideration, and have found no reversible error assigned. The question of one being an innocent purchaser in buying property, and paying for it with a pre-existing debt, does not arise. The husband could sell the community property in payment of a community debt. In this way the community property—the sorrel horse, the float, and the wagon—were sold to Compere by August Therriault.

The jury may have based their verdict upon the charge that the value of the community did not exceed the amount due Compere for funeral expenses, and expenses of last sickness, and therefore, under the charge, found for defendant as to the community on that issue. If so, the verdict is correct. Appellant does not contend that the funeral expenses should not have been paid out of the community, but that its value was greatly in excess of the amount due for such expenses. There was evidence supporting the verdict, and it was the province of the jury to believe or disbelieve it. The point was raised in a motion for a new trial, and the court below overruled it. After the jury and the court below have determined the weight and value of the testimony, it must be a rare case when this court, on appeal, will reverse their conclusions, if it would be done in any case. At all events, we do not feel authorized to set aside the findings in this case.

As to the questions concerning the horse Dick, which was the separate property of plaintiff, Mrs. Therriault: The horse could not be appropriated by others, her husband joining, without her consent; but she could dispose of it herself, her husband having abandoned her at the time. The court submitted the question whether or not she sold the horse to Yeager, and he, in turn, sold it to defendant; and the jury evidently decided that the transactions were sales, or, if only a pretended sale by Mrs. Therriault to Yeager, that Compere was an innocent purchaser from Yeager, without notice, and in such case he should be protected. There is no question as to his paying a valuable consideration at the time Compere received the horse from August. It was cash which August required to discharge his six notes. We note in this connection, parenthetically, that Yeager testified that these six notes were taken in exchange for his note given to Mrs. Therriault for his rights in the horse, and that the exchange of

August's six notes for the Yeager note was made in plaintiff's presence, and with her consent. She received the payment of these notes through her attorney.

We have thus considered the material questions arising in the case. We find no error assigned for which the judgment should be reversed. Appellant's brief does not conform to the rules. An assignment that the court erred in a quoted charge, but which fails to point out the error, makes no proposition which the court can consider, and, when it may be explained by a proposition, the proposition must be germane to the assignment.

Appellant complains that one of the horses was not disposed of by the court's charge, and therefore the judgment is not final. If the judgment is not final, the appeal would not lie, and it should be dismissed; but the judgment is final. The verdict and judgment are for defendant, and dispose of the case. The judgment is affirmed.

#### GILL v. FIRST NAT. BANK.

(Court of Civil Appeals of Texas. Nov. 11, 1898.)

PLEADING—PARTNERSHIP—FRAUD BY PARTNER—BANKS—POWERS—ESTOPPEL—PROMISSORY NOTE—NEGOTIABILITY.

1. An allegation in an answer which is not denied under oath must be taken as true.

2. One partner is chargeable with fraud of another partner in procuring a note, whether he had actual knowledge or not.

3. A bank which is endeavoring to enforce a note given in a transaction in which it was acting in connection with the payee, and sharing in the profits thereof, is estopped to deny its power to enter into such a partnership.

4. A note payable "on or before" a certain date is negotiable.

5. An allegation that plaintiff is a national banking corporation incorporated under and by virtue of the national banking laws is a sufficient compliance with the statutory requirement of an allegation that it is duly incorporated.

Appeal from district court, Dallas county; Edward Gray, Judge.

Action by the First National Bank against J. W. GILL. Judgment for plaintiff, and defendant appeals. Reversed.

Henry & Crawford, for appellant. T. L. Camp, for appellee.

**RAINEY, J.** The appellee bank brought this suit against appellant, Gill, to recover upon several notes executed by said Gill, payable to the order of Jesse Harris, who indorsed and transferred same to said bank. The appellant admitted the execution of the notes, but alleged that the execution of same was procured by fraud, of which the bank had notice when same were transferred to it. The case was submitted to the court without a jury, and judgment rendered for appellee, from which this appeal is taken.

We think the court erred in rendering judgment for the appellee, as the same was not

warranted, under the state of the pleadings and evidence. The defendant in his answer alleged, in substance, that said notes were executed for the purchase price of certain horses sold by Harris to the appellant; that, at the time of the sale of said horses and the execution of said notes, said Harris fraudulently represented that said horses were of the purest strain of Clydesdale, that they had the best known pedigree, and that all of them were eligible to registration in the Clydesdale Association of America; and that he relied upon said representations, but that said representations were false; and that said horses were worthless stock. It was further alleged that, at the time of the sale of said horses, said Harris and the said plaintiff were partners, and were acting together in the sale of same, and shared in the profits arising from the said transaction. The defendant having alleged the partnership of Harris and the plaintiff, and same not having been denied under oath, under our statute the court should have considered the partnership as established. The partnership being established by reason of the failure to deny under oath the allegations of partnership, it follows that, if Harris perpetrated a fraud in procuring said notes by false representations, the bank was chargeable with the notice of said fraud, whether it had actual knowledge thereof or not. In the case of *Reed v. Brewer*, 37 S. W. 418, the supreme court held that where the defendant alleges that a partnership existed between the plaintiff and a third party, the existence of such a partnership would be considered as established, unless the existence of the same is denied by the plaintiff under oath. In the case of *Bank v. Oliver*, 41 S. W. 414, this court held to the contrary. This ruling being in conflict with the ruling of the supreme court, as above shown, the same is overruled. When we made that ruling the case of *Reed v. Brewer*, supra, had recently been decided, and we were not aware of its existence.

It is insisted, however, by appellee, that it could not legally enter into such a partnership, and that the allegations of partnership in defendant's answer should not be considered of any force or effect. We cannot concur in this proposition. Whether such partnership would be legal or not, it is unnecessary for us to decide. If such should be conceded, we are of the opinion that if the bank was acting in connection with Harris in the sale of the horses, and sharing in the profits arising therefrom, it is estopped from denying its power to contract such relation, when attempting to reap the benefit arising therefrom by enforcing the collection of the notes through the courts.

The terms of the note, that it was payable "on or before" a certain date, did not affect its negotiability. *Buchanan v. Wren* (Tex. Civ. App.) 30 S. W. 1077.

The allegation that plaintiff is a national banking corporation, incorporated under and

by virtue of the national banking laws, is a substantial compliance with the article of the statute requiring an allegation that it is "duly incorporated." The judgment is reversed, and the cause remanded.

# MOORE v. BYARS et al.

(Court of Civil Appeals of Texas. Nov. 16, 1898.)

## CANCELLATION OF INSTRUMENTS—FRAUD—TRUST DEED—VENUE.

1. An action to cancel a trust deed on the ground that it was obtained by fraudulent agreements to assign a judgment in consideration thereof is properly brought in the county where the fraud was committed, although defendants reside in a different county.

2. An action to cancel a trust deed is properly brought in the county in which the land on which it is an incumbrance is situated.

Appeal from district court, Milam county; W. G. Talliaferro, Judge.

Action by James B. Moore against Hattie T. Byars and others to compel the cancellation of a trust deed. Judgment for defendants, and plaintiff appeals. Reversed.

This is an appeal from the judgment of the district court of Milam county dismissing suit of appellant, upon the ground that the court had no jurisdiction of the parties defendant. The court sustained a demurrer of defendants, raising the question of same. There is no brief for the appellees. Appellant's brief shows that the petition contained the following averments: "Plaintiff resides in Milam county, Texas. Defendants reside in Colorado county, Texas. On March 16, 1887, defendants H. R. and Hattie T. Byars recovered a money judgment against plaintiff, J. B. Moore, and also R. Lyles, Willis J. King, and John C. Oxenford, for \$1,112.95, with 12% interest from date; said judgment having been recovered upon a certain note against R. Lyles as principal, and J. B. Moore, Willis J. King, and John C. Oxenford as sureties. The judgment bears a credit, and December 29, 1896, amounted to about \$2,200. On December 29, 1896, plaintiff herein, J. B. Moore, on one side, and defendants Hattie T. and H. R. Byars, on the other, entered into an agreement in settlement of said J. B. Moore's liability and obligation under said judgment, and for transfer of said judgment to him, said agreement being, in substance, as follows: (1) Plaintiff, J. B. Moore, to pay \$400 cash by January 7, 1897. (2) Plaintiff to settle costs in said suit in which said judgment was recovered in Colorado county, Texas. (3) Plaintiff to make to H. R. and Hattie T. Byars his promissory note for \$700, and a deed of trust to secure same, upon certain real estate in Milam county, Texas. (4) When these conditions should be performed by plaintiff, H. R. and Hattie T. Byars were to transfer to plaintiff the judgment of the district court of Colorado county, it being plaintiff's intention, well known to

defendants, to become subrogated to H. R. and Hattie T. Byars' interests and rights in said judgment. Said H. R. and Hattie T. Byars had a duly authorized and appointed agent, to wit, — Campbell, who resided in Cameron, Milam county, with full power to act for them, and through their said agent and attorney, acting in said Milam county, procured and accepted from plaintiff, Moore, in Milam county, the said \$700 note, and trust deed securing the same (the cancellation of which he is seeking in this suit), by then and there representing and holding out to plaintiff, Moore, through their said agent and attorney, that they would forthwith transfer to him said judgment obtained by them in the district court of Colorado county, said H. R. and Hattie T. Byars at the time intending not to so transfer said judgment. And said representations whereby said defendants obtained said money and note and trust deed aforesaid were made in Milam county, Texas, and were made for the fraudulent purpose of so obtaining same. That plaintiff properly performed all the terms and conditions of said agreement (such performance being in Milam county, Texas, and defendants accepting performance in said county). That defendants H. R. and Hattie T. Byars did not ever intend to transfer said judgment to plaintiff, but fraudulently held out and represented to plaintiff that such was their intention, such fraud and representations being committed in Milam county, Texas, and the \$700 note and deed of trust being fraudulently obtained in said county, each and all through and by the agent of said Byars, situated in Milam county. That, when plaintiff had fully performed the conditions of said agreement, he demanded a transfer of the judgment, which defendants H. R. and Hattie T. Byars declined to make. That a material consideration inducing plaintiff to make said agreement was (being well known to H. R. and Hattie T. Byars) that said R. Lyles, whose surety plaintiff was in said judgment, at the time of said agreement and its performance by plaintiff, owned certain property in Milam county, of the value of \$3,500; and he, at the same time of the above agreement, entered into a contract with plaintiff that he (Lyles) would convey said property to the plaintiff immediately when plaintiff should perform his agreement with the Byars, and secure from them the transfer of the judgment to himself. That the deed of trust constitutes a cloud and incumbrance upon plaintiff's title to said real estate. That defendant W. E. Bridges is fraudulently setting up title to the note and deed of trust sought to be canceled, having bought same with full notice of the fraud, and that his claim of ownership originated since the institution of this suit. That said Bridges' pretended purchase of said note and trust deed is not in fact a bona fide transaction, but a simulated purchase, for the purpose of defeating the jurisdiction of this court over

this cause. Plaintiff asks a cancellation of the \$700 note and deed of trust, and damages resulting from the fraud." Defendants excepted to the suit, because the petition shows upon its face that they were sued out of the county of their residence, and because it does not show other facts which would authorize the suit to be brought against them in Milam county. The court sustained the exceptions, and, plaintiff declining further to amend, dismissed the suit.

Henderson, Streetman & Freeman, Monte J. Moore, and L. C. McBride, for appellant.

COLLARD, J. (after stating the facts). The averments of the petition amount to more than a mere breach of contract; they amount to a fraud; and, if the averments are true, plaintiff is entitled to the equitable relief he seeks. Defendants fraudulently promised and represented to him that they would assign to him the judgment upon his paying the cash consideration named, and executing his note to them for \$700, and securing it by deed of trust upon his land, with the intention at the time not to perform their contract. These facts, if true, would establish their intention to defraud him,—to obtain from him his property and obligation upon false pretenses, and with a specific purpose to defraud him. *Clark v. Haney*, 62 Tex. 514, and authorities there cited.

This fraud was committed in Milam county, and the suit was properly brought in that county. Rev. St. 1895, art. 1194, § 7; *Boothe v. Flest*, 80 Tex. 141, 15 S. W. 799. The deed of trust executed by plaintiff was an incumbrance upon the title to his land in Milam county, and, upon that ground, the suit to remove the incumbrance by cancelling the same was properly brought in that county. The venue was properly laid in Milam county upon two grounds,—the fraud committed in the county, and to remove incumbrance upon the title to plaintiff's land. The court erred in sustaining exceptions to the venue, and the judgment is reversed, and the cause remanded. Reversed and remanded.

SMITH v. T. M. RICHARDSON LUMBER CO.

(Court of Civil Appeals of Texas. Nov. 19, 1898.)

On rehearing. Denied.

For prior report, see 47 S. W. 336.

TARLTON, C. J. We deem it proper to state additional conclusions upon that ground of the motion which urges error in the second section of our original opinion (47 S. W. 336), having reference to the issue of insolvency on the part of Tyree, the maker of the note in suit. Upon this we are of opinion that, if we committed error in holding that no other reasonable deduction than that of

the actual insolvency of Tyree could be drawn from the evidence, as indicated in that opinion, we must nevertheless overrule the appellant's contention. If the general charge was defective, the defect was one of omission, merely, in the failure to submit the issue of actual insolvency. Says Chief Justice Stayton in *Railway Co. v. Gay*, 86 Tex. 609, 26 S. W. 815: "It has been held, in a long line of decisions, that a charge correct so far as it applies to the facts, but omitting to state the law applicable to an issue raised by them, furnishes no ground for reversal, unless a proper instruction relating to the matter omitted be asked and refused." A special instruction was asked in this instance, but it submitted exclusively the issue of the notorious insolvency of the defendant Tyree. The evidence certainly did not raise the issue of such notorious insolvency. The testimony bore exclusively upon the actual insolvency of the maker, Tyree. Hence the special instruction would have been positively improper and misleading. The court correctly rejected it. The motion is overruled.

BELL et al. v. PRESTON et al.

(Court of Civil Appeals of Texas. Nov. 19, 1898.)

On motion for rehearing. Denied.

For former opinion, see 47 S. W. 375.

STEPHENS, J. The contention is renewed in motion for rehearing and in request to certify to supreme court, and is persistently urged, in both written and oral arguments, that the declarations of appellant R. V. Bell as to the northwest corner of the Little Mora survey, though made before he became the owner of that survey, were properly admitted in evidence against him. No case directly in point has been cited on either side. Mr. Greenleaf (volume 1, § 179) states the rule as we understand it, thus: "The admissions which are thus receivable in evidence must, as we have seen, be those of a person having at the time some interest in the matter afterwards in controversy in the suit to which he is a party." He then proceeds to illustrate it, but by cases in which admissions of guardians, administrators, and the like, made before they were clothed with the trust, were held to be inadmissible against them in their representative capacity. In *Wood*, Prac. Ev. p. 501, we find the same rule stated thus: "Nor are the declarations of a party interested in the matter in controversy [admissible], if made at a time when he had no interest;" to sustain which he cites the case of *Burton v. Scott*, 3 Rand. 390, which is directly in point. That was a will contest, involving the testamentary capacity of Maj. Scott, the testator. The declarations of Mrs. Scott made before the will was executed, and tending to show the incapacity of her husband to make

a will, were excluded as incompetent. Two of the four judges participating, all of whom concurred, delivered opinions, that of Judge Carr upon this point reading: "The real question, then, is this: Can the declarations of a person as to a subject in which he had no interest at the time be given in evidence against him, if, by any subsequent event, an interest in the subject should be thrown upon him? I have not been able to find any authority directly on this point. All the cases in which the declarations of a party are said to be evidence against him show that he had, at the time of making such declarations, an existing interest. The principle, however, on which his declarations are made evidence, will, I think, decide the question before us. 'The true meaning and sense of the rule, that the declarations of parties may be given in evidence against them, is the reasonable presumption that no person will make any declaration against his interest, unless it be founded in truth.' Testing the question by this criterion, the declarations of Mrs. Scott, made before the will, cannot be given in evidence; for it is the will which gives existence to her interest. Before its date she could not know that she would be left a penny. She could not know that it would not be so written as to oblige her to renounce it, and fly to the law for her support. She had not then that motive so powerful as to afford a safe guarantee that she would make no declaration as to the incapacity of her husband, which was not founded in truth; and her declarations, wanting the essential quality to make them evidence, were properly excluded." That of Judge Green reads: "The declarations of Mrs. Scott offered in evidence were made at a time when she had no interest, any more than a perfect stranger, in the question whether Maj. Scott was sane or insane. They cannot, therefore, be received as her admissions against her interest, nor as hearsay, any more than those of a perfect stranger, who was disabled from giving evidence by death." We conclude, therefore, that, both in principle and on authority, the declarations of Bell, being clearly incompetent when made, did not become competent because of his subsequently acquired interest. It is now for the first time suggested that, because of his interest in some other survey than the Mora, he was interested in the corner in question when the declarations were made, but the suggestion comes too late to require us to search the record again to find a new support for the ruling in question. It should have been made on the original hearing. Nor do we determine whether the evidence might not have been admissible as impeaching testimony, since it was not so offered. The other ground of the motion is sufficiently covered by the opinion already filed. Since we see no reason to doubt the correctness of the disposition made of the appeal upon either ground, both the rehearing and the certificate to the supreme court will be denied.

# **RHODES v. ALEXANDER et al.**

(Court of Civil Appeals of Texas. Nov. 19, 1898.)

**HUSBAND AND WIFE—COMMUNITY PROPERTY—  
BRAND RECORDS—PRESUMPTION OF OWNERSHIP—APPEAL—REMAND FOR NEW TRIAL.**

1. A married woman's recorded brand on cattle raises the presumption that they are community property if acquired by her during coverture, unless the record shows the contrary.

2. Where, on a statutory claim by a wife for chattels levied on as her husband's, she adduced evidence which the court erroneously held sufficient to establish a prima facie case, so that she was probably misled thereby into refraining from producing other competent evidence, final judgment will not be rendered, but the case will be remanded for a new trial.

Appeal from Hall county court; Wm. Par-due, Judge.

Action by W. R. Rhodes against W. C. Alexander. On a judgment for plaintiff execution was levied, and N. D. Alexander, wife of defendant, filed a claimant's affidavit and bond. Judgment was rendered thereon for claimant, and plaintiff appeals. Reversed.

Ben H. Kelly and C. R. Brice, for appellant. J. K. Duke and Theodore Mack, for appellees.

HUNTER, J. Appellant levied an alias execution on eight cows and four sucking calves, on March 11, 1898, in Hall county, found in the possession of W. C. Alexander, to satisfy a judgment against said Alexander for \$249.85 rendered June 6, 1896, in favor of appellant. On March 14th N. D. Alexander, wife of W. C. Alexander, presented her claimant's affidavit and bond for the cattle, claiming them as her separate property. The issues made up between the parties, under the direction of the court, were, on the part of appellant, that the cattle were the community property of W. C. Alexander and the claimant, and subject to his levy; while the defendant Mrs. Alexander expressly assumed the burden of proof, and alleged "that said cattle were her separate property, through mutations of her separate estate invested in cattle that were exchanged for the cattle in controversy." Under the issues as formed, the appellant was entitled to recover, unless the appellee proved that the cattle were at the time of the levy her separate property. The only evidence she offered was the mark and brand record of Hall county, which showed that on May 12, 1890, she had her mark and brand recorded in the office of the county clerk of said county. It did not show that cattle thus marked and branded were her separate property. The cows levied on were in her mark and brand. The sucking calves were not marked or branded, but were calved by the cows levied on, and they were following their mother cows when levied on. The claimant and W. C. Alexander had been husband and wife for at least eight years. The oldest cows levied on were not more

than five years old. Upon these facts found by the county court, the learned county judge found the following conclusions of law: "(1) The claimant having assumed the burden of proof, and having shown that the cattle in controversy were in her recorded mark and brand, raises the presumption that they were her separate property, and the burden of proof then shifted to the plaintiff. (2) The inference that the cattle were obtained by the claimant during her marriage with W. C. Alexander will not overcome the presumption that they are and were her separate property. (3) The separate property of a married woman is not subject to the payment of the debts of her husband." These conclusions were duly excepted to, and error is assigned thereto.

We are of opinion that the court erred in holding that the fact that the cattle were in the mark and brand of the wife, which mark and brand had been duly recorded in her name, was sufficient to raise the presumption that they were her separate property, and that the burden of proof then shifted to the plaintiff. There is nothing contained in the statute on marks and brands which would require or authorize such a construction. The marks and brands placed on cattle are evidence of ownership when they are recorded, but they would be no higher evidence of ownership or of any separate title in the wife than would be the evidence of a recorded deed to lands conveyed to her. It is well settled that unless the deed conveying lands to her shows that they are to be held to her separate use, or that the consideration paid therefor was her separate means, the presumption is that they are community property, and may be taken for the debts of the husband, or even conveyed by him without the wife's joining in the deed, unless they should become the homestead. We know of no law requiring a different construction to be placed on the mark and brand record. The mark and brand record is evidence of ownership of cattle in the wife just in the same sense that a deed to her is evidence of her title to the land, and in either case, unless the deed or the record shows the property to be her separate estate, the presumption would be that it is community property, if acquired during coverture. In this case there was not a particle of evidence offered by the claimant to establish her claim. That offered by her proved *prima facie* that the cattle were community property, and subject to the levy of appellant. Neither she nor her husband testified in the case, or offered to do so.

The case was tried below without a jury, and comes here on conclusions of fact and of law found by the county judge, as well as upon a statement of facts, and the greatest trouble we have had has been to determine whether we should reverse and render the judgment or remand the cause for a new trial. The county judge places among his

conclusions of fact one that the cattle were the separate property of Mrs. Alexander, and it seems that both his honor and the claimant's attorneys considered that the mark and brand record was sufficient to warrant this conclusion. It tended to prove exactly the opposite, but she may be able to establish her title on another trial, and probably would have done so on this, had not the court considered her mark and brand record sufficient to establish *prima facie* her claim. So we have at last concluded that the case was not developed below,—was not tried on its merits,—and we are led to believe by the record that the claimant and her counsel were probably misled into error by the views of the court, and that, under such circumstances, it would not be proper and just to render the judgment here; and we therefore order that the judgment herein be reversed, and the cause remanded for a new trial. *Smythe v. Lumpkin*, 62 Tex. 245; *Hays v. Tilson* (Tex. Civ. App.) 35 S. W. 515.

#### KELLER v. LEWIS.

(Supreme Court of Arkansas. Nov. 5, 1898.)

PHYSICIANS—MALPRACTICE—LIABILITY FOR ANOTHER PHYSICIAN'S ACTS.

Where one obtaining the services of a physician knew the latter was going away, and the services were gratuitous, the physician is not responsible for the negligence or want of skill of the physician who continued the case under an independent contract, but is responsible only for such treatment as he administered personally.

Appeal from circuit court, Hot Spring county; Alexander M. Duffie, Judge.

Action by Lawrence B. Lewis against James M. Keller for malpractice in setting the bones of plaintiff's elbow. From a judgment for plaintiff, defendant appeals. Reversed.

Cockrill & Cockrill, for appellant. Wood & Henderson, for appellee.

BUNN, C. J. The defendant asked the following instruction, which was refused by the court: "(9) A physician is responsible for want of ordinary care and skill; and this, too, whether his services are given gratuitously or not. *But in this case, if plaintiff knew defendant was going away, and the services of the defendant were given gratuitously, he could only be held responsible for such treatment as he administered personally, and cannot be held for any negligence or want of skill in Dr. Minor.*" The sentence we have italicized is the only one demanding our consideration. The employment of Dr. Minor constituted an independent contract, and Dr. Keller is not responsible for his negligence or want of skill. *Myers v. Holborn* (N. J. Err. & App.) 33 Atl. 389; *Hitchcock v. Burgett*, 38 Mich. 501. The error is a material one, for we cannot say how far it may



have influenced the jury in arriving at the verdict on the whole case. There are other minor errors in instructions, but they are not prejudicial. Furthermore, without intending to express any opinion as to whether there is evidence to justify a verdict for some amount or not, the verdict is manifestly excessive in amount, evincing passion or prejudice in the jury, or else that they did not understand the court's instructions as to the damages they were to inquire into. For the errors named, the judgment is reversed, and the cause remanded.

### KELLY v. PEOPLE'S BUILDING, LOAN & SAVING ASS'N.

(Supreme Court of Arkansas. Oct. 29, 1898.)

#### BUILDING ASSOCIATION—AMENDMENT OF ARTICLES—WITHDRAWAL.

1. Under an article of a building association allowing its articles to be amended at the annual meeting or any special meeting called for that purpose, provided that a notice in writing, stating the proposed amendment, be mailed to each shareholder, such notice must be given in case of a regular annual meeting as well as in case of a special called meeting.

2. When plaintiff became a member of defendant building association, its articles permitted withdrawals by members of plaintiff's class on the maturity of their stock or when it had reached par value. Thereafter an amendment was adopted, whereby members of plaintiff's class were entitled to withdrawal, provided their certificates had been in force for more than three years. Plaintiff had no notice of the intention to present, or of the adoption of, said amendment. *Held* that, notwithstanding the noncompliance by defendant with an article of association providing for 10 days' notice of any proposed amendment prior to the meeting at which it was to be acted on, plaintiff will be presumed to have assented thereto, inasmuch as the amendment was for the benefit of himself and those included in his class.

3. After plaintiff became a member of defendant building association, an amendment to its articles was adopted, whereby members of plaintiff's class were entitled to withdrawal if their certificates had been in force for more than three years. Thereafter another amendment was adopted, which prohibited withdrawals by members of plaintiff's class until the maturity of their stock. Plaintiff had no notice of the intention to present or of the adoption of the latter amendment. *Held* that, inasmuch as the latter amendment took away plaintiff's vested rights under the first amendment, and had been adopted in violation of an article of the association providing for 10 days' notice of any proposed amendment, it was void as to him, and hence plaintiff was entitled to withdraw under the terms of the first amendment.

Appeal from circuit court, Monroe county; James S. Thomas, Judge.

Action by W. E. Kelly against the People's Building, Loan & Saving Association. From a judgment in favor of defendant, plaintiff appeals. Reversed.

C. F. Greenlee, for appellant. W. T. Tucker and Chester M. Elliott, for appellee.

BUNN, C. J. This is a suit for amount due on the withdrawal of plaintiff as a member of the defendant association, less certain

credits allowed. Judgment for defendant company, and the plaintiff appeals to this court.

The main question involved is whether or not, under the articles of association and by-laws of the company, the appellant had a right to withdraw, when he attempted to do so, following the same up by the institution of this suit. When the appellant became a member of the association in May or June, 1893, the articles and by-laws did not permit withdrawals of members of the class to which appellant belonged until the maturity of the stock, or until it had reached par value. In December following, an amendment to the articles was adopted by the association, in this language: "Members having certificates in class A shall be entitled to withdraw the amount paid into the loan fund on the same; provided such certificates have been in force for three years or more, and that they are in good standing on the books of the association at the time the application for withdrawal is made." Then follows another section as to the allowance of interest. The appellant does not appear to have had any notice of the intention to present, or of the adoption of, the amendment quoted, until long after it was adopted, to which notice he was entitled under one of the articles of association, which reads as follows, to wit: "These articles of association may be altered or amended at the annual meeting or any special meeting called for that purpose; provided, that a notice in writing, stating the proposed alteration or amendment, be mailed to each shareholder ten days before the day on which such meeting shall be held." A majority of us construe this language to mean that the notice required should be given in case of a regular annual meeting as well as in the case of a special called meeting. There was no such notice given to appellant, as required, of the proposed amendment afterwards adopted in December, 1893, as stated; but, since it was apparently for the benefit of appellant and all included in his class, his assent to it will be presumed. Besides, he actually acquiesces in it, and in fact claims the benefit of it in this suit. It is therefore good as to him, and confers an additional vested right. *Kent v. Mining Co.*, 78 N. Y. 159. Under this amendment, the appellant, having been a member more than three years, and being clear on the books of the company, was entitled to a withdrawal, and thereon to receive such sums as the regulations allowed him,—in this instance \$390, as he shows. On the 10th January, 1896, another amendment was adopted, which, in effect, repealed the one of December, 1893, last above referred to, and prohibited withdrawals by the appellant and members of his class until the maturity of their stock. Of the pendency of this last amendment appellant had no notice whatever, neither did he know anything of it, until the controversy

arose as to his right to withdraw, some months after its adoption. The repealing amendment manifestly took away from appellant such vested right as had been conferred upon him by the first-named amendment of December, 1893. After the appellant had been a member the required length of time, and when he stood fair on the books of the company, to wit, on the 2d May, 1896, he wrote to O. N. Whiting, secretary of the company at Syracuse, N. Y., indicating to him his desire and intention to withdraw, and received an answer, of which the following is a copy: "Syracuse, N. Y., May 6, 1896. W. E. Kelly, Brinkley, Ark.—Dear Sir: We have yours of the second, and beg to say in reply that we have, so far as we are concerned, found no fault with you as collector at Brinkley. We have requested you once or twice to be more prompt with your remittances. Of course, if you wish to withdraw your stock, that is another matter. You are entitled to file your application for withdrawal at any time, and upon receipt of notice of your intention to do so we will send you the necessary blanks. No reason is necessary further than your wish." Appellant testified further: "I at once notified defendant to send necessary blanks, and I would comply with all conditions to withdraw, but it [the defendant] refused to do so, but, on the contrary, denied my right to withdraw. After I had received their letter of May 6th, I thought there was no question about my right to withdraw, and that I would at once receive the amount I had paid in, with interest and dividends according to [the] terms of articles of association and by-laws, and therefore retained \$207.07, which I had collected for defendant from M. Kelly, and applied the same on amount due me, and wrote to defendant, notifying it of this, and asked for balance due of \$182.93, with interest, but it then refused to permit my withdrawal. After allowing credits for amount I received from M. Kelly, the defendant is now due me \$183.93, with interest, which is unpaid." The amendment of 10th January, 1896, having the effect to take away a vested right conferred upon appellant by the amendment of December, 1893, and furthermore having been proposed and adopted without the required notice to appellant, the same is void as to him, and he had a right to withdraw at the time he endeavored to do so, notwithstanding the existence of the amendment; and was entitled on such withdrawal to the amount claimed by him, so far as the evidence shows; and the judgment against him was therefore erroneous.

The cases to which our attention has been called, to wit, Englehardt v. Association, 148 N. Y. 281, 42 N. E. 710, and Pepe v. Society [1893] 2 Ch. 311, are not strictly applicable to the case at bar. They are not apparently based on the same character of articles of association or by-laws,—that is, rules re-

quiring notice, for instance,—but all of them seem to contain a discussion of the question whether or not amendments passed according to the constitution and by-laws are binding upon the members, and this, too, when the subject of the amendments is merely the routine management of the business of the concern. Without stopping to discuss such a question, we simply hold that the notice required by the articles of association involved in this case falls within the category of the manner of proposing and adopting amendments, and must be complied with, in order to bind the members. Association v. Lewis (Colo. App.) 27 Pac. 872.

Reversed and remanded.

### GISH v. NOLEN et al.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 12, 1898.)

#### DEEDS—CORRECTION OF MISTAKE—DECLARATIONS OF GRANTOR AS EVIDENCE.

In an action to correct a mistake in a deed, declarations of the grantor, since deceased, made before and after the making of the deed, as to how he intended to make it, are not admissible in evidence, being made in the absence of the grantee, and not at the time when the deed was written or acknowledged.

Appeal from circuit court, Harlan county.  
"Not to be officially reported."

Action by Clara B. Nolen and others against Cora E. Gish, to correct a mistake in a deed. Judgment for plaintiffs, and defendant appeals. Reversed.

Howard & Clay, for appellant. Tinsley & Faulkner, for appellees.

WHITE, J. B. F. Nolen in August, 1892, for love and affection, made a deed to his wife, now appellant, to a certain tract of land in Harlan county. This deed was duly acknowledged and recorded. Nolen has since died, and the appellees, his children, who are infants, suing by their grandfather as next friend, claim that the deed to the appellant, their mother, was by mistake written so as to deed to appellant the land absolutely in fee simple, when, as they aver, their father intended to make the deed jointly to appellant and appellees, or to deed to appellant a life estate, remainder in fee to appellees, and they ask that the chancellor decree a correction in the deed. The answer of appellant admits the execution of the deed to her, but denies the alleged mistake or any mistake in its execution. Upon this issue presented, appellees took the depositions of several witnesses. These witnesses prove statements of B. F. Nolen, the grantor, as to his intention to make the deed, and how he intended to make it, and also his statements as to how he had made the deed. These statements were all made in the absence of appellant, and were not made at the time the deed

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

was written or acknowledged. It is shown that Nolen himself prepared the deed.

The principal question presented and argued is the competency of the proof introduced. The deed appears to be of good composition, and from the instrument itself there is no suggestion of any omissions, or inapt words used. The grantor, B. F. Nolen, lived two years after its execution, and was an attorney, being admitted to practice shortly after the date of the deed. We are of opinion that the whole testimony offered by appellees, as to statements of B. F. Nolen as to his intentions and purpose in making the deed, as well as his statements as to what he had done, all being in the absence of the grantee, was incompetent, and the exceptions thereto by appellant should have been sustained. That being done, and no legal evidence of any mistake being before the court, the petition should have been dismissed. For the error indicated the judgment is reversed, and cause remanded, with directions to dismiss the petition.

#### GEORGE v. REAMS et al.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 11, 1898.)

#### APPEAL AND ERROR—WEIGHT GIVEN CHANCELLOR'S FINDING OF FACT.

On an issue between the widow and children of a decedent, as to whether the purchase price of land to which the decedent held the title was paid by his wife, so as to give her the benefit of the purchase, the chancellor's finding in favor of the children will not be disturbed; being fairly supported by the evidence, which is conflicting.

Appeal from circuit court, Laurel county.

"Not to be officially reported."

Action by D. S. Reams and others against Lydia George for a division of land. Judgment for plaintiffs, and defendant appeals. Affirmed.

Chas. R. Brock, for appellant. Hazelward & Parker, for appellees.

**HAZELRIGG, J.** The husband of the appellant died the owner of two tracts of land in Laurel county, one of which was occupied by him as a homestead, and has been so occupied by the appellant since her husband's death. The other tract, at the suit of the children of the deceased, has been divided among them; and from the judgment so dividing it the appellant prosecutes this appeal, insisting that she paid the greater part of the purchase price for this tract, and, while her husband took title to himself, he held it in trust for her. The issue thus presented is solely one of fact. The evidence is conflicting, and fairly supports the finding of the chancellor, to the effect that the children are the owners of the land, and not the appellant. Affirmed.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

#### BROWN et al. v. BROWN'S ADM'R.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 14, 1898.)

#### HUSBAND AND WIFE—PROFITS DERIVED BY HUSBAND FROM WIFE'S LAND—RIGHTS OF HUSBAND'S CREDITORS.

Profits arising from land held by the husband as trustee for his wife and children, and from which he is entitled to a support in conjunction with them, cannot be subjected to his debts; there being nothing to show that his labor and management contributed more than he was bound to contribute to the support of his family, or that the value of his labor was more than the cost of his support.

Appeal from circuit court, Hardin county.

"Not to be officially reported."

Action by Catherine Brown's administrator against D. M. Brown and Georgia A. Brown. Judgment for plaintiff, and defendants appeal. Reversed.

S. H. Bush and J. D. Irwin, for appellants. James Montgomery and C. H. Noggle, for appellee.

**PAYNTER, J.** The appellants, D. M. Brown and Georgia A. Brown, are husband and wife. The purpose of this action is to subject certain lands which were purchased and deeded to Georgia A. Brown to the payment of the debts of the husband, D. M. Brown. The land in controversy was either purchased with the money arising from the profits of a farm which the wife and her children owned, or with the money of the husband. The creditor sought to show that the husband had money at the time the wife and children became the owners, by devise, of a certain tract of land, upon which it is claimed the money was made to purchase the land in controversy. He also attempted to show that the husband had made money from fair privileges which he had purchased. The evidence in this record fails to show that D. M. Brown had any money or property with which to purchase the land when his wife and children acquired the land devised to them. It also fails to show that he made any money from the fair privileges with which he could have made the purchase. As the creditor wholly fails to show that D. M. Brown had any money at the time his wife and children acquired the land by devise, and as he failed to show that any money was made by him from the fair privileges, we must conclude that the money was made as claimed by Mrs. Brown. While the proof tends to show that the husband did some work upon the land, and helped carry on the farming together with hired men and the sons of Mrs. Brown, who also had an interest in the land, yet it fails to show that his labor and management contributed more than he was by law bound to contribute to the support of his family. Neither does the testimony show that the value of his labor amounted to more than the cost of his support. The land from

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

which the profits arose, as decided in a former appeal in this case (18 S. W. 521), is held in trust for Mrs. Brown and her children, and the husband is their trustee, and is entitled to reside with his wife and children on the land, and in conjunction with them derive a support therefrom. We are of the opinion that the testimony in this case is not sufficient to justify the court in depriving Mrs. Brown of the land which the lower court ordered sold to pay her husband's debt. The judgment is reversed, with directions that the petition be dismissed.

### WHITE et al. v. COLE et al.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 12, 1898.)

#### WILLS—UNDUE INFLUENCE—INSTRUCTIONS TO JURY—WRITING OF WILL BY DEVISEE.

1. In a contest of a will on the ground of undue influence, the evidence being conflicting, and sufficient to support a verdict for either party, a verdict for the will will not be set aside.

2. It is not error to fail to give an instruction upon a question as to which no instruction is asked.

3. A will devising the greater part of the estate to the husband of a deceased aunt, who had reared testator and had been his guardian, is not unreasonable; testator being unmarried, and having no living parent, brother, or sister.

4. A verdict for a will contested on the ground of undue influence will not be set aside because the will was written by the principal devisee; he having been a practicing lawyer, and having written other wills for relatives of the testator.

Appeal from circuit court, Powell county.

"Not to be officially reported."

Contest by J. S. White and others of the will of Lee Jake White. Judgment for J. G. Cole and others, the propounders, and the contestants appeal. Affirmed.

Bronston & Allen, J. A. Sullivan, and J. M. Benton, for appellants. Beckner & Jouett, for appellees.

GUFFY, J. This appeal is prosecuted from a judgment of the Powell circuit court adjudging a certain paper to be the last will and testament of Lee Jake White. It appears from this record that he was an unmarried man, without living parents, brothers, or sisters, that the appellee J. G. Cole was the husband of testator's aunt, and that said White was reared by said Cole and wife; Cole being his guardian. It further appears that the will was executed on Friday morning, and that the testator died Saturday night following; and it is insisted for appellants that he was not capable of making a will at the time the paper in controversy was signed and witnessed, and it is their further contention that appellee Cole had an undue influence over the testator. It will be seen from the will that the testator first desired that all of his just debts be paid, and then followed certain de-

vises, to wit: To Frank B. Russell, \$500; John Tompkins, \$250; Mrs. Georgia Tompkins, wife of John Tompkins, \$250, and his saddle horse; and to the children of William and Mattie Mahone the sum of \$1,000. The sixth item reads as follows: "I give and bequeath to my pa, John G. Cole, a promissory note which I hold against him, for the sum of \$1,500, and the accumulated interest, and do hereby direct my executors to deliver to him said note; and said sum of \$1,500 is not to be charged against said John G. Cole in the settlement of my estate." The said Cole and the testator's cousin Mary White were made residuary legatees of the testator. The evidence for and against the testamentary capacity of the decedent is quite voluminous and conflicting, and to some extent the same may be said to sustain the contention of appellants as to the undue influence of the appellee Cole; but it was the province of the jury to weigh and determine as to all these issues, and we are not authorized to disturb the verdict, there being sufficient evidence to have supported a verdict either for or against the appellants.

The exceptions to the instructions given are not tenable, for the reason that the instructions were as favorable to appellants as the law authorized, and in fact the same correctly presented the law applicable to the case on trial. No instruction was asked upon the question of fraud in obtaining the signature or execution of the will; hence the court did not err in that respect, if, indeed, the evidence would have authorized any such instruction. Nor do we think that the court erred to the prejudice of the substantial rights of the appellant in the admission or rejection of testimony.

Under the circumstances as developed in this case, the disposition of testator's property cannot be said to be unreasonable or irrational. The proof conduces strongly to show that the testator regarded Cole in the light of a parent; and, Cole's wife being dead, it was not unnatural that the testator should devise a large part of his property to his guardian, whom he seems to have regarded as a parent. Nor is the bequest to his cousin Mary White unreasonable. It is true that appellee Cole wrote the will, but it also appears that he had been a practicing lawyer, and had written other wills for relatives of the testator; hence it was not unreasonable that he should be called upon to write the will in question. Judgment affirmed.

### CAIN'S ADM'R v. OHIO VAL. TEL. CO.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 11, 1898.)

#### NEGLIGENCE—OBSTRUCTION OF STREET—PEREMPTORY INSTRUCTION.

A telephone company, in laying wires underground under a city ordinance granting per-

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

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mission to occupy the portions of the streets of the city necessary for that purpose, obstructed a part of a street, leaving open for travel a space of about 7½ feet between a manhole and the curbing. The cap of the manhole was partly removed, so as to extend into this open space. An experienced driver, with full knowledge of the surroundings, used this route when he might have used another, and in doing so his horse became frightened and shied, throwing him from the wagon to the street, causing his death. *Held*, that decedent assumed the risk, and that there can be no recovery for his death.

Appeal from circuit court, Jefferson county.

"Not to be officially reported."

Action by John Cain's administrator against the Ohio Valley Telephone Company to recover damages for the death of plaintiff's intestate. Judgment for defendant, and plaintiff appeals. Affirmed.

Pryor, O'Neal & Pryor and P. B. & Upton W. Muir, for appellant. Phelps & Thum and Humphrey & Davie, for appellee.

BURNAM, J. This is an action for damages by the personal representative of John Cain for the death of his decedent, which is alleged to have been brought about by the negligence of appellee. The particular acts of negligence complained of are: That defendant had removed the heavy iron cover from its manhole, located near the northwest corner of Eighth and Green streets, leading to the underground conduit which had been prepared for its wires; that it had stretched a rope from a capstan located at the northwest corner of the streets named into the manhole, so as to obstruct the street between the manhole and the northeast corner, leaving a space of only about seven feet between the manhole and the northwest corner for the passage of vehicles; and that it had further obstructed the street on that side by placing the cap partially over the hole, but so as to project into the street on the west side of the hole. And it is alleged that deceased, in attempting to drive through the narrow space, under the direction of the agents and servants of appellee, struck the iron cover with the wheel of his wagon, and that the collision frightened his team so that they jumped forward, causing the wheel of his wagon to strike against the curbing on the opposite side of the street, and a telephone pole which stood near the curbing, which so jarred the wagon that he was thrown from his seat to the street, and that he died from the effects of the fall. After appellant's evidence had been introduced on the trial, the court below sustained a motion made by appellee for a peremptory instruction; and, appellant's motion for a new trial having been overruled, this appeal is prosecuted.

The only question on this appeal is, did the proof authorize the giving of the peremptory instruction? The record discloses that the city of Louisville had by ordinance required appellee to put its wires underground, and

had given it time in which to do so, and permission to occupy the portions of the streets of the city necessary to accomplish this purpose; that the underground conduit had been constructed, and the street restored to its original condition; that manholes had been left in the street, about three feet long and something less than two feet wide, on the corners of each square, to enable the telephone company to place its wires in the conduit and keep them in order, and that these holes had been covered by heavy iron caps, which, when placed in proper position, were level with the surface of the street. The accident occurred about 1 o'clock p. m. on a bright day, and at a time when the employes of appellee were drawing a telephone wire through the conduit between Eighth and Ninth streets. To do this, they had fastened the end of the wire to a rope that had been run through the conduit from Eighth to Ninth street, and which came out of the manhole at the corner of Eighth and Green streets, and was attached to a windlass located a little east of Eighth on Green street. Eighth street is paved with asphalt, and in order to get a firm footing for the windlass, or capstan, it was necessary to place it on Green street, which was constructed of bowlders and gravel. The effect of stretching the rope from the manhole at the corner of Eighth and Green streets to the windlass was to barricade a part of Eighth street on the east side of the manhole, and leave open for travel a space of about 7½ feet between the manhole and the curbing on the west side of Eighth street. The testimony shows that there was some sort of framework around the manhole, and that the cap was not taken entirely from over the hole, which was over 3 feet long and about 22 inches wide, but was moved sufficiently to allow the rope running to the windlass to come out of the hole, and therefore projected, to some extent, onto the space left open on the west side. Deceased was driving a large, two-horse wagon northwardly on Eighth street, on his way to Fifth and Main streets. When he arrived at Green street, which intersects Eighth at right angles, he stopped his team, and waited until a wagon which was coming towards him, going south on Eighth street, had passed between the manhole and the curbing on the west side, the space not being sufficient for both wagons to go through at the same time. After this wagon had passed by, he started to drive through the opening, when suddenly his horses became frightened and shied, causing the left wheel of his wagon to run against the curbing on the opposite side of the street, and to strike a telephone pole which stood near it, so violently as to throw him from his seat into the street, alighting on his head, which produced concussion of the brain, from which he died. The testimony shows that deceased was an experienced driver in the city, and that he knew he could reach his

destination, Fifth and Main streets, by going east on Green street to either Seventh, Sixth, or Fifth street, and then proceed north, and thus avoid passing through the narrow opening between the manhole and the curbing. There was no necessity for him to have taken the route over Eighth street, and there is no testimony that he was either induced or directed so to do by the agents and servants of appellee. It is perfectly clear that he took this course voluntarily, and with a full knowledge of the surroundings, as it was daylight, and there was nothing to obstruct his vision. The evidence does not disclose clearly what frightened the horses and caused them to shy,—whether it was the manhole itself, the barricade around the hole, or the cap, which one of the witnesses seems to think the wheel ran over. However this may be, appellee was engaged in its lawful work, under an ordinance of the city giving it express authority to use so much of the street as might be necessary, and it seems to us that it used every reasonable precaution to protect the public from accident. It could not have anticipated, and it cannot be held responsible because the horses driven by deceased suddenly shied in passing through the opening, and ran the wheel of the wagon against the curbing, which resulted in the death of deceased. Deceased knew the risk he was running in attempting to drive through the opening, and voluntarily assumed that risk, and the accident which followed was not the direct or proximate result of any negligence on the part of appellee; and the peremptory instruction was properly given. Wherefore the judgment is affirmed.

JENKINS v. LOUISVILLE & N. R. CO.  
et al.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 15, 1898.)

CARRIERS—INJURY TO PASSENGER IN SLEEPING CAR—PEREMPTORY INSTRUCTION.

1. Where the evidence tended to show that plaintiff, while a passenger in a sleeping car, was injured by the falling of the partition plank which separated the berth in which he was sitting from that in front of him, it was error to give a peremptory instruction for defendants, railroad and sleeping-car companies, though the porter testified, without contradiction, that he had securely fastened the plank, and the evidence showed that it could not fall when thus fastened, there being no explanation as to how it fell out of place.

2. Where the evidence conduces in any degree to establish a right to recovery, it is error to give a peremptory instruction for defendant.

Appeal from circuit court, Jefferson county.  
"To be officially reported."

Action by Norburn B. Jenkins against the Louisville & Nashville Railroad Company and the Pullman Palace-Car Company to recover damages for personal injuries. Judgment for defendants, and plaintiff appeals. Reversed.

O'Neal & Pryor, W. B. Dixon, and Kohn, Baird & Spindle, for appellant. Lyttleton Cooke, for appellee Louisville & N. R. Co. Phelps & Thum, for appellee Pullman Palace-Car Co.

BURNAM, J. Appellant brought this suit against the Louisville & Nashville Railroad Company and the Pullman Palace-Car Company to recover damages for an injury alleged to have been sustained while he was a passenger on one of the railroad company's trains, and occupying a berth in the sleeping car of the Pullman Company. He had paid to the railroad company his fare from Nashville to Louisville, and had also paid for and been assigned a berth in a car of the Pullman Company; and he alleges that, while occupying his seat therein and leaning forward engaged in reading, he received a violent blow on the back of his head, caused by the falling of the headboard, or partition plank, which separated the berth in which he was sitting from that in front of him, and that by reason of this blow his health and sight have become permanently impaired, and that he has been compelled to incur large expense in trying to be cured from the effects of the injury, which he alleges was caused by the negligence and wrongful acts of the appellees. The railroad company in its answer denied every affirmative fact alleged in the petition; and further alleged that, if appellant received the injury complained of, it was wholly in consequence of his own negligence and misconduct. The Pullman Company filed its separate answer, in which it denied all the affirmative averments of the petition; and further averred that, at the time of the alleged injury, it had furnished a suitable and proper car, which was provided with all the necessary and usual safeguards for the protection and comfort of its passengers; that the partition planks, or headboards, provided in the car, were adjusted and put in place after the usual and customary manner, and were provided with all the safeguards and protections known to the most skillful manufacturers of such cars and of such partition planks, or headboards; that it had also provided a competent and skillful employé to put the headboards, or partition planks, in place, and that at the time the accident is alleged to have occurred he had placed in its place, in the customary and proper manner, the headboard which is claimed to have fallen on the appellant; and that, if any injuries were received by the appellant from the falling of this headboard, they were received without negligence on its part. The pleadings being made up, and the case tried, at the conclusion of the testimony the circuit judge gave to the jury a peremptory instruction to find for the defendants, and judgment was entered accordingly, and we are asked on this appeal to reverse that judgment.

Upon the trial appellant testified that while

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

he was sitting in the seat of the berth that had been assigned to him, leaning forward, reading, the partition plank, or headboard, which divided the berth he occupied from the one in front of him, suddenly, and without previous warning, fell, and struck him on the head; that the blow knocked him down between the seats of the berth, and that the porter and the occupant of the berth directly opposite took the headboard off of him and replaced it; that as the immediate result of this blow on the head he experienced considerable pain and sickness of the stomach, which resulted in vomiting and quite a severe contusion; that when he arrived in Louisville on the next day he consulted with Dr. Skinner in regard to his injury, who examined him, and prescribed for him, after seeing him twice; that shortly afterwards he left Louisville, and went to Henderson, Ky., where he consulted Dr. Dickson, who examined him and treated him for the same injury; that as a result of the injury he has been compelled to abandon his profession as a dentist, and has experienced great suffering and permanent injury to his health. H. M. Tindel testifies that he had been sitting talking with appellant in his berth some time; that between 9 and 10 o'clock he retired to his berth, which was opposite that of appellant; that he left appellant sitting up reading a book, and that a short time after he had retired he heard the noise of something falling; that he looked across, and saw that the headboard between the berth occupied by appellant and the one immediately in front had fallen down, and was lying upon the back and head of appellant, who had been knocked down between the seats, on his hands and knees; that he called the porter, who came back from the front end of the car, and placed the board in its proper position; that he observed that the appellant was looking very pale, and that he complained of being sick at the stomach during the night. Dr. Skinner testifies that he saw appellant the next day in Louisville, and that his attention was called to a tender spot and a little swelling on the back of his head, and that he prescribed for him; that about 10 days afterwards he saw appellant again, and that he looked sick and emaciated, and seemed quite feeble, and that he thought the injuries resulting from the blow had developed into a form of meningitis, permanently impairing appellant's health. And substantially the same testimony is given by Dr. Dickson, who treated him after his return to Henderson.

It is insisted for appellees that it is shown by the uncontradicted testimony of their carpenter and the porter of the sleeping car that these headboards were so constructed and were so fitted in place (there being grooves

in the board which fit upon projecting beads on the stationary part of the car) as to make it a physical impossibility for it to fall out of place, after it had been once properly put in and fastened, and that the uncontradicted testimony of the porter is to the effect that the board was not only placed properly, but was securely fastened; and it is further contended that, even if this board had fallen from its place, as claimed, it was a physical impossibility for it to have struck appellant as testified to by him; and that these physical facts present in the case are sufficient to overcome the evidence of the witnesses who testified for the appellant, and to justify the peremptory instruction given by the court.

Even if it be conceded, from the testimony, that the mechanical contrivances for keeping this partition board in its place were the very best known, and were sufficient for that purpose, still the question remains, was it actually so placed and secured by the catches? The only witness who testifies on this point is the porter, and he admits that the board had in some way gotten out of its place, and no explanation is given by the testimony as to how this occurred. It is suggested that it was the work of the appellant, and was a part of a scheme on his part to defraud appellee and the accident insurance company, but, at best, this theory is based only on conjecture. There is no testimony that appellant unfastened these locks, or in any way tampered with the headboard; and, when this is coupled with the testimony that the board did in some way get out of its proper place, to appellant's injury, a presumption arises, in the absence of other satisfactory proof, of negligence on the part of appellees, for which they are liable. See *Railroad Co. v. Smith*, 2 Duv. 556; *Cooley. Torts*, p. 663; *Ray, Neg. Imp. Duties (Pass. Carr.)* p. 681; *Railroad Co. v. Walrath*, 38 Ohio St. 461; and *White v. Railroad Co.*, 144 Mass. 404, 11 N. E. 552. The rule has often been announced by this court that it is the province of the jury to determine the weight of evidence and the credibility of the witnesses, and that where the evidence conduces in any degree to establish a right of recovery it is error to give a peremptory instruction to find for defendant. See *Railroad Co. v. Howard's Adm'r*, 82 Ky. 212, and *Hammill v. Railroad Co.*, 93 Ky. 344, 20 S. W. 263. The testimony in this record is not of that conclusive and undisputed character where but one reasonable inference can be drawn from it, and the application to this case of the rules of law laid down for the guidance of courts in cases of conflicting testimony authorized its submission to the jury. For the reasons indicated the judgment is reversed, with directions to grant the appellant a new trial, and for proceedings consistent with this opinion.

EATON v. HUNT.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 12, 1898.)

## FORCIBLE ENTRY AND DETAINER—WHEAT CONSTITUTES RELATION OF LANDLORD AND TENANT.

September 20, 1894, H. and E. entered into a contract by which H. agreed to sell E. a farm for a named price when H. should obtain a deed from court to E. It was stipulated that E. rented the farm for the year 1894, but, if deed should be made, no rent to be paid, and, if the deed should not be made during the year 1894 or 1895, the contract to be void, "as regards the sale of the land," and E. to give possession on or before December 25, 1895. H. failed to obtain deed within the stipulated time. *Held*, that the relation of landlord and tenant existed, and H. was entitled to enforce restitution by writ of forcible detainer.

Appeal from circuit court, Barren county.

"Not to be officially reported."

Writ of forcible detainer by M. R. Hunt against Leonard Eaton. Traverse of finding, and judgment of circuit court awarding restitution, from which defendant appeals. Affirmed.

Boles & Duff and W. S. Pryor, for appellant. Thos. H. Hines, for appellee.

WHITE, J. The appellant and appellee on September 20, 1894, entered into a written contract by which it is stipulated and agreed that Hunt is to sell Eaton a certain farm in Barren county for the price of \$925 when Hunt is enabled to make deed, or obtains a deed from court to Eaton. It is also stipulated that Eaton rents the farm for the year 1894, for a part of the produce. There is a reservation to Hunt of a room on the place, to be occupied by him, so as to retain his homestead. The contract contains this stipulation: "When said deed is made and tendered to Eaton, then said Eaton is to pay said Hunt the purchase price of the land, which is nine hundred and twenty-five dollars. In the event that said Hunt fails to get the court to make said deed during the year 1894 or 1895, then this contract is null and void, as regards the sale of the land. If said deed is made, and the purchase price paid direct into said Hunt's own hands, personally, then said Eaton is to pay no rent for said farm; otherwise the said Eaton is to pay Hunt one-third of any and all produce raised on the farm, and one-fourth of the tobacco. In the event that said Hunt fails to make said deed, then said Eaton is to give Hunt peaceable possession of the place on or before Dec. 25, 1895." The deed was never made, and in January, 1896, the appellee, Hunt, sued out a writ of forcible detainer; appellant refusing to surrender the possession. On the trial before the justice, on the premises, the jury returned a verdict of guilty of the forcible detainer complained of, and upon that verdict restitution was awarded. Appellant, Eaton, traversed the verdict and the judgment of the justice, and took the case to the circuit court.

A trial was had in the circuit court, and a verdict of guilty was again returned, and judgment was rendered thereon, awarding restitution. After appellant's reasons and motion for new trial had been overruled, he prosecutes this appeal.

Counsel for appellant urge a reversal of the judgment for the reason that the relation of landlord and tenant is not shown to exist, and that in any event the verdict is flagrantly against the evidence. We are of opinion that by the written contract, the execution of which is admitted, the relation of landlord and tenant did exist. There is express provision for rent, and the amount of rental, and a day certain when the tenancy expired. This payment of rent was contingent, to the extent that, if the purchase price was paid to Hunt personally, no rent would be exacted. The expiration of the tenancy was contingent upon the date of the deed; and, if no deed was made, then to expire December 25, 1895. But it is said there is a contract of sale of the land. This contract of sale was also contingent upon Hunt being able to perfect title during the years 1894 or 1895. If the deed was not made before the close of the year 1895, the contract, as regards the sale, was to be null and void. Before this writ of forcible detainer was sued out, the contract for the sale, by its very terms, was null and void, and the possession was due to appellee, Hunt. Appellant insisted in the lower court that Hunt did not in good faith try to perfect title and make the deed to appellant, and therefore was not entitled to recover. The court permitted proof on this point, and instructed the jury thereon, and the verdict was adverse to appellant on this issue. We are not prepared to hold the verdict is flagrantly against the evidence. As it occurs to us, from the proof, it would have been wholly immaterial how much good faith appellee had used in trying to procure the deed as contemplated. His efforts would have been unavailing without a satisfaction of the mortgage lien on the land. At the time this writ was sued out, there could be no other relation existing than landlord and tenant. The contract of sale, by its express terms, was nullified, and could not afterwards be enforced. Appellant was not a trespasser. He went on the land under a contract with the owner. He had no right to remain longer, under the contract. There appearing no error, the judgment is affirmed.

DONALDSON v. SECURITY TRUST & SAFETY-VAULT CO et al.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 11, 1898.)

## STATUTES—TIME OF TAKING EFFECT—AMENDMENT OF STATUTE REGULATING JURISDICTION OF COURT OF APPEALS.

As the act of March 14, 1898, providing that no appeal shall be taken from a judgment

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

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for the recovery of money or personal property, if the value in controversy be less than \$200, exclusive of interest and costs, did not take effect until 90 days after March 17, 1898,—the date of adjournment of the general assembly,—it does not apply to an appeal granted in the lower court within that time.

Appeal from circuit court, Fayette county.  
"Not to be officially reported."

Action by A. H. Donaldson against M. F. Hopkins and the Security Trust & Safety-Vault Company. Judgment dismissing action as to the Security Trust & Safety-Vault Company, and plaintiff appeals. Motion to dismiss appeal overruled.

Hobb & Scott, for appellant. Falconer & Falconer, for appellee.

LEWIS, C. J. The judgment in this case was rendered, and appeal from it granted, in the lower court, May 31, 1898; the transcript being filed in the clerk's office of this court, and tax paid, June 27, 1898. By an act of the general assembly approved March 14, 1898, it is provided that "no appeal shall be taken to the court of appeals from a judgment for the recovery of money or personal property, if the value in controversy be less than two hundred dollars, exclusive of interest, cost," etc. But the act did not take effect and come in force until 90 days after adjournment (March 17, 1898) of the general assembly. Therefore, as judgment in this case, though for less than \$200, was rendered and appeal granted before termination of that period, neither the right of appeal nor the jurisdiction of this court was affected by the statute; for the motion for an order of the lower court granting the appeal, to which appellant was then entitled as matter of right, was, we think, in the meaning of the statute, taking the appeal. The motion to dismiss the appeal upon the ground of want of jurisdiction is overruled.

#### HARRIS-SELLER BANKING CO. v. BOND.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 15, 1898.)

PRINCIPAL AND SURETY—INDULGENCE TO PRINCIPAL—AMENDMENT OF PLEADINGS.

1. A surety is released by the granting of indulgence to the principal, for a valuable consideration, without his consent, if the creditor had notice of the suretyship at the time, though he did not have such notice when the note was executed.

2. It was not an abuse of discretion to permit an amended answer to be filed, to conform the issues to the proof.

Appeal from circuit court, Woodford county.

"Not to be officially reported."

Action by the Harris-Seller Banking Company against Boliver Bond on certain promissory notes. Judgment for defendant, and plaintiff appeals. Affirmed.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Ed. M. Wallace and Chas. M. Harris, for appellant. D. T. Edwards, for appellee.

HAZELRIGG, J. When sued by appellant on two promissory notes signed by one Wilson and himself, appellee pleaded (1) that he was merely the surety of Wilson, and that for a valuable consideration the appellant, without his knowledge or consent, agreed not to sue on or collect the notes for a given time; and (2) that, by agreement with appellant, appellee was discharged from liability on the Wilson notes in consideration of his procuring Wilson's discharge on certain other notes to another bank. The proof conduces to show, not only that Bond was merely the surety on the notes sued on, but that the bank knew it, and did forego collection of them for a valuable consideration paid to it by Wilson without the knowledge or consent of the surety, and, further, that the agreement between appellee and Wilson as to releasing the former from liability on appellant's notes was communicated to appellant, and approved by it, and appellee was notified that appellant would no longer look to him for payment of the notes, but would look alone to Wilson. The instructions properly submitted the issues to the jury. It is contended that the bank had no notice that appellee was merely surety, but we think the proof conduces to show otherwise. It may not have had such notice when the notes were executed, but it had it when the arrangement for indulgence was entered into. Of this there is direct and unequivocal proof.

There seems to have been no abuse of discretion in permitting the amended answer to be filed, as it sought merely to conform the issues to the proof. Judgment affirmed.

#### MELTON v. BROWN et al.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 15, 1898.)

VENDOR AND PURCHASER—ENFORCEMENT OF LIEN BEFORE ALL OF PURCHASE MONEY IS DUE—PRESUMPTION AS TO DIVISIBILITY OF PROPERTY—AUTHORITY OF GUARDIAN AD LITEM.

1. Under Civ. Code, § 694, subsec. 3, providing that where several debts secured by one lien are held by the same person, and all are not due, the court may order a sale of enough of the property to pay the debts due, unless it appear that it is not susceptible of advantageous division, it will be presumed, in the absence of proof to the contrary, that a house and lot in a city or town are not susceptible of advantageous division, and the court should not order a sale thereof until all of the purchase money is due.

2. A guardian ad litem was not authorized to consent to a sale of his ward's real estate to satisfy notes for purchase money before the maturity thereof.

Appeal from circuit court, Webster county.  
"Not to be officially reported."

Action by W. D. and T. H. Brown against Ora Melton to enforce a vendor's lien on land.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Judgment for plaintiffs, and defendant appeals. Reversed.

Towery & Browning, for appellant. F. M. Baker, for appellees.

BURNAM, J. On September 7, 1893, J. T. Melton purchased of L. A. Melton a house and lot in the town of Sebree City, fronting Main street 50 feet, and running back 250 feet, in consideration of the sum of \$550, for which he executed notes due as follows: March 1, 1894, \$200; March 1, 1895, \$100; March 1, 1896, \$100; March 1, 1897, \$100; and March 1, 1898, \$50. Previous to his death, J. T. Melton had paid the first two notes. The note due March 1, 1896, and the one due March 1, 1897, were sold and transferred by L. A. Melton to one Bud Ramsey, and by him sold and transferred to W. D. Ramsey, and by the latter they were sold and transferred to W. D. Brown. The \$50 note due March 1, 1898, was sold and transferred to Bud Ramsey, and by him it was sold to W. D. Ramsey, by whom it was sold to T. H. Brown; and on the 16th day of April, 1896, W. D. and T. H. Brown instituted their suit in equity, alleging the death of the payor, and that he had left surviving him, as his only heir at law, the infant defendant, Ora Melton, and asked a sale of the property to satisfy all the unpaid notes for purchase money. The infant defendant having no statutory guardian, a guardian ad litem was appointed, who filed his answer consenting to a judgment for a sale of the property, alleging that it would be for the best interests of the infant to have the house and lot sold; and, pursuant to this judgment, a sale of the property was made on the 15th day of June, 1896, for the sum of \$350. Exceptions were filed to the confirmation of this sale by Mrs. Esther Melton (grandmother of the infant), as next friend, who was made a defendant, the chief ground relied on being that the sale was made to satisfy the notes for purchase money not due. Her exceptions were overruled, and the sale confirmed, and this appeal is prosecuted, asking a reversal.

In construing subsection 3 of section 694 of the Civil Code, this court has decided (*Faught v. Henry*, 13 Bush, 471; *Leopold v. Furber*, 84 Ky. 214, 1 S. W. 404; and *Gentry v. Walker*, 93 Ky. 405, 20 S. W. 291) that, in an action to enforce a vendor's lien, this court will presume that a house and lot in a city or town is not susceptible of advantageous division, and that a court should not order a sale thereof, in the absence of proof showing this fact, until all the purchase money is due. Guardians ad litem appointed to represent infant defendants cannot waive or admit away any of the substantial rights of their wards. It is their duty to make a vigorous defense, and they must demand and insist upon strict proof of a plaintiff's case. See 10 Enc. Pl. & Prac. p. 675, and authorities there cited. And the guardian ad litem in this case was not authorized to consent to a sale of his ward's real estate to satisfy notes for purchase mon-

ey before the maturity thereof. The record shows that the property was sold for materially less than the original purchase price, and the court erred in entering judgment for a sale of the house and lot to satisfy installments of the purchase money not due, and in overruling the exceptions of appellant to the sale made pursuant thereto. For these reasons the judgment must be reversed, and the cause is remanded, with directions to set aside the sale, and for proceedings consistent with this opinion.

#### SIBLEY v. HOLCOMB.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 15, 1898.)

DEEDS—SIGNATURE PROCURED BY FALSE REPRESENTATION AS TO CONTENTS—FALSE REPRESENTATION BY OFFICER TAKING ACKNOWLEDGMENT.

1. One of several grantors in a deed is not liable on a warranty therein, where his signature and acknowledgment to the deed were procured by the false representation of the deputy clerk, as grantee's agent, that it was only a quitclaim deed.

2. Where a grantor who is illiterate signs and delivers a deed upon the faith of its false reading to him by another, or a false representation as to what it contains, it is not his deed, whether or not the person who makes the false representation is the grantee's agent.

Appeal from circuit court, Letcher county.

"To be officially reported."

Action by H. W. Sibley against John Holcomb for breach of a covenant of a warranty in a deed. Judgment for defendant, and plaintiff appeals. Affirmed.

Thomas H. Hines, for appellant. Holt & Holt and Tyree & Adams, for appellee.

HAZELRIGG, J. The Holcombs—O. G., H. C., and John—claimed to be the owners of some 200 acres of land in Letcher county under a survey made, it appears, subsequently to other surveys and patents to Altemus and others. While so claiming the land, O. G. and H. C. Holcomb sold to Sibley a number of trees standing thereon, and executed to him a deed of general warranty therefor. Sibley paid the purchase price to O. G. Holcomb, and it does not appear that John Holcomb had any connection with the transaction or got any benefit therefrom. When approached by Fairchild, the deputy clerk, to obtain his acknowledgment of the deed, he declined to sign it on the ground that he had no confidence in the title obtained under the Holcomb survey, and had no interest in the transaction. He was assured by Fairchild that it was only a quitclaim timber deed, and passed no interest nor affected him in any way, unless he did have some interest under the survey. He could not read or write, and signed the instrument, with his wife, upon the assurances of Fairchild. It turned out to be a deed of general warranty,

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

and, when sued by Sibley on the warranty, he pleaded that the deed had been obtained by the false representations of Fairchild, who in this matter was acting for Sibley. The proof conduces to show that one Kroll was the general agent of Sibley in the purchase of land and timber in Letcher county, but that, in some cases, deeds and checks were delivered to Fairchild, who was to obtain the acknowledgment to the deed, and then deliver the checks to the parties entitled thereto. In the present instance he was intrusted with the check for the purchase price of the timber, which was payable to O. G. Holcomb, and was to deliver it to him after obtaining the acknowledgment of all the Holcombs. In all this, save taking the acknowledgments, he was clearly not acting in his official capacity, but acting for Sibley; and it is fairly inferable from the proof that Fairchild's instructions were to obtain deeds of general warranty from the Holcombs before delivering the check, and it is not unlikely his pay for this extra work depended on getting such a deed. At any rate, John Holcomb was induced to sign it solely on the misstatements of Fairchild, acting for Sibley, in procuring the deed, and, as he received nothing, he is not liable on the alleged warranty.

But, aside from the question of Fairchild's agency, the instrument was not in fact the deed of appellee, in the form it is in, and was properly held by the chancellor to be only a quitclaim. In Pol. Cont. p. 401, the principle is there illustrated: A layman who was unlettered had a deed tendered to him which he was told was a release for arrears of rent only. The deed was not read to him. To this he said, "If it be no otherwise, I am content," and so delivered the deed. It was in fact a general release of all claims. It was adjudged that the instrument was not his deed. The effect is that if an illiterate man have a deed falsely read over or falsely represented to him, and he then signs and delivers it, it is nevertheless not his deed. Judgment affirmed.

#### JEWELL et al. v. KIRK et al.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 10, 1898.)

INFANTS — GUARDIAN AD LITEM — ENTIRE JUDGMENT — ERROR AS TO ONE OF SEVERAL DEFENDANTS.

1. It would have been erroneous to enter judgment establishing a public road as against an infant landowner for whom no guardian ad litem had been appointed.

2. A judgment establishing a public road over land belonging to different defendants is an entirety, and, if erroneous as to any one of defendants, must be reversed as to all.

3. On appeal to the circuit court from an order of the county court establishing a public road, it is proper to dismiss the case if all the parties were not properly before the court.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Appeal from circuit court, Martin county.

"Not to be officially reported."

Special proceeding in the county court by George Jewell and others against Sampson Kirk and others to establish a public road. Order establishing road, and defendants appealed to the circuit court. Judgment dismissing proceeding, and plaintiffs appeal. Affirmed.

Kirk & Kirk, for appellants.

DU RELLE, J. This proceeding was instituted in the Martin county court by Jewell and others, appellants here, for the purpose of establishing a public road. Commissioners were appointed, who made report, assessing the damages, and summons was issued against the owners of the land over which the road was to pass to show cause against the establishment of the road. The summons was returned executed on the defendants named, except Ellen Kirk, "and on Ellen Kirk by delivering to W. T. Cain, attorney for her, a nonresident, December 1, 1894." A summons was also issued to Pike county, with no name of any person to be served, and was returned, "Executed on Ellen Kirk, this Jan. 25, 1895." An affidavit was made that Ellen Kirk was not 21 years of age, and W. T. Cain was appointed guardian ad litem, and filed an answer for Sally Kirk, instead of for Ellen Kirk, but not in the form provided by the Code. No order appointing Cain guardian ad litem for Sally Kirk appears in the record, nor does he appear to have filed an answer as guardian ad litem for Ellen Kirk. Copies certified by the clerk of the Martin county court are filed with the brief of appellants' counsel of an order setting aside the order appointing Cain guardian ad litem for Ellen, and of another order appointing him guardian ad litem for Sally Kirk, and it is claimed by counsel that the order setting aside Cain's appointment as guardian for Ellen was because of the discovery that Ellen was not a minor, and that Sally was. Obviously, however, this court cannot consider the copies filed with the brief.

An order was made by the county court establishing the road. The landowners appealed to the circuit court, which sustained a motion to quash the summons and return of service thereof executed on Ellen Kirk in Pike, and the sheriff's return of service on W. T. Cain, as attorney for Ellen Kirk, and dismissed the proceeding, with costs, upon the ground that Sally Kirk was shown by the record to be an infant, and had no guardian ad litem, and that Ellen Kirk was not before the court. Upon the hearing of the motion to quash the petitioners offered in evidence "the following record or order of the Martin county court, which does not appear in the transcript, viz.: 'Martin County Court, February 11, 1895. George Jewell & Others, Plaintiffs, against Sampson Kirk & Others, Defendants. Order. The defendant Ellen Kirk, by att'y, produced and

filed exceptions to the commissioners' report.' The commissioners' report would indicate that the appellees were the joint owners of the lands over which the proposed road was to pass. Clearly, it would have been erroneous to enter a judgment establishing the road as against Sally Kirk, for whom no guardian ad litem appeared to have been appointed; and, this question having been made in the circuit court, if such appointment had been made, it could have been there shown. But it is urged as ground for reversal that Ellen Kirk was shown to have entered her appearance by her attorney, by filing exceptions to the commissioners' report, and that the court erred in setting aside the judgment of the county court as against the defendants who were served with process, and failed to file exceptions. But it seems to us that an order opening a public road, whether over a single tract jointly owned by several, or over separate parcels owned severally, is an entirety, and erroneous if all the parties over whose land the road passes are not before the court. It follows, therefore, that it was not error—the case being tried de novo in the circuit court—to dismiss the case for the reason that all the parties were not properly before the court; wherefore the judgment is affirmed.

**PRUDENTIAL INS. CO. v. LEYDEN'S ADM'X.<sup>1</sup>**

(Court of Appeals of Kentucky. Nov. 17, 1898.)

**LIFE INSURANCE—APPLICATION BY ONE PERSON IN NAME OF ANOTHER—IMMATERIAL MISREPRESENTATIONS—INSURABLE INTEREST.**

1. Where a niece made application for insurance in the name of her aunt, and, after answering the questions in the application, requested the agent to see the insured in person, and the agent subsequently informed her that he had done so, and had the insured examined by a physician, the company cannot, after receiving dues from the niece for 18 months, avoid payment of the policy because of the false statement of the niece that her aunt had not had asthma, there being no testimony showing that death was produced by that disease.

2. Where the insurance is for the benefit of the estate of insured, it is immaterial that the person who took out the policy and paid the premiums had no insurable interest.

Appeal from circuit court, Jefferson county. "Not to be officially reported."

Action by Jane Leyden's administratrix against the Prudential Insurance Company on a policy of life insurance. Judgment for plaintiff, and defendant appeals. Affirmed.

J. M. Chatterton, for appellant. J. W. S. Clements, for appellee.

**BURNAM, J.** The Prudential Insurance Company seeks to have reversed a judgment of the Jefferson circuit court making it liable for a policy of insurance issued by it upon

the life of Jane Leyden for the sum of \$108, upon the ground that Annie Mullen, her administratrix, fraudulently stated in the application made therefor that the deceased had not suffered from the disease of asthma. The proof in the record conduces to show that Annie Mullen, the plaintiff in this action, was the niece of decedent, who earned her living by working in a laundry; that she could not write; that the agent of appellant sought her out, and persuaded her to make application in the name of her aunt for the insurance, wrote down her answers to the printed questions appearing in the application, and signed the name of the insured, the niece only making her mark thereto; that he was informed that the insured was an inmate of the Home of the Little Sisters of the Poor, and was requested to go to see her in person; that subsequently he informed appellee that he had seen the aunt, and had had her examined by a physician; and that for 18 months after the application was accepted the defendant company regularly collected from appellee 20 cents each week as a payment of dues on the policy. It is evident from all the proof in the case that the appellant was not deceived or misled by any answer made in the application, and it should not, after receiving the benefit of all it was entitled to from appellee, be permitted to avoid the payment of the policy on the ground of what appears to be an immaterial matter, as there is no testimony that the death of the insured was traceable to or produced by asthma; the death certificate of the attending physician showing that she died of organic heart disease.

It is insisted for appellant that the niece has no insurable interest in the life of the deceased, but it seems to us that this contention can have no application to the facts of this case. The policy was not taken out upon the life of the aunt for the benefit of the appellee, but for the benefit of the estate of the insured, and this suit is in the name of her administratrix.

Upon careful consideration of the whole case, we conclude that the verdict of the jury herein should not be disturbed. Wherefore the judgment is affirmed.

**DRESSMAN v. SEMONIN et al.<sup>1</sup>**

(Court of Appeals of Kentucky. Nov. 16, 1898.)

**MUNICIPAL CORPORATIONS—ASSESSMENT FOR PUBLIC IMPROVEMENTS—PRIORITY OVER MORTGAGE LIEN.**

A lien on abutting property for the cost of constructing a sewer has priority over a mortgage lien on the property, though the mortgage was executed before the improvement was made.

Appeal from circuit court, Kenton county. "To be officially reported."

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Action by Georgella Semonin and others against Ben Dressman and others to enforce a mortgage lien. Judgment for plaintiffs, and defendant Ben Dressman, who asserted a prior lien, appeals. Reversed.

D. A. Glenn, for appellant. Simmons & Simmons and J. H. Stuart, for appellees.

WHITE, J. The appellees, being lienholders, by mortgage, on certain property in the city of Covington, instituted an action for foreclosure, and subsequently made appellant a party, alleging that he claimed a lien of some kind on the same property, and asked that he assert the same. Appellant filed answer and cross petition, asserting a lien for certain local improvements made in building a sewer; and, upon trial had, this claim was allowed, and he was adjudged a lien for \$84. A sale of the property was adjudged to satisfy all the liens, but the judgment adjudges that the mortgage liens are superior to appellant's lien for improvement, and from that part of the judgment only this appeal is taken. So the only question presented is as to priority. The correctness of the judgment for the improvement, or any question as to the regularity or validity of the ordinances under which it was made, is not before us on the appeal, and there is no cross appeal. Appellees filed grounds, and moved to dismiss the appeal for want of jurisdiction; but that motion was overruled, and the case was submitted on the merits.

We are of opinion that the opinion in the case of Dressman v. Bank (decided Feb. 3, 1897) 38 S. W. 1052, is decisive of this case. The court there says: "We hold in this case that appellee took the mortgage on the lots in question subject to the power of the city to require said lots to bear their proportion of the expense of constructing the streets on which they fronted, and that appellant was entitled to have his claim for such construction paid first out of the proceeds of the sale of such lots." Appellees insist that as the improvement in this case was a sewer, and not a street, the case *supra* has no application. We fail to see any distinctive difference. Both are public improvements made under the same authority, and of course are governed by the same rules. For the reasons given in the case of Dressman v. Bank, *supra*, the judgment is reversed, and cause remanded, with directions to adjudge appellant priority of his lien, and for proceedings consistent herewith.

#### PARK v. HUMPICH et al.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 17, 1898.)

PARTIES—CONSTRUCTION OF DEED—GRANTEE IN VOID DEED AS NECESSARY PARTY TO ACTION.

1. Under a deed conveying land to M., in trust for his wife "and the issue of his body,"

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

the wife being dead, the only child of M. is the sole beneficiary, and her children, having no interest, are not necessary parties to an action to enforce a lien on the land.

2. A deed conveying to the grantor's wife land which he held in trust for a former wife and "the issue of his body" passed no interest, and the grantee therein was not a necessary party to an action to enforce a lien on the land.

Appeal from circuit court, Jefferson county. "Not to be officially reported."

Action by V. & B. Humpich & Co. against Joseph S. Murray and Sallie R. Hicks to enforce a lien on land. Judgment confirming the sale of land, and W. S. Park, the purchaser, appeals. Affirmed.

M. A., D. A. & J. G. Sachs, for appellant. John I. Calloway and J. C. Miller, for appellees.

LEWIS, C. J. Appellees having, under contract with the city of Louisville, improved a portion of Shelby street, by making a pavement, obtained an apportionment warrant against Sallie R. Hicks, owner of a lot of land abutting on that part of the street improved, and within the boundary liable for cost of the improvement. Subsequently they brought this action to subject said lot to payment of so much as was duly and legally assessed against the owner thereof for said improvement, said Sallie R. Hicks, B. R. Hicks, her husband, Joseph S. Murray, and the city of Louisville being made defendants, and, under a judgment of the court, the lot was sold, W. S. Park becoming purchaser. But he resisted confirmation of the sale, upon the grounds that Sallie R. Hicks was not owner of the lot, and a good title thereto could not in this action be made to him as purchaser; and the court having overruled his exceptions, and adjudged he shall pay the purchase price, this appeal is prosecuted.

The lot in question was originally purchased and paid for by Joseph S. Murray, father of Sallie R. Hicks, who caused it to be conveyed to himself as trustee for his wife, Sue R. Murray, and the issue of his body. Sallie R. Hicks was at date of the deed and is now the only child of Joseph S. Murray; and her two children, who appellant contends are necessary parties to this action, were not born until long after the death of Sue R. Murray and execution of deed. Sallie R. Hicks, upon the death of her mother, became sole cestui que trust and beneficiary of the lot, and, before the death of her father without other children, will become sole owner of the fee; for under the deed, as we construe it, the word "issue" means, and was intended to describe, the child or children of the donor. So, her children have no present or remainder interest in the land, and are not necessary parties to the action. Whatever they may hereafter have will be acquired through her. Besides, as both the trustee and present beneficial owner are parties to the action, the lien of appellees on the lot is enforceable, and the title and possession

appellant may obtain under the judicial sale cannot be affected or disturbed by the children of Sallie R. Hicks.

It appears that subsequent to the date of the deed, and the death of Sue R. Murray, Joseph S. Murray married one Kate Gelpin, from whom, however, he was divorced. But during that coverture he undertook to convey title of the lot in controversy to his wife, Kate. Assuming all the facts shown by this record to be true, Kate Gelpin did not, in our opinion, acquire title or right to possession of the lot, and was not an indispensable party to this action. Judgment affirmed.

#### DAY'S ADM'X v. DAVIS.

DAVIS v. DAY'S ADM'X et al.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 16, 1898.)

EXECUTORS AND ADMINISTRATORS — PRIORITY OF  
LIEN FOR ATTORNEY'S FEE OVER  
MORTGAGE—USURY.

1. A mortgage lien on the land of a decedent, enforced in an action brought by the administrator to settle the decedent's estate, has priority over the lien of the administrator's attorney for his fee.

2. Interest in excess of the legal rate should be credited on the principal as of the time of payment.

Appeals from circuit court, Jefferson county.

"Not to be officially reported."

Action by Eliza Day, administratrix of James Day, for a settlement of decedent's estate. Judgment sustaining certain exceptions to the commissioner's report of settlement, and overruling certain other exceptions; and plaintiff and David Davis, who filed a cross petition, prosecute separate appeals. Reversed.

Maxwell Davis and Otto Wehle, for appellant Davis. C. B. Seymour, for appellant administratrix.

GUFFY, J. These two appeals, by consent, are heard together; both being from a judgment of the Jefferson circuit court, chancery division. James Day died in 1892, and Eliza Day was appointed administratrix. It appears that decedent left no personal estate subject to distribution, but was the owner of some real estate in Louisville, Ky., upon which David Davis and others held mortgage liens. It further appears that the Loraine lodge of Independent Order of Odd Fellows instituted suit for a settlement of the estate of the decedent, and David Davis, by cross petition, asserted a mortgage lien upon the real estate; and it further appears that at the instance of the administratrix said suit was dismissed, and that on the 2d of November, 1893, she instituted suit for a settlement of the estate of said decedent, and that the same was referred to the master commis-

sioner for settlement. David Davis asserted his mortgage lien for the sum of \$3,500, evidenced by note and mortgage of date July 1, 1880, with interest at 6 per cent., payable semiannually, with interest due from July, 1892. The administratrix, in her reply, among other things, alleged that Davis had collected interest upon said sum of \$3,500 at the rate of 7 per cent. per annum from the 1st of July, 1880, until the 1st of July, 1892, and pleaded and relied upon the statute in such case made and provided, and asked that the note be purged of usury, all of which was denied by rejoinder of Davis. After the issues were all made up, and proof taken, the commissioner, in his report, allowed Davis the full amount of his claim, except 1 per cent. for six months, and also allowed to the administratrix \$500 attorney's fee for her attorney, the appellee Kutzlub, which claim was to be subordinate to the mortgage lien of said Davis. To this report both Day's administratrix and Davis excepted, but the court overruled the exception of the administratrix of Day as to the claim of Davis, and rendered judgment in favor of Davis for the amount of his claim, as stated, and for an enforcement of his lien upon the real estate; and from that judgment the administratrix of Day has appealed. The court below sustained the exception of Davis to the allowance to Day's administratrix for the \$500 fee to Kutzlub, to the extent of reducing the claim to \$300, but adjudged that the same was superior to the claim of Davis, and must be first paid out of the proceeds of the mortgaged property; and from the judgment so allowing the priority Davis prosecutes an appeal.

It will be seen that the only questions presented for decision are as to the correctness of the latter judgment in regard to the fee of Kutzlub, and as to the judgment in favor of Davis. We are inclined to the opinion that \$300 was a proper and reasonable fee to Kutzlub for the services rendered to the administratrix in the discharge of her duties, and for such services as she received at his hands. But it is insisted, for Davis, that the \$300 should not take precedence of his claim,—in other words, that Davis' mortgage lien must be first satisfied, before any part of said fee could be paid out of the proceeds of the mortgaged property. It seems to us that, under the facts and circumstances as developed in this case, the mortgage lien of Davis is superior to the said attorney's fee, and must be paid first. We deem it unnecessary to enter into a discussion of this question, for the reason that it seems to us that the opinions in the cases of *Kentucky National Bank v. Louisville Bagging Co.*, 98 Ky. 371, 33 S. W. 101, and *Milward v. Shields* (Ky.) 43 S. W. 184, conclusively settle that the attorney's fee in contest is inferior in dignity to the mortgage lien of Davis. The judgment of the court below, adjudging that said fee be paid out of the proceeds of the mortgaged

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

property before the mortgage claim of Davis is paid, is reversed.

As to the claim of usury in the note held by Davis, it may be said that there is some conflict of proof; but, taking all the proof and circumstances into consideration, it seems to us that the proof establishes the fact that 7 per cent. was collected upon the \$3,500 from the 1st of July, 1880, until the 1st of July, 1892, and that 1 per cent. thereof was usurious, and that the usurious interest so paid should be credited upon the debt at the time of payment, which seems to have been semiannually. The judgment rendered in favor of Davis is therefore reversed, and the cause remanded, with directions to render judgment in his favor, subject to the credit for usurious interest, as herein indicated. No other appeals have been prosecuted from the judgment and orders of the court below in this case. They all therefore remain unaffected by this opinion. Cause remanded for further proceedings consistent herewith.

#### HOLLINGSWORTH v. WARNOCK.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 17, 1898.)

##### PLEADING—SELF-DEFENSE—GROUNDS FOR NEW TRIAL—VERDICT AGAINST EVIDENCE.

1. An answer denying that defendant, "not in his self-defense, carelessly and wantonly, or carelessly or wantonly, shot and killed the husband of the plaintiff with a pistol," pleads that the killing was done in self-defense.

2. Where one armed with a deadly weapon, and ready to fight, provokes an assault by insulting language, he has no right, when assaulted with a mere blow of the fist, to at once shoot his assailant.

3. The assignment, as a ground for new trial, that the decision is against the law, is too general to be considered.

4. Where the evidence showed that the killing for which plaintiff sought to recover damages was neither accidental nor in self-defense, a verdict for defendant should have been set aside as against the evidence.

Appeal from circuit court, Greenup county. "Not to be officially reported."

Action by Julia Hollingsworth against Denny B. Warnock to recover damages for the killing of plaintiff's husband. Judgment for defendant, and plaintiff appeals. Reversed.

John F. Hager and John M. Burns, for appellant. B. F. Bennett, W. J. Worthington, and A. E. Cole & Son, for appellee.

HAZELRIGG, J. The appellant, the widow of John Hollingsworth, avers in her petition, in substance, that the appellee, not in his self-defense, carelessly and wantonly shot and killed her husband with a pistol loaded with powder and ball, or other hard substance, by reason of which she was deprived of his protection, etc. The appellee denied that "he, not in his self-defense, carelessly and wantonly, or carelessly or wantonly, shot and killed the husband of the plaintiff with

a pistol loaded with powder and ball, or other hard substance, or with any other instrument so loaded, or at all." The words "not in his self-defense" may be taken as qualifying everything that follows them, and they would then qualify the words "carelessly and wantonly," and "carelessly or wantonly," and the words "at all." The plea would therefore be that the killing was done in self-defense.

The testimony introduced by the plaintiff conduces to show: That in answer to an inoffensive inquiry by Ed Hollingsworth of the appellee, as to "what was the matter," he replied, "None of your business, you d—d, pot-gutted s—n of a b—h"; and, according to one witness, at the same time appellee began to draw his pistol, at which time Ed Hollingsworth struck appellee with his fist, knocking him back some feet, and against a stove. That friends of both parties then caught them, but that as appellee straightened up he fired his pistol; the ball striking and killing John Hollingsworth, the father of Ed Hollingsworth, who had, with others, advanced to separate the appellee and his son. That, at the time of the shot, neither Ed Hollingsworth nor any one else was advancing on appellee, and he was in no danger. But, aside from this testimony, the testimony of none of appellee's witnesses conduces to show that he was in any danger at the time the shot was fired, but, on the contrary, had been separated from his adversary, who exhibited no weapon of any kind. Appellee himself testifies that he did not shoot at any one; that he drew his pistol because he had been assaulted by Ed Hollingsworth, and believed he was in danger, but the pistol was immediately grabbed by those around him, and was then discharged. As he did not shoot at any one, it cannot be said that he shot in self-defense. Moreover, it is not the law that one armed with a deadly weapon, and ready to fight, may provoke an assault by insulting language, and, when assaulted with a mere blow of the fist, at once shoot his assailant. The appellee, it may be observed, was a deputy sheriff, whose duty it was to preserve the peace, not to break it. After instructions objected to by the appellant, but not complained of in her grounds for a new trial, the jury found for the defendant.

The only grounds for new trial are that the verdict is not sustained by the evidence, and the decision is against the law. We are not told what decision is against the law, and need not consider this ground further. *Jones v. Woche*, 90 Ky. 230, 13 S. W. 911; *Railroad Co. v. McCoy*, 81 Ky. 403; *Meaux v. Meaux*, 81 Ky. 475. It is clearly true that the evidence does not support the verdict, if based on the plea made by the appellee, namely, that of self-defense; nor is the verdict supported by the pleadings, so construed. But let us consider the case—as the lower court seems to have done—as if the killing were attempted to be excused by the answer on

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

the ground of an accidental killing, done not carelessly or wantonly. This view was submitted to the jury under an instruction objected to by appellant, but, as we have seen, not made the basis of complaint in the motion for new trial. All the witnesses for appellant, as well as a number for appellee, prove that the appellee fired the shot; and, while the appellee certifies that "they grabbed the pistol," he does not pretend to say that by such grabbing the weapon was in fact discharged. He only attempts to make that impression. And he introduces those who did the grabbing, and they prove that appellee fired the shot. There is therefore very scant proof, if any, to the effect that the shot was fired accidentally. It is, in fact, made to appear very conclusively to the contrary. We are thereupon of the opinion that, construing the pleadings as we may, and broadening the defense to the extent most favorable to the appellee, as indicated in the instructions, there is not sufficient evidence to sustain the verdict, and the finding is flagrantly against the weight of the testimony. The judgment is reversed for a new trial on principles consistent with this opinion.

PAYNTER, J., not sitting. GUFFY, J., concurs.

**BEAN et al. v. MEGUIAR et al.<sup>1</sup>**  
(Court of Appeals of Kentucky. Nov. 17, 1898.)

**APPEAL—RES JUDICATA—JUDICIAL SALES—SIGNING OF REPORT BY DEPUTY COMMISSIONER.**

1. On appeal from a judgment confirming a sale of land, the question as to the sufficiency of the description of the land in the judgment ordering the sale is *res judicata*, that judgment having been affirmed on a former appeal.

2. A judgment subjecting a debtor's interest in land under a will having been affirmed on appeal on the presumption that the will—not copied in the record—authorized the judgment, the question as to whether the debtor's interest under the will was subject to his debts is *res judicata* on appeal from a judgment confirming the sale of the land.

3. A sale of land will not be set aside because the deputy master commissioner signed the report of sale in his own name, instead of in the name of the master commissioner, by himself as deputy.

Appeal from circuit court, Montgomery county.

"Not to be officially reported."

Action by Meguiar, Helm & Co. against Ann E. Bean and others to recover land purchased at execution sale. Judgment confirming sale of land made under a judgment setting aside the execution sale, and ordering a resale of the land, and defendants appeal. Affirmed.

For former report, see 29 S. W. 306.

Woodford & Chenault, for appellants. Tyler & Apperson, for appellees.

**BURNAM, J.** This appeal is taken from a judgment of the lower court overruling ap-

pellants' exceptions to the report of a sale of real estate made by the deputy master commissioner of the Montgomery circuit court under a judgment of that court. The grounds of exception are: First, that the description of the property ordered to be sold is too indefinite and uncertain; second, that appellant Ann E. Bean, the widow of James Bean, deceased, had no interest in the tract of land, or any part thereof, under the will of her husband, which was liable to sale to satisfy the debts of the creditors, and that the judgment erroneously deprived Grace Bean and the other children of the provision made for them by the will of their father; and, third, that the report of the sale was signed in the name of H. Clay Cooper, deputy commissioner of the Montgomery circuit court, instead of in the name of the master commissioner, by H. Clay Cooper, deputy. This is the second appeal which has been prosecuted to this court from the judgment under which this land was sold. Upon the former appeal (29 S. W. 306) this court said: "The will of James Bean is not copied into the record; hence it must be presumed by this court that the will authorized the judgment of the lower court. This being true, and it appearing that the execution was valid, and appellees had paid the amount bid for the life estate in the land, the judgment of the court below seems to be in accordance with the law and facts, and is therefore affirmed." And a petition for rehearing in that case was overruled. The opinion upon the former appeal is decisive of the rights of the parties to this appeal upon all questions involving the validity of that judgment, as on a second appeal this court will not go behind the first decision, and decide a question which was, or could have been, raised on the first appeal, unless the question were one that was expressly left open for future litigation. See *Hackworth v. Thompson*, 3 Ky. Law Rep. 254; *Burns v. Stephenson*, Id. 754; *Davis v. McCorkle*, 14 Bush, 746; *Smith v. Brannin*, 79 Ky. 114; and *Alsop v. Adams*, 10 Ky. Law Rep. 362. We cannot, therefore, consider on this appeal the questions raised by either the first or second exceptions to the report of sale, as they are *res judicata*, notwithstanding the fact that upon that appeal this court did not consider the will of James Bean, deceased, or determine the rights of appellants growing out of the third clause thereof.

The third ground of exception is that the report of sale is incorrectly signed. Ky. St. § 400, provides for the appointment of a deputy commissioner, who is required to take the same oath as the master commissioner, and who is authorized to perform all the duties of the master commissioner; and, while this exception may be technically correct, yet the error complained of was in no way prejudicial to the rights of appellant, as the deputy seems substantially to have conformed to the requirements of the judgment under which the sale was made. For the reasons indicated, the judgment is affirmed.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.



**PURSIFULL v. COMMONWEALTH.<sup>1</sup>****(Court of Appeals of Kentucky. Nov. 15, 1898.)****INTOXICATING LIQUORS—LOCAL OPTION — REPEAL OF STATUTE—JUDGMENT BY DEFAULT IN MISDEMEANOR CASE.**

1. All local prohibitory liquor laws have been repealed by the general local option law as to the penalties imposed thereby.

2. Under Code Cr. Prac. § 258, providing that in verdicts of guilty the jury shall fix the degree of punishment to be inflicted, "unless the same be fixed by law," it is error to render judgment by default without the intervention of a jury, where the statute gives a discretion as to the amount of the fine between certain limits.

3. The prohibitory liquor law applicable to Bell county was repealed as to the city of Pineville by the provision of the charter of cities of that class authorizing the city council to grant license to sell liquors.

4. Where an indictment for selling liquor in violation of a prohibitory liquor law charged that the liquors were sold in Bell county, "outside of the city limits of Middlesborough, and without a license from the city council of Pineville," defendant having made default, a jury should have been impaneled to determine the question of his guilt, and also to fix his punishment if found guilty, as the penalty for selling liquor in the county outside the cities of Middlesborough and Pineville was different from that for selling in the city of Pineville without a license, and it did not appear from the indictment where the liquor was sold.

Appeal from circuit court, Bell county.

"Not to be officially reported."

Charlie Pursifull was convicted of the offense of selling liquor in violation of a local prohibitory law, and appeals. Reversed.

Calvin Hurst, for appellant. W. S. Taylor and M. H. Thatcher, for appellee.

**PAYNTER, J.** The indictment charges the appellant, Pursifull, with selling spirituous liquors, etc., in violation of certain local acts prohibiting the sale of spirituous, vinous, and malt liquors in the counties of Bell, Harlan, Perry, and Leslie. He gave bond for his appearance to answer the indictment, and, having failed to appear, the court rendered judgment against him by default. The court did not hear evidence on the subject of his guilt. Neither was a jury impaneled to fix the punishment. The court imposed a fine of \$100. Under the doctrine of the case of *Stamper v. Com.* (Ky.) 42 S. W. 915, the penalty to be imposed for selling liquors in violation of local statutes is that imposed by the general law.

It is insisted that the court could not render judgment by default, because the degree of punishment to be inflicted in such cases is not "fixed by law." Section 258, Code Cr. Prac., reads as follows: "In verdicts of 'Guilty,' or 'For the commonwealth,' the jury shall fix the degree of punishment to be inflicted, unless the same be fixed by law." In *Com. v. Cheek*, 1 Duv. 27, it is said "that, as the trial on an indictment for a misde-

meanor may be had in the absence of the defendant (section 185), his failure to appear upon the call of the indictment for trial will have the same effect as his failure to plead after the overruling of his demurrer; and that, in either case, final judgment should be entered against him without the intervention of a jury, except where the punishment is not definitely fixed by law, and where, for that reason, a jury is necessary to fix the punishment." Under this opinion, judgment can be rendered by default in a misdemeanor case without the intervention of a jury, except where the punishment is not definitely fixed by law, in which case it is necessary to impanel a jury to fix the punishment. This court said in *Herron v. Com.*, 79 Ky. 39, that section 258, Code Cr. Prac., means "that if the law fixes the punishment, leaving no room for discretion on the part of the jury as to its kind or extent, then the law does not require them to fix the degree of punishment in their verdict."

Section 1304, Ky. St., reads as follows: "Any person who shall, without license so to do, sell or otherwise dispose of spirituous, vinous, or malt liquors, shall, for each offense, be fined not less than twenty nor more than one hundred dollars." Section 2357, *Id.*, provides, where the question of the sale of liquors has been submitted to the voters of a county, city, town, district, or precinct, and the vote is adverse thereto, then any person who shall sell liquors in such territory shall be fined in the sum of not less than \$100 nor more than \$200 for each offense. Under each of these sections there is a minimum and maximum penalty for their violation. If a party is tried and found guilty, then it would be discretionary as to what the punishment should be, within the limitations prescribed. Under these sections, the punishment is not fixed by law, in contemplation of section 258, Code Cr. Prac. The defendant was entitled to have impaneled a jury to determine what his punishment should be; therefore the court erred in rendering judgment against him by default.

The indictment charges that the liquors were sold "outside of the city limits of Middlesborough, and without a license from the city council of Pineville." In *Brown v. Com.* (Ky.) 34 S. W. 12, the court held that the city council of Pineville, by virtue of the provision of the law enacted for the government of cities of that class, was authorized to grant a license to sell liquors. The act conferring such authority repealed the prohibitory statute, in so far as it affected the territory embraced in the corporate limits of that city. As the prohibitory law no longer exists within the corporate limits of the city of Pineville, a sale of liquors therein, without a license authorizing it, would subject the party to a penalty imposed by section 1304, which is not less than \$20 nor more than \$100 for each offense. The legislature regarded as sufficient the penalty as stated

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in counties, cities, and districts where the law authorizes a license to be granted. In the counties, towns, districts, and precincts where prohibitory laws are in force, the penalty for selling liquors is fixed at a sum of not less than \$100 nor more than \$200 for each offense. It will be seen from this that, if the appellant sold liquors within the corporate limits of the city of Pineville, he subjected himself to a fine of not less than \$20 nor more than \$100; and if he sold it in Bell county, outside of the cities of Pineville and Middlesborough, a fine could be imposed of not less than \$100 nor more than \$200. There is no bill of exceptions in this case showing where the liquor was sold, if at all. We think the court erred in not impaneling a jury to determine the question of the guilt of the defendant, and, if found guilty, the punishment to be inflicted. The judgment is reversed for proceedings consistent with this opinion.

# MONTGOMERY COUNTY FISCAL COURT v. TRIMBLE.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 2, 1898.)

ELECTIONS—VOTE ON PROPOSITION AS TO INCURRING COUNTY DEBT—STARE DECISIS—OVERRULED CASES.

1. Under Const. § 157 (providing that no county shall be permitted to become indebted to an amount exceeding, in any year, the income and revenue provided for such year, "without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose"), to authorize an indebtedness in excess of the limit prescribed, the assent of two-thirds of the voters voting on that question is sufficient, it not being necessary to have the assent of two-thirds of the voters voting at the same time for public officers. *McGoodwin v. City of Franklin* (Ky.) 38 S. W. 481, and *City of Owensboro v. Baker* (Ky.) 37 S. W. 1129, overruled; and *Belknap v. City of Louisville*, 36 S. W. 1118, 99 Ky. 474, overruled in part.

2. When a question involving important public interests has been passed upon on a single occasion, and the decision cannot be said to have been acquiesced in, it is the duty of the court, when properly called upon, to re-examine the questions involved, and to overrule the former decision if convinced that it was incorrect.

Guffy and Du Relle, JJ., dissenting.

Appeal from circuit court, Montgomery county.

"To be officially reported."

Action by John G. Trimble against the Montgomery county fiscal court to enjoin defendant from issuing bonds. Judgment for plaintiff, and defendant appeals. Reversed.

Turner & Hazelrigg, Kennedy & Williamson, and Norvell & Robertson, for appellant. G. E. Coons, for appellee.

PAYNTER, J. Under "An act to provide free turnpike and gravel roads," approved March 17, 1896, there was submitted, at the

November election, 1897, to the voters of Montgomery county, the proposition as to whether or not they were in favor of issuing bonds for the purchase and maintenance of the turnpike roads of the county, free of toll to the traveling public. There were 1,920 votes cast for this proposition, and 185 against it. At that election for county and state officers there were cast, in the aggregate, 3,060 votes. This action involves the construction of section 157 of the constitution, which reads as follows: "\* \* \* No county shall be authorized or permitted to become indebted, in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose. \* \* \*"

There are two opposing views presented for our consideration. One is that it required two-thirds of all the votes cast at that election to give the fiscal court the right to issue bonds to purchase and maintain turnpike roads in the county, free of toll to the traveling public. The other is that when two-thirds of the voters voting on the proposition to issue bonds, etc., voted for it, the assent which the constitution required had been obtained.

Section 157 of the constitution does not make any reference to a general election. It limits the power of a city, town, county, and taxing district in the amount of taxes which shall be levied and collected, and prohibits them from becoming indebted in any year to an amount exceeding the income and revenue for such year, without the assent of two-thirds of the voters of such city, town, county, or taxing district, voting at an election to be held for that purpose. Previous to the present constitution, when a question was submitted to the voters as to whether a tax should be imposed or an indebtedness incurred, a majority of those voting on the question determined whether or not the tax should be levied or an indebtedness incurred. Indeed, the court cannot recall an instance in which the assent of a greater number than a majority of those voting was required to be obtained to impose a tax or authorize an indebtedness to be contracted; neither can it recall an instance in which the general assembly required a majority of the electors of a city, town, or county to give their assent to a proposition before taxes could be levied or an indebtedness incurred. It is a fundamental principle in our system of government that its affairs are controlled by the consent of the governed; and, to that end, it is regarded as just and wise that a majority of those who are interested sufficiently to assemble at places provided by law for the purpose shall, by the expression of their opinion, direct the manner in which its affairs shall be conducted. When majorities are spoken of, it is meant a majority of those who feel an interest in the government, and

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who have opinions and wishes as to how it shall be conducted, and have the courage to express them. It has not been the policy of our government, in order to ascertain the wishes of the people, to count those who do not take sufficient interest in its affairs to vote upon questions submitted to them. It is a majority of those who are alive and active, and express their opinion, who direct the affairs of the government; not those who are silent, and express no opinion, in the manner provided by law, if they have any. Before reaching a conclusion that those who framed our fundamental law intended to change a well-settled policy by allowing the voter who is silent and expresses no opinion on a public question to be counted the same as the one who takes an interest in and votes upon it, we should be satisfied that the language used clearly indicates such a purpose.

The constitutional convention thought it wise to require that the assent of two-thirds of those who voted upon the question of a municipality or a county incurring an indebtedness beyond its yearly income and revenue should be obtained. Partly for the purpose of taking from the general assembly the power to authorize a majority to control in such matters, section 157 was incorporated in the constitution. It is nowhere said in this section that the assent of two-thirds of the electors of the county, or two-thirds of those who may vote for candidates to fill offices, must be obtained before the indebtedness can be incurred. The language used does not even suggest the idea that the assent of two-thirds of the electors must be obtained. Besides, we cannot believe that the constitutional convention intended that some tribunal should be established to ascertain the number of electors in a county, and then require the assent of two-thirds of them to a proposition for the county to incur an indebtedness. That would introduce a new rule in this state,—one which would require accurate information, which is almost impossible to obtain. If it had been intended that two-thirds of those who might vote for candidates to fill offices and on other questions should be obtained, some language would have been employed to have clearly expressed that idea. If it had said the county could not incur an indebtedness "without the assent of two-thirds of the electors thereof," we would understand that an elector's failure to vote was equivalent to voting against the proposition. If it had said "without the assent of two-thirds of the voters thereof," voting at an election, we would be of the opinion that, when the word "election" was used, it referred to the proposition upon which the vote was to be taken. To avoid the necessity of the court determining the meaning of the word "election," as used, the constitutional convention added, immediately after the word "election," words as follows: "To be held for that purpose." So, the language used in the constitution is as follows, to wit:

"That the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose."

The consensus of judicial opinion is that, when an election is held at which a subject-matter is to be determined by a majority of the voters entitled to cast ballots thereat, those absenting themselves, and those who, being present, abstain from voting, are considered as acquiescing in the result declared by a majority (here two-thirds) of those actually voting, even though, in point of fact, but a minority of those entitled to vote really do vote. The fact that the election was held for the purpose of obtaining the necessary assent of two-thirds of the voters to the proposition on the day of the general election to fill offices does not change the rule of interpretation, nor, if so required to be held, does it show a purpose to require the assent of two-thirds of those who vote for officers and on other questions at the election. To so interpret the language used is to disregard its plain import and the current of judicial decisions in this country. If it meant that the assent of two-thirds of those voting at the general election for officers and on other questions was necessary to authorize the county to incur an indebtedness, then it was unnecessary and improper to allow any one to vote "No" on the proposition who may have voted for officers at that election. The general assembly took the view expressed of the section of the constitution under consideration, because the act under which the election was held provides: "If two-thirds of the legal voters voting on said proposition vote in favor of the proposition, then said fiscal court shall issue bonds as provided herein."

The question in *Armour Bros. Banking Co. v. Board of County Com'rs of Finney County*, 41 Fed. 322, arose under a statute authorizing the creation of an indebtedness, provided the question was "submitted to a vote of the people at some general election, and if a majority of all the votes cast at the polls opened for that purpose shall be in favor of such assessment, then the debt may be created." The court said: "The only question involved is a construction of said section. Does it mean a majority of all the votes cast, or a majority of all the votes cast on that subject? There were 2,887 votes cast for county and state officers at said election, and only 1,527 on the matter of buying a farm and raising an assessment to pay for the same,—1,133 votes in favor, and 394 against. The defendant insists that, to justify the board of county commissioners in contracting the debt, it should have received a majority of all the votes cast at said election: while the plaintiff insists that only a majority of all the votes cast on that subject was required. The law says: 'Unless the amount of taxes to be assessed shall be submitted to a vote of the people at some general election, and a majority of all the votes

case at a poll opened for that purpose shall be in favor of such assessment.' The words 'a majority of all the votes cast' do not mean cast at a poll opened for the purpose of a general election, but cast for the purpose of such assessment, at a poll opened for that purpose. If the meaning had been otherwise, instead of saying 'at a poll opened for that purpose,' the words 'at said election,' after the word 'cast,' would have clearly expressed the meaning defendant contends for. It is probable the law contemplates a separate poll or ballot box, but undoubtedly the same poll could be used as was used for county and state officers. Reading the statute in this manner solves the problem. The following authorities amply support the conclusion that only a majority of the votes cast on the subject of the assessment were required: *Commissioners v. Winkley*, 29 Kan. 36; *State v. Echols* (Kan. Sup.) 20 Pac. 523; *Cass Co. v. Johnston*, 95 U. S. 369; *Walker v. Oswald* (Md.) 11 Atl. 711; *Gillespie v. Palmer*, 20 Wis. 544; *Sanford v. Prentice*, 28 Wis. 358."

In *Metcalfe v. City of Seattle*, 1 Wash. 301, 25 Pac. 1013, the court had under consideration a question involving the construction of a provision of the constitution of the state authorizing a city to increase its indebtedness "upon the assent of three-fifths of the voters therein voting at an election to be held for that purpose." It said: "In response to the second question, we have not the least hesitation in answering that the three-fifths majority required to carry an election in favor of increasing municipal indebtedness is three-fifths of those persons who actually vote at the election, and not three-fifths of all those who have the right to vote thereat. The language of the constitution is that no municipal corporation shall become indebted beyond one and one-half per cent. of its taxable property without the assent of three-fifths of the voters therein voting at an election to be held for that purpose.' How could words be plainer? It is three-fifths of the voters voting, not of all persons who might vote, but may or may not do so. The word 'therein,' placed between 'voters' and 'voting,' merely qualifies the persons who might vote, not the body of voters who must vote to constitute a lawful majority. At certain elections many persons residing outside of the city have their voting places assigned within the city limits; but, at at these particular elections, it is only the voters 'therein'—residing therein—who can vote. Perhaps a longer phrase might have served to remove all doubt from every mind, but to us the interpretation seems clear as it is."

In *Walker v. Oswald*, 68 Md. 150, 11 Atl. 712, the statute authorized the selling of spirituous liquors in a county, provided "a majority of the voters of said county shall determine by their ballots in favor of the high license law." The court said: "It thus appears, and in fact it is conceded, that the number of votes cast in favor of the high license law was not equal to a majority of all

the votes cast at the same election for the several candidates for congress, though the votes actually cast in favor of this law constituted a majority of all the votes polled on that particular subject. The single question, therefore, presented by this appeal, is whether, under these circumstances, the act became operative and effective; or, stated in other words, did the adoption of the act depend upon its receiving in its favor a majority of all the votes cast at that election upon some other subject or subjects, or upon its receiving a majority of the votes cast specifically for and against its adoption? It has been settled, both in England and in this country, by an almost, if not quite, unbroken current of judicial decisions from the time of Lord Mansfield to the present day, that, when an election is held at which a subject-matter is to be determined by a majority of the voters entitled to cast ballots thereat, those absenting themselves, and those who, being present, abstain from voting, are considered as acquiescing in the result declared by a majority of those actually voting, even though, in point of fact, but a minority of those entitled to vote really do vote. \* \* \* Conceding this to be true with respect to a special election held for the purpose of submitting a single question to the popular vote, it is insisted on the part of the appellant that a different principle should prevail in a case like this, where, at a general election, the measure, though receiving a majority of the votes cast on that subject, failed to receive a majority of the votes cast upon some other subject. Hence, as we have already stated, the sole ground upon which it is claimed that the act in question failed to become effective, is that, at the general election when the subject was voted on, less than a majority of those who voted for the congressional candidates cast their ballots 'for high license law,' and not that a majority of those who voted on this subject did not vote in favor of it. This objection to the adoption of the act is founded exclusively upon the construction which is sought to be placed upon the words of the eighth section, 'a majority of the voters of said county,' taken in connection with the evidence furnished by the vote on the congressional canvass, that there were more votes in the county than the number who voted upon this measure. If this construction, which confines the language to what is alleged to be its literal import, without reference to the provisions of the preceding section, is to prevail, it would be, it seems to us, as applicable in the case of a special election where but one subject is submitted, as it is claimed that it is in the case of a general election, where several subjects or persons are to be voted for; the only difference between the two instances being in respect to the evidence which might be adduced to ascertain the actual number of the voters of the county. In regard to a general election, it is urged that the highest aggregate vote cast

furnishes the evidence as to the number of the voters of the county. At a special election it is not improbable that only a minority of the voters, well known to be an unmistakable minority, may vote. This fact might be susceptible of proof,—might be in reality self-evident. Yet in the latter instance those who absent themselves from the polls, and those who, being present, abstain from voting, are regarded as assenting to the result declared by those who do vote. Upon what principle would it be incompetent to apply the same presumption to those who, though attending a general election and voting on other subjects, abstain from voting upon one particular matter like the act in question? The very concession that a minority may elect necessarily implies that there is a larger number of voters who do not vote, of whom that minority is merely a fraction. Hence, the admission that a majority of those entitled to vote did not vote does not preclude the minority who actually do vote from determining the result by their ballots."

In *Commissioners v. Winkley*, 29 Kan. 40, a statute was to go in operation, and, "if a majority of the votes cast are for the bounty, they shall declare said law to be in full force and effect." The proposition was voted for on the same day the general election for township officers in the county was held. The court said: "The electors who were present at the polls at the called election, and, while voting for township officers, did not vote upon the bounty proposition, are presumed to assent to the expressed will of the majority of those voting thereon."

The conclusion we have reached, and the opinions from which we have quoted, are supported by *State v. Barnes*, 3 N. D. 319, 55 N. W. 883; *Cass Co. v. Johnston*, 95 U. S. 360; *Carroll Co. v. Smith*, 111 U. S. 565, 4 Sup. Ct. 539; *Gillespie v. Palmer*, 20 Wis. 544; *Holcomb v. Davis*, 56 Ill. 413; *Smith v. Proctor*, 130 N. Y. 319, 29 N. E. 312. We are of the opinion that, when two-thirds of those voting upon the proposition to issue bonds voted therefor, the fiscal court was authorized to issue them for the purpose of buying and maintaining free turnpikes, unless there is some other legal or constitutional objection thereto not raised in this case. The case of *Belknap v. City of Louisville*, 99 Ky. 474, 36 S. W. 1118, is overruled in so far as it is in conflict with this opinion. The cases of *McGoodwin v. City of Franklin* (Ky.) 38 S. W. 481, and *City of Owensboro v. Baker* (Ky.) 37 S. W. 1129, are overruled. The result in the *Belknap* Case would have been the same had the court taken the view of section 157 which is herein expressed, because of the terms of the act and ordinance under which the election was held.

This question involves important public interests. The rights of the voters to determine, in the manner authorized by the constitution, what indebtedness, if any, municipalities or counties shall incur, should be

preserved. We have been called upon to re-examine the question involved, and, having reached a conclusion that the opinion heretofore expressed as to section 157 is incorrect, we think it proper to so adjudge. "When a question involving important public or private rights, extending through all coming time, has been passed upon on a single occasion, and which decision can in no just sense be said to have been acquiesced in, it is not only the right, but the duty, of the court, when properly called upon, to re-examine the questions involved, and again subject them to judicial scrutiny. We are by no means unmindful of the salutary tendency of the rule *stare decisis*; but at the same time we cannot be unmindful of the lessons furnished by our own consciousness, as well as by judicial history, of the liability to error and the advantages of review." *Cooley, Const. Lim.* (5th Ed.), note to page 65. The judgment is reversed for proceedings consistent with this opinion.

GUFFY, J. (dissenting). It will be seen from the record and opinion in this case: That at the November election, 1897, the following proposition was submitted to the voters of Montgomery county, to wit: "Are you in favor of issuing bonds for the purchase and maintenance of turnpikes of this county, free of toll to the traveling public?" On that proposition 1,920 voters voted "Yes," and 185 voted "No." That at said November election for county and state officers, and upon all questions to be then determined, there were cast 3,000 votes. It further appears that the appellee, Trimble, instituted an action in the Montgomery circuit court seeking an injunction to restrain the fiscal court of Montgomery county from issuing any of said bonds. A demurrer was filed to the petition, which was overruled by the court below, and the appellant prosecutes this appeal.

The majority opinion of the court reversed the judgment of the court below, and holds that the votes cast at said election authorized the fiscal court to issue the bonds; thus overruling the decision of this court in *Belknap v. City of Louisville*, 99 Ky. 474, 36 S. W. 1118, rendered June 13, 1896, as well as some other decisions which follow that case. It will be observed that the vote in question was taken while the decision *supra* was in full force, which, in effect, said to the voters of Montgomery county who attended the election, that "you need not go to the trouble of voting on the bond question, for if you vote at the election at all, and refrain from voting on the bond issue, you will be counted against it." It seems to me that it can neither be law nor justice for this court to now adjudge that the bond proposition had been carried or authorized by the vote cast, when in fact, according to the solemn decision of this court, in full force at the time of the election, the proposition was unquestionably

defeated. I recognize and fully indorse the proposition that all erroneous decisions, if any, which have been or may hereafter be rendered by this court, should be overruled. There can be no more reason for allowing an erroneous decision to stand than exists for the continuance of a statute which ought never to have been enacted. But I am of the opinion that the case of *Belknap v. City of Louisville* correctly expounds or construes the constitution of this state. I am frank to say that some of the decisions of courts of other states may have sometimes construed constitutional provisions somewhat similar to the one under consideration to mean what the majority opinion in this case holds the meaning of our constitution to be; but I fully indorse the expression used by this court in response to a petition for rehearing recently delivered in the case of *Louisville & N. R. Co. v. Com.*, 47 S. W. 598, which in substance says that this court will construe for itself the true meaning of its own constitution and laws. Moreover, if we had adhered to the decision in the *Belknap Case*, the other courts would probably have adopted our construction of the language under consideration.

It is a well-settled rule of construction of all constitutional provisions, as well as of statutes and contracts, that the circumstances and conditions surrounding the parties at the time are to be taken into consideration if there be any ambiguity as to the wording of such provisions, laws, or contracts. It can hardly be denied that much wrong and oppression had resulted to the property holders of the state by reason of elections being authorized at which bonds and debts were allowed by vote to be imposed upon the citizens of different counties and taxing districts. It is well known that the framers of our present constitution were cognizant of these deplorable evils and burdens, and in good faith attempted to prevent a repetition of such wrongs. And it was the boast of the advocates of the new constitution that its provisions would protect the people from the imposition of enormous burdens imposed by the votes of the people for the benefit of corporations, or those who were booming or promoting so-called "improvements" for the public good; and it is my opinion that the enormous majority given for the adoption of the new constitution was due more to reliance upon such statements than to any other cause.

Section 179 of the constitution seems to prohibit any county, etc., from becoming a stockholder in any company, association, or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, or individual, except for the purpose of constructing or maintaining bridges, turnpike roads, or gravel roads. Section 157 of the constitution fixes the tax rate of cities, towns, and counties, and, after specific provisions in regard thereto, provides as follows: "No county, city, town, taxing district, or other municipality, shall be authorized or per-

mitted to become indebted, in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void. Nor shall such contract be enforceable by the person with whom made; nor shall such municipality ever be authorized to assume the same." When we consider the manifest object of the constitution, and viewing it in the light of current history, it seems to me that the manifest intention as expressed in the foregoing section was to prohibit a county from becoming indebted in any manner in excess of the revenue authorized by the section supra, without the consent of two-thirds of the voters thereof. The question then naturally occurs, how is that consent to be obtained? The answer of the constitution is, "Voting at an election held for that purpose." It must be borne in mind that these bonds cannot be authorized by the fiscal court except on one condition, and that condition is clearly and unequivocally expressed in the section supra, in the words "without the assent of two-thirds of the voters." That assent can only, under the terms of the constitution, be ascertained by the voters attending the election, and voting for such indebtedness. We have nothing to do with the question that might be suggested as to how the number of voters in the county should be ascertained. The burden is always on the party holding the affirmative to make out his case. It must be conceded that the court has no right to impose a debt upon the taxpayers without some authority, and the only authority given by the constitution is by the consent of two-thirds of the voters thereof; and, by any fair rule of construction, the word "thereof" must, of necessity, mean the voters of the county upon whom these enormous burdens are intended to be imposed. Has it ever been held, in any case where the assent of a party was required to make valid a proposition or contract, that his failure to refuse or object was ever held to be equivalent to assent? It may be well to remark, further, that the proposition submitted to the voters is unlimited; and it may be well argued that, under the majority opinion, the fiscal court may, without limit, issue bonds enough for the purchase and maintenance of the turnpike roads of this county, free from toll to the traveling public, although such bonds may amount to untold millions. It is true that section 158 of the constitution says: "The respective cities, towns, counties, taxing districts, and municipalities shall not be authorized or permitted to incur indebtedness to an amount, including existing indebtedness, in the aggregate exceeding the following named maximum percentages on the value of the taxable property there," etc. But it must be remembered that section 157 is an independ-

ent section, and is the only section which treats of the power of the people to authorize the creation of indebtedness by vote; and, as there is no limit to the indebtedness which may be authorized by the vote therein provided for, it is not an unreasonable conclusion that, if the proposition is adopted by the constitutional vote, there is in fact no limit as to the indebtedness thus authorized to be incurred. But, if this fact be not correct, it must necessarily follow that the fiscal court can from year to year issue bonds for the maximum amounts allowed by section 158 to accomplish the purpose indicated in the proposition submitted to the voters as aforesaid. The requirement of two-thirds of the voters of the county to signify their assent by voting for the indebtedness in question is in accord with the provisions of the constitution of 1849 and 1850, which required the vote of the majority of all the voters of the state to vote for the calling of a convention to amend the constitution in order that the convention shall be called; and in the present constitution (section 256) we find that it is provided that the passage of an amendment to the constitution shall be determined by the majority of the votes cast for and against the amendment; and in section 64 it is provided that no county shall be divided, etc., unless a majority of all the legal voters of the county voting on the question shall vote for the same. So, in two other sections of the constitution, the convention was at no loss for apt words with which to limit the decision of the question to those only who should vote upon the question.

I adhere fully to the construction given to section 157 in the case of *Belknap v. City of Louisville*, supra. It seems to me that the doctrine announced in the majority opinion will enable turnpike corporations, whose property becomes worthless, to, in many cases, unload the same upon the taxpayers of the county, and burden the present and succeeding generations with taxes, which will be of but little benefit to the great mass of property holders in such county. It is feared that great injustice will be the result of all elections held and determined under the principles announced in the majority opinion. It does not require much sagacity to see that at no distant day turnpike travel will be to a great extent superseded by electric cars; and if it be true, as contended by some, that such car tracks or lines can be legally established alongside of the turnpikes, the pikes would then be of but very little, if any, value to the public. Entertaining the views which I do in regard to the manifest meaning and intention of section 157 of the constitution, I feel it my duty to enter this, my most earnest and respectful dissent from the majority opinion in this case.

DU RELLE, J. (dissenting). In addition to the reasons stated in the opinion in the case of *Belknap v. City of Louisville*, 90 Ky. 474,

36 S. W. 1118, there are some reasons for dissenting from the majority opinion herein which apply peculiarly to the case at bar.

It is said that there are numerous elections to be held at the coming election upon the question of issuing bonds to pay for turnpikes purchased in various counties of this state, and that in order to prevent the people from being misled by the opinion in the *Belknap Case* into abstaining from voting at such elections, upon the theory that a vote not cast upon that question will be counted as a vote against the issue of bonds, this case should be decided before the election. This very case presents a well-defined illustration of such misleading. The law under which the proposition was submitted to the vote now under consideration was enacted shortly before the opinion in the *Belknap Case* was delivered. It gave a legislative construction to the constitutional provision, by providing specifically that a two-thirds majority of the votes cast for and against the proposition was sufficient to authorize the bond issue. The *Belknap Case* followed, and gave notice to the people that the legislative construction was unauthorized by the constitution, and that a vote cast upon any other question, or for any officer, and not cast upon the proposition to issue bonds, would be counted against the proposed bond issue. Shortly after that opinion had so given notice to the people of Montgomery county, the election now under consideration was held; and the people of that county—if they are to be supposed at all to take notice of the proceedings and decisions of this court—were misled into believing that it was unnecessary to vote upon the bond issue in order to defeat it, provided they voted at the general election. It is no answer to this proposition to say that the equality of the vote for free turnpikes and the vote in favor of the bond issue shows that they were not misled; for it may well be considered that those who might have voted against free turnpikes refrained from voting on that question because they knew that the vote in favor of free turnpikes would be inoperative if a sufficient number of them refrained from voting on the proposition for the bond issue.

To say nothing of the doctrine of *stare decisis*, it may be here stated that, in all the authority cited upon the other side of this question, there is not a case which comes squarely up to the question in this case, or presents the same language given in section 157 of the constitution, forbidding the creation of indebtedness by any municipality "without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose." I am clearly of opinion that this provision was intended by the framers of the constitution, and so understood by the citizens whose votes made it organic law, to place, not an insurmountable, but a real and effective, obstacle in the way of the creation of municipal indebtedness by the meth-

od which used to be termed "sneaking a vote through." The custom had grown into an abuse, under the old constitution, of holding such elections without any one voting at them except those personally interested in the passage of the measure, and thereby saddling upon a municipality an increase of debt without the assent of a tithe of "the voters thereof." This, in my judgment, was intended to be prevented by section 157; but the opinion of the majority in this case renders that attempt abortive, for there would be practically no more difficulty in a vigorous and organized minority securing a two-thirds majority of the votes cast for and against such a proposition than there was under the old system in securing a bare majority. It seems to me that the question of policy, whether the bond issues which it is desired to carry through at the coming election are wise or unwise, is a question with which this court has nothing to do; but that the policy of the constitution, in interposing real and practical obstacles to the adoption of such measures as the one under consideration, is one which should specially appeal to the court.

#### COMMISSIONERS OF SINKING FUND v. GEORGE et al.<sup>1</sup>

(Court of Appeals of Kentucky. June 23, 1898.)

**OFFICERS—PENITENTIARY COMMISSIONERS—ELECTION BY LEGISLATURE—STATUTES—EMERGENCY CLAUSE—PASSAGE OVER GOVERNOR'S VETO—NECESSITY OF GOVERNOR'S APPROVAL OF JOINT RESOLUTION—TERM OF OFFICE—PARTIAL VALIDITY OF STATUTE.**

1. Under Const. § 93, providing that "inferior state officers, not specifically provided for in this constitution, may be appointed or elected in such manner as may be prescribed by law," and section 107, providing that the general assembly may provide for the election or appointment of such other ministerial and executive officers as may from time to time be necessary, the legislature had power to pass the act of March 5, 1898, creating the board of penitentiary commissioners, and providing for their election by the legislature.

2. The power to elect officers to fill an office created by statute does not necessarily belong to the executive department of the government, and may therefore be conferred by statute upon the legislature.

3. Under Const. § 55, providing that "no act, except general appropriation bills, shall become a law until ninety days after the adjournment of the session at which it was passed, except in cases of emergency, when, by a concurrence of a majority of the members elected to each house of the general assembly, by a yeas and nays vote entered upon their journals, an act may become a law when approved by the governor," an act embracing an emergency clause, when passed over the governor's veto, as provided by section 88 of the constitution, becomes a law at once, though never approved by the governor.

4. Under Const. § 89, requiring that every order, resolution, or vote in which the concurrence of both houses may be necessary, except on a question of adjournment, or as otherwise pro-

vided in the constitution, shall, like bills, be approved by the governor or passed over his veto, neither a joint resolution authorizing a meeting of the joint assembly for the purpose of electing penitentiary commissioners as provided by law, nor the vote taken in such election, need be presented to the governor for his approval.

5. Under Const. §§ 93, 107, authorizing the general assembly to provide for the election or appointment of officers for a term "not exceeding four years," the act of March 5, 1898, creating the board of penitentiary commissioners, and fixing the terms of the three commissioners at two, four, and six years, respectively, is void in so far as it fixes the term of one of the commissioners at six years.

6. The fact that the statute fixes the term of one of the commissioners at six years, instead of four, does not invalidate the entire act, but merely renders the excess of the term void, leaving such commissioner with a term of only four years.

7. As the act repealed the law which made the commissioners of the sinking fund ex officio directors of the penitentiaries, and conferred upon the board of commissioners the power to appoint the officers and employes of the penitentiaries theretofore appointed by the commissioners of the sinking fund, it put an end at once, upon the election and qualification of the members of the board, to the terms of the officers of the penitentiaries appointed by the commissioners of the sinking fund.

8. It was within the power of the legislature to put an end to the terms of such officers by repealing the law under which they held.

Du Relle and Burnam, JJ., dissenting.

Appeal from circuit court, Franklin county. "To be officially reported."

Action by the commissioners of the sinking fund against Henry George and others. Judgment for defendants. Plaintiffs appeal. Affirmed.

W. H. Holt, W. S. Pryor, W. S. Taylor, and L. N. Dembitz, for appellants. Bronston & Allen and Wm. Goebel, for appellees.

PAYNTER, J. Several important constitutional questions are involved in this case. During the last session of the legislature an act was passed entitled "An act to create a board of penitentiary commissioners and regulate the penal institutions of this commonwealth." Section 1 reads as follows: "That a board of commissioners is hereby created to govern the penitentiaries of this commonwealth. Said board shall consist of three members, to be elected by the general assembly on or before the 10th day of March, 1898. One of whom shall hold his office to be determined by lot of commissioners elected, for the term of two years, one for the term of four years and one for the term of six years, or until their successors are elected and qualified. \* \* \*" It is contended that the legislature could not constitutionally pass the act and elect the commissioners; that the election of the commissioners is an executive, not a legislative, function. There is no express power conferred upon the executive department by the constitution to appoint such officers or agents which the general assembly may designate for the direction or control of the penitentiaries. Neither is such power implied from any provi-

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.



sion of the constitution. There is no provision of the constitution which places any limitation on the power of the legislative department to name or select the officers or agents necessary to properly manage the penal institutions. Neither is there any provision of the constitution from which it can be fairly implied that the legislative department shall not elect or select those who may aid or control in the conduct of the affairs of the penal institutions. When the constitution has imposed no limits upon the legislative power, it must be considered practically absolute. Plenary power in the legislature for all purposes of civil government is the rule. A prohibition to exercise a particular power is the exception. When one questions the legislative power to pass a statute, he should show that the constitution expressly prohibits its enactment, or that such prohibition is fairly implied from its provisions. The court said in the case of *Slack v. Railroad Co.*, 13 B. Mon. 22, that: "It would be difficult, perhaps impossible, to define the extent of the legislative power of the state, unless by saying that, so far as it is not restricted by the higher law of the state and federal constitutions, it may do everything which can be effected by means of a law. It is the great, supervising, controlling, creative, and active power in the state, subject to the fundamental restrictions just referred to. Whatever legislative power the whole commonwealth has is by the constitution vested in the legislative department, which, representing the popular majorities in the several local divisions of the state, and under no other restraint but such as is imposed by the fundamental law, by its own wisdom, and its own responsibilities, may regulate the conduct and command the resources of all, for the safety, convenience, and happiness of all, to be promoted in such manner as its own discretion may determine. The legislative department performs and finishes its office by the mere enactment of a law. It does not of itself carry the law into operation. This is necessarily done by extrinsic agencies. The law, being made known, may be universally observed or obeyed. It may be carried into operation by the executive alone. It may be enforced by the judiciary, or by the co-operation of the judiciary and the executive. These are the regular agencies provided by the constitution for the execution of the laws. But the legislature is not restricted to these agencies. It may select or appoint others, as is often done, when the object of the law is to accomplish local or individual purposes. The agency generally employed for applying the legislative will and the power of the government to purposes merely local has been that of county courts for counties, and of the trustees of towns or the municipal authorities of cities for towns or cities, which, to the extent of the powers permanently or temporarily vested in them, and whether al-

lowed a discretion or not, do but carry into effect the legislative will and power. But these local agencies are selected, and some of them created, by the legislature itself, for the purpose of carrying its power into all parts of the commonwealth, or into such parts as require its application for their benefit or coercion. And the legislature may select other agencies for particular purposes, having in view, as it must be presumed to have, the nature of the object to be accomplished, and the fitness of the agency selected." It was said in *People v. Draper*, 15 N. Y. 543, that: "The people, in framing the constitution, committed to the legislature the whole law-making power of the state which they did not expressly or impliedly withhold. Plenary power in the legislature for all purposes of civil government is the rule. A prohibition to exercise a particular power is an exception. In inquiring, therefore, whether a given statute is constitutional, it is for those who question its validity to show that it is forbidden. It do not mean that the power must be expressly inhibited, for there are but few positive restraints upon the legislative power contained in the instrument. \* \* \* It follows that it belongs to the legislature to arrange and distribute the administrative functions, committing such portions as it may deem suitable to local jurisdictions, and retaining other portions to be exercised by officers appointed by the central power, and changing the arrangement from time to time as convenience, the efficiency of administration, and the public good may seem to require. If a particular act of legislation does not conflict with any of the limitations or restraints which have been referred to, it is not in the power of the courts to arrest its execution, however unwise its provisions may be, or whatever the motives may have been which led to its enactment. There is room for much bad legislation and misgovernment within the pale of the constitution; but, whenever this happens, the remedy which the constitution provides, by the opportunity for frequent renewals of the legislative bodies, is far more efficacious than any which can be afforded by the judiciary. The courts cannot impute to the legislature any other than public motives for their acts. If a given act of legislation is not forbidden by express words or by necessary implication, the judges cannot listen to a suggestion that the professed motives for passing it are not the real ones. If the act can be upheld upon any views of necessity or public expediency which the legislature may have entertained, the law cannot be challenged in the courts." Chief Justice Marshall said in *Fletcher v. Peck*, 6 Cranch, 87: "How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated." The general assembly is elected by the people. Presumably, it knows what laws should be

enacted for their benefit, and for the public good. If a law is within constitutional limits, a court cannot intervene and declare it invalid because, in its opinion, the law is unwise. Upon this subject Mr. Cooley (Const. LAm. 200, 201) says: "The rule of law upon this subject appears to be that, except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not, in any particular case. The courts are not the guardians of the rights of the people of the state, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people, in their sovereign capacity, can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the lawmaking power. Any legislative act which does not encroach upon the powers apportioned to the other departments of the government, being *prima facie* valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the constitution, and the case shown to come within them."

The legislative department for a great many years retained control over the penitentiary, and during that time, under the law then in force, elected the warden, who had the authority to select his subordinates. The members of the constitutional convention well knew that the legislature had been assuming that, under the constitution, it had the right to so control the penitentiary and elect the warden. Notwithstanding the legislature had been exercising the right to so elect the warden, the framers of the present constitution failed to place an inhibition in it against the exercise of such power by the legislature. Besides, it is provided in section 93 of the constitution that "inferior state officers, not specifically provided for in this constitution, may be appointed or elected, in such manner as may be prescribed by law, for a term not exceeding four years, and until their successors are appointed or elected and qualified." Section 107 of the constitution provides that "the general assembly may provide for the election or appointment, for a term not exceeding four years, of such other county or district ministerial and executive officers as may, from time to time, be necessary." Under section 93 of the constitution, the legislature could not only provide for inferior state officers, but could designate how they should be appointed or elected. Section 27 of the present constitution provides how the powers of government of the commonwealth shall be distributed. Section 28 of

the constitution declares that no person or persons of one department shall exercise any power belonging to either of the others, except as expressly directed or permitted. These sections are the same as sections 1 and 2, art. 1, of the preceding constitution, except there has been substituted in section 27 the word "confined" for the word "confided," which was in section 1 of the preceding constitution; but this change does not alter the meaning of the section. It is these sections upon which counsel for the appellees rely to show that the selection of the board of commissioners is an executive function. These sections do not indicate a purpose upon the part of the framers of the constitution to limit the power of the legislature in the matter of selecting or electing officers or agents to carry out its will. We might add at this point that the legislature has also for a great many years elected a librarian. We have two instances in which the legislature has assumed the right to elect persons to fill positions which it has created. So far as we are aware, its right to have done so has never been questioned. The legislatures of many of the states of the Union have assumed to exercise substantially the same power as has the general assembly of Kentucky, in the matter of selecting or electing officers to fill positions which they had created. It was held in *People v. Freeman* (Cal.) 22 Pac. 173, that it can be so done. Mr. Freeman, in his notes to that case (13 Am. St. Rep. 130), after reviewing the various decisions of the supreme courts, says: "The truth is that the power of appointing or electing to office does not necessarily and ordinarily belong to either the legislative, the executive, or the judicial department. It is commonly exercised by the people, but the legislature may, as the lawmaking power, when not restrained by the constitution, provide for its exercise by either department of the government, or by any person or association of persons whom it may choose to designate for that purpose. It is an executive function when the law has committed it to the executive, a legislative function when the law has committed it to the legislature, and a judicial function, or at least a function of a judge, when the law has committed it to any member or members of the judiciary. The legislature, unless inhibited by the constitution, may exercise its power in either of the three modes: (1) It may, by a statute, create an office, and name persons who are to fill it. *State v. Seymour*, 35 N. J. Law, 48; *Daley v. City of St. Paul*, 7 Minn. 390 (Gil. 311); *Mayor of Baltimore v. State*, 15 Md. 376. (2) It may by law create an office, and provide that it shall be filled by election or appointment by the legislature in joint convention assembled. *People v. Langdon*, 8 Cal. 1; *People v. Fitch*, 1 Cal. 536; and the principal case. (3) It may, after creating an office, provide that it may be filled by appointment made by any person, or by the members of a voluntary asso-

clation, as by the members of the chamber of commerce, and the presidents and vice presidents of the marine insurance companies of a certain city, or by the members of the board of underwriters of such city; nor is it necessary that the persons thus designated be citizens of the United States, and authorized to vote as such. *Sturgis v. Spofford*, 45 N. Y. 440; *In re Bulger*, 45 Cal. 556."

It would make this opinion unnecessarily long to cite other authorities touching this question. We are of the opinion that the election of the commissioners was not essentially an executive function, and that the legislature had the right to elect them.

Before a bill can become a law on its final passage, it must receive the votes of at least two-fifths of the members elected to each house, and a majority of the members voting. Const. § 46. Section 88 prescribes the details as to how a bill shall be presented to the governor, as to his signing it, or his return of it with his objections, and as to how it can become a law notwithstanding the veto, or his failure to sign it. Section 55 of the constitution reads as follows: "No act, except general appropriation bills, shall become a law until ninety days after the adjournment of the session at which it was passed, except in cases of emergency, when, by the concurrence of a majority of the members elected to each house of the general assembly, by a yea and nay vote entered upon their journals, an act may become a law when approved by the governor; but the reasons for the emergency that justifies this action, must be set out at length in the journal of each house." It is contended that although there is an emergency clause in the bill, and it was passed by the two houses as the constitution requires, it cannot become a law for 90 days, unless the governor approves it. If the constitutional convention had intended that the will of the governor was to control in the matter of declaring an emergency, it would simply have said that the governor may declare an emergency, and put the act in force at once. We do not think the language and the spirit of the constitution make the approval of the governor a condition precedent to the taking effect of an act. The legislature can pass a bill, and it can, by the plain provisions of the constitution, become a law without the governor's approval. There may be a great necessity that the act should immediately become a law. And, as the legislature can pass a bill against the objections of the governor, it seems to us that it was never intended that the governor should have the power, by withholding his approval, to prevent the act from taking effect for 90 days after the adjournment of the general assembly which passed the act. The governor can delay the time, when the bill shall become a law, 10 days, by holding the bill without signing or returning it. It seems to us that, when an act becomes a law without his approval, it would be a strange

construction of the constitution to allow the time to be postponed when it would take effect because the governor did not approve it. The governor vetoed the bill. It contained the emergency clause. The general assembly had the same power to pass the bill with an emergency clause as it had to pass it without such clause. And the clause was effective to put in operation the act. We think the language used, to wit, "when approved by the governor," refers to the time when the act would take effect if approved by him. However, when he disapproves it, then it does not take effect, unless passed, as the constitution requires, over his objection. This being done, it became a law immediately, if the legislature had declared an emergency. By considering sections 55 and 88 together, we think the conclusion we have reached is correct.

It is claimed that the commissioners could not have been elected except by the respective bodies of the general assembly, in their separate capacity, the senate and house concurring therein; that the joint resolution authorizing a meeting of the joint assembly for the purpose of electing the commissioners should have been approved by the governor before it went into effect; and that the vote cast in the election of the commissioners, also, should have been approved by him. The act authorized the general assembly to elect the commissioners on or before the 10th of March, 1898, regardless of the wishes of the governor. It was passed over his objections. By the terms of the act, it could meet at any time on or before that date. By a motion in each house a time could have been designated when the members of the general assembly could meet in joint session to elect the commissioners. The joint resolution simply answered the purpose of such motion. That being the purpose of the joint resolution of the two houses, it certainly was not necessary to obtain the approval of the governor, because the general assembly had, by the passage of the act, been empowered to elect the commissioners. The governor could not invalidate the election by his disapproval of the result. The act gave him no voice in the election. Had the general assembly intended that the election of the commissioners should be subject to the approval of the governor, it would have probably conferred upon him the right to appoint them. We are of the opinion that any action, either by motion, order, or resolution, which the senate and house might have taken with a view of meeting in joint session to elect the commissioners, could be had without presenting it to the governor. The governor's official connection with the matter ceased when the bill became a law. We are of the opinion that section 89 of the constitution was not violated when the general assembly proceeded to the election of the commissioners without the approval of the governor. The bill became a law on the 5th day of March, 1898,—five days before the

last day upon which the election should take place. If the views of counsel for appellants are correct, the governor could have prevented an election under the act, and thus destroyed it, by simply holding for six days a resolution fixing the time when the general assembly should meet in joint session to elect the commissioners. He could not prevent the bill from becoming a law by vetoing it, yet he could defeat its operation by failing to approve the resolution, or the result of the vote. We cannot agree that counsel's views on the question are correct. The commissioners received a majority of the votes of both houses, and of each house, and were duly elected.

As the term of Finnell and that of all others elected as successors are for six years, does it follow that the whole act is void? Whether the commissioners are officers or administrative agents, it is not necessary to decide, but we will assume they are officers. Under the provisions of the constitution, the legislature was not authorized to fix the terms of officers exceeding four years. The manifest purpose of the act was to take from the commissioners of the sinking fund their control and management of the penitentiaries of the state; and it is equally as clear that the legislature intended to assume the control and management of the penitentiaries, and to accomplish that purpose through the instrumentality of the board of commissioners which it created. The general assembly manifested a purpose that one of the terms should be two years, and another should be for four years, and the right to fix these terms cannot be questioned. The language employed shows that the general assembly was willing that one of the commissioners should hold his office for six years,—two years longer than the constitution will permit. As the general assembly expressed a willingness that one of the commissioners should hold for two years longer than the constitution permits, it is certainly reasonable to conclude that it was the will of that body that the commissioners should hold for four years, as this term is necessarily included in the longer one which it fixed. Holding the act void in so far as it makes the term six years, instead of four, still the balance of the act is complete and enforceable. The purpose and intent of the general assembly, that the commissioners should manage and control the penitentiaries, can be effectuated by eliminating from the act that part which attempted to make terms six, instead of four, years. If the constitution had expressly required that the terms of officers should be fixed at exactly four years, and the general assembly had fixed the terms of the commissioners, respectively, at one, two, and three years, then we could not hold that it was its intention that they should hold for terms of four years. In such state of case, the very fact that the legislature provided that the terms should be less than that fixed in the constitution would be a manifestation of an unwillingness of the general as-

sembly to create the offices and fix their terms at four years. It is different in this case. The general assembly has not only shown a willingness that the terms shall be as much as four years, but also that they shall be six. If the unconstitutional portion of an act can be stricken out, and that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which is rejected, it must be sustained. When that part of the act which adds two years to the constitutional term of four years is rejected, there will be three commissioners, one of whom shall hold for a term of two years, and two for a term of four years each, and, in the language of the act, "until their successors are elected and qualified." They are the commissioners whom the general assembly have elected to execute its will as expressed in the act. The commissioners hereafter elected by the general assembly under the act shall hold their office for four, instead of six, years; or, if the general assembly desires that the management of the penitentiaries shall be by commissioners, it can make such provisions as it pleases for their election. It is said by Mr. Cooley in his work on Constitutional Limitations (page 211) that: "The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand, though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial, but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. The difficulty is in determining whether the good and bad parts of the statute are capable of being separated, within the meaning of this rule. If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portion."

There can be no doubt that the act repeals the law which made the commissioners of the sinking fund ex officio directors of the penitentiaries, and vested in the board of commissioners the power to manage and control the affairs of the penitentiaries of the state. Upon the election and qualification of the members of the board of commissioners, all authority which was vested in the commissioners of the sinking fund to appoint and remove officers and employés of the penitentiaries ceased, and at that moment the board of commissioners was vested with all the

powers which the act conferred upon them. At the same time the rights of the officers and employes of the penitentiaries ceased. "A warden for each penitentiary shall be elected by the said commissioners." Act 1898, § 2. "It shall be the duty of the commissioners if at any time they deem it necessary to appoint a deputy warden for each penitentiary." Id. § 6. "The commissioners shall appoint a clerk for each penitentiary." Id. § 7. "The commissioners shall appoint a chaplain for each penitentiary." Id. § 9. These requirements as to the appointment of persons to fill the positions named are in accordance with the purpose of the general assembly to constitute another authority to govern the penitentiaries. The express authority to elect a warden and to appoint persons to the other positions named shows the legislative intent to be that those who then held the positions could no longer do so, and the fact that they did so hold them did not place any restrictions on the board of commissioners in the matter of electing a warden, and in the appointment of a clerk, deputy warden, physician, and chaplain. The general assembly repealed the law which authorized the commissioners of the sinking fund to control the management of the penitentiaries, and at the same time, notwithstanding the commissioners of the sinking fund had elected a warden, appointed a deputy warden, clerk, physician, and chaplain, in effect declared that the board of commissioners should elect a warden, and appoint persons to the other positions. The authority which the general assembly gave the commissioners to elect a warden and appoint persons to the positions named forces the conclusion that those then holding the positions could not continue to do so, unless elected or appointed by the board of commissioners. The act made it the duty of the board of commissioners to appoint a deputy warden, "if at any time they deemed it necessary." If the person holding the place had the right to hold it during the time for which he was appointed, then the board of commissioners might deem it wholly unnecessary to have a deputy warden; still he would continue to hold his place, if the position of counsel for appellants be correct. It was by an act of the general assembly that the commissioners of the sinking fund were made directors of the penitentiaries, and by which their subordinate officers held their positions. They all held subject to the legislative will. That the general assembly could at any time repeal the law under which they held is no longer an open question in this state. In *South v. Commissioners*, 86 Ky. 188, 5 S. W. 567, in speaking of the warden of the penitentiary, the court said: "The office in question was not a constitutional one. It is the creature of the legislature, and subject to its will." There are other adjudications of this court to the same effect. The act does not in express terms say that the offices are abolished, but it does repeal the law under

which the officers were appointed. If the act under consideration had repealed the law under which they were appointed, without creating an authority to govern the penitentiaries, it could not be contended that the commissioners of the sinking fund and their appointees continued in office. Does the mere fact that the act which repeals the law under which they held their positions provides that the new authority shall call to their aid certain persons, who may bear the same official designation and perform the same duties, operate to keep them in office? We think not. The judgment is affirmed.

BURNAM, J., dissents. DU RELLE, J., dissents from that part of the opinion which relates to the joint resolution, and that part which annuls the statute as to the term of office.

DU RELLE, J. In dissenting from the opinion of the majority in this case, I shall not attempt to do more than give a bare outline of my views upon the subject, and the reasons which have led me to the conclusion reached, without any elaboration of argument or citation of authority.

A number of reasons for holding invalid the act establishing the board of prison commissioners were urged in argument. For example, the act provides that the commissioners shall be elected by the "general assembly." By section 29 of the constitution it is provided that "the legislative power shall be vested in a house of representatives and a senate, which, together, shall be styled the 'General Assembly of the Commonwealth of Kentucky.'" It was urged that whatever the general assembly has authority to do must be passed by both houses; that an order, bill, resolution, or vote can be adopted by the general assembly only by the separate action of each house; that a thing authorized to be done by the general assembly cannot be performed by a joint assembly of the two houses, except in cases where the two houses separately authorize such thing to be done by the joint assembly, for a joint assembly of the two houses is not authorized by the constitution, no provision being made by that instrument for the holding of such joint assembly, for the officers who shall preside thereat, or for the recording of its transactions; that such provision must therefore be made by the general assembly (that is to say, by the separate action of the two houses) before a joint assembly can be held; and that this necessity was recognized by the general assembly in the case at bar, for the two houses separately adopted a resolution to meet in joint assembly for the election of the commissioners. It was conceded that if each house had met separately, and elected the same persons to fill these offices, it would have been an election by the general assembly, but as they did not so proceed, but desiring to act by joint assembly, and per-

ceiving the necessity of a resolution adopted in each house to authorize the holding of such joint assembly, separately adopted the resolution, it was essential that they should comply with section 89 of the constitution, which requires that "every order, resolution or vote, in which the concurrence of both houses may be necessary, except on a question of adjournment, or as otherwise provided in this constitution, shall be presented to the governor, and, before it shall take effect, be approved by him," etc., and the meeting of the two houses in joint assembly was therefore unauthorized and ineffectual.

A further objection rests in the provision of section 93 of the constitution, that "inferior state officers, not specifically provided for in this constitution, may be appointed or elected, in such manner as may be prescribed by law, for a term not exceeding four years, and until their successors are appointed or elected and qualified," in the teeth of which provision the act in question provided that the first three commissioners elected to these offices should draw lots for the first terms of two, four, and six years, and commissioners elected thereafter should hold for a term of six years. It was zealously urged that the fixing of a term of office at six years was in plain violation of the organic law, and absolutely void; that this objection applied to all three of the commissioners elected, because each one was elected for the six-year term as much as either of the others, and the taint applied equally to all three; and, if this were not so, that, the term for which the commissioner drawing the six-year term was elected being unconstitutional, the board could not act. But I have not thought it essential to consider these objections, for they, as well as the others made in argument, may be passed over as trivial, in comparison with the objection that the act is inherently vicious, as being an invasion by the legislative department of the powers and privileges of the executive.

Immediately after the bill of rights in the constitution follow the two sections concerning the distribution of the powers of government:

"Sec. 27. The powers of the government of the commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to-wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

"Sec. 28. No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

These provisions, peculiar to the constitution of Kentucky, have been preserved in the various instruments since the first constitution was adopted, and have been imitated more or less closely in the constitutions of

other states. The constitution of the United States (article 1, § 1) provides simply that "all legislative powers herein granted shall be vested in a congress of the United States," with like provisions as to the vesting of judicial powers in the judiciary, and executive powers in the president. That is the extent of departmental division under the federal constitution. The Kentucky constitution goes much further; and, had Mr. Jefferson been in America at the time of the adoption of the federal constitution, that instrument would, in all probability, have contained the enactment which we find only in the constitution of Kentucky, with its three distinct provisions: First, that the government shall be divided into three distinct departments; second, that each of them shall be confined to a separate body of magistracy; and, third, that no person or collection of persons shall exercise any power properly belonging to either of the others, except in the instances thereafter expressly directed or permitted. When Mr. Jefferson returned from France, the federal constitution had been adopted; and, having been appointed secretary of state, he obtained permission to go to Monticello for some months. John Breckinridge and George Nicholas paid him a visit there, and informed him that Kentucky was about to frame a constitution for herself, and that Virginia was about to permit Kentucky to become a separate and independent state. He told them that there was danger in the federal constitution, because the clause defining the powers of the departments of government was not sufficiently guarded, and that the first thing to be provided for by the Kentucky constitution should be to confine the judiciary to its powers, and the legislative and executive to theirs. Mr. Jefferson drew the form of the provision, and gave it to Nicholas and Breckinridge; and it was taken by Nicholas to the convention which met at Danville, and there presented,—Breckinridge not being present at the convention. There was much discussion and dissent when the article was offered, but, when its author was made known, the respect of Kentucky for the great name of Jefferson carried it through, and it was at once adopted.

A similar question to the one under consideration had arisen under the federal constitution in 1791, and its discussion may have been suggestive to Mr. Jefferson, and aided in crystallizing his views into the form in which they have come down to us. At the first session of the federal congress an act was passed conferring executive powers upon the judiciary, which the federal judges in a number of circuits refused to obey. The act provided that the supreme court and the subordinate judges should perform the executive duty of making a list of invalid pensioners,—should investigate the facts, and make a list of names of persons entitled to pensions under the act. Application was made by invalid soldiers in New York and Philadelphia to have their names put upon this list. The

judges of the circuit court for the district of Pennsylvania (Wilson, Blair, and Peters) addressed a letter to the president in regard to the act, in which, deploring the necessity for their action, they laid before President Washington "the sentiments which on a late painful occasion" governed them in regard to this act. They then said: "It is a principle important to freedom that, in government, the judicial should be distinct from and independent of the legislative department. To this important principle the people of the United States, in forming their constitution, have manifested the highest regard. \* \* \* Upon due consideration, we have been unanimously of the opinion that under this act the circuit court held for the Pennsylvania district could not proceed: (1) Because the business directed by this act is not of a judicial nature. It forms no part of the power vested by the constitution in the courts of the United States. The circuit court must consequently have proceeded without constitutional authority. \* \* \* These, sir, are the reasons of our conduct. Be assured that, though it became necessary, it was far from being pleasant. To be obliged to act contrary either to the obvious directions of congress, or to a constitutional principle in our judgment equally obvious, excited feelings within us we hope never to experience again." Judges Iredell and Sitgreaves, of the circuit court for the district of North Carolina, addressed a similar letter to the president, in which, expressing their regret that the occasion for their action had arisen, they stated the proposition that "the legislative, executive, and judicial departments are each formed in a separate and independent manner, and that the ultimate basis of each is the constitution only, within the limits of which each department can alone justify any act of authority." The circuit court for the district of New York (Jay, chief justice; Cushing, justice, and Duane, district judge) took the act into consideration, and were unanimously of opinion and agreed: "That by the constitution of the United States the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from and oppose encroachments upon either. That neither the legislative nor executive branches can constitutionally assign to the judiciary any duties but such as are properly judicial, and to be performed in a judicial manner. That the duties assigned to the circuit courts by this act are not of that description. \* \* \* As, therefore, the business assigned to this court by the act is not judicial, nor directed to be performed judicially, the act can only be considered as appointing commissioners for the purposes mentioned in it, by official instead of personal descriptions. That the judges of this court regard themselves as being the commissioners designated by this act, and therefore as being at liberty to accept or decline that office." In *re Hayburn's Case*, 2 Dall. 409. They

thereupon, in view of the benevolent nature of the act, decided to execute it in the capacity of commissioners. It will be observed that, under the constitution of Kentucky, this could not have been done, on account of the provision in the twenty-eighth section that "no person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except," etc. No such provision being in the federal constitution, while the judges, as judges, could not execute the act, there was no inhibition contained in the constitution against their executing it as commissioners. President Washington adopted the suggestion made in the letters referred to, sending a message to congress, and the obnoxious law was repealed. So much for the history of this provision of the organic law.

What has been done in this case? Under a constitutional grant of authority (section 93), that inferior state officers not specifically provided for in the constitution may be appointed or elected in such manner as may be prescribed by law, the legislature, instead of prescribing the manner in which these officers shall be elected, has undertaken to authorize their appointment by itself. That the persons who may be appointed to these positions are officers, within the meaning of the constitution, seems to me to admit of little doubt. They are clothed with extraordinary powers; they may appoint officers, for cause remove them, make and annul contracts, handle and control public funds; they are required to execute bond and take the oath of office; and they receive a salary from the public treasury. These powers and duties seem clearly to bring them within the definition given by the chief justice in *City of Louisville v. Wilson*, 99 Ky. 598, 36 S. W. 944, where it was said: "There are various tests by which to determine who are officers, in the meaning of the law; but at last, in case of uncertainty, the intention of the lawmakers controls. To constitute an officer, it does not seem to be material whether his term be for a period fixed by law, or endure at the will of the creating power; but if an individual be invested with some portion of the functions of the government, to be exercised for the benefit of the public, he is a public officer." Surely, in performing the duties and executing the powers imposed and given by this act, these persons are invested "with some portion of the functions of the government, to be exercised for the benefit of the public." By section 29 of the constitution the "legislative power" is vested in a house of representatives and a senate, which are together styled the "General Assembly of the Commonwealth." This grant vests the legislature with all legislative power; that is to say, everything that may be properly done by law may be performed by the legislature. But appointment to office has been held by this court to be "intrinsically executive."

Said Chief Justice Robertson: "And, although the constitution has confided to the courts the appointment of their own clerks, still the nature of the power is not changed. It is essentially executive, whensoever or by whomsoever it may be exercised. It is as much executive when exercised by the courts as by the governor. It is the prerogative of appointing to office, and is of the same nature, whether it belonged to a court or to a governor." *Taylor v. Com.*, 3 J. J. Marsh. 401. Under the constitution in force at the date of that opinion, the court was authorized to appoint its clerk. It is expressly directed and permitted to the legislature by the constitution to perform certain specified executive and judicial functions. For instance, the two houses are authorized to elect their own officers (sections 34 and 249),—an executive act expressly provided for. Each house is empowered to judge of the qualifications, elections, and returns of its members (section 38),—a judicial act. So it may punish for disorderly behavior, and expel members. Section 39. So it appears that it was deemed necessary by the framers of the constitution to expressly direct and permit the legislature to exercise the power of appointment to office in a specified case, and this by necessary implication forbids the exercise of such power in all other cases.

The creation of an office may be accomplished by law. It is a legislative power. Ordinarily the filling of an office is a power to be exercised by the people, and unless to be thus exercised, or in some other mode expressly provided by the constitution, the duty must be performed by the executive. I am well aware that there are numerous cases upon both sides of this proposition, but the reasoning of the authorities appears to me to be entirely against the proposition that the legislature can create an office, and by the same act name the person who is to fill it,—a proposition distinctly decided in the affirmative in the opinion of the majority,—or can fill such an office by any subsequent act or vote. With the policy of the law I have nothing to do. The evils which must necessarily follow such so-called "legislation" may be alluded to as probably operating upon the minds of the framers of the organic law when they inserted the provision under consideration. One legislature enacts a law or two creating offices, and appoints the incumbents to those offices. Such legislation being upheld by the courts, the next legislature will go further, for it is not of record that any legislature has voluntarily relinquished powers of this character. The result will inevitably be that in time the brief period permitted by the constitution for legislative sessions will be entirely occupied in the devising and creation of new offices, and in shameless trafficking in votes to secure appointments to office. It is instructive to consider in this connection the fact that under the federal constitution,

which contained no direct inhibition against the exercise of the powers of one department by persons connected with another, such as is contained in our constitution, the federal congress has never passed an act creating an office, and at the same time filled the office, and has never attempted it but once. I attach little importance to the fact that the librarian has for many years, without protest, been elected by the legislature; for the powers and duties of the librarian may, without any great stretch of judicial interpretation, be construed to make that officer an officer of the general assembly. Nor does it seem to me that the fact that the legislature at one time elected a warden of the penitentiary should be held decisive of this case, when the constitutionality of that legislation was never called in question before the courts.

These, stated briefly, and without elaboration or argument, are my reasons for dissenting from the opinion of the majority. I regard this legislation as the first flagrant act in the destruction of the barrier against confusion of powers of government which was provided by the wisdom of Mr. Jefferson for the firstborn daughter of Virginia.

BURNAM, J., concurs in this dissent.

#### STATE v. VAN BRUNT.

(Supreme Court of Missouri, Division No. 2.  
Nov. 7, 1898.)

#### CRIMINAL LAW — APPEAL BY STATE — QUASHING INFORMATION.

No appeal lies from a judgment quashing an information.

Appeal from criminal court, Buchanan county; Romulus E. Culver, Judge.

Prosecution of W. T. Van Brunt for a certain offense. From a judgment quashing the information, the state appeals. Dismissed.

Edward C. Crow, Atty. Gen., and Sam. B. Jeffries, Asst. Atty. Gen., for the State. R. A. Brown, for respondent.

SHERWOOD, J. No appeal lies from a judgment quashing an information. *State v. Carr*, 142 Mo. 607, 44 S. W. 776, and other cases. Appeal dismissed. All concur.

#### STATE v. REVELY.

(Supreme Court of Missouri, Division No. 2.  
Nov. 7, 1898.)

#### CRIMINAL LAW — REVIEW — BILL OF EXCEPTIONS — MOTION FOR NEW TRIAL — HOMICIDE — EVIDENCE.

1. A recital in a bill of exceptions, "Defendant filed his motion for new trial in the words and figures as set out on page number 19," is not a direction to the clerk to copy it into the record, within the provisions of Rev. St. 1889, § 2304, that it shall not be necessary for the



review of the action of any lower court on appeal that a motion for new trial be copied or set forth in the bill of exceptions filed in the lower court: provided the bill of exceptions so filed contains a direction to the clerk to copy the same, and the same is so copied into the record sent up to the appellate court.

2. Accused went to the lunch counter of a saloon where he was employed, to get a lunch, and deceased made a remark which angered accused. He left, and in 10 or 15 minutes returned, and, calling deceased a scoundrel, said, "If you want anything out of me, I am here for it." They scuffled, and were separated, and deceased stepped back, when accused followed him, and stabbed him. There was some evidence offered that it was in self-defense. Held to sustain a verdict of murder in the second degree.

Appeal from St. Louis criminal court; James E. Withrow, Judge.

Thomas Revely was convicted of murder in the second degree, and he appeals. Affirmed.

Ashley Clover, for appellant. Edward C. Crow, Atty. Gen., Sam. B. Jeffries, Asst. Atty. Gen., and W. W. Graves, for the State.

**BURGESS, J.** At the May term, 1897, of the circuit court of the city of St. Louis, the defendant was convicted of murder in the second degree, under an indictment theretofore preferred against him by a grand jury of said city, and his punishment fixed at 10 years' imprisonment in the penitentiary for having stabbed to death with a knife one Michael Green, at said city, on the 8th day of February, 1895. Defendant appealed. At the time of the homicide, deceased was a waiter at Peckington's saloon, in the city of St. Louis. Some time between 8 and 9 o'clock on Saturday evening, February 8, 1896, defendant went into the saloon, and up to the lunch counter, and got a lunch, when deceased made some remark to him which seemed to anger him. He then left the saloon, but in 10 to 15 minutes returned again. Deceased was then waiting on some people at a table. Defendant said to him: "Now, you scoundrel, here I am again. If you want anything out of me, I am here for it." Just after this remark, they came together as if scuffling, when they were separated by some of those present. Green then stepped back, when defendant followed him up, and stabbed him in the heart with a knife, from the effects of which he died a few days thereafter. The defense interposed was that the stabbing was done in self-defense, which there was some evidence to sustain. The court instructed for murder in the second degree, manslaughter in the fourth degree, and self-defense. Defendant is not represented in this court.

The motion for a new trial is not made part of, or copied in, the bill of exceptions, but is copied in the record proper; and it is now insisted by counsel for the state that, as it was not made part of the record by bill of exceptions or by direction to the clerk in the bill of exceptions to copy the same, it is no

part of the record, and cannot be considered by this court. By section 2304, Rev. St. 1836, it is provided that it shall not be necessary, for the review of the action of any lower court by the supreme court or courts of appeal on appeal or writ of error, that the motion for a new trial, in arrest of judgment, or instructions filed in the lower court, shall be copied or set forth in the bill of exceptions filed in the lower court: provided the bill of exceptions so filed contains a direction to the clerk to copy the same, and the same are so copied into the record sent up to the appellate court. The only way that the motion for a new trial could have been made part of the record was by copying it into the bill of exceptions, or into the record proper by the clerk, in pursuance of directions to that effect. The only reference to the motion for a new trial in the bill of exceptions is in the following words: "Defendant filed his motion for a new trial in words and figures as set out on page number 19;" and this was no compliance with the statute. All proceedings not part of the record proper can only be preserved and made so by bill of exceptions, and the motion for a new trial was not a part of the record proper. In *State v. Griffen*, 98 Mo. 672, 12 S. W. 358, it was held that where a motion for a new trial is not set forth in the bill of exceptions, and there is no direction to the clerk to copy the same, no notice will be taken of it by the appellate court, and only the record proper will be considered. The same rule is announced in *State v. Wray*, 124 Mo. 542, 27 S. W. 1100. We can therefore only examine the record proper, and this we find free from error. The judgment is affirmed.

**GANTT, P. J., and SHERWOOD, J., concur.**

#### STATE v. COPELAND.

(Supreme Court of Missouri, Division No. 2  
Nov. 7, 1898.)

#### CRIMINAL LAW — APPEAL — BILL OF EXCEPTIONS.

Where a bill of exceptions contains only the testimony, without instructions or motion for a new trial, and does not show an exception taken to overruling of a motion for a new trial, the record proper only can be reviewed.

Appeal from criminal court, Buchanan county; Romulus E. Culver, Judge.

Ida Copeland was convicted of grand larceny, and she appeals. Affirmed.

John Doniphan, for appellant. Edward C. Crow, Atty. Gen., and Sam. B. Jeffries, Asst. Atty. Gen., for the State.

**BURGESS, J.** At the March term, 1898, of the criminal court of Buchanan county, the defendant was jointly indicted with two others, and charged with feloniously stealing at said county seven live turkeys, the property of one Harriett McCauley, of the value of

§35. At the same term, on application of Ida Copeland, she was granted a severance, put upon her trial, found guilty of grand larceny, and her punishment fixed at two years' imprisonment in the penitentiary. She appealed.

The bill of exceptions presented by the record in this case contains nothing save and except the testimony adduced at the trial. It does not contain the instructions, motion for a new trial, or motion in arrest of judgment, all of which are matters of exception. Nor does it show that an exception was taken and saved to the action of the court in overruling the motion for a new trial. So that there is nothing before this court for review save and except the record proper, and in this we find no reversible error. We must therefore affirm the judgment.

GANTI, P. J., and SHERWOOD, J., concur.

### STATE v. BROWN.

(Supreme Court of Missouri, Division No. 2.  
Nov. 7, 1898.)

#### HOMICIDE — SELF-DEFENSE — MANSLAUGHTER — INSTRUCTIONS—HARMLESS ERROR.

1. The submission of the issue of justifiable homicide, without evidence to warrant it, is error in accused's favor, of which he cannot complain.

2. Under Rev. St. 1889, § 3469, defining manslaughter in the second degree as homicide committed without a design to effect death, or in a heat of passion, a charge submitting that issue is properly refused, in the absence of evidence to sustain it.

3. In the absence of evidence warranting it, a charge on the law of manslaughter in the fourth degree is properly refused.

Appeal from criminal court, Jackson county; John W. Wafford, Judge.

James Brown was convicted of murder in the first degree, and he appeals. Affirmed.

Roberts & Roberts, for appellant. Edward C. Crow, Atty. Gen., Sam B. Jeffries, Asst. Atty. Gen., and W. W. Graves, for the State.

BURGESS, J. Defendant, a negro, was convicted in the criminal court of Jackson county of murder in the first degree. From the judgment and sentence, he appealed.

A brief statement of the facts is that defendant shot and killed, with a pistol, in Jackson county, on the 1st day of April, 1898, Henry Prater, who was also a negro. About noon of that day, defendant went to the house of one Ella Williams, and remained there until the homicide occurred, which was about 5 o'clock and 30 minutes of that evening. Just before the killing took place, deceased went to the Williams house, and inquired if Brown was there, and was informed by some member of the family that he was not. He then went away, but again returned, a short time thereafter, and again inquired if Brown was there. Brown, who

was in the house at the time, heard deceased inquiring for him on this occasion, and went out of the door with pistol in hand, and said to him: "Here I am. Do you want me, you son of a bitch?"—and began firing at deceased, who threw up his hands and asked defendant not to kill him, and, about the time the second shot was fired, turned and ran a short distance, and fell, and died a few minutes thereafter. Defendant pursued him with a pistol in hand until deceased fell. The ball that killed Prater entered on the right side of the body, a little above, and from one to two inches of, the right nipple, passed through the upper portion of the left lung, and came out of the body between the third and fourth ribs, just below the shoulder blade. Deceased was not armed. Defendant claimed that the killing was done in self-defense, and it was upon this theory that the case was tried. The court instructed for murder in the first and second degrees, and upon the theory that the defendant shot and killed deceased in defense of his own person. Defendant asked the court to instruct the jury that, if they found defendant guilty, it must be for manslaughter in the second or fourth degrees, which it refused to do. Defendant is not represented in this court, but in his motion for a new trial several grounds for the reversal of the judgment are assigned. A number of these are without merit, not having the slightest ground upon which to predicate them; so that we will give them no further notice, but turn our attention to those which seem to be worthy of consideration.

Murder in the first and second degrees were properly defined in the instructions, which were in accord with the repeated and uniform rulings of this court. It is doubtful if the instruction upon the theory that the killing was done in self-defense was authorized by the evidence, but this, if an error at all, was in favor of defendant, and he cannot complain.

There was no evidence that the killing was done, without a design to effect death, in a heat of passion, so as to reduce the offense to manslaughter in the second degree, as defined by section 3469, Rev. St. 1889; and, in the absence of such evidence, there was no error in refusing defendant's instruction upon that theory of the case. *State v. Lewis*, 118 Mo. 79, 23 S. W. 1082; *State v. Bulling*, 105 Mo. 204, 15 S. W. 367, and 16 S. W. 830. The same may be said with respect to defendant's refused instruction for manslaughter in the fourth degree. There was no evidence upon which to base it.

The seventh and eighth instructions should not have been given, but, upon the whole, the case was very fairly presented to the jury. The killing was without the slightest justification or excuse,—a willful, deliberate murder; and the jury would have been remiss in the discharge of their duties, and unmindful of their obligation as jurymen, had they

not so found. Defendant not only shot to death his pleading and fleeing victim, but pursued him, with the instrument of death in hand, until deceased fell prostrate upon the ground,—bent upon taking his life, if he had not already done so. Defendant had a fair and impartial trial, and should suffer the penalty imposed upon him by law for its transgression. The judgment is affirmed.

GANTT, P. J., and SHERWOOD, J., concur.

### STATE v. SOUTH.

(Supreme Court of Missouri, Division No. 2.  
Nov. 7, 1898.)

CRIMINAL LAW—EVIDENCE—CROSS-EXAMINATION  
—NEW TRIAL—JUROR.

1. Where there is a mistrial, followed by a second trial, the proceedings on the first trial should not be copied into the transcript.

2. The wife of the accused, who testified that on the day the crime was committed she rode to town with a certain person, may be asked, on cross-examination, whose wagon it was they rode in.

3. On the hearing of a motion for a new trial there were affidavits of two persons that one of the jurors had stated that accused was sure to go to the pen. The juror denied making the statement, and other witnesses testified to the bad character of the affiants for truth and veracity. *Held*, that the charge was not sustained.

Appeal from circuit court, Newton county; J. C. Lamson, Judge.

William South was convicted of assault with intent to kill, and appeals. Affirmed.

George Hubbert, J. W. Brunk, and Cravens & Cravens, for appellant. Edward C. Crow, Atty. Gen., and W. W. Graves, for the State.

GANTT, P. J. The defendant was jointly indicted with John Tate for felonious assault upon William Meadows. The first count charged an assault with intent to kill, and the second an assault with intent to rob. A severance was granted. Plea of not guilty was duly entered, and, on a trial before a jury, defendant was convicted on the first count, and his punishment fixed at three years in the penitentiary. Motions for new trial and in arrest were filed in due time, heard, and overruled. Defendant appeals.

The record is voluminous, but, upon careful inspection, we discover no error in the impaneling of the grand or petit jury. The indictment is sufficient, and the arraignment regular. There was a mistrial, and the clerk has erroneously copied the proceedings on the first trial into his transcript. These records are sufficiently large when all unnecessary matter is excluded. The verdict is full and responsive. There was ample direct evidence tending to show that defendant shot Meadows in the house of the latter, without any provocation; that defendant entered the house of Meadows, and ordered him to throw up his hands, and, as Meadows jumped up, immediately fired at him, the ball striking

him under his right jaw, and coming out at the back of his neck. The defense rested upon the claim that some person other than defendant committed the assault, and that defendant had not been identified.

The errors relied on to reverse the judgment are briefly: First, improper cross-examination of defendant's wife; and, secondly, that the trial court improperly refused a new trial on account of the prejudgment of one of the trial panel, J. B. Maness.

1. Having gone laboriously through the examination and cross-examination of the wife of defendant, we find nothing to sustain the first assignment of error. Mrs. South having testified with great particularity and detail as to her movements on the day of the shooting, and as to her ride home with Mrs. Williams, she was asked by Mr. Benton, counsel for the state, whose wagon Mrs. Williams had that day; and she answered, over the objection of defendant's counsel, that she believed it was Mrs. Williams' wagon. The objection is wholly without merit. It was immaterial, but wholly innocuous, but, if it had been important to know, it was entirely legitimate cross-examination. *State v. Avery*, 113 Mo. 475, 21 S. W. 193; *State v. Fitzgerald*, 130 Mo. 407, 32 S. W. 1113.

2. As to the juror Maness. It was charged in the motion for new trial that he had expressed an opinion that defendant was guilty prior to his being selected as a member of the jury. Two parties, Worley and E. D. Snow, made oath that the juror had stated in their presence "that South had broken jail and gone to Tennessee, and had been arrested and brought back, and was sure to go to the pen." The juror made affidavit positively denying that he had made such a statement or anything to that effect. A number of witnesses testified to the good character of the juror for truth and veracity, and the bad character of Worley for truth and veracity. Other affiants stated that Snow's reputation for truth and veracity was also bad. The trial court found the charge against the juror was not sustained. Upon this issue of fact we will not disturb that finding, as there is nothing whatever to indicate it was the exercise of an unsound discretion. If left to us, we should unhesitatingly find the same way. No error appearing, we affirm the judgment.

SHERWOOD and BURGESS, JJ., concur.

### STATE v. CARR.

(Supreme Court of Missouri, Division No. 2.  
Nov. 7, 1898.)

BURGLARY—INDICTMENT—HABITUAL CRIMINAL—EVIDENCE.

1. An indictment alleging that accused feloniously, burglariously, and forcibly broke and entered into a building, with intent to steal property therein, sufficiently charges burglary in the second degree.

2. An indictment alleging that accused at a certain prior time was convicted of burglary in

the second degree, and on such conviction sentenced to the penitentiary for a term of years, and thereafter discharged therefrom on lawful compliance with his sentence, is sufficient as an indictment as an habitual criminal.

3. At 3 o'clock in the morning, accused and another were seen coming from the immediate vicinity of a store, the door of which was 15 minutes later found broken open and slightly ajar. A half hour before then the door had been tried, and found all right. Accused had been convicted of burglary before on his own confession, and, on seeing the officers, fled. *Idd*, that a conviction of an attempt to commit burglary was warranted.

4. Where a door of a building was, a short time after having been found all right, found broken open,—there being no evidence of an entry, or that anything had been stolen,—a conviction of an attempt to commit burglary will not be disturbed because the offense, if any, is burglary.

5. Where one is indicted as an habitual criminal, evidence of his former conviction is admissible to discredit him as a witness, and to enable the jury, on conviction, to fix the punishment.

Appeal from St. Louis criminal court; William Zachritz, Judge.

Thomas Carr, alias Humpty Carr, was convicted of an attempt to commit burglary, and appeals. Affirmed.

The indictment was as follows, viz.: "State of Missouri, City of St. Louis—ss.: Circuit Court, City of St. Louis, April Term, 1897. The grand jurors of the state of Missouri, within and for the body of the city of St. Louis, now here in court, duly impaneled, sworn, and charged, upon their oath present: That Thomas Carr on the 6th day of April, in the year of our Lord 1892, at the city of St. Louis, aforesaid, in the St. Louis criminal court, was duly convicted, on his own confession, of the offense of burglary in the second degree, and, in accordance with said conviction, was duly sentenced by said court to an imprisonment in the penitentiary of the state of Missouri for the term of three years, and was duly imprisoned in said state penitentiary in accordance with said sentence; and that the said Thomas Carr was duly discharged from said state penitentiary after and upon lawful compliance with said sentence; and that the said Thomas Carr, alias Humpty Carr, after his said discharge from said state penitentiary, to wit, on the 9th day of May, in the year of our Lord 1897, at the city of St. Louis aforesaid, into a certain store, shop, and building of Albert McFarland, there situate and being, feloniously, burglariously, forcibly did break and enter, with intent there and thereby feloniously and burglariously to steal, take, and carry away certain goods, wares, merchandise, and personal property in the said store, shop, and building then and there kept and deposited, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state. Samuel D. Hodgdon, Assistant Circuit Attorney."

L. A. McGinnis, for appellant. The Attorney General and Sam. B. Jeffries, for the State.

GANTT, P. J. At the April term, 1897, of the circuit court of the city of St. Louis, defendant was indicted for burglary in the second degree, as an habitual criminal, and was convicted, and sentenced to the penitentiary for 10 years. The indictment is in all respects sufficient to charge both the burglary, and that defendant was an habitual criminal. *State v. Austin*, 113 Mo. 538, 21 S. W. 81. No error is perceived or assigned upon the record proper.

It is insisted, first, that there was no evidence to sustain the charge in the indictment. We cannot assent to this. It was established beyond all doubt that the door of the drug store of Albert McFarland, on the southwest corner of Fifteenth street and Washington avenue, was broken on the morning of May 9, 1897, about 3 o'clock. This door was locked with an ordinary lock, and secured by a crossbar fastened on either end by screws, by Mr. McFarland, about 10 o'clock on the night of the 8th. About one-half hour before it was discovered to be broken, the night watch had passed, and tried it, and found it all right. About a quarter of an hour later two police officers going east on Washington avenue noticed a man on the north side of Washington avenue, just opposite the north door of the drug store in question. When he discovered them he crossed the avenue south, and met two other men, one of whom was defendant. These two came along the west side of Fifteenth street, and from the immediate vicinity of the broken door. They saw the officers, and, without being challenged, all three broke and ran south, and along the east side of Fifteenth street. The officers pursued, and fired a shot, whereupon defendant halted, but the other two escaped. The night watch, hearing the shot, came to the officers, and was told to examine the door while they took the defendant to the holdover. The night watch discovered the door broken open, and went after McFarland. They could not state that anything had been stolen from the store. The defendant was shown to have been convicted of burglary, and sentenced to the penitentiary for three years, in 1892. He testified he had served his time. Under these circumstances, we think there was evidence upon which the jury might well have found that defendant and his associate had broken the door, and had been warned by the third man of the approach of the officers, and fled. The undisputed fact of the breaking, his presence in the immediate vicinity of the crime, and the short time which had elapsed since the night watch had examined the door and found it locked, and the suspicious fact of his prowling in the streets at 3 o'clock in the morning, and his guilty flight, all combined, make a very satisfactory case.

As to the proposition that the burglary was complete, and the jury erred in finding defendant guilty of an attempt to commit burglary, we think the jury might well have found the breaking without the entering, and

their verdict will not be disturbed on that ground.

There was no error in the instruction in which the court advised the jury that they should consider the former conviction of burglary solely for the purpose of discrediting the defendant as a witness, and for the fixing of his punishment. It was competent for those purposes, and for those only. The judgment of the former conviction was rendered in 1892, and was for three years, and defendant testified he had served his sentence. There is no error in the record, and the sentence is affirmed.

SHERWOOD and BURGESS, JJ., concur.

### STATE v. TATE.

(Supreme Court of Missouri, Division No. 2.  
Nov. 7, 1898.)

#### ASSAULT WITH INTENT TO ROB—AGREEMENT TO ROB—SUFFICIENCY OF EVIDENCE.

1. Evidence that a person walked up to and pushed open the door of prosecutor's house at 8 o'clock in the evening, and told prosecutor to throw up his hands, and that, when prosecutor arose from his chair, said person shot him and fled, is insufficient to sustain a conviction for assault with intent to rob.

2. In a prosecution for assault with intent to rob, the state's claim was that the offense had been committed by reason of an agreement between S., the person assaulting, and defendant. There was evidence that, before the offense, defendant had talked with other persons about robbing prosecutor; that, on the day of the offense, S. and defendant had been together, and rode to the town where prosecutor lived; that they remained in the town that evening; that S. and defendant were seen together going along the road in front of prosecutor's house; that S. entered prosecutor's house, shot at him, and fled; that tracks of two men were found next morning near the house, one track being of a No. 7 shoe, which was the size S. wore, and the other being of a No. 9, which was about the size defendant wore; that S. lived on defendant's farm, and they were together a great deal; that defendant attempted to bribe witnesses to prevent an indictment, and spoke to counsel a day or two after the assault about defending him. *Held* insufficient to show that the assault was committed in pursuance of an agreement between S. and defendant.

Appeal from circuit court, Newton county; J. O. Lamson, Judge.

John Tate was convicted of a felonious assault with intent to rob, and he appeals. Reversed.

Cravens & Cravens, J. W. Brunk, and Geo. Hubbert, for appellant. The Attorney General, Sam. B. Jeffries, and W. W. Graves, for the State.

BURGESS, J. At the May term, 1896, of the circuit court of Newton county, the defendant and one William South were jointly indicted by the grand jury of said county, and charged, in the first count in the indictment, with feloniously, on purpose and of their malice aforethought, shooting with a pistol,

with intent to kill, one William Meadows, at said county, on or about the 26th day of April, 1896, and, in the second count, with feloniously assaulting said Meadows with intent to rob. At the May term, 1897, of said court, on motion of defendant Tate, a severance was granted him. He then filed his application for a continuance, which was overruled. Defendant was then put upon his trial before a jury, found guilty under the second count in the indictment, and his punishment fixed at two years' imprisonment in the penitentiary. From the judgment and sentence, he appealed.

The evidence tended to show that, some time before the offense is alleged by the state to have been committed, the defendant Tate had talked with one Charles Palmer about robbing Meadows; that there were several of these conversations, the last of which was two or three months before the assault was made upon Meadows by South, which was on the night of the 18th day of April, 1896. It also appeared from the evidence that, on the day last mentioned, Tate and South had both been to the city of Neosho, attending a trial in which South was defendant; that they and some other parties, who were with them, relatives, came from Neosho to Granby in a wagon and a buggy; that Tate and South, and perhaps one Johnnie Williams and another, were in the wagon, and a woman or two in the buggy; that they drove into Granby at about 5:30 o'clock in the afternoon; that, instead of riding to their homes in the vehicles aforesaid, they remained in Granby, and sent the vehicles home, notwithstanding the fact that it had been raining and was still raining some. The evidence then shows that, about 7:30 o'clock, William Meadows observed both Tate and South going along the road by his house, the Meadows house being about a mile from the town, and about a quarter of a mile from the railway depot; that, within about a half hour from the time these two parties were seen together near the house of William Meadows, Bill South walked up to the house of the prosecuting witness, William Meadows, pushed the door open, and walked in, and told Meadows to throw up his hands. Meadows was sitting in a chair, and, as he got up out of the chair, South shot him, and then turned and ran away. South was recognized as the assailant both by Meadows and his wife. No one saw the defendant Tate present at the time. It was dark. Upon examination made by the neighbors the next morning, it was found from the tracks that two men had run across a little potato patch situated just east of the house, showing that some one was there with South at the time of the attempted assault. The evidence further shows that South lived on Tate's farm, and that they were together a great deal; that, immediately after this, the defendant Tate was showing a good deal of anxiety about a report to the effect that he was accused of doing the shooting. It shows

that defendant Tate had never been to the house of Mr. Meadows since he lived at the place where the shooting was done; that, within a day or two after the shooting, Tate came in and had a talk with Mr. Meadows, and spoke to him about being accused of doing the shooting. The evidence discloses that the defendant immediately set to work to suppress testimony, in order to prevent an indictment at the May term of the court; that he attempted to bribe witnesses to prevent an indictment being found against him; that, within a day or two after the trouble, he had gone to Neosho, and spoken to counsel about defending him in the cause. The testimony further shows that the two tracks across the potato patch were of different size, one being made by a No. 7 shoe, and the other by one about the size of a No. 9. The evidence then shows that South wore a No. 7 shoe, and that Tate's shoe was larger, perhaps about a No. 9.

It is not claimed by the state that the conviction of defendant can be maintained upon the ground of the commission by him in person of an assault upon Meadows, with intent to rob him of his money or property, but that the assault was committed by South for that purpose in pursuance of an agreement and understanding between him and the defendant. But this contention finds no ground for support in the facts disclosed by the record. No such preconcerted plan was shown; nor was Tate present at the time of the assault by South. The evidence does not even show that South committed the assault with intent to rob. Not a word seems to have been said by him at the time as to what his purpose was. No demand for money or property was made by him, and, while it may be conjectured that his purpose was for robbery, the judgment cannot be permitted to stand upon that theory. But, even if the evidence showed that South made the assault with intent to rob, the evidence tending to show defendant's connection with it was purely circumstantial, and entirely insufficient to justify the verdict. In fact, there was an entire failure of proof as to the offense of which defendant was convicted, and for that reason alone we reverse the judgment, and remand the cause.

GANTT, P. J., and SHERWOOD, J., concur.

#### STATE v. BRINKLEY et al.

(Supreme Court of Missouri, Division No. 2.  
Nov. 7, 1898.)

#### CRIMINAL LAW—BURGLARY—LARCENY—INDICTMENT—INSTRUCTIONS.

On trial of an indictment for burglary and larceny, under Rev. St. 1889, § 3529 (providing that, where a person committing burglary also commits a larceny, he may be prosecuted for both in the same indictment, and, if convicted, shall be imprisoned in the penitentiary, in addition to the punishment prescribed for bur-

glary, not less than two nor more than five years for the larceny), the court should instruct the jury that they might convict of burglary and acquit of larceny, or acquit of the former and convict of the latter, or convict or acquit of both.

Appeal from criminal court, Jackson county; John W. Wafford, Judge.

Charles Brinkley and Burl Handy were convicted of burglary and larceny, and they appeal. Reversed.

Jos. S. Brooks, for appellants. Edward C. Crow, Atty. Gen., and Sam. B. Jeffries, Asst. Atty. Gen., for the State.

BURGESS, J. At the September term, 1897, of the criminal court of Jackson county, an indictment was preferred against defendants by the grand jury of said county, charging them with burglary and larceny. At the same term they were put on their trial, found guilty of both burglary and larceny, and the punishment of each one fixed at three years' imprisonment in the penitentiary for the burglary, and two years each in addition thereto for the larceny. After an unsuccessful motion for a new trial, they appealed.

The building which defendants are charged with breaking into is a one-story brick building, numbered 221 Walnut street, Kansas City, Mo. The offense is alleged to have been committed on the night of the 27th day of October, 1897. The building was occupied by Messrs. Andy & Barney Duback, partners, and is described in the indictment as a certain "shop," and was used for the purpose of molding, making, and shaping castings of iron. At the time of the commission of the alleged offense, the building was securely fastened, and had not been open for several days. While the building had not been opened for several days, it had not been abandoned; but, at the time it was burglarized, there were in it the tools alleged to have been stolen by defendants therefrom. The entrance to the building was made through one of its windows, by pulling off the sheet iron which had been nailed over it. Several of the boxes in which the tools and fixtures were placed were broken open, and a number of the tools carried away. Part of the tools were found in the possession of one of the defendants, and the other defendant was arrested at a second-hand store, where he had disposed of his portion of them. There was a hole in the roof of the building at the time of the commission of the alleged offense, but the evidence does not show of what size.

The court instructed the jury as to burglary and larceny, and gave the usual instructions as to the presumption of guilt arising from the recent possession of stolen property, but did not instruct them what they should do in the event they should find defendants guilty of larceny, but not of burglary, nor what they should do if they found them guilty of burglary, and not of larceny.

Defendants assign for error the action of the court in refusing to instruct the jury what kind of a building constituted a shop, and that they might convict defendants of larceny, and acquit them of burglary, if the evidence authorized such a verdict. As to the first proposition the jury were fully instructed, and defendants' contention to the contrary is without merit; but it is not so as to the other point. Section 3529, Rev. St. 1889, provides that if any person, in committing burglary, shall also commit a larceny, he may be prosecuted for both offenses in the same count, or in separate counts of the same indictment, and, on conviction of such burglary and larceny, shall be punished by imprisonment in the penitentiary, in addition to the punishment prescribed by the statute for the burglary, not less than two nor exceeding five years for the larceny. It will thus be seen that when a person, in committing a burglary, also commits larceny, and is found guilty of both, that the minimum punishment for the larceny is two years' imprisonment in the penitentiary, regardless of the value of the property stolen. But if acquitted of burglary, and found guilty of larceny, the larceny would be grand or petit, according to the value of the property stolen. *State v. Barker*, 64 Mo. 282. So that in the case at bar, if defendants had been acquitted of the burglary, and convicted of larceny, the offense would have been a misdemeanor only, as the value of the property stolen was less than \$30. As was said in *State v. Hecox*, 83 Mo. 531: "This cause was tried on the theory that, if defendant was found guilty of larceny, he must also be found guilty of burglary. In other words, the larceny charged, and for which alone he could be convicted, was incidental to the burglary. This was a mistaken view of the law. They were two distinct offenses, though joined in the same indictment on different counts. *State v. Kelsoe*, 76 Mo. 506; *State v. Martin*, Id. 337; *State v. Owens*, 79 Mo. 620. If acquitted of burglary, and found guilty of larceny, the larceny would be grand or petit, according to the value of the property stolen. *State v. Barker*, 64 Mo. 282. The jury were properly informed as to what their verdict should be if they found the defendant guilty of burglary, and if they found him guilty of both burglary and larceny; but they should have been further told that they could acquit of burglary, and find defendant guilty of larceny, in which event the larceny would be petit larceny only, under this indictment." While the instruction asked by defendants upon this theory of the case did not go far enough, in that it did not tell the jury that they might convict of burglary and acquit of larceny, as well as acquit of burglary and convict of larceny, or convict or acquit of both, as they believed them guilty or not guilty under the evidence, by it the court's attention was called to the fact that it had failed to so instruct (*State v. Davis*, 141 Mo.

522, 42 S. W. 1033), which should have been done; and, because of its failure to do so, we reverse the judgment, and remand the cause.

GANTT, P. J., and SHERWOOD, J., concur.

#### STATE v. ADLER.

(Supreme Court of Missouri, Division No. 2.  
Nov. 7, 1898.)

HOMICIDE—SELF-DEFENSE—DANGER FROM CROWD—INSTRUCTIONS—RENEWING FIGHT—MALICE—FLIGHT OF ACCUSED—PRESUMPTION—ENTERING INTO DIFFICULTY.

1. In a prosecution for murder, where the plea was self-defense, there was evidence that, at the time defendant shot deceased, he was being pursued by him and an angry crowd, one of which had an open knife in his hand, another a pistol, and others bricks. *Hdd*, that an instruction that the jury must acquit if defendant had reasonable cause to believe "deceased" was about to kill him was too narrow, since defendant, if he believed any of the crowd were about to kill him, had the right to shoot and kill any of them.

2. Where an instruction which enlarges an instruction given, by calling attention to the law on a certain state of facts, is properly refused, because of its lack of clearness, it is equivalent to a request to instruct thereon.

3. One who abandons a conflict, but thereafter renews it, or voluntarily enters into it to wreak his malice, cannot rely on the theory of self-defense.

4. Flight by one accused of a crime, for the purpose of avoiding arrest and prosecution, raises a presumption of guilt.

5. The voluntary entering into a difficulty is not an ingredient of a homicidal act, unless done for the purpose of wreaking malice or of taking advantage of an antagonist, and taking his life or doing him great bodily harm.

Appeal from criminal court, Jackson county; John W. Wafford, Judge.

William Adler was convicted of murder in the second degree, and he appeals. Reversed.

Blake L. Woodson and I. B. Kimbrell, for appellant. The Attorney General and Sam. B. Jeffries, for the State.

BURGESS, J. Defendant was tried and convicted of murder in the second degree, and his punishment fixed at 10 years' imprisonment in the state penitentiary, for having, with malice, shot with a pistol, and killed, one William Johnson. He was indicted, tried, and convicted in Jackson county, where the crime was committed. From the judgment and sentence, he appealed.

Briefly stated, the facts as disclosed by the record are that about 5 o'clock on the evening of May 2, 1897, defendant and deceased engaged in a quarrel near the crossing of Sixth and Broadway streets, in Kansas City, Mo., during which Adler ran Johnson across Sixth street, then west on the same street; Adler pulling off, as he went along, a piece of plank, from three to four feet in length, from a board fence or advertisement sign. Johnson ran into an alley, and picked up some pieces

of bricks, which he began throwing at Adler, and with one of them struck him on some part of the body. When Adler saw Johnson picking up the pieces of brick, he retreated, and ran into a grocery store, being pursued by Johnson, and another man, who had a knife open in his hand. In the meantime a large number of persons had gathered upon the scene, yelling, "Hit him!" "Head him off!" "Catch him!" etc. Adler remained in the store but a very short time, when he returned to the street, with a revolver in his hand. There were then present about 200 persons, whites and blacks, the latter largely preponderating. Johnson was a negro. When Adler came out of the store, some one present informed Johnson that he had a gun, and was going to shoot. Johnson was then from 80 to 90 feet from Adler, and began running, when Adler took after him, and fired two shots at him from a pistol, the second of which entered the left back, between the tenth and eleventh ribs, passing through the upper end of the left kidney, ranging slightly upward, passing through the right lower lobe of the right lung, from the effects of which he died within five minutes. There was some evidence tending to show that, at the time of the shooting, a large number of the persons present were pursuing defendant, among them the deceased, at least one of them with an open knife in his hand, and another with a pistol, when defendant turned and fired upon deceased. Soon after the shooting occurred, defendant went to Kansas City, Kan., and, when arrested that evening, denied being a party to the difficulty. He entered the plea of self-defense. The court instructed for murder in the first and second degrees, manslaughter in the fourth degree, and self-defense. The grounds upon which a reversal of the judgment is sought are the giving of erroneous instructions on behalf of the state, the refusal of legal and proper instructions asked by defendant, and the use of improper language by the prosecuting attorney in the argument of the case before the jury.

But three of the state's instructions are criticised,—the tenth, eleventh, and fourteenth. They are as follows: "No. 10. The court instructs the jury that if you find from the evidence that the defendant shot and killed William Johnson, but shall further find that at the time the defendant killed William Johnson, that he believed, and had reasonable cause to believe, that William Johnson was about to kill him, or to do him some great bodily harm, you will acquit him. It is not necessary that the danger should have been actual and about to fall on the defendant, but it is necessary that the defendant should have believed that it was actual and about to fall on him at the time he fired the fatal shot, if he did so, and that he then had reasonable cause to believe it was actual and about to fall on him. It is no defense if he did in fact believe William Johnson was about to kill him or do him some great bodily harm, un-

less at the time he so fired the fatal shot, if he did so, he had reasonable cause to believe, and did believe, that William Johnson was at that time about to kill or do him some great bodily harm. As to whether or not the defendant had, at the time he fired the fatal shot, reasonable cause to believe, and did believe, that William Johnson was about to kill him or to do him some great bodily harm, you will decide from all the facts and circumstances before you. No. 11. The jury are the sole judges of the credibility of the witnesses, and of the weight and value to be given to their testimony. In determining as to the credit you will give to a witness, and the weight and value you will attach to a witness' testimony, you should take into consideration the conduct and appearance of the witness upon the stand, the interest of the witness, if any, in the result of the trial, the motives of the witness in testifying, the witness' relation to, or feeling for or against, the defendant or the alleged injured party, the probability or improbability of the witness' statements, the opportunity the witness had to observe and to be informed as to matters respecting which such witness gives testimony, and the inclination of the witness to speak truthfully or otherwise as to matters within the knowledge of such witness. All these matters being taken into account, with all the other facts and circumstances given in evidence, it is your province to give to each witness such credit and the testimony of each witness such value and weight as you deem proper. If, upon a consideration of all the evidence, you conclude that any witness has sworn willfully false as to any material matter involved in the trial, you may reject or treat as untrue the whole or any part of such witness' testimony." "No. 14. The court instructs the jury that if you believe from the evidence that the defendant entered voluntarily into the difficulty that resulted in the death of William Johnson, and shall further find that the defendant could have, with safety to himself, withdrawn from the difficulty before the fatal shot was fired, and thus have avoided killing Johnson, it was his duty to have done so."

It is insisted that the tenth instruction is erroneous, in that it limits defendant's right to defend himself against the assaults which were made, or were about to be made, upon him by deceased only, and leaves out of consideration his right to use a weapon if necessary to protect himself from impending harm at the hands of the mob of angry and excited men, some of whom were armed with knives, pistols, bricks, and stones, and acting in concert with deceased. There was some evidence tending to show that, at the time defendant shot deceased, he was being pursued by him and a large number of angry and excited people, at least one of whom had an open knife in his hand, another a pistol, and others with parts of bricks; and, if this was true, he had the same right to defend himself against the assaults of all of them, or



any one of them, that he had against the assault of deceased; and if, in so doing, defendant shot and killed deceased, he was not guilty of any offense, nor would he have been had he killed either of the others of the pursuing party; and, as the instruction restricted the right of defendant to defend himself against the assault of Johnson only, it was too narrow, and should not have been given as it was. Although defendant brought on the difficulty in the first instance, or voluntarily entered into it for some unlawful purpose, the evidence showed that he abandoned the conflict, and ran into a store; and if he did so in good faith, and when he came out of the store he was pursued by deceased, and others acting in concert with him, in such manner as to give defendant good cause to believe, and he did believe, that they were about to do him great bodily harm, he had the right to shoot and kill any of them if necessary to protect his person from such apprehended danger. *State v. Partlow*, 90 Mo. 608, 4 S. W. 14; *State v. Cable*, 117 Mo. 380, 22 S. W. 953; 1 Bish. Cr. Law (5th Ed.) § 871; *Horr. & T. Cas. Self-Def.* 227; *Stoffer v. State*, 15 Ohio St. 47. Defendant's first refused instruction seems to have been intended to present this theory of the case; and while it does not do so very clearly, and was properly refused for that reason, it was sufficient to call the court's attention thereto,—indeed equivalent to a request to instruct thereon; and, in having failed to do so, it committed error. *State v. Davis*, 141 Mo. 522, 42 S. W. 1083; *State v. Brinkley* (not yet officially reported) 47 S. W. 793. But if, after defendant abandoned the conflict, he thereafter renewed it, or voluntarily entered into it for the purpose of wreaking his malice, there was no self-defense in the case.

It is well settled that flight by a person accused of a crime, for the purpose of avoiding arrest and prosecution for the offense, raises a presumption of guilt. *State v. Potter*, 108 Mo. 424, 22 S. W. 89; *State v. Ma Foo*, 110 Mo. 7, 19 S. W. 222; *State v. Williams*, 54 Mo. 170; *State v. Gee*, 85 Mo. 647. And there was sufficient evidence to justify the instruction upon that point.

The fourteenth instruction is vicious, in that it does not embody that constituent element of voluntarily entering into a difficulty which is absolutely necessary in order to deprive a person so doing of the right to avail himself of the law of self-defense; that is, that he must have done so for the purpose of wreaking his malice, or for the purpose of taking the life of some of those present, or doing some of them some great bodily harm. *State v. Partlow*, supra; *State v. Gilmore*, 95 Mo. 554, 8 S. W. 359, 912; *State v. Cable*, supra; *State v. Lewis*, 118 Mo. 84, 23 S. W. 1082; *State v. Evans*, 128 Mo. 406, 31 S. W. 34; *State v. Hopper*, 142 Mo. 478, 44 S. W. 272; *State v. Rapp*, 142 Mo. 443, 44 S. W. 270. In the last case, *Sherwood, J.*, in speaking for the court, said: "We say here now, once

and for all, that the voluntarily entering into a difficulty is not an ingredient of any homicidal act." It must be done for the purpose of wreaking malice, or for the purpose of taking advantage of an antagonist, and of taking his life or doing him some great bodily harm. It logically follows from what has been said that the second instruction asked by defendant, which is in harmony with the views herein expressed, should have been given.

There was nothing in the remarks of the prosecuting attorney in his argument before the jury which would justify a reversal of the judgment upon that ground.

From these considerations, we reverse the judgment, and remand the cause.

GANTT, P. J., and SHERWOOD, J., concur.

### STATE v. BURDETT.

(Supreme Court of Missouri, Division No. 2.  
Nov. 7, 1898.)

CRIMINAL LAW—APPEAL—RECORD—REVIEW—INDICTMENT—VENUE—BURGLARY.

1. A motion for a new trial is not a part of the record proper, and is available only when made part of the bill of exceptions.

2. Rulings of the circuit court will be reviewed only after having been brought to its attention by motion for a new trial.

3. An indictment that at the county of Christian, in the state of Missouri, defendant burglariously entered a building "there situate," sufficiently describes the place of the offense.

4. An indictment that accused feloniously and burglariously entered the building of a certain person, which was situate within the curtilage of such person's dwelling, but did not form a part thereof, sufficiently charges that the building within which the burglary was committed was within the curtilage of the owner's dwelling, within Rev. St. 1889, § 3526, defining burglary in the second degree as the breaking and entering into a building within the curtilage of a dwelling, but not forming a part thereof.

5. Where a taking of goods, as well as a burglarious entry, is charged, accused may be convicted of burglary without being also convicted of larceny.

Appeal from circuit court, Christian county; Argus Cox, Special Judge.

C. M. Burdett was convicted of burglary in the second degree, and he appeals. Affirmed.

Francis M. Wolfe, O. E. Gorman, and John Schmook, Jr., for appellant. Edward C. Crow, Atty. Gen., Sam. B. Jeffries, Asst. Atty. Gen., and W. W. Graves, for the State.

GANTT, P. J. At the February adjourned term of the circuit court of Christian county, for the year 1897, the following indictment was duly preferred against the defendant, C. M. Burdett: "The grand jurors of the state of Missouri, impaneled, sworn, and charged to inquire within and for the body of Christian county, upon their oath present

that O. M. Burdett, late of the county and state aforesaid, on the 27th day of March, A. D. 1897, at the county of Christian and state of Missouri, did then and there unlawfully, feloniously, and burglariously, with the assistance and aid of one or more confederates, then actually present, aiding, and assisting, break into and enter the smoke house of one W. E. Thrower, by then and there, feloniously and burglariously, forcibly bursting and raising the latch of the outside door of the said smoke house there situate, the said smoke house being a building within the curtilage of the dwelling house of the said W. E. Thrower, in which dwelling house then and there resided the said W. E. Thrower and family, and the said smoke house not being or forming a part thereof, the said dwelling house, in which said smoke house there was then and there kept divers of goods and chattels, and with the intent then and there feloniously and burglariously to steal, take, and carry away six middling pieces of hog-meat, of the value of twenty dollars, of the personal property of the said W. E. Thrower and one J. W. Morris, then and there in the said smoke house being found, and did then and there, feloniously and burglariously, break into and enter the said smoke house in the manner aforesaid described, and then and there feloniously and burglariously steal, take, and carry away the said six middling pieces of hog meat, of the property and value as aforesaid described, against the peace and dignity of the state." The defendant demurred to this indictment, and, his demurrer having been overruled, he was duly arraigned, and entered his plea of not guilty. Upon a trial he was found guilty of burglary in the second degree, and sentenced to three years' imprisonment in the penitentiary. From that sentence this appeal is prosecuted.

1. At the threshold of our investigation of the errors alleged to have been committed by the circuit court, we are confronted with the proposition that the record proper only is before us; in other words, that the so-called "bill of exceptions" is such only in name, and not in fact or law. If this be so, it will save the examination and decision of numerous points discussed in defendant's brief. Upon examination of the transcript, we find the motion for new trial is not made a part of the bill of exceptions, nor is it called for in the bill by defendant. It does, indeed, appear that in the record proper the clerk has incorporated a motion for new trial and the order overruling it. But nowhere in the bill of exceptions was any exception taken or preserved to the action of the court in overruling the motion. It has long been held by this court that motions for new trial and in arrest of judgment, applications for continuance and instructions, were not a portion of the record proper, and, unless made a part of the bill of exceptions, would not be noticed by this court.

State v. Griffin, 98 Mo. 672, 12 S. W. 358, and cases cited. Being no part of the record proper, it necessarily followed that they could only become part of the record by proper exceptions. State v. Gilmore, 110 Mo. 1, 19 S. W. 218. From these rulings it results that, in legal contemplation, there is no motion for a new trial in the record; and this court, in a long line of decisions, has held that it will not consider objections to the action of the circuit courts which were not brought to the attention of the circuit court by a motion for new trial. *Ross v. Railway Co.*, 141 Mo. 390 38 S. W. 926, and 42 S. W. 957; *Cowen v. Railroad Co.*, 48 Mo. 550; *Matlock v. Williams*, 59 Mo. 105; *State v. Murray*, 126 Mo. 529, 29 S. W. 590; *State v. Harvey*, 105 Mo. 316, 16 S. W. 886; *Rev. St. 1889, § 4221*.

2. The sufficiency of the indictment alone remains to be considered. This indictment is evidently intended to charge an offense under section 3526, *Rev. St. Mo. 1889*. That section provides that "every person who shall be convicted of breaking and entering any building within the curtilage of a dwelling house, but not forming a part thereof, \* \* \* shall on conviction be adjudged guilty of burglary in the second degree." It was ruled in *State v. Schuchmann*, 133 Mo. 111, 33 S. W. 35, and 34 S. W. 842, that an indictment under this section must charge that the building in which the burglary was committed was within the curtilage. Here the averment is "did then and there feloniously break and enter the smoke house of one W. E. Thrower, by then and there, feloniously and burglariously, forcibly bursting and raising the latch of the outside door of the said smoke house there situate, the said smoke house being a building within the curtilage of the dwelling house of the said W. E. Thrower, in which dwelling house then and there resided the said W. E. Thrower and family, the said smoke house not being or forming a part thereof." Holding, as we do, that every indictment must contain and set forth every necessary ingredient of the offense sought to be charged, we think this indictment distinctly charges the place, to wit, "at the county of Christian, in the state of Missouri," and the felonious and burglarious breaking and entering into a smoke house "there situate," and fully met the requirement of the statute, and the decision of this court in the *Schuchmann Case*, *supra*, in averring that "said smoke house was within the curtilage of the dwelling house of W. E. Thrower," but was not a part thereof.

It remains only to add that it was entirely competent to convict the defendant of burglary without convicting him of larceny also. *State v. Brinkley* (not yet officially reported) 47 S. W. 798. Perceiving no error in the record, the judgment is affirmed.

SHERWOOD and BURGESS, JJ., concur.

## STATE v. HILL.

(Supreme Court of Missouri, Division No. 2.  
Nov. 7, 1898.)

CONSTITUTIONAL LAW—JUDGES—POWERS—SPECIAL  
LAWS—UNIFORMITY OF OPERATION.

1. Act March 1, 1897, providing that the judge of the criminal court of Buchanan county may be called on by the circuit judge of any other county to hold a term or a part thereof in such other county, and vesting him in such case with the powers of a circuit judge, is a special law, and repugnant to Const. art. 4, § 53, prohibiting special legislation regulating the practice or jurisdiction of judicial proceedings.

2. Said act is repugnant to Const. art. 4, § 53, par. 32, prohibiting the enactment of a special law where a general law can be made applicable.

3. 2 Rev. St. 1889, p. 2209, § 3, gives the judge of the criminal court of Buchanan county the powers of a circuit judge in criminal cases. Act March 1, 1897, vests him whenever called on by a circuit judge of another county to hold a term or a part thereof, with the powers of a circuit judge in civil and criminal proceedings. *Held*, that the latter provision is invalid for want of uniformity of operation.

Appeal from circuit court, Platte county;  
R. E. Culver, Special Judge.

Joel Hill was convicted of an offense, and he appeals. Reversed.

James W. Coburn, James H. Hull, and James W. Boyd, for appellant. Edward C. Crow, Atty. Gen., and Sam. B. Jeffries, Asst. Atty. Gen., for the State.

SHERWOOD, J. The powers and jurisdiction of the judge of the criminal court of Buchanan county are defined in section 3, p. 2209, 2 Rev. St. 1889. That section as it was originally, and the amendment thereto, approved March 1, 1897, are as follows, the amendment being indicated by the brackets:

"Sec. 3. Powers and Jurisdiction. The judge of said court shall be a conservator of the peace throughout his county, and shall have the power and jurisdiction to issue, hear and determine writ of habeas corpus, and to admit to bail all parties entitled thereto, and shall have such powers as the several judges of the circuit courts in this state have in criminal cases, [and may be called upon by the judge of any circuit in this state to try any cause pending in such circuit in which a change of venue has been granted from the judge, or to hold any term or part of term of court for such circuit judge, and in such matters shall have such powers as the several judges of the circuit courts of this state now have in civil and criminal proceedings.]"

If the foregoing amendment is valid, then the judge of the criminal court of Buchanan county had the right to sit in the trial of this cause on the bench of the circuit court of Platte county, having been called upon so to do by the judge of that court.

In order to determine the question thus presented, it is necessary to examine the provisions of section 53 of article 4 of the constitution, so far as applicable to the case be-

fore us. The general assembly is prohibited from passing any local or special law "regulating the practice, or jurisdiction of, or changing the rules of evidence in, any judicial proceeding or inquiry before courts," etc. Is the amendment of 1897, then, "a local or special law"? In *Ex parte Allen*, 67 Mo. 534, it was held that "An act making provision for supplying the place of a criminal judge in the event of his sickness, absence or inability to hold court" was one regulating the criminal practice and proceedings in courts of record. And in *State v. Kring*, 74 Mo. 612, it was decided that the act approved March 26, 1881 (Laws 1881, p. 119), in relation to and which changed the method of procedure only in the criminal court of St. Louis, was a special law, inasmuch as it was confined in its operation to that one court, and was therefore violative of section 53 of article 4 of the constitution aforesaid. In the light of these authorities, and in the light of the plain provisions of the constitution already cited, the law before us cannot escape the condemnation of being a local or special law.—one which regulates the practice and jurisdiction of courts.

The law under consideration is invalid for another reason, even if concession be made that the legislature could validly pass a local or special law for the purpose indicated. Paragraph 32 of section 53 of article 4 of the constitution declares: "In all other cases where a general law can be made applicable, no local or special law shall be enacted." That a general law could be made applicable to judges of criminal courts all over the state no one can doubt. Thus, a statute which made it a misdemeanor for barbers to shave their customers on Sunday was held to be a local or special law, where a general law could be made applicable. *State v. Graneman*, 132 Mo. 326, 33 S. W. 784.

The act of 1897 is also obnoxious to other objections: Its operation is not uniform. In Buchanan county the judge of the criminal court has only "such powers as the several judges of the circuit courts of this state have in criminal cases," but whenever he steps over the line of Buchanan county he immediately assumes the proportions and jurisdiction of a circuit judge in civil as well as in criminal cases. Touching this topic of the uniform operation of a law, Judge Cooley observes: " \* \* \* Those who make the laws are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough." This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments. \* \* \* Cooley, Const. Lim. (6th Ed.) 483, and cases cited. "The legislature may suspend the operation of the general laws of the state; but when it does so the suspension must be general, and cannot be made for individual cases or for particular

localities." *Id.* 482, and cases cited. By the general laws of the state, the judges of the criminal courts of the state could not be called out of their respective counties to sit on a circuit bench in other counties. By the law in question that general law is suspended only in a particular locality, to wit, Buchanan county. While in that county the judge of the criminal court is, as such judge of such court, subject to the control of the circuit court of his county, but, when he is dehors the county, he becomes a controller of the criminal court of any county into which he may be called to exercise his new-found and new-fledged functions. Nor is it possible to separate the civil powers of the judge thus called in from his criminal, since the legislature evidently had but one object in view; its purpose was evidently to confer both civil and criminal jurisdiction. This being the case, the whole statute must fall. *Id.* 211. As the defendant was tried and convicted under an unconstitutional law, we reverse the judgment and remand the cause. All concur.

### STATE v. PENNINGTON.

(Supreme Court of Missouri, Division No. 2.  
Nov. 7, 1898.)

#### HOMICIDE—EVIDENCE—INSTRUCTIONS—SELF-DEFENSE.

1. Evidence that accused was subject to epileptic fits, which is expressly stated to be interposed, not to prove his insanity at the time of the homicide, but to account for his conduct afterwards, is properly excluded.

2. An instruction that if defendant had reason to believe, and did believe, that deceased was about to injure him, and killed him to prevent such injury, he must be acquitted, and that the danger need not have been real, if defendant believed with good reason that it existed, but that he must have had reasonable cause to believe the danger existed, before he can be acquitted for self-defense, fully covers the law on that point.

3. When an instruction, as given, fully covers the law of self-defense, it is not error to refuse requests for other instructions on the same point.

4. If accused voluntarily entered into the altercation with deceased for the purpose of killing or injuring him, the danger in which he found himself during the altercation would not extenuate his offense.

5. The evidence showed that accused began the altercation with deceased, who was armed only with a pocketknife, which he held open in his hand at the time, and during the quarrel shot him,—he making no resistance,—and then, exclaiming that he had killed an innocent boy, shot and slightly wounded himself; that on the previous day accused had threatened to kill deceased. The defense was self-defense; accused claiming that deceased had made threats against him, and that during the altercation he tried to stab him. *Held*, that an instruction on murder in the first degree, in connection with instructions as to lesser degrees, was not error.

Appeal from circuit court, Morgan county; D. W. Shackelford, Judge.

Harrison H. Pennington was convicted of murder in the second degree, and appeals. Affirmed.

The defendant appeals from a judgment sentencing him to the penitentiary for 12 years for a murder in the second degree. The indictment was preferred by a grand jury of Morgan county. The defendant was duly arraigned and tried at the April adjourned term, 1897. The homicide occurred at Proctor, a small village on the Osage river, in Morgan county. On the day of the general election, November 3, 1896, the defendant, Pennington, and the deceased, Benjamin Wilson, were both in the town of Proctor. About 8 o'clock in the night of that day they met in the store of Mr. Talbott. The evidence very conclusively establishes that Pennington began the difficulty by saying to Wilson: "You have been telling around that I have been bootlegging whisky," or "selling whisky." Wilson replied that he had not. Pennington repeated that he had. Wilson again said: "I have not been telling anything of the kind. It seems like you fellows have got it in for me this evening. I am not afraid of you,"—and asked Pennington: "Where is your proof?" Pennington replied: "William Irwin." Wilson asked: "Where is Irwin? Bring him here, and I will prove to you that I did not tell him that." Pennington then said: "You are a liar. You are a G—d d—n liar. You are a G—d d—n son of a bitch, you are,"—and immediately began to shoot the deceased. He shot him four times. One bullet entered between the fifth and sixth intercostal space, another entered under the arm, in the axillary space, a third struck the tenth rib, and a fourth went into the muscle of the arm. Death was almost instantaneous. The deceased made no resistance. He was wholly unarmed, save with an ordinary pocketknife, the long blade of which was perhaps two inches in length. It appears that, just prior to the assault on him by defendant, the deceased had his knife in his hand, cutting a piece of bologna sausage which he was eating. This knife was found under him, with the large blade open, after his death. After shooting the deceased four times, defendant broke his revolver, and threw out the exploded shells, and reloaded it. He then started towards the door, and accosted William Irwin, and inquired if he had friends enough there to bury him. Irwin said: "I think you have," whereupon defendant said, "All right; I killed this poor, innocent boy, and I want to die with him;" and, suiting his action to his words, he shot himself, but not seriously, we judge from the result. He then stepped out of the door, and turned back, saying, "I want to go back and kiss that poor, innocent boy that I have killed." He got down on his knees, leaned over, and kissed the dead man. There was evidence that a few minutes before the shooting the deceased came into the store, passing near where defendant and one Moore were talking, and remarked, in a quiet but general way, that "nobody could run sandles on him that way"; apparently alluding to some conversation outside of the store. There was also testimony that on Sun-

day, prior to the election, defendant had said that if Wilson, the deceased, had used the language that the defendant had heard, "he believed he would kill him." The defense was self-defense. Defendant, in his own behalf, testified that he and deceased had several conversations outside of the store on different occasions during the day of the homicide; that at the well deceased said to him, "I have got it in for you;" that he made this same speech that night, out on the porch of the store, at which time defendant says he assured deceased he never said he would hurt him. He details the occurrence in the store in this way: "Mr. Wilson, he come in again, and he walked up and got right in front of me and the cut-off in the counter. The cut-off runs straight from the east door to the north wall of the building. There is a cut-off in the west counter. What I means is, where you go behind the counter, and where you go out at the door, going between the counter. And he turned round there to me. On that, there was a word or two spoken,—I disremember what it was; and he turned round there, and he looked me right in the eyes, and he says to me, he says, 'I have got no friends here, but' (he said) 'you cannot run a sandy on me.' Just them very words is what he spoke; and, of course, I disremember what the conversation was after that, but it occurred pretty shortly. I disremember what it was. And when he said that,—when he says, 'You can't run any sandy on me,'—the best I remember, he had his hand in his hip pocket, just this way. And he pulled his hand out of his hip pocket, and stuck it in this pocket. Q. Coat pocket? A. Yes, sir; and then he kinder turned this way, and he says again, 'I don't allow no damn man to run a sandy on me;' and he drew the knife out of his pocket, in his hand. There was a light on the west counter, something near four feet in the gateway where you go between the counter from the east to the west; and that goes way on the other side, that goes out on the porch. And this lamp was sitting over there something near three or four feet from the end of the counter. Mr. Wilson was standing on the north side of me, and he throwed himself in a position like this, with that knife in his hand. I could see the knife very plainly, because I seen the light reflect on it from that lamp on the west side of the stove; and, when he threw that knife back that way, Mr. Powelson jumped in and says, 'Boys, I don't want no fighting in this house.' That is what Mr. Powelson says. And I seen the knife there, as he drew back this way, in a kind of position like this; and I saw him as he threw his hand back there. I seen the lick was coming from the knife. I was not more than three feet from him. Powelson caught me, and this other fellow caught him. And this other fellow was on the east side of Wilson. He was on the east side of him as he turned around, and I drew my pistol out of my hip pocket and shot him. Q. How rapidly did you shoot? A. Well, I could not state how

fast it was. Q. What kind of a revolver was it? A. It was a double action. Q. Were you excited? A. Yes, sir; I was excited a little bit." The defendant further testified: "I had no intention of shooting him before I saw the knife. The excitement was so high with me that I don't remember anything at all after the shooting occurred. I don't remember shooting myself. I felt the shock, but do not remember it. I do not remember talking with Mr. Irwin. Don't remember when Mr. Thompson and Dr. Gibbs came. I think the knife blade was about two and one-half or three inches long." Henry Bicknell testified that on the day of the killing he was standing at the well in Talbott's barnyard with the deceased; that while there defendant passed by, and deceased remarked, "There is a s— of a b— that I have got it in for." He testified to hearing Pennington tell deceased to go away from him; he was not looking for fights. There was evidence that defendant's general reputation as a peaceable man was good, and that deceased had a bad reputation in that regard. The court instructed the jury in writing on murder in the first degree, second degree, and manslaughter in the fourth degree, self-defense, reasonable doubt, the presumption of innocence, and the good character of defendant. Defendant asked certain instructions which the court refused.

William Forman and Boogher & Williams, for appellant. Edward C. Crow, Atty. Gen., Sam B. Jeffries, Asst. Atty. Gen., and W. W. Graves, for the State.

GANTT, P. J. (after stating the facts). 1. This cause was well tried, and the exceptions are few. One of the principal points urged for reversal is the exclusion of certain evidence tending to show that defendant, both before and after the killing, had been subject to epileptic fits. To rightly understand the court's ruling on this point, we repeat what occurred on the trial in this connection. Counsel for defendant offered to prove by defendant himself and his brother and a physician that defendant had been subject to epileptic fits before and since the killing. "We do not offer this to show him insane at the time of the killing, but to account for his forgetfulness of the events first following the killing." Thereupon the court ruled "that counsel having stated that a plea of insanity is not interposed in this case, and that the proposed evidence is only offered for the purpose of explaining the conduct of defendant after the fatal shooting, the objections to it are sustained, and the evidence excluded." This action of the court is now assigned as error. Most clearly, the court was right. After the declaration of counsel that the only purpose was to account for defendant's failure to remember the occurrences after the killing, it was not relevant to any issue in the case. The crime, if any, was then complete, and defendant was not on trial

for any subsequent conduct. Whether his memory was good or bad was utterly immaterial. Having waived the only defense to which evidence of his subsequent condition could have been relevant, it was properly excluded.

2. The court gave the following instruction on self-defense: "(4) If at the time the defendant shot the deceased he had good reason to believe, and did believe, that the deceased was about to immediately inflict upon him some great personal injury, and he shot him for the purpose of averting such apprehended injury, then you must acquit him, on the ground of self-defense. In such case it is not necessary that the danger should have been real, and about to fall. All that is necessary is that defendant believed, and had good reason to believe, that such danger existed. On the other hand, it is not enough that the defendant believed in the existence of such danger, but he also must have had reasonable cause for so believing, before he can be acquitted upon the ground of self-defense." This instruction fully covered the law on this point, and no error was committed in refusing others asked by defendant on the same subject.

3. Among other instructions, the trial court instructed the jury that: "If the defendant brought on the difficulty, or entered into it with the intention of killing, or inflicting great personal injury upon, said Wilson, then the danger in which he found himself during such difficulty would not extenuate his offense, or reduce its grade at all; but if he voluntarily brought it on, or entered into it, without any intent of killing, or inflicting great personal injury upon, said Wilson, and during such difficulty it became necessary for him to kill said Wilson to save himself from being killed or receiving great personal injury, then he cannot be entirely excused on the ground of self-defense, but in that case you should find him guilty of manslaughter in the fourth degree." Defendant insists this instruction has been condemned by this court in *State v. Partlow*, 90 Mo. 608, 4 S. W. 14, and *State v. Rapp*, 142 Mo. 443, 44 S. W. 270. We do not so understand those cases. In *Partlow's Case* this court held that the right of perfect or imperfect self-defense depended upon the intent with which the assailant brought on the quarrel. The doctrine as stated by Dr. Wharton (1 Whart. Cr. Law [8th Ed.] §§ 474-476), that: "The plea of provocation will not avail in any case where it appears that the provocation was sought for and induced by the act of the party in order to afford him a pretense for wreaking his malice; and it will presently be seen that, even where there may have been previous struggling or blows, such plea cannot be admitted where there is evidence of express malice; and it must appear, therefore, that when he did the act he acted upon such provocation, and not upon any old grudge,"—was expressly approved as law. And the

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rule as advanced by Bishop (2 Bish. Cr. Law, § 702) was adopted, in these words: "If, without provocation, a man draws his sword upon another, who draws in defense, whereupon they fight, and the first slays his adversary, his crime is murder. For he who seeks and brings on a quarrel cannot, in general, avail himself of his own wrong in defense. But where an assault which is neither intended nor calculated to kill is returned by violence beyond what is proportionate to the aggression, the character of the combat is changed; and if, without time for his passion to cool, the assailant kills the other, he commits only manslaughter." The instruction was clearly drawn with reference to this view of the law. In *State v. Rapp*, 142 Mo. 443, 44 S. W. 270, the instruction failed to note altogether the intention with which the assailant entered into the difficulty; and the case, in its other features, was dissimilar to the one now being considered.

It remains only to say there was no error in giving an instruction on murder in the first degree. There was cogent evidence that defendant had fully formed the design to kill deceased, and that he carried out his purpose in a heartless, cruel manner, without the slightest justification or provocation. We are not surprised that remorse drove the defendant himself to admit that he had killed an innocent young man. Had the verdict been for murder in the first degree, it would not have been disturbed. Having patiently considered all the assignments, and found no error in the record, we affirm the judgment, and it is so ordered.

SHERWOOD and BURGESS, JJ., concur.

MERRICK et al. v. ROGERS et al.

(Court of Civil Appeals of Texas. Nov. 23, 1898.)

BILLS AND NOTES—CONTEMPORANEOUS AGREEMENTS  
—APPLICATION OF PAYMENTS—MIS-  
LEADING INSTRUCTIONS.

In an action on a note, where the defense was that plaintiff (payee) agreed to furnish defendant (maker) a line of credit, and that the note was executed and delivered to secure such line of credit, on an agreement "that the first moneys paid to plaintiff by defendant should be applied on the note," which was alleged to have been paid in full by such payments, the court instructed that, if the jury believed the evidence constituting such defense, they should find for defendant, whether or not said moneys were "specifically directed to be applied on said note." *Held*, that a subsequent clause of the instruction, stating that, if the moneys paid on account had not been applied on the note by plaintiff, then the note was not paid, was erroneous, and also misleading, as in contravention of the preceding clause.

Appeal from McLennan county court; J. N. Gallagher, Judge.

Action by J. T. Rogers against J. H. Merrick, T. L. Smith, and another. From a

judgment for plaintiff against defendants Merrick and Smith, they appeal. Reversed.

O. L. Stribling and T. P. Stone, for appellants. Scarborough & Scarborough, for appellees.

KEY, J. J. T. Rogers brought this suit against J. H. Merrick, T. L. Smith, and Joel Robinson to recover upon a promissory note. The defendants in their answer averred, in substance, that the plaintiff agreed to furnish the defendant Merrick a line of credit for meat to be used by him in running a market; that the note was executed and delivered for the purpose of securing such line of credit, and upon an agreement that the first moneys paid by Merrick to the plaintiff should be applied to the payment of the note; and that Merrick had paid to the plaintiff sums of money that exceeded the amount of the note, thereby paying off and discharging the note. The defendant Robinson interposed another defense, unnecessary to be here stated. Verdict and judgment were rendered in favor of the plaintiff against Merrick and Smith, and releasing Robinson from liability. Merrick and Smith have appealed.

There was testimony tending to support the averments of the answer referred to, and the court instructed the jury in reference thereto as follows: "(3) On the issue of payment of the note sued on, you are instructed that if you find from the evidence that plaintiff agreed at the time the note was given by defendants and received by him that the first moneys paid by said Merrick and Smith should be applied in satisfaction and payment of the note sued on, and you further believe from the evidence that said agreement was never afterwards modified between plaintiff and any of said defendants, and you further find that said plaintiff has received from said Merrick and Smith sufficient money to satisfy and pay the note sued on, if it had been applied to said note, whether specially directed to be applied to said note or not, then said note should be held to be paid, and you will find for all the defendants, and so say by your verdict; but if you find from the evidence that such an agreement was made by plaintiff at the time he received, and defendants gave, the note sued on, and you further find that said Merrick and Smith have never paid him any sum of money to be credited on this particular note sued on, or that plaintiff has never so applied any part of the money paid him by said Merrick and Smith, if any was so paid him, but applied the same on other valid indebtedness owed to him by said Merrick and Smith, then the note sued on would not be paid, and you should so find."

This charge, down to the word "verdict," states the law correctly, but that which follows after the word "verdict," if correctly copied in the transcript, is subject to the criticism urged against it, because it tended to

contravene the other, and was calculated to confuse and mislead the jury. It conveys the idea that, even if the agreement referred to was made, the plaintiff had the right, in the absence of directions given by Merrick and Smith, to apply the funds covered by the agreement to indebtedness other than the note sued on. If the alleged agreement was made, and Merrick and Smith thereafter made payments to the plaintiff, without any direction as to how they should be applied, the first payments so made, to the extent of the note sued on, were, by the terms of the contract referred to, to be applied in satisfaction of the note, as stated in the first part of the charge quoted. However, counsel for appellees contend that error in the charge is immaterial, and the judgment should be affirmed, because the court should have directed a verdict for the plaintiff. This contention is advanced because the defendants stated in their answer that the note was executed to secure a line of credit, and the uncontroverted testimony shows that the defendants Merrick and Smith still owe the plaintiff, for meat furnished them, a sum in excess of the note sued on. If the answer admitted that the note was executed to secure a line of credit for an indefinite period of time, or for any and all sums, this contention might be sustained. The answer, however, does not go to this extent, and does expressly allege that it was agreed between the parties that the first moneys paid by Merrick to the plaintiff should operate as payments upon the note. On the other questions presented we rule against appellants, and for the error pointed out we reverse and remand the case. Reversed and remanded.

#### STEVENS v. PERRIN.

(Court of Civil Appeals of Texas. Nov. 19, 1898.)

##### APPEARANCE—PROCEEDINGS CONSTITUTING.

An attorney stating to a clerk of court that he represents plaintiff, and requesting that his name be entered on the docket as his attorney, does not thereby make an appearance for him, within Rev. St. 1895, art. 5300, requiring a continuance, if plaintiff does not appear at the first term, in proceedings for the trial of the right of property seized under execution.

Appeal from district court, Floyd county: S. I. Newton, Judge.

Action by J. R. Stevens against William Perrin. Plaintiff obtained judgment, and issued an execution, and Ida Perrin asserted ownership in the property levied on. From an order quashing the execution, plaintiff appeals. Reversed.

Joe Rossen and Morgan & Moore, for appellant.

TARLTON, C. J. On August 23, 1890, the appellant recovered a judgment against William Perrin in the county court of Knox county, Tex. On May 22, 1897, an alias execution

upon this judgment was issued to Floyd county, and was levied upon a number of horses as the property of the defendant in the judgment. On July 9, 1897, Ida Perrin, the appellee herein and the wife of William Perrin, filed her claimant's oath and bond, asserting her separate ownership of the property levied upon. At the August term, 1897, of the district court of Floyd county, which was the first term after the filing of the claim, the appellee filed her motion to set aside the execution and to discharge her bondsmen, alleging that the execution was void because it did not appear from the face thereof at what term or by what court the judgment was rendered upon which the process issued. The court at the same term, in the absence of the plaintiff or his counsel, sustained the motion, quashed the execution, and ordered the discharge of the claimant and her sureties, and the release of the property from the levy. At the succeeding term, held in February, 1898, the plaintiff in the judgment and execution appeared and filed his application to set aside the judgment rendered at the July term, 1897, alleging that he had a valid judgment and execution against William Perrin, showing by proper averments that the execution was not subject to the defects on which was founded the judgment dissolving it at the preceding term; that the property levied upon was the community property of William Perrin and Ida Perrin; showing, further, that neither the plaintiff nor his attorney had appeared at the preceding term of the court; and praying that the judgment then rendered be set aside, and that issues be made up between the parties, to the end that a trial of the right to the property levied upon might be had upon the merits of the controversy. The defendant replied to this application, alleging an appearance by the plaintiff at the preceding term, the character of which appearance is disclosed by the following affidavit of the district clerk of Floyd county: "Morgan, Stephens & Moore, attorneys who live at Benjamin, Texas, 115 miles from this court, appeared at the last term of this court, and said they represented plaintiff in the cause of Stevens and Perrin, No. 45, in district court, and Morgan & Stephens' names were by me placed on the docket in said cause as attorneys for plaintiff, and on the first day of said term of court said attorneys appeared and filed a copy of an execution in said cause. It is not my custom as clerk to place attorneys' names on the docket as attorneys unless pleadings show it or unless directed by the attorneys to do so, and I think I noted said Morgan & Stephens' names on said docket as attorneys for plaintiff at their request. Said attorneys had no other case in this court at said term of court, except the cause of Stevens and Perrin. Mr. Stephens, in conversation while he was here, told me he was not interested in the cause, but was only accompanying Mr. Morgan."

Our statute provides that, "if the plaintiff does not appear at the first term, the case

must be continued to the next term; \* \* \* but if he does not then appear on or before the appearance day of the term, he may be nonsuited." Rev. St. 1895, art. 5300. From this it is manifest that the ex parte proceeding upon which the action of the court was predicated was erroneous, unless the plaintiff must be held at that term to have entered an appearance, within the meaning of the law. We are of opinion that the facts stated in the clerk's affidavit (and also in the appended affidavit of an attorney, which we deem it unnecessary to set out) do not constitute such an appearance. A statement by an attorney in the clerk's presence that he represents a party litigant, with a probable request, as in this case, that his name be entered upon the docket as the attorney for the party, cannot, it seems to us, constitute such an appearance as is contemplated by law. Says Chief Justice Willie in *Field v. Fowler*, 62 Tex. 68: "How this appearance is to be effected is not prescribed, but when the parties come into court, as in this case, and have an entry made upon the minutes that they have appeared, it is sufficient to prevent the consequences of a failure to appear on either side." So, the statute (Rev. St. 1895, art. 1241) regulating proceedings in ordinary suits prescribes that "the defendant may \* \* \* by attorney \* \* \* enter an appearance in open court, and such appearance shall be noted by the judge upon his docket and entered in the minutes, and shall have the same force and effect as if citation had been duly issued and served as provided by law." We hence deduce that, in the absence of pleadings filed or of an appearance in open court entered upon the minutes thereof, it would be unsafe and unwise to hold parties responsible for an appearance in courts of record upon such vague and uncertain conditions as those here disclosed. The sufficiency on its face of the plaintiff's application is not questioned here, but the record indicates that the court overruled the motion on account of an erroneous apprehension of what constitutes an appearance. Hence we reverse the judgment and remand the cause, that the matter in controversy between these parties may be tried upon its merits. It is so ordered.

#### BROWN v. MONTGOMERY.

(Court of Civil Appeals of Texas. Nov. 19, 1898.)

#### RIGHT TO SET-OFF—INTEREST—SEPARATE ACTIONS—CONSOLIDATION—COSTS.

1. The claim of one sued on an interest-bearing debt should be set off against the debt as of the time the claim became due, and not the time of trial; and this though the debtor brought a separate action on his claim, and for more than was due, which the creditor disputed in toto, and the right to set-off was not put forth for years afterwards, when the two actions were consolidated, and the debtor amended his answer in the first action, and claimed the set-off.



2. Under Rev. St. 1895, art. 753, providing that when a counterclaim is pleaded the party recovering judgment shall also recover his costs, where one maintaining an independent action on a counterclaim merges it into the original action, and sets up his claim there, he is properly charged with the costs of his own action, and also the other, if he fails to establish a set-off equal to the original demand.

Appeal from district court, Wilbarger county; B. M. Baker, Special Judge.

Action by R. E. Montgomery against G. A. Brown. There was a judgment for plaintiff, and defendant appeals. Reversed.

Huff & Hall and G. A. Brown, for appellant. W. S. Essex, for appellee.

STEPHENS, J. On December 10, 1892, appellee sued appellant in the district court of Tarrant county upon two promissory notes made April 16, 1889, due one and two years from date, each in the principal sum of \$400, with interest from date at the rate of 10 per cent. per annum, payable annually, and unpaid interest to draw interest; each note containing the further stipulation for "ten per cent. on the amount due as attorney's fee," if sued upon. On December 31, 1892, appellant sued appellee in the district court of Wilbarger county for the reasonable value of services rendered as an attorney at the instance of appellee; the amount of the claim exceeding that of the notes declared on by appellee. On February 23, 1893, after trials, appeals, and reversals in both cases, in accordance with a written agreement entered into providing for a change of venue from Tarrant to Wilbarger county, and providing for a trial at the same time of both suits before the same special judge, the cases were tried in the district court of Wilbarger county, under the following number and style: "No. 1,364. R. E. Montgomery v. G. A. Brown,"—upon amended pleadings filed at that term of the court, in which appellee declared on the notes, and appellant, among other defenses, set up as a counterclaim, and in extinguishment of the notes, his account for professional services. Upon the issue thus joined, the court, after finding in favor of appellee the amount due upon his notes, principal and interest, at the institution of the suit in Tarrant county, December 10, 1892, allowed appellant as offsets at that date the following: \$315 due February 1, 1889, with interest at 8 per cent. per annum from January 1, 1890, to October 22, 1891, and at 6 per cent. from that time to December 10, 1892, and the further sum of \$400 (of the \$1,000 claimed), due May 9, 1887, with interest from January 1, 1888, at the rates above specified,—and gave appellee judgment for the difference, plus the interest to date of judgment, with attorney's fees, and for all costs of both suits. From that judgment this appeal is taken, both parties assigning errors thereto; and as it rests upon conclusions of law and fact, without any statement of facts, we proceed at once to dispose

of the questions of law raised by appellant's assignments and appellee's cross assignments of error.

That there was nothing in the character of appellant's counterclaim to prevent him from pleading it as an offset to appellee's debt, seems to be conceded. Indeed, the accepted construction of our counterclaim statute does not admit of contention on this point. Like statutes in other states have been similarly construed. *Briggs v. Moore*, 14 Ala. 433, in which an account for reasonable attorney's fees was allowed as an offset against a promissory note. For a recent and parallel case decided by this court, see *McCarty v. Squyres*, 34 S. W. 356. But, as appellee's debt bore a higher rate of interest than appellant's, the contention arises over the time and manner of applying the offset; appellant contending that it should have been applied to the notes as they matured, so as to extinguish entirely the one first maturing, and the other pro tanto, while appellee contends that the application should not have been made before the time of the trial. Ordinarily the offset is applied as of the time when the suit was brought, as was done on the trial of this case; but the rule on this subject where interest materially affects the result is thus laid down by a standard author: "The claim of the debtor not bearing interest should be set off against that of the creditor drawing interest, as of the time it became due and owing." *Wat. Set-Off*, § 663. True, he quotes from *Pothier* to sustain this rule; but as the doctrine of set-off was unknown to the common law, and was taken from the civil law, the authority seems pertinent. The cases cited in the footnote construing American statutes on the subject seem also to sustain the text. Among these is the case of *Meriwether v. Bird*, 9 Ga. 594, in which a promissory note was offset by an account for services rendered as an attorney. The judgment was reversed because the trial court refused to charge the jury "that, in making the calculation of what was due between the parties, the defendants had a right to have their set-off allowed as a credit on plaintiff's demand, as of the time at which the services rendered were due"; the court charging "that defendants were entitled to have what was proven to be due defendant allowed as a credit only of the time at which the then trial was had." The opinion was delivered by the renowned Judge Lumpkin, in which, after tracing the history and origin of the defense of set-off, showing that it was unknown to the common law, and that it had been taken from the civil law, introduced into this country by statutes modeled upon that of George II. "to advance justice as well as convenience," and after making the quotation from *Pothier* above referred to, this language is used: "Is there anything in our law of set-off which excludes this construction? I know of nothing, and it is so manifestly right that it commends itself to the conscience of every man."

So we see nothing in our counterclaim statute to exclude such a construction. The author quoted from, in laying down the rule quoted, did not confound the civil-law doctrine of compensation with that of set-off; for in section 16 of his work he clearly states the distinction between the two, as follows: "Set-off resembles compensation. But there is this material difference: That in the former the debts are not in themselves, and of right, balanced and extinguished; that the right of set-off is merely a defense to an action for the debt; and that the defendant is not obliged in any instance to avail himself of his right, but may, at his option, pay, or on other grounds contest, the one debt, and bring a separate action for the other." He then proceeds with an appropriate illustration. While the rule so laid down is of civil-law origin, it is nevertheless laid down as a rule of set-off, and not of compensation. This distinction is adverted to by us because it has been held by our supreme court that "our statute authorizing discounts and set-offs did not introduce the civil-law doctrine of compensation." *Holliman v. Rogers*, 6 Tex. 98; *Howard v. Randolph*, 73 Tex. 454, 11 S. W. 495. The case of *Tucker v. Jewett*, 32 Conn. 563, also cited by *Waterman*, is in line with the Georgia case cited. Some of the Texas cases cited by appellant to sustain this, the first proposition in his brief, at least tend in the same direction.

Our statute confers the right on the debtor to plead the offset, but is silent as to the time and manner of its application to the creditor's claim; thus leaving it to the courts to make a just application in accordance with the received construction of similar statutes. We see no reason to depart from the above-quoted rule in the case at bar. Appellee, according to the finding, owed and should have paid appellant's account long before the notes were due. True, appellant brought an independent suit upon his account, and for more than was due; but appellee disputed the liability in toto, and, according to a supplemental finding of the court, refused at the maturity of the notes, as well as afterwards, to allow appellant any credit, and persisted in the prosecution of his own suit for the full amount claimed. Thus the parties stood apart, mutually litigious, through a series of years, till by agreement the suits were, in effect, consolidated, when appellant saw fit, and was permitted, to amend his answer in the suit of appellee, and claim the right of offset. For not doing so sooner, his right should not have been abridged; but he was taxed with the costs of his own suit, then merged in appellee's, and, because he failed to establish an offset equal to appellee's debt, he was taxed with the costs of appellee's suit. By amending his answer in appellee's suit, and pleading his claim therein as an offset, appellant, in effect, abandoned his own suit; and all costs were properly adjudged against him, both for that reason, and as pro-

vided in article 753, Rev. St. We conclude that the amounts allowed on the accounts, being the reasonable value of appellant's services, which appellee ought to have paid before the maturity of his notes, with interest as allowed, should have been applied in extinguishment of the note, with interest, first maturing, and pro tanto to the other note, with interest, at its maturity, and that judgment should have been rendered for appellee for the amount remaining unpaid on this note, with interest and attorney's fees as therein provided. This conclusion dispenses with consideration of the question so much discussed in the briefs as to the effect of a change in 1891 or 1892 of the rate of interest on open accounts. The judgment will therefore be reversed, and here rendered in accordance with this conclusion, except that as to costs it will not be disturbed, but the costs of this appeal will be taxed against appellee.

HUNTER, J., not sitting, having recused himself.

#### TIMMONS et al. v. CASEY.

(Court of Civil Appeals of Texas. Oct. 15, 1898.)

WITNESSES—EXAMINATION—PAPERS—MECHANICS' LIENS—SEPARATE CONTRACTS—MATERIAL MEN.

1. A paper containing a statement of items of expenditure in building a house was used by defendant's attorney on the trial as a guide in conducting the examination of defendant, and was not used by the witness to refresh his memory, nor was defendant, as a witness, asked any questions in regard to the paper by his attorney. *Held*, that it was not error to refuse to compel defendant's attorney to deliver the paper to plaintiff's attorney for the purpose of assisting him in cross-examining defendant as to the paper, where defendant's attorney offered, in response to the request, to introduce it in evidence.

2. Plaintiff material man, the contractor, the owner, and the architect treated two contracts, one to build a dwelling house and the other to build a barn, as in effect one contract for constructing all the improvements on the lot. It was not shown what part of plaintiff's material went into the barn. The contractor abandoned the work, and the cost of completing the house and barn together was a sum more in excess of the contract prices than the entire amount due the contractor under both contracts. The cost of completing the barn alone was less than the amount due the contractor thereon. *Held*, that plaintiff cannot have his lien enforced on the barn for the amount due the contractor thereon in excess of the cost of completing it.

Appeal from district court, Hill county; J. M. Hall, Judge.

Action by H. D. Timmons & Co. against John S. Casey. From a judgment for defendant, plaintiff's appeal. Affirmed.

This is a suit by appellants against the appellee to establish and foreclose a lumber dealer's lien on a certain lot and improvements belonging to appellee, described in appellants' petition. The cause was tried at the fall term, A. D. 1897, in the district court of Hill

county, before the Honorable J. M. Hall, judge, without a jury, and the court rendered a judgment on the law and facts in favor of the appellee. The plaintiffs, H. D. Timmons & Co., have appealed from the judgment rendered. The trial judge filed the following conclusions:

"The court finds as a fact that the defendant, John S. Casey, entered into a written contract with one John Bolinger on the 24th day of September, A. D. 1895, to erect for him a dwelling house on lot No. —, in the city of Hillsboro, Texas; that the said John Bolinger was to furnish all material and perform all the work sufficient to complete and finish the said building; and that said Casey was to pay him therefor the sum of \$3,870. I further find that on November 19, 1895, said John Bolinger quit said work, and abandoned his contract, and at that time said dwelling house had been fairly begun. I find that up to said November 19, 1895, the said Casey had paid said Bolinger under said contract, for material furnished and work performed, \$2,740.20, and at the time he left, to wit, November 19, 1895, the said Casey was not due the said John Bolinger, the contractor, any sum under the contract; and I find that on November 17, 1895, the plaintiff herein served notice on said Casey, accompanied by bill of particulars of the amount of Bolinger's indebtedness to plaintiff, and that said Casey did not, after receiving said notice of bill of particulars, pay to Bolinger any sum of money under the contract, and never did thereafter pay to said Bolinger any sum of money, and neither did said Bolinger earn any. I find that on November 23, 1895, after Bolinger had quit the work and threw up his contract, E. H. Silven, an architect in the employ of the defendant, took charge of the work under the written contract, and under the directions of the defendant and the sureties of the contractor's building bond, all of which was in accordance with the contract, and completed the work according to the contract as entered into between said John Bolinger and John S. Casey, the defendant. I find that the said dwelling house cost the defendant \$6,000, and I further find that, after the completion of the said dwelling house, the said Casey was not due Bolinger anything under the contract. I further find that on the 24th day of October, 1895, the defendant herein entered into a contract with one John Bolinger to erect for him (Casey), and finish and deliver in a good, workmanlike manner, the brick work, carpenter work, tin and galvanized work, glazing, etc., and all work required, in the erection of a 1½-story barn and coal house, two water-closets, cesspool, and all fences required to fence the entire lot No. — of the Craig addition to the city of Hillsboro; also to put down cement walks in accordance with the said contract. I further find that the said Casey was to pay him (Bolinger) for the above-named work, completed and delivered, the sum of \$1,161.40. I find that on the 19th day of November, 1895, that said Bolinger quit

said work under this contract, and abandoned the same, and that the erection of said barn had fairly begun, and that the other improvements mentioned in said contract had not been commenced. I find that it would take \$1,500 to complete the improvements mentioned in said contract of date October 24, 1895, and I find at the time said Bolinger quit work that the value of the work done and material furnished on said barn was \$700, and it would have required \$300 more to have completed the barn alone, and would have required \$500 to have completed the other improvements mentioned in said contract dated October 24, 1895. I further find that the value of the material furnished by Bolinger to build the barn, up to the time he quit the work, is the sum of \$400. I further find that, after the said Bolinger threw up the contract and quit the work, the architect took charge of the same under the terms of this contract, and completed the improvements named in said contract, in accordance with the agreements and stipulations mentioned in said contracts. I find that the improvements mentioned in the said contracts, completed in accordance with the terms of the said contracts, cost the defendant the sum of \$3,030.04 in excess of the amount named in the contracts for which Bolinger was to erect, finish, and complete the said improvements; that, after completing the improvements mentioned in both of said contracts, the said Casey was not indebted to Bolinger in any sum, but that said Casey had expended \$2,999.04 in excess of the sum named in the contracts, and that he (Casey) had instituted a suit on the builder's bond for the sum of \$1,000, the amount of said bond.

"Conclusions of law: I find, as conclusions of law, that as Casey was due the contractor, Bolinger, nothing at the date Bolinger quit the work, and that at the date plaintiffs served the defendant with notice of Bolinger's indebtedness to them, attaching thereto a bill of particulars, said Casey was not indebted to the said Bolinger, and did not thereafter pay to said Bolinger any sum of money under the contracts, and that, Bolinger having contracted to furnish all material and all work necessary to complete the improvements mentioned in said contracts, the said Casey would not be liable to the plaintiffs for the material furnished, unless at the time Bolinger quit the work, and at the time defendant was served with notice of plaintiffs' claim against Bolinger, that he was indebted to Bolinger, and paid him money after the notice was so served upon him. The facts show that, after said improvements were completed in accordance with the contracts, the defendant was not due Bolinger any sum of money on the contracts. Therefore the plaintiffs could not recover from the defendant, Casey, for an account made with the contractor, Bolinger, unless after the said work was completed, in accordance with the contract, the defendant, Casey, was due the said Bolinger something

under the contracts for the erection and completion of said improvements. I conclude, as a matter of law, that the plaintiffs had taken proper steps to fix a lien against the lot and improvements, but that said lien never attached, because, as a matter of fact, the defendant was never, at any time after the service of a notice of plaintiffs' claim against the contractor, or at the time notice of plaintiffs' claim was served, indebted to said contractor in any sum, and never paid out in any manner any sum of money which was due the contractor."

McKinnon & Carlton, for appellants. W. E. Spell, for appellee.

FINLEY C. J. (after stating the facts).

1. The first assignment of error is directed at the refusal of the court to require the attorney of appellee to deliver over to the attorneys of appellants a statement or memorandum of expenditures prepared by the architect, showing the money expended in completing the work after it was abandoned by the contractor. The contention is that this paper was used by appellee while being examined by his attorney to refresh his memory, and that opposing counsel had the right to cross-examine him upon this paper. The bill of exceptions, in the explanation made by the judge, states that the paper was a private memorandum used by counsel in examining the witness, that it was not used by the witness, and that appellee's counsel offered to put it in evidence, or allow opposing counsel to do so, but the latter objected to this. It seems that this paper was used by appellee's attorney upon the trial, simply as a guide to him in conducting the examination of the witness, was not used by the witness to refresh his memory, and it does not appear that the witness was asked any questions in regard to the paper by appellee's attorney. The architect who made the memorandum was examined as a witness as to the facts, and the appellee appears also to have been thoroughly cross-examined as to the subject-matter to which the paper related. It does not appear when this memorandum was prepared, and we infer that the offer to allow the paper to go in evidence was made by appellee's counsel in response to the request of opposing counsel for the production of the paper. Under these circumstances, we are of the opinion that there was no error in declining to force counsel for appellee to deliver over the paper to opposing counsel. We are cited to no authority supporting such a proposition, and we know of no principle upon which it can be properly based.

2. Under the second and third assignments of error, which attack the conclusions of the court, this proposition is urged: "The contract for building the barn, fencing, etc., being a separate contract, and Casey being indebted to Bolinger on this contract at the time he abandoned the contract in a sum

more than sufficient to complete the same, and appellants having fixed their lien, it was error not to find for appellants the difference between the amount Casey owed Bolinger and what was necessary to complete this contract." Appellants' pleadings seek to establish their lien upon the entire lot, residence building, and all the improvements on the lot. They allege that the material was furnished for the construction of the residence building, barn, and other improvements, and do not specify any particular portion as being furnished to put into the constructions provided for by the second contract. The appellants, the contractor, the appellee, and architect all treated the two contracts as, in effect, one contract for constructing all the improvements upon the lot. What part of appellants' material went into the barn and other improvements covered by the second contract is not made to appear. It is manifest that appellee owed the contractor nothing at the time he abandoned the work, considering the entire work to be done as provided for in the two contracts. It may be that if the improvements contracted for under the second contract, the barn, etc., were to be separated from the other work, appellee would be found to be owing the contractor some amount upon that work. He probably had not paid the value of the material and work upon these particular improvements, but he had fully paid all that was due upon the work as a whole; and it also appears that he had to expend more to complete the work upon these particular improvements, according to the contract, than would have been coming to the contractor upon their completion by the terms of the contract. Under this state of case, appellants were not entitled to have the barn, servants' house, etc., provided for in the second contract, separated from the residence contract, and a lien enforced thereon in their favor for the value of the material furnished by them. Had appellants furnished the material specifically for the constructions provided for in the second contract, and such material had been put into them, and appellants' pleadings treated them as separate from the residence contract, the contention made might obtain. That character of case is not, however, presented, and we only desire to consider and decide the case as made by the record before us.

3. It is next urged that the evidence did not justify the conclusion that appellee had paid out more money for the completion of the dwelling house than the amount for which it was contracted to be built by Bolinger. This contention is not sustained by the record. The evidence abundantly supports the conclusion complained of; indeed, no other conclusion could reasonably be reached from the evidence.

No other reasons are presented for a reversal of the judgment, and it will be affirmed. Judgment affirmed.

**COX et al. v. SHERMAN HOTEL CO.**  
(Court of Civil Appeals of Texas. June 18, 1898.)

**ADVERSE POSSESSION—INCLOSURE—INSTRUCTIONS.**

1. Under Rev. St. 1896, art. 3343, providing that an action to recover land "against another having peaceable and adverse possession thereof, cultivating, using, and enjoying the same," must be brought within 10 years after the cause of action accrued; and article 3348, defining "peaceable possession" to be such as is "continuous and not interrupted by adverse suit to recover the estate"; and article 3349, defining "adverse possession" to be "an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another,"—an adverse holder need not claim to own the land during his possession in order that the limitation may run in his favor.

2. A request for an instruction that if defendants, who claim to hold under adverse possession, made representations to plaintiff, before the latter purchased from a third person, that they were merely holding under such third person, "they must find that [defendants] had so fenced and used the lands as a pasture for more than ten years next preceding the conversation, in which latter event you will also find for defendants," which does not contain the qualification that the possession must have been intended as hostile to, and not subject to, the rights of the owner, is properly refused.

3. In trespass to try title, where defendants claimed by adverse possession by reason of having inclosed the land and used it as a pasture, it is error to refuse a request for an instruction as to what would constitute a fence or inclosure of the land.

Appeal from district court, Grayson county; Don A. Bliss, Judge.

Trespass to try title by the Sherman Hotel Company against S. B. Cox and others. Judgment was for plaintiff, and defendants appeal. Reversed.

S. B. Cox and J. A. Templeton, for appellants. Head, Dillard & Muse, for appellee.

**FINLEY, C. J.** This was a suit of trespass to try title, brought by the Sherman Hotel Company, in the district court of Grayson county, December 9, 1896, against S. B. Cox and William Winn, the object and purpose of the suit being to recover a certain lot of land situated in the city of Sherman, in said county. The petition was in the usual form. Melvina Winn, wife of William Winn, made herself a party defendant, and she and her co-defendants pleaded (1) not guilty; (2) 10 years' limitation; and (3) that for the last preceding 20 years the defendants William Winn and Melvina Winn had been intermarried, and had been husband and wife, and that during all of said period of time they had used and occupied and claimed the land in controversy as their homestead. To this answer the plaintiff replied by supplemental petition, wherein it pleaded (1) a general denial; and (2) that the defendants William and Melvina Winn never asserted any claim to the land sued for until about the time of the institution of this suit; that appellee purchased the land from the Houston &

Texas Central Railroad Company, and that, before making said purchase, they had a conversation with Winn wherein he disclaimed having any claim to the land, and that he rented same out to appellee's agent as belonging to the railroad company; that Melvina Winn heard this conversation, and assented thereto; and that, by reason of such conversation, the said defendants were estopped from asserting any title to the land; and that they had never acquired any title thereto by limitation. To this supplemental petition, appellants replied by supplemental answer, wherein they denied generally and specially the facts set up in the supplemental petition, and they specially alleged that, if said conversation set up and relied upon by appellee to create an estoppel ever occurred (which they denied), then that same occurred after their title to the land was perfected by limitation, and while they were occupying, using, and enjoying same as their homestead, all of which facts were well known to appellee and to its vendor prior to appellee's purchase of the property. The cause was tried before a jury, October 19, 1897, and resulted in a general judgment for appellee. From this judgment, William and Melvina Winn have appealed.

On the trial, the defendants admitted the plaintiff's cause of action, except in so far as it was defeated by the facts set up by defendants in their answer. It was shown that on April 20, 1896, defendants William and Melvina Winn conveyed to defendant Cox, by deed of that date, a portion of the land in controversy. It was shown by the uncontradicted testimony of appellants William and Melvina Winn, and of other witnesses, that said appellants had had the land in controversy inclosed by fences, and had been using the same for about 20 years next preceding the institution of this suit. It was also shown that in 1873 William and Melvina Winn owned and were living on two 75-foot lots and one 50-foot lot, which were obtained from Julia Robertson, and which lay east of and in front of a 2-acre tract, of which last-named tract the acre in controversy was a part. This two acres, including the acre in dispute, lay immediately west of the two lots on which Winns had built their house, and the 50-foot lot north of these, and it extended west to a creek. It was also undisputed that appellee derived whatever title it had to the land in dispute by purchase thereof from the Houston & Texas Central Railroad Company.

The principal controverted issues of fact were (1) whether or not appellants had acquired title to the land in controversy by 10 years' limitation; and (2) whether or not they were estopped from asserting such title as against appellee upon these issues. On the issue of limitation, there was no question that appellants' possession was not sufficient in length of time; but the question was as to the character of possession,—

whether or not it was intended to be hostile to the owner of the land. Upon the facts alleged as grounds of estoppel, it is fair to say that the evidence was such as to make an issue of fact for the decision of the jury.

The first and third assignments of error complain of the first and fourth paragraphs of the charge of the court. These paragraphs of the charge, in effect, tell the jury that the possession of the defendants, however long, hostile, and exclusive its character, cannot avail them, unless they claimed to be the owners while holding possession of the land. The statute does not make it essential that the possessor shall claim to own the land during his possession in order that limitation of 10 years may run in his favor. Article 3343, Rev. St. 1895, provides: "Any person who has the right of action for the recovery of any lands, tenements or hereditaments against another having peaceable and adverse possession thereof, cultivating, using and enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward." "Peaceable possession," as used in the above article, is defined in article 3348 to be such possession as is "continuous and not interrupted by adverse suit to recover the estate." "Adverse possession," as therein used, is defined in article 3349 to be "an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another." It is not meant by the expression "under a claim of right" that the party in possession should make any claim to ownership of the land, otherwise than by a visible, hostile, exclusive, and continuous appropriation of the land. One may enter upon land as a naked trespasser, knowing that he has no title whatever, and intending to acquire title by limitations of 10 years; and if he continues in peaceable adverse possession for 10 years, cultivating, using, or enjoying the same, he will thereby acquire title to the land. It is the character of his possession, and not the claim of title or ownership which he may assert, that is made the basis of the operation of the statute of limitations. In *Craig v. Cartwright*, 65 Tex. 424, it is said: "Possession, with exercise of such rights as pertain to an owner alone, must be deemed sufficient evidence of adverse claim, in the absence of some evidence indicating that it is held in subordination to the title of the real owner." If the holding is not intended to be hostile to the rights of the real owner, but in subordination thereto, then possession is not adverse, and would not support limitations. *Charles v. Saffold*, 13 Tex. 112. The charge of the court was erroneous, and, in view of the evidence, was most likely hurtful to defendants.

2. The following special charge was asked and refused, and its refusal is assigned as error: "An actual, visible, and exclusive appropriation of land, such as would give title

and ownership, is constituted by the fencing and continued use of it as a pasture, without an actual residence on it. If the jury find that William Winn and Melvina Winn have had said land under fence, and used it as a pasture for more than ten years prior to the institution of this suit, they will find for defendants, unless they also find that they made the representations set out in plaintiff's petition, in which event they must find that William and Melvina Winn had so fenced and used the lands as a pasture for more than ten years next preceding the conversation, in which latter event you will also find for defendants." This charge, under the evidence in this case, was not proper to be given without the qualification that the possession of defendants must have been intended as against or hostile to the owner of the land, and not subject to the rights of such owner.

3. A special charge was asked explaining what would constitute a fence or inclosure of the land, and it was refused. The general charge is silent on this point, and we think the facts of the case called for an instruction upon it.

For the errors pointed out, the judgment against appellants is reversed, and the cause remanded.

#### TEXAS & P. RY. CO. v. KELLY.

(Court of Civil Appeals of Texas. June 25, 1898.)

#### RAILROADS—TRESPASSER ON TRAIN—CONTRIBUTORY NEGLIGENCE.

A person, having traveled on freight trains of defendant before, boarded one, and offered to pay his fare. The conductor refused it, and told him he would have to get off. The passenger offered to get off, if the train were stopped, which was refused, and he was told to get off when the train reached a hill which it was then approaching. Going on the platform before the hill was reached, he fell off; he testifying that he was kicked off by the conductor, which the conductor denied. *Held*, that the passenger was not negligent in boarding the train, and in voluntarily going on the platform preparatory to jumping off.

Appeal from district court, Marlon county; J. M. Talbot, Judge.

Action by M. D. Kelly, next friend of G. D. Kelly, against the Texas & Pacific Railway Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Appellant's assignment of error was as follows: "The court erred in rendering judgment for the plaintiff G. D. Kelly, because his injuries were caused by his own negligence in boarding a freight train in the nighttime, and in standing upon the platform of the caboose preparatory to jumping off when the train reached the top of the hill, and in jumping or falling therefrom before the train reached the top of the hill, where it would have been running slow enough for him to have gotten off in safety, even though requested to get off when the train reached there, by the conductor."

W. T. Armistead, for appellant. J. A. Armistead, for appellee.

FINLEY, C. J. This is a suit for damages on account of personal injuries. The case was tried before the court without a jury, and the court gave judgment for the plaintiff for the sum of \$600, from which the railway company appeals.

There is but one assignment of error presented, which is to the effect that plaintiff's injuries were caused by his own negligence. The injured party detailed the manner in which he received the injuries as follows: "I am the son of M. D. Kelly. I was twenty years old the 2d day of November, 1897. On Saturday night, or rather Sunday morning, November 7, 1897, I was at Jefferson, in company with H. O. Scott and Zack Biggs, and we decided to go to Marshall, sixteen miles south of Jefferson. The regular passenger train south had gone, and our only chance was to take a freight train, which I had often done before. I boarded the caboose, and the other two boys got on top of the freight train, at Jefferson. The freight train was going west. Before I got on the caboose one of the employes told me that I could go by paying my fare. I had \$6.50 in my pocket. After the train passed the bayou the conductor came to me in the caboose, and asked me what I was doing there. I told him that I wanted to go to Marshall, and had money to pay my fare. He replied that I should not go on that train, and that he would not take my money, which I offered him. The conductor told me to jump off, and I told him it was too dangerous, as the train was running about thirty miles an hour, and it was dark (being about 2 o'clock a. m.); and I told him to stop the train, and I would get off, and he said he would not stop the train, but that I must get off. He cursed me, and said, if I did not get off on the next hill, he would take me by the seat of the breeches and back of the head, and pitch me headforemost in the embankment. We were then standing on the rear platform, and I had hold of the irons next to the caboose with my left hand. He says that, 'You must jump off at the top of the hill,' which is about two miles west of Jefferson. I then started to take hold of the caboose iron railing with my right hand, and looked to see where we were, and while in that position the conductor struck or kicked me, and my feet fell clear off the steps, and I held on with my hands; and as I turned the conductor was the only person on the caboose platform, where I was. I then struck something and fell. I lay where I had fallen about five hours, or until I was found, about 7 o'clock the next morning. I do not remember anything, after I struck the ground or wire fence, until I came to; a negro being there, talking to me. By the fall I had my left ear nearly torn off, a gash cut across my right arm between the elbow and wrist, my left shoulder was wrenched and bruised, and my back strained, besides other bruises on my body, from which wounds I suffered greatly, mentally and

physically, for two weeks; and I still suffer some from the lick that I got on my head in that fall, which dented or bent in my skull. You can feel the dent in there now. My head troubles me continuously from this wound, and has since it got hurt. I know the conductor that knocked me off the caboose. There he is in court. (Witness identified conductor.) I know that is the man that knocked me off the caboose, and he was the conductor in charge of that train. I was laid up two or three weeks before I went to work. I was making \$7.50 per week, under my father, at the Kellyville Foundry, pointing plows, at the time I got hurt." The conductor denied that he struck the boy, and asserted that he either jumped or fell off the train. The assignment is wholly without merit. Judgment affirmed.

CLAYTON et al. v. WATKINS et al.  
(Court of Civil Appeals of Texas. May 23, 1898.)

APPEAL—HARMLESS ERROR—PLEADING—STATUTE OF LIMITATIONS—NEW PROMISE—ASSUMPTION OF VENDOR'S LIEN NOTE.

1. A petition declared on a note barred on its face, and defendant excepted, but, before ruling had, plaintiff amended, and declared on a written promise to pay the note. *Held*, that error in overruling the exceptions was not ground for reversing a judgment based on the amended petition.

2. An amended petition declaring on a note apparently barred, and on written promises, not barred, admitting the justness of the debt and promising to pay it, states a cause of action.

3. A maker wrote to the payee, "Is it possible to carry my loan one year longer?" "You wrote me you would extend this three years longer, one year at a time. One more year would just make the five years. I can pay you the interest in advance. \* \* \* If you think you have not got security enough, I can give you all you want." *Held*, to remove the note from the bar of limitation, the extension asked being granted.

4. The grantee of a deed reserving a lien to secure a note conveyed to another by a similar deed, reserving a lien to secure the same note. The second purchaser wrote to the payee: "I wish to know if you will extend this note another year by the interest being paid in advance. You will very greatly oblige me by so doing." He also sent him, seven weeks later, \$11, and wrote: "Enclosed find \$11 to pay interest on S.'s note." *Held*, that he assumed the payment of the note.

5. The letters removed the note from the bar of limitation as to him.

Appeal from district court, Dallas county: Edward Gray, Judge.

Bill by J. B. Watkins and others against George Clayton and others. There was a decree for plaintiffs, and some of defendants appeal. Affirmed in part.

September 1, 1897, J. B. Watkins, T. H. Chalkley, and M. Summerfield, plaintiffs, filed their original petition against J. J. Robinson, Thomas H. Snow, George Clayton, and Esther Clayton, defendants, in which plaintiffs declared on a note for \$600, and prayed for a foreclosure of a vendor's lien on 160 acres of

land. Defendant George Clayton answered by general and special exceptions, general denial, plea of limitation, and plea of title in himself. Defendant Esther Clayton filed general demurrer and general denial. Thomas H. Snow filed general and special exceptions, general denial, and plea of limitation. J. J. Robinson filed general and special exceptions, general denial, and special pleas. Plaintiffs filed their first amended original petition, in which they set up alleged new promises, again declared on same note as in the original petition, and prayed for a judgment on said note, and for a foreclosure of the vendor's lien. Defendants George Clayton, Esther Clayton, and Thomas H. Snow filed, jointly, first supplemental answer, consisting of general and special exceptions, general denial, and plea of limitation. All exceptions were overruled by the court except those of J. J. Robinson. The cause was tried by the court, and resulted in a judgment in favor of plaintiffs against Thomas H. Snow and George Clayton for the amount of the note, and against all the defendants for a foreclosure of the lien. George Clayton and Esther Clayton have perfected their appeal to this court.

The following facts were proven: Plaintiffs introduced in evidence: (1) Note for \$600, dated October 25, 1889, due October 25, 1891, executed by Thomas H. Snow, payable to J. J. Robinson, with interest from date at the rate of 10 per cent. per annum, payable annually, both principal and interest payable at the office of the J. B. Watkins Land Mortgage Company, Dallas, Tex., secured by a vendor's lien on 160 acres of land described in plaintiff's petitions filed herein, which note was indorsed on the back, "J. J. Robinson." (2) Warranty deed from J. J. Robinson and wife, D. L. Robinson, to Thomas H. Snow, dated October 25, 1889, conveying the land described in plaintiffs' original and first amended original petitions filed herein, and reciting, as a part of the consideration for the land, the note above described, and being the note herein sued on; said deed specially reserving a vendor's lien to secure its payment on the land described in said deed, being same land above mentioned. Said deed was filed for record in Eastland county, Tex., October 23, 1889, and duly recorded. (3) Warranty deed from Thomas H. Snow to George Clayton, dated October 23, 1893, conveying the land described in plaintiffs' original and amended petitions herein, and reciting the consideration as follows: "Fourteen hundred dollars to me in hand paid by George Clayton, as follows, to wit: Eight hundred dollars cash in hand paid, and one promissory note for (\$600) six hundred dollars, bearing date October 25, 1889, and due two years from date, bearing ten per cent. interest per annum from date; it being expressly understood that a vendor's lien is hereby retained on the land herein described to secure the prompt payment of the note above mentioned." Said deed was filed for record in Eastland county,

Tex., October 25, 1893, and duly recorded in said county. (4) Letter from Thomas H. Snow to J. B. Watkins Land Mortgage Company, dated October 4, 1893, which letter, among other things, contained the following: "Is it possible to get you to carry my loan one year longer? I have made every effort to raise the money, and do not see how I can possibly do it. Banks have shut down, and we have had a drouth on us this year, and we have made but little. If you will do me the kindness to carry me one year longer, you will do me a great favor. You wrote me that you would extend this three years longer, one year at a time. One more year would just make the five years. I can pay you the interest in advance, but I do not believe I could raise the principal. If you think you have not got security enough, I can give you all you want. Can give you any kind of a note you ask,"—which said letter was in writing, and signed by the defendant, Thomas H. Snow. (5) The letters in writing from defendant George Clayton, and signed by him, to the J. B. Watkins Land Mortgage Company, one dated September 1, 1894, in which, among other things, said Clayton wrote said company as follows: "I write you in reference to a certain \$600 vendor's lien note held by yourselves against Thomas H. Snow, formerly of Eastland county. I wish to know if you would extend this note another year by the interest being paid in advance. You will very much oblige me by so doing." The other of said letters, dated October 24, 1894, among other things, contained the following: "Inclosed find \$11 to pay interest on T. H. Snow's note of January 1st." Defendants introduced file mark on plaintiffs' original petition, as follows: "Filed 1st day Sept., A. D. 1897." Plaintiffs' first amended original petition bears the following file mark: "Filed 25th day of Oct., A. D. 1897."

#### Conclusions of Fact.

We conclude from the foregoing evidence:

(1) On October 25, 1889, Thomas H. Snow executed his promissory note for \$600, due October 25, 1891, bearing 10 per cent. per annum interest from date, payable to J. J. Robinson, at the office of the J. B. Watkins Land Mortgage Company, Dallas, Tex. This note was executed in part payment for the land described in the petition, and conveyed by J. J. Robinson to Thomas H. Snow by his deed of that date, said deed expressly retaining a vendor's lien upon the land to secure the payment of the note. Said note on the same day became the property of the appellee.

(2) On October 23, 1893, Thomas H. Snow conveyed this land to George Clayton for the consideration of \$1,400, of which \$800 was paid in cash, and for the balance said Clayton assumed the payment of the \$600 note executed by Snow to Robinson. Said deed retained a vendor's lien to secure the payment of said note.



(3) That on October 4, 1893, Thomas H. Snow secured an extension of said note from the mortgage company for one year, and admitted the justness of the debt, and promised to pay it.

(4) That George Clayton admitted the justness of said \$600 note in a letter to the mortgage company, dated September 1, 1894, and by his letter of October 24, 1894, and promised to pay the same. The debt was not barred by the statute of limitations at the time appellee filed its amended petition on October 25, 1897, setting up the written acknowledgments of said debt.

Kirby & Kirby, for appellants. Robertson & Firmin, for appellees.

BOOKHOUT, J. (after stating the facts). It is contended that the court erred in overruling appellants' exceptions to plaintiffs' original petition, because said original petition declared upon a note which was shown by the petition to be barred by the statute of limitations of four years. The original petition was filed September 1, 1897, and declared upon a note which, upon its face, was barred by the statute of limitations. The appellants filed exceptions, and an answer, October 4, 1897, setting up the statute of limitations. On October 25, 1897, plaintiffs filed their first amended original petition, in which they set out the note, and declared upon a written promise alleged to have been made by defendants admitting the justness of the debt, and promising to pay it. October 26, 1897, the court overruled the defendants' exceptions to plaintiffs' original petition. This ruling, if error, is not a ground for reversing the judgment. The same exceptions were presented to plaintiffs' first amended original petition, and by the court overruled. This pleading was sufficient, and the court did not err in overruling the exceptions to the same.

Appellant George Clayton complains that the trial court erred in holding that the letter of Thomas H. Snow to the mortgage company, dated October 4, 1893, was a sufficient acknowledgment of the justness of the debt and a promise to pay the same. Thomas H. Snow did not appeal, and is not complaining of the judgment against him. We do not think appellant Clayton can raise this objection to the judgment. But, should we be mistaken in this, then we hold that the letter was an acknowledgment of the justness of the debt, and clearly evidenced an intention to pay the same. Upon the faith of this letter Snow secured one year's extension of the note, and four years did not elapse between the expiration of this extension and the date of filing of plaintiffs' first amended original petition.

Appellant Clayton contends that the two letters written by him to the mortgage company were not sufficient to remove the bar of the statute of limitations. The note is for \$600, and is dated October 25, 1889, and be-

came due October 25, 1891, bears 10 per cent. per annum interest from its date, and is signed by Thomas H. Snow. It was executed in part payment of land described in the petition, said land being conveyed by J. J. Robinson to Thomas H. Snow the same day the note was executed. The deed retains an express lien upon the land to secure the note. On October 23, 1893, Snow conveyed the land to George Clayton for \$800 cash and one promissory note for \$600, bearing date October 25, 1889, due in two years from date, bearing 10 per cent. per annum interest from date. This deed reserved an express lien to secure the payment of said note. It will be seen that the note described in this deed to Clayton exactly corresponds with the note described in the deed from Robinson to Snow, and set out by plaintiff. The petition alleged that the defendant George Clayton expressly assumed the payment of the note sued on in the deed to him from Snow. The letter of George Clayton to the mortgage company, dated September 1, 1894, describes this note, and requests an extension of it. On October 24, 1894, Clayton paid the mortgage company the interest upon the note, sending it in a letter of that date. Under these facts, the court did not err in holding that appellant George Clayton assumed the payment of the note sued on. Clayton's letter of September 1, 1894, made reference to the note, and requested an extension of the same for another year, and, as an inducement for such extension, he expressed a willingness to pay the interest in advance. On October 24, 1894, he wrote the company a second letter, in which he sent the interest on the note up to January 1st. These letters were a sufficient acknowledgment of the debt to remove it from the bar of the statute. *Howard v. Windom*, 86 Tex. 566, 26 S. W. 483. Plaintiffs' first amended original petition having been filed within four years from the date of these letters, the court did not err in holding that the debt was not barred by the statute of limitations.

The appellant Esther Clayton has appealed, and assigns error that the petition did not contain any allegation authorizing a judgment against her. Appellees admit that this assignment is well taken.

The judgment as to Esther Clayton is reversed, and the cause as to her is dismissed. In all other respects the judgment of the court below is affirmed.

MYERS et al. v. HUMPHRIES et al.

(Court of Civil Appeals of Texas. Nov. 10, 1898.)

MECHANICS' LIENS—IMPROVEMENT OF HOMESTEAD—RENEWAL NOTES—ADDITIONAL SECURITY—LIMITATIONS—WAIVER OF LIEN—PLEADING—VARIANCE.

1. The mechanic's lien law, providing that, to obtain a lien, the person claiming it must re-

cord his contract, and bring suit thereon within 12 months, does not apply to liens created by agreement, under the constitution, for the improvement of a homestead.

2. A note given in renewal of mechanic's lien notes and for other indebtedness was made payable in five years. *Held*, that the enforcement of the original lien would not be barred by limitation of four years, since, the debt remaining, the liens, as its incidents, continued in force as security.

3. The holder of mechanic's lien notes took a renewal note, in which was included an additional indebtedness, and additional security was taken. *Held*, that the mechanic's lien was not thereby waived.

4. Plaintiff's allegations in a suit on a note did not refer to credits indorsed thereon, while the note offered in evidence showed such credits. *Held*, that there was no variance, as it was alleged that installments of interest had been paid, and the credits were for such installments.

Appeal from district court, Nueces county; J. B. Wells, Judge.

Action by R. H. Humphries and others against A. A. Myers and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

G. R. Scott & Bro., for appellants.

**WILLIAMS, J.** On the 21st day of November, 1889, appellants Myers and wife made a contract in writing with John A. Smith, by which the latter was to furnish all labor necessary for the building of a house on their homestead, located on lot No. 6, block 24, in Bluff part of Corpus Christi, and by which the former agreed to pay therefor the sum of \$415, to secure the payment of which the writing stipulated: "And the party of the first part [Smith] is hereby declared to have a mechanic's lien on the improvement so made, and the land or lot upon which same is to be situated." This contract was duly acknowledged by Myers and wife in the manner required for a conveyance of a married woman's separate property. At the same time Myers and wife executed to Smith their four promissory notes, payable, respectively, December 2 and December 15, 1889, and January 1 and January 15, 1890,—the first three for \$100 each, and the last one for \$115,—all bearing 10 per cent. interest after maturity. The contract also stipulated for the payment of an attorney's fee of 10 per cent., if an attorney should be employed to collect the notes. At the same time Myers and wife made a like contract with M. T. Gaffney, by which the latter agreed to furnish the material for the building, and by which the former agreed to pay him therefor \$601.68, for which they executed a note, payable December 5, 1889, bearing 10 per cent. interest after maturity. This contract was also acknowledged by the parties as that with Smith, and contained like stipulations as to lien and attorney's fees. Neither contract was ever filed for record, but they were fully complied with by Smith and Gaffney. Prior to November 27, 1889, plaintiff became the owner of the notes given by Myers and wife to Smith

and Gaffney, and of all their rights under said contracts. On that date, plaintiff having advanced to Myers and wife other money, amounting, with the Smith and Gaffney notes, to \$1,200, Myers and wife executed to plaintiff their note for that amount, payable five years after date, bearing 10 per cent. interest from date, payable semiannually, deferred payments of interest to bear interest at 1 per cent. per month. The note provided also for a 10 per cent. attorney's fee should judicial proceedings be used in collecting after maturity, and recited further: "This note is given in renewal of certain mechanic's lien notes, and is secured, in addition to the mechanics' liens, by deed of trust on lots in Corpus Christi, Texas." Myers and wife, on same day, executed a trust deed on other lots to secure payment of the note. This action was brought on the 4th day of June, 1897, against Myers and wife, and other defendants, whose connection with the case it is immaterial to state, to recover the amount due on the note for \$1,200, and to foreclose the original liens on lot No. 6, and the mortgage on the other lots. The pleadings of plaintiffs set up the facts as they have been stated. Judgment having been rendered for plaintiffs, Myers and wife have appealed, and the grounds of their resistance to the action will appear in our conclusions of law.

#### Conclusions of Law.

1. The several contentions embraced in the assignments of error, that the petition was bad for its failure to show that the contracts with Smith and Gaffney were recorded, and for the reason that the action was not brought within 12 months after the making of those contracts, nor within 12 months after the execution of the last note and deed of trust to secure it, may be disposed of together. The statutory requirements on which such positions are rested relate to the liens of mechanics and material men proper, which depend for their existence upon compliance with the provisions of the statute, and not to liens created, under authority of the constitution, upon the homestead by express agreement directly conferring them. The distinction between the two kinds of liens is explained in the case of Lippencott v. York, 86 Tex. 276, 24 S. W. 275, to which we need only refer.

2. The enforcement of the original liens granted to Smith and Gaffney was not barred by limitation of four years, nor precluded by the taking of the new note and the deed of trust. The note included the indebtedness for which those liens were security, both having passed to plaintiff. The new note was merely a change in the evidence of the original debt, and not an extinguishment of it. The debt remaining, the liens, as its incidents, continued in force as part of the security. Such liens were not waived either by the taking of the note or the additional security. Plaintiff sought only to charge the homestead with the debts secured by the first

liens, and not with the additional sum included in the note last taken.

3. There was no variance between the \$1,200 note offered in evidence and that alleged in the petition. The credits indorsed on it, though not in terms alleged in the petition, were, in effect, admitted by the statement that the installments of interest had been paid up to May, 1896, and the credits are for such installments.

While we have not followed the assignments in their order, the above conclusions dispose of all of them. The petition where attacked was sufficient, and the evidence offered in support of it was properly admitted. Affirmed.

#### HOOTEN v. ORR et al.

(Court of Civil Appeals of Texas. Oct. 26, 1898.)

##### OFFICERS—USURPATION—DAMAGES—PLEADING.

Plaintiff was suspended from office on petition, and a bond was given by one temporarily appointed to fill his place, conditioned, as required by Rev. St. 1895, art. 3550, to pay damages and costs sustained by reason of such suspension if the cause of removal was insufficient or untrue. The case against plaintiff was dismissed, it not having been disposed of before his term of office expired. Held, that plaintiff, in suing on the bond, must allege that the causes set forth in the petition for his removal were false.

Appeal from district court, Cass county; J. M. Talbott, Judge.

Action by J. M. Hooten against S. A. Orr and others on a bond for damages for a removal from an office. Judgment for defendants, and plaintiff appeals. Affirmed.

Geo. T. Todd, for appellant. Oneal & Allday and Oneal & Culberson, for appellees.

RAINEY, J. At the general election, in November, 1894, J. M. Hooten was elected commissioner for the county of Cass. In the following January, he was removed and temporarily suspended by the district judge on the petition of one W. F. Ford against plaintiff and two other commissioners, seeking to remove them from their said offices. An order was entered by the district judge suspending the plaintiff, and one S. A. Orr was temporarily appointed to fill his place. A bond, being required of him, was duly given, for the sum of \$500, conditioned as required by article 3550, Rev. St. 1895. Said cause was not finally disposed of until plaintiff's office had expired, and for that reason said cause was dismissed. This is a suit brought by said Hooten against said S. A. Orr and sureties on his bond, alleging, in substance, his removal from office, the execution of the bond, and praying a recovery on said bond against the principal and sureties, for the damages sustained by reason of his said removal; the basis of the recovery being that the petition for his removal was dismissed without a trial upon the merits after his tenure of office had expired. A

general demurrer to plaintiff's petition was sustained, and, he refusing to amend, judgment was rendered against him.

It is urged that plaintiff's petition was fatally defective, because it failed to allege that the cause or causes that were alleged in the petition for his removal were false. We think this contention well founded. It was proper to dismiss the proceedings for removal after the tenure of office had expired, as there was no basis for litigation, and for this reason alone plaintiff would not be entitled to recover, but it was incumbent upon him to allege and prove that the grounds alleged for removal were false. *Hagans v. McClain* (Tex. Civ. App.) 36 S. W. 518. The judgment is affirmed.

#### TEXAS & P. RY. CO. v. BIGHAM.

(Court of Civil Appeals of Texas. Nov. 19, 1898.)

##### CARRIERS—CONNECTING LINES—CONSTITUTIONAL LAW—INSTRUCTIONS—APPEAL—REVIEW—ESTOPPEL.

1. Rev. St. 1895, arts. 331a, 331b, making a carrier liable, as a connecting line, for all damages to through-billed freight which it transported, making the several connecting lines agents for each other, and making any instrument showing that the freight was received by the first carrier for through shipment prima facie evidence of the liability therein declared, irrespective of any stipulation in any printed bill of lading, etc., to the contrary, and giving such connecting carrier an action over against its connecting lines, is not an invasion of the right of contract because articles 4535-4539 also compel all connecting lines to receive and carry all freight coming from their connections, at rates fixed by the railroad commission, in view of the carriers' common-law duty to receive such freight, and of Const. art. 10, § 1, requiring connecting carriers to receive tonnage from initial carriers "under such regulations as shall be prescribed by law."

2. It was not error to embody in a charge Rev. St. 1895, arts. 331a, 331b, making connecting carriers liable for all damages to freight carried under a through-billing contract with the initial carrier, where the bill of lading, though it did not name defendant carrier, billed the shipment via a junction station from which no other line reached the point of destination.

3. A party cannot assign as error a submission of an issue to the jury at his own request.

Appeal from district court, Taylor county: T. H. Conner, Judge.

Action by Claud Bigham against the Texas & Pacific Railway Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Bidwell & Stennis, for appellant. Cockrell & Hardwicke and Theodore Mack, for appellee.

STEPHENS, J. This appeal is from a recovery of damages in the sum of \$963 for injuries to 17 cars of cattle shipped from Chenango, Tex., over the International & Great Northern Railway, to Mineola; thence over the Texas & Pacific to Baird. As the shipment had both its origin and destination in

this state, and was made after the act of 1895 was passed (Rev. St. 1895, arts. 331a, 331b), appellee sought to hold appellant liable, as a connecting carrier, as provided in that act, for the injury and loss sustained before the cattle reached Mineola, as well as that sustained between Mineola and Baird. The evidence tended to show that most of the damage was done, or at least developed, on appellant's road, though it also showed that when the cattle reached Mineola some of them were dead, and many of them were down in the cars. The charge of the court submitted to the jury the issue both of a joint and separate liability, and the evidence warranted a finding against appellant upon both grounds; that is, that a through shipment had been made by the International & Great Northern Railway Company, and acquiesced in as such by the Texas & Pacific Company, under such circumstances as to render the latter company liable jointly with the former, as a connecting carrier, and also that a sufficient amount of damage was shown to have resulted from appellant's treatment of the cattle after they reached its road to warrant the verdict,—the amount of the verdict not being complained of.

The proposition of the first assignment of error is that the above act of the legislature is contrary to our bill of rights, and to the fourteenth amendment to the constitution of the United States. The argument seems to be that this act of the legislature makes one railroad carrier responsible for the negligence of another, upon prima facie evidence of its being a connecting carrier as therein provided, notwithstanding any stipulations or attempted stipulations to the contrary by such carriers, or either of them, which prima facie evidence is therein made to consist, in part, at least, of acts which, under articles 4535-4539 of the Revised Statutes of 1895, all railroad carriers in this state are compelled to perform, and thus, in view also of the power conferred on the railroad commission to fix rates, the right of railway companies to contract is taken away; that is, the law (articles 4535-4539) compels every railway company in this state to receive from every other railway company with which it connects all freight coming to it from such connecting line, and carry same at rates fixed by the commission, and then (articles 331a, 331b) makes the fact of its doing so prima facie evidence of its participation in the through shipment, as a joint or connecting carrier, any stipulations to the contrary notwithstanding. This seems plausible. But we must not lose sight of the proposition, as old as the common law, that a common carrier is bound to carry, and that, too, at a reasonable rate, whatever freight, including live stock, is tendered to it in proper condition, whether by the shipper or the initial or other carrier. 4 Elliott, R. R. §§ 1452, 1545, 1547. Nor must we overlook the following provision of our constitution: "Every railroad

company shall have the right, with its road, to intersect, connect with or cross any railroad; and shall receive and transport each the other's passengers, tonnage and cars, loaded or empty, without delay or discrimination, under such regulations as shall be prescribed by law." Article 10, § 1. As the relation between railroad companies engaged in the carrying business in any given case is matter peculiarly within their own knowledge, and as such companies have better facilities than the shipper for determining what company is liable for the loss, and for adjusting between them that liability, we see nothing unreasonable in requiring the company sued to show, by facts proven, rather than by stipulations inserted in printed bills of lading, as the act of 1895, in effect, does, that some other company over whose road the goods were carried alone was liable. The legislature, in passing the act in question, might well have concluded that such stipulations should be regarded, in the absence of proof of the real facts, rather as evidence of a joint shipment than of separate shipments. To further guard the rights of the company thus in the first instance held prima facie liable, provision is made in article 331a for a recovery by it over against the company at fault. Taken all together, we find nothing in the law of 1895 so manifestly unreasonable and arbitrary as to warrant this court in declaring it unconstitutional. It but prescribed "such regulations" as the above quotation from the constitution authorized as incidental to the right there granted one railroad company to connect with another, and the duty there imposed on companies so connecting to "receive and transport each the other's" freight. In 4 Elliott, R. R. § 1446, we find the following: "And it has also been held that a connecting carrier cannot be considered as ratifying the original contract where, in receiving and transporting the goods, it merely does what a valid statute requires it to do,"—citing the Dwyer and Baird Cases (Railway Co. v. Dwyer, 75 Tex. 572, 12 S. W. 1001; Same v. Baird, 75 Tex. 256, 12 S. W. 530). The learned author, however, appends the following note to these cases: "This, however, is not free from doubt; for it would seem that the connecting carrier might receive and transport the goods as required by statute, upon different terms from those specified in the contract with the initial carrier, and that it should make a special contract as to such terms, if it desires not to be held to have adopted the original contract." But it will be remembered that these decisions were made before the law in question was passed, and doubtless led to its enactment. Furthermore, so far as this case is concerned, the second special charge given at appellant's request placed a construction upon this act which, in effect, took from it the main ground of objection, which special charge reads: "If you find from the evidence that the written contract executed

at Houston, Texas, between the International & Great Northern Railway Company and W. R. Bigham, as shipper, was a contract for a through carriage of the cattle in controversy from the town of Chenango, on the International & Great Northern Railway, to the town of Baird, on the line of the defendant, and if you further find from the evidence that the plaintiff has failed to prove by competent evidence that the defendant ratified, acquiesced in, or acted upon said contract, then you will find for the defendant for all damages, if any, to plaintiff's cattle resulting from the negligence, if any, of the International & Great Northern Railway Company, its agents or employes; and you are further instructed that the mere receiving of said cattle at Mineola, and forwarding them over its line to Baird, with or without a new or independent contract, and the collection for the charges of freight thereon at Baird, at the rate agreed upon between the International & Great Northern Railway Company and W. R. Bigham for a through shipment from said town of Chenango to said town of Baird, would not alone constitute a ratification of, acquiescence in, or action upon such original contract executed by the International & Great Northern Railway Company and W. R. Bigham as shipper."

It is next insisted, under the second, third, and fourth assignments of error, that the court should not have given in charge to the jury articles 331a and 331b, because the contract made with the initial carrier was not a contract for through shipment, and had not been acquiesced in by appellant. Appellant's road was not specified in this contract, but Baird was named as the destination of the shipment, and there was no evidence that shipper had any choice of routes from Mineola to Baird. On the contrary, the inference was clear that the bill of lading was intended to cover a shipment from Chenango to Baird over the two lines,—first over that of the International & Great Northern to Mineola, and then over the Texas & Pacific to Baird. Unless the shipper had a choice of routes from Mineola, it was wholly unnecessary for the bill of lading to name the line of road, there being only one from Mineola to Baird. Surrounding circumstances tend to show a through shipment, and acceptance thereof by appellant. Hutch. Carr. § 152; 4 Elliott, R. R. § 1446. It follows that these assignments must be overruled.

The fifth and sixth assignments complain of the sixth and seventh paragraphs of the charge, submitting in the alternative the liability of appellant apart from the through-shipment feature, upon the ground that this issue was not raised either by the pleading or the evidence; but we do not so read the record, and hence overrule these assignments.

The seventh complains generally of the charge, because the court submitted to the jury whether or not the cattle had been shipped on a contract for through shipment; but

a sufficient answer to this is that in doing so his honor but followed the request of appellant's counsel.

It remains only to dispose of the eighth and last assignment, which complains that "the court erred in refusing the fifth special charge asked by appellant"; but the brief fails to inform us even of the nature of this charge, or to give the page of the record where it may be found. We would therefore be warranted in disregarding this assignment, but, as appellee makes no objection to our considering it, we have examined the special charge, the refusal of which is complained of, and have concluded that, if given as requested, it would probably have misled the jury, if, indeed, it was not at variance with the law of 1895 given in charge to the jury. The judgment is affirmed.

TEXAS & P. RY. CO. v. BREADOW.<sup>1</sup>  
(Court of Civil Appeals of Texas. Oct. 22, 1898.)

#### INJURY TO EMPLOYE—INSTRUCTIONS.

1. In an action for injuries to employé, the jury were instructed that, if decedent was in the exercise of ordinary care, "and defendant's servant or servants operating the engine was or were not exercising ordinary care," and that, by reason of the failure of said servant or servants to use such care, decedent was struck by the engine and killed, to find for plaintiff. *Held*, that the instruction was not objectionable on the ground that the jury might have understood, from the use of the words "was or were," that they might find for plaintiff, notwithstanding the evidence might show that defendant was not guilty of negligence.

2. In an action for injuries to employé, the jury were instructed that if decedent was in the exercise of ordinary care, and defendant's servants operating the engine were not, and that, by reason of the failure of said servants to use such care, decedent was struck by the engine and killed, to find for plaintiff, but, if the servants of defendant in charge of the engine were in the exercise of ordinary care, to find for defendant. "unless you find for plaintiff under the first paragraph of this charge." *Held*, that the latter proviso was not misleading, where the first paragraph charged that plaintiff's right to recover rested on the negligence of defendant.

Appeal from district court, Dallas county; W. J. J. Smith, Judge.

Action by Johanna Breadow against the Texas & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The petition of Johanna Breadow (appellee), plaintiff below, as surviving widow, suing for herself and for her two minor children, declared for damages against the Texas & Pacific Railway Company on account of the killing of Fred Breadow, who was injured while in the service of the defendant, as a car repairer, on or about March 7, 1892, and died from said injuries on the following day. Plaintiff charged that the injuries and death of said Breadow were occasioned by the negligence of defendant, to the damage of

<sup>1</sup> Writ of error denied by supreme court.

plaintiff and her children in the sum of \$20,000. This is the second appeal in this cause, appellee having formerly recovered a judgment for \$8,000, which was reversed because of error in the charge of the court on the subject of the persons operating defendant's engine having seen the deceased in time to avoid contact with the engine, by the exercise of ordinary care and prudence, it being held that there was no evidence to warrant the submission of the issue to the jury. 35 S. W. 490; 36 S. W. 410. Under the pleadings at the former trial, there were two counts in the petition,—one alleging that the operatives on the engine actually saw the deceased and failed to exercise ordinary care towards him; the other based on facts constituting general negligence under all the circumstances of the case, as well as negligence per se in violating the ordinances of the city. At the second trial the first-named ground of recovery (being the second count in the petition) was abandoned, and trial had on the other (being the first count in the petition). The plaintiff's pleadings presented, in substance, these issues: (1) That defendant company operated its tracks, yards, and engines in a public place, in and along and across the streets of the city of Dallas, where pedestrians and vehicles were habitually accustomed to pass, with the full knowledge and consent of defendant, and was charged, by law and the physical circumstances of danger, with the exercise of care proportioned to the risks of the place and enterprise. (2) That the ordinances of the city specifically required that no train or engine should be run at more than six miles an hour, and that the engine bell should be rung and kept ringing all the time the engine was in motion. (3) That at the time and place of the accident defendant was guilty of negligence, in that its servants in charge of the engine were not exercising due and proper care and vigilance under all the circumstances, and were violating the law, by running at 12 miles an hour, and not ringing the bell or giving any other signal. (4) That deceased was an employé of the defendant company, going from his place of work to his home by the usual and nearest route, and along the customary path used by the public generally; that he was exercising due and proper care and prudence for his own safety, and was keeping proper lookout for danger, and regulated his movements by such care, as well as by a reliance on the belief that defendant would observe the positive requirements of the law as to speed and signals. The defendant's answer embraced, besides exceptions, a general denial, and special pleas to this effect: (1) That Breadow sustained the injuries in question in the private yard of defendant, comprising several acres of land, on ground owned in fee simple by defendant, and remote from any street or crossing; that defendant's main track, and numerous side, switching, and repair tracks, are constructed, extend into and through

said yard, and are liable to be used at any time in the necessary conduct of defendant's business, as was well known to Breadow, who was an old and experienced employé in said yard; that Breadow himself was negligent, in that on the occasion in question he neither watched, looked, nor listened for the approaching engine, but, without using either of these precautions, he relied altogether upon those in charge of the engine using precaution to avoid striking him. (2) That the proximate cause of deceased's injury was that just a moment before he was struck, and while he was walking eastward through the yard and along the switch track, and while he was in a position of no peril, he suddenly, without looking to see upon what track the engine was approaching from behind, stepped to the right, and in such close proximity to the passing track that he was struck. (3) That the tracks in defendant's yard are places of peril, where engines and trains are liable to be propelled at any time; that personal security therein requires close and exacting attention from all engaged therein, particularly when they approach near to or on said tracks; and that for the better security of its employés defendant has at all times maintained a wide passageway, about 10 feet wide, between the main and passing track, and that, in unnecessarily departing from the sufficient passageway aforesaid, deceased unnecessarily assumed a most perilous position, and at such a time and place as to render impossible precautions for his safety thereafter; and that Breadow, with knowledge as an experienced employé, assumed the risks incidental to the service. A trial before a jury resulted in a verdict and judgment in favor of plaintiff for \$8,000, apportioned between herself and children. Defendant's motion for a new trial was duly heard and overruled, to which order defendant excepted, and gave notice of appeal in open court. Defendant duly perfected its appeal.

The death of Fred Breadow, by being run over by appellant's cars, is not questioned, and appellant admits that the issues tendered by plaintiff, including the negligence of the company, were sufficiently established by the evidence. The only issue of fact raised for our decision is that of contributory negligence upon the part of the deceased. On this issue we find no such state of facts as would justify us in determining that the jury should have found that the deceased was guilty of contributory negligence, and, in support of the verdict and judgment, we conclude that such contributory negligence was not established.

Alexander, Clark & Hall and T. J. Freeman, for appellant. Leake, Henry & Greer, W. C. Kimbrough, and Dudley G. Wooten, for appellee.

FINLEY, C. J. (after stating the facts). 1. The first assignment presented attacks the verdict upon the issue of contributory negligence.

This assignment is disposed of by our conclusion of fact that contributory negligence was not established. We do not deem it necessary to discuss the evidence under this assignment.

2. The next assignment complains of paragraph 2 of the charge, which is as follows: "If you find and believe from the evidence that at the time that Fred Breadow was struck by defendant's engine, and received the injuries which resulted in his death, he, the said Fred Breadow, was in the exercise of ordinary care (that is, such care as a person of ordinary care would exercise under like circumstances), and that defendant's servant or servants in charge of and operating said engine was or were not exercising ordinary care (that is, such care as a person of ordinary care would exercise under like circumstances), and that, by reason of the failure, if any, of such servant or servants in charge of and operating said engine to use ordinary care, said engine struck said Fred Breadow, and inflicted upon him the injuries which resulted in his death, then you will find for plaintiff. But if you find and believe from the evidence that, at the time said Fred Breadow was so struck by said engine, the servant or servants of defendant in charge of and operating said engine were in the exercise of ordinary care, as hereinbefore explained, you will find for defendant, unless you find for plaintiff under the first paragraph of this charge. And if you find and believe from the evidence that at the time Fred Breadow was so struck by said engine said Fred Breadow was not in the exercise of ordinary care, as before defined, and that his failure, if any, to so exercise ordinary care, in any wise or in any degree contributed to his said injuries, you will in any event find for defendant."

The contention is that the jury may have understood from this charge that they should find for the plaintiff, notwithstanding the evidence might show that the railway company was not guilty of negligence. We think this construction of the charge quite technical, and not the construction which would ordinarily be placed on the language used. The use of the expression, "was or were not exercising ordinary care," was manifestly adopted to conform the verb, in both the singular and plural forms, to the subjects, "defendant's servant or servants." This is made certain, further on in the paragraph, by the instruction that, if the servants of the defendant were in the exercise of ordinary care at the time Breadow was struck by the engine, a verdict should be given for the defendant. There is nothing substantial in this criticism upon the charge.

3. This further complaint is made of the charge: "The charge of the court was misleading and erroneous in the continuation of said paragraph 2 of the charge, wherein the court instructed: 'But if you find and believe from the evidence that, at the time said Fred Breadow was struck by said engine, the serv-

ant or servants in charge of and operating said engine were in the exercise of ordinary care, as hereinbefore defined, you will find for defendant, unless you find for plaintiff under the first paragraph of this charge,'—for the reason, if the servant or servants of the defendant in charge of and operating said engine were in the exercise of ordinary care, defendant was entitled to a verdict without qualification." Upon examination of the first paragraph of the charge, we find that it correctly presents the law of the case, and the reference to it in the second paragraph could not reasonably be understood to limit or qualify the right of the defendant to a verdict, if the jury believed from the evidence that it was not guilty of negligence. The first paragraph expressly instructs the jury that the plaintiff's right of recovery rests upon the negligence of the railway company, and a verdict for plaintiff could not be properly rendered, under that paragraph, unless such negligence was proven.

4. The refusal of two special charges asked is assigned as error. The general charge correctly and adequately presented the law of the case to the jury, and there was no error committed by refusing to further charge the jury as requested. We find no error in the proceedings of the court below, under the presentation of the case to us, and the judgment will be affirmed. Judgment affirmed.

### HINES v. LUMPKIN.

(Court of Civil Appeals of Texas. Nov. 19, 1898.)

#### SLANDER OF TITLE—OPINION OF ATTORNEY.

1. A deed in plaintiff's chain of title is properly excluded, where its certificate of acknowledgment fails to show that the grantees who appeared before the notary and acknowledged the deed were known to him to be the persons who signed the instrument.

2. Under Sayles' Civ. St. art. 3347, providing that, whenever an action for the recovery of real estate is barred by the statute of limitations, the person having peaceful and adverse possession shall be held to have full title, precluding all claims, plaintiff, in an action for slander of title, may prove title by limitation, without specially pleading it.

3. A lawyer employed by the owner and a prospective purchaser to examine a title to real property is guilty of slandering the title if he falsely and maliciously declares it bad when he knows it to be good, or could have ascertained the fact by ordinary skill and diligence.

4. Where a lawyer employed to examine a land title was to pass on the title only as it was shown in an abstract furnished him, and he did this with such skill and care as ordinarily skillful and prudent attorneys would use in such case, he would not be liable for slander of title if the abstract was at fault, though the records might show a perfect title.

Appeal from district court, Bosque county; J. M. Hall, Judge.

Action by W. W. Hines against S. H. Lumpkin. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Lockett & Kimball and Wm. M. Knight, for appellant. Lumpkin & Alexander, for appellee.

HUNTER, J. This suit was brought by W. W. Hines in the district court of Bosque county on July 28, 1894, against S. H. Lumpkin, to recover special damages occasioned by certain slanderous words alleged to have been uttered by Lumpkin of and concerning the title of plaintiff to 94 acres of land lying in Bosque county, and which he had sold to one Byrum at \$12.50 per acre, on condition that the title was good, it being agreed between them that said Lumpkin should pass upon the title, and that they should be bound by his decision. The contract of sale containing this condition was in writing, and signed by both parties. The averment is as follows: "Did falsely, maliciously, and without probable cause for believing them to be true, use and speak, in substance, the following defamatory words concerning the plaintiff's title to the said ninety-four acres of land aforesaid, to wit: 'The title' (meaning thereby plaintiff's title to the ninety-four acres aforesaid) 'is not worth a durn' (meaning thereby that plaintiff's title was invalid and worthless), 'and my advice to Byrum is to have nothing to do with it; if he does, he will get into trouble.'" It is alleged that Byrum refused to purchase the land by reason of these words so spoken to him, and that plaintiff was damaged thereby in the sum of \$1,000 actual and \$2,000 vindictive damages. The defendant pleaded the general denial, and specially that he was an attorney at law, and that M. J. Byrum brought him the abstract of title to the land in question, and employed him to examine the title as shown and set forth in the abstract, and not otherwise, and this he did in good faith and truly, advising said Byrum, in substance, that said abstract did not show a good and sufficient title in said Hines, on account of the unsatisfied incumbrances thereon as shown by said abstract, and for other defects; that this opinion was given in good faith to his said client, and without malice, and he is therefore not liable to the plaintiff, as his communication was privileged; that the abstract showed incumbrances on the land in one instance of \$12,500 not properly released, and in another \$1,167.50, which was not yet due, and was unreleased, and that, as shown by said abstract, said title was not good, and his statements concerning the same were true; that, in any event, he acted in good faith, and without malice, and that he is responsible only to his client, the said Byrum, for any erroneous advice given, and not to the plaintiff, to whom he owed no duty whatever.

The evidence tends to show that the parties to the contract had agreed upon defendant, Lumpkin, who was a lawyer, and considered as especially skilled in the laws pertaining to land titles; but when they went to his office Byrum employed him, and paid him his fee

in advance, to examine the title as shown in a certain abstract of title which was furnished Lumpkin, it being understood that he should not be required to leave his office, but should pass upon the title as presented in that abstract. The abstract is not contained in the record, but it seems that it showed a deed of trust against this 94 acres and other lands, executed by W. S. Martin and wife, conveying the land to R. L. Brown to secure a note of \$12,500 made by said Martin in favor of J. Gordon Brown, dated June 30, 1890, and due November 1, 1895, which was duly recorded in Bosque county. As we understand the record, the abstract also showed that R. L. Brown on February 18, 1892, received from Martin and wife an absolute deed to the lands, and on that day executed a release of the deed of trust, but it did not appear in the abstract that J. Gordon Brown, the owner of the note and beneficiary in the mortgage, had joined in said release or consented thereto, although the deed to R. L. Brown, as recorded in the deed records, showed that the conveyance was made in discharge of the said \$12,500 note, which was then and there canceled and delivered to Martin. The abstract also showed that there was about \$1,167.50 in vendor's lien notes, which had been executed by Hines to Brown, outstanding and unreleased, due in 1896, 1897, 1900, and 1903, respectively; but Fitzhugh, the agent of Brown, and who seems to have been interested in the lands also, it is contended, told the defendant, Lumpkin, before he examined the abstract, that these vendor's lien notes would be released if the trade was completed by the parties, it appearing that he was to get the proceeds of the sale in discharge of these same notes. There was evidence tending to prove that Lumpkin was familiar with the title to the land, and had previously declared the title good, and also some evidence tending to prove ill feelings on his part towards Fitzhugh and the Browns, under one of whom Hines held his title, though it seems friendly relations existed between him and Hines.

On the trial the court properly excluded a deed in plaintiff's chain of title—the deed from Joseph Monks and wife to George W. and William F. Norton—because the certificate of acknowledgment failed to show that the persons who appeared before the notary and acknowledged the deed were known to him to be the persons who signed the instrument; and thereupon the plaintiff offered evidence to prove title to the land under the five-years statute of limitation, which was excluded by the court upon the ground that he had not set up a title by limitation in his petition. In excluding this evidence of limitation we think the court erred.

Article 3371, Sayles' Civ. St., provides: "The laws of limitation of this state shall not be made available to any person in any suit in any of the courts of this state unless it be specially set forth as a defense in his an-



swer." Article 3347 provides: "Whenever in any case the action of a person for the recovery of real estate is barred by any of the provisions of this chapter, the person having such peaceable and adverse possession shall be held to have full title, precluding all claims." The five-years article is embraced in this chapter.

The article first quoted has reference only to the manner in which the statute may be used as a defense. But the last article vests the title of the true owner in the party who has had peaceable and adverse possession for the period of time prescribed by the statute, and this title may be used in offensive proceedings as well as defensive, and, when made the basis of an action to recover damages from a wrongdoer, it is not necessary to plead it specially, but it is sufficient to aver title in general terms, the same as in any other case. It is, when the bar is once completed, as good a title in the one in whose favor the statute had run as the true owners held before they were barred; and it is no more necessary for a plaintiff to plead it specially in actions for damages to the land or slander to the title than it is in cases where he holds under a chain of deeds running back to the sovereignty of the soil. *Railway Co. v. Wickham* (Tex. Civ. App.) 44 S. W. 1023; *Sayles' Civ. St. arts. 3347, 3371*. We are therefore of opinion that the plaintiff should have been permitted to prove his title by limitation, although not specially pleaded.

The court below charged the jury to find a verdict for the defendant, doubtless because, under the rulings of the court, the plaintiff had failed to prove a title to the land. If title to the land is proven on another trial, and the evidence is the same as now appears in the record, we think it would probably be error to give a peremptory instruction to find for defendant; for we are inclined to think that there is sufficient evidence, on all the material allegations in plaintiff's petition, to entitle him to have them submitted to the jury under proper legal charges.

We also think that the evidence was sufficient to require the issues presented by the defendant's answer to be submitted to the jury, and in view of our conclusions, resulting in another trial, we think it would be improper in us to discuss the evidence. We think it proper to state, however, that we can see no reason why a lawyer, though employed to examine a title and agreed upon by both parties, may not be guilty of slandering the title the same as anybody else, if he falsely and maliciously declares it bad when he knows it to be good, or could have ascertained the fact by the use of ordinary skill and diligence. Of course, if his contract was to pass upon the title only as it was shown in the abstract furnished him, and he did this truly, or with such skill and care as ordinarily skillful and prudent attorneys would use in such a case, then he would not be liable if the abstract was at fault, though the deed records

might show a perfect title. Ordinarily a title by limitation is not shown in an abstract, and an attorney, under a contract to pass upon the title as shown by such abstract, would not be required to consider such a title, or even justified in doing so, unless the evidence thereof should be very full and accurate on all the legal points that could be raised on such a title. For the reasons before stated, we think the judgment herein ought to be reversed and the cause remanded; and we so order.

## TEXARKANA & FT. S. RY. CO. v. COLLINS.

(Court of Civil Appeals of Texas. Nov. 10, 1898.)

### EMINENT DOMAIN — OPERATION OF RAILROAD — DAMAGES — PLEADING.

Where a complaint for damages for the construction of a railroad in a street in front of the plaintiff's house alleged generally that he had been damaged from the operation of the road, a judgment in favor of plaintiff for the difference between the market value of his property before the construction of the road and its value thereafter, where such injury was not specially alleged, was not supported by the pleadings.

Appeal from district court, Jefferson county; Stephen P. West, Judge.

Action by F. O. Collins against the Texarkana & Ft. Smith Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Greer & Greer, for appellant. Votaw, Martin & Chester, for appellee.

**WILLIAMS, J.** This was an action by appellee against appellant to recover damages for the construction of appellant's railroad along a street in Beaumont upon which appellee's residence fronted. The damage was thus alleged: "Plaintiff and his family are constantly annoyed and greatly damaged by the ringing of bells, blowing of whistles, and rumbling noise of the cars, and vibration in said street and plaintiff's residence, and black coal smoke, offensive and dirty, being constantly driven, by the south winds, over and upon plaintiff's lot, and into his said residence, blackening, soiling, and damaging furniture, curtains, clothing, and everything with which it comes in contact, thus greatly annoying, harassing, and damaging plaintiff; and that plaintiff and his said family are constantly exposed to great danger of being run over, knocked down, and injured by the operation of said railway, as aforesaid, in that a great number of trains constantly pass over said railroad, and by reason of its near proximity to plaintiff's said residence, and no other ingress or egress, plaintiff and his said family are compelled to expose themselves to the danger of crossing and traveling over and upon said street, but that their traveling and passing over and upon said street upon which defendant's railway is located, as aforesaid,

plaintiff and his said family are compelled to go on foot, by reason of the construction of the railway aforesaid in such a manner that vehicles cannot pass over and along such street; and that by reason of the construction of defendant's railway as aforesaid, and its operation, etc., as heretofore alleged by plaintiff, this plaintiff is damaged by reason of the premises in the sum of one thousand dollars (\$1,000); that, though often requested so to do, defendant has failed and refused, and still fails and refused, to pay plaintiff the said damages, or any part thereof. Wherefore plaintiff prays that citation issue to defendant in terms of law, requiring it to answer this petition, and that on hearing hereof plaintiff have judgment for his said damages, and all costs of suit, and for general relief; and he will ever pray," etc. The court below rendered judgment in favor of plaintiff for the difference between the market value of his property just before the construction of the road and such value thereafter. Several of the appellant's assignments of error present the proposition that such judgment is erroneous because the petition did not contain allegations of such damages sufficient to support a recovery of them. We are of the opinion that the proposition is correct. Injury to the value of the real estate of appellee might or might not have resulted from the causes alleged. The court cannot, therefore, assume, as a legal consequence of the facts alleged, that such injury to value of property did result. In determining the effect upon its value, the court would have to estimate any special benefits as well as special injuries which the construction and operation of the road caused, and, without an allegation to that effect, could not see that a diminution of value had resulted. It necessarily follows, therefore, that the damages allowed were special in their nature, and were not recoverable under the general allegation of damages; and, as there is no special allegation of injury to the value of the property, the judgment has no support in the pleadings. *Railway Co. v. Curry*, 64 Tex. 87; *Harris v. Finberg*, 46 Tex. 85. Reversed and remanded.

#### ALLEY et al. v. BAILEY.

(Court of Civil Appeals of Texas. Nov. 10, 1898.)

##### ADVERSE POSSESSION—APPEAL—REVIEW.

1. By a deed executed and registered in 1882, land was conveyed to plaintiff, and in 1884 he and his partner inclosed a pasture including it, by running a fence east from the bank of the Colorado river to a certain point, thence north to the fence of a pasture company running back to the river, which was sufficient to keep cattle in and out from the inclosure thus made. It did not appear that plaintiff was entitled to use the fence on the north, but he and his partner kept their cattle in the pasture, controlled all the lands included in it, and excluded all other persons therefrom, and lived within the pasture, though not on

the land conveyed. In 1886 they built an inner fence, extending across the pasture, and crossing the land conveyed, of which plaintiff claimed to be and was recognized in the vicinity as the owner. His claim was open and notorious. In 1888 he moved away, but continued his possession and control otherwise as before, until 1890, and paid the taxes on the land conveyed. *Held*, that plaintiff acquired title to such land under the five-years statute.

2. Objections to the admission of parol evidence cannot be raised for the first time on appeal.

Appeal from district court, Matagorda county; T. S. Reese, Judge.

Action by Oliver P. Bailey against W. W. Alley and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Foard, Thompson & Townsland, for appellants. Gaines, Hamilton & Carpenter, for appellee.

WILLIAMS, J. Appellee brought this action to recover title and possession of a tract of land in Matagorda county, alleging his ownership of same generally, and also setting up title acquired by possession under the five-years statute of limitation. He recovered upon the title by limitation, and the assignments of error all allege errors in the conclusions of the trial court holding the evidence sufficient to establish such title.

The facts, in brief, are that on the 4th day of January, 1882, E. L. Angier and Byrd Eastham executed to Bailey a deed conveying the land in controversy, which deed was duly registered March 1, 1882. In August, 1884, Bailey and one Johnson, who was his partner, inclosed, in a pasture, about 8,000 acres of land, including that in question, by running a fence from the east bank of the Colorado river eastwardly to a point from which they extended it northwardly, and joined it to the fence of the Pierce-Sullivan Pasture Company, which ran from that point back to the river, making an effectual inclosure of the land. The inclosure thus had for one of its sides the Colorado river, which was sufficient to keep cattle in and out, and for another a fence belonging to another party, of whose consent to this use of its fence there is no direct evidence. It appears, however, that Bailey & Johnson kept their cattle in the pasture which they had thus inclosed, controlling all of the lands included in it, and excluding all other persons therefrom. They lived within the pasture, but not on the land in controversy. In 1886 they built an inner fence, extending diagonally from the southern to the northern fence, and crossing the land in controversy. There is parol evidence, admitted without objection, that Bailey and Johnson, together, controlled all of the land in the pasture, and that Bailey claimed to be, and was recognized in the vicinity as, the owner of the tract in question. His claim was open and notorious. Bailey moved away from the pasture in 1888, but continued in the possession and control of it, such as is above described, otherwise than by residence with-

in it, as late as 1890. During this time the taxes on the land were paid by him.

We think these facts justify the conclusion of the trial court that plaintiff had sustained his claim of title by limitation. Such control as Johnson exercised was evidently subordinate to Bailey's claim to the land, and not hostile to it. The possession of the partnership, if it can be regarded as distinct from that of the individual partner claiming particular tracts, was nevertheless, in law, the possession of such claimant, because received from him and held in subordination to his title. The fact that the inclosure was partly formed by a fence belonging to another, whose consent to such use of it is not expressly shown, is of no importance. The question in this regard is, did Bailey in fact have an exclusive possession of the land? and, if he had, his wrongful use of the fence of another, if it was wrongful, would not alter the fact. But it would seem that such use of the fence as the evidence shows would indicate that the owner of it consented thereto, at least tacitly. Nor is the fact that one side of the inclosure was a river of controlling importance. It kept the cattle of those using the pasture within it, and those of others out of it. It enabled the parties, in short, to control the land, hold the exclusive possession of it, and use it for the purposes to which it was adapted, and the other indications of possession were so prominent as to give the requisite notoriety. We cannot see that any element of an adverse possession is wanting. If it be true, as contended, that Bailey & Johnson's control of the land in the pasture should have been shown by other evidence than parol, it is too late to raise that objection in this court for the first time. Affirmed.

#### TURNER v. CRANE et al.<sup>1</sup>

(Court of Civil Appeals of Texas. Oct. 13, 1898.)

#### EXECUTION—LEVY—SHERIFF'S DEED—DESCRIPTION OF LAND—SUFFICIENCY.

1. An execution issued on a judgment against one Hunnings was lost. The entry on the docket did not show against whom the writ was issued. The sheriff's deed recited that the execution was issued on a judgment against one Hemmings, commanding a levy on his property, and in the habendum recited that he would hold the same to the purchaser as fully as could the "said Hunnings, above mentioned." *Held*, that as the deed was evidence of the execution, and consistent with the conclusion that it was issued either against Hemmings or Hunnings, it would be presumed that the execution followed the judgment, and was correctly issued.

2. A sheriff's deed to land levied on and sold under execution described the levy as on 200 acres of land off of the S. end of 800 acres known as the "Red Bluff League." It was admitted that the S. line of the 800-acre tract was a straight line running east and west. *Held*, that the description was sufficient, as it would only require the ministerial act of a surveyor to lay off 200 acres, with the south

line of such 800-acre tract as its southern boundary.

#### On Rehearing.

1. An objection to a sheriff's deed to land that it does not state the county in which the land was situated is untenable, where the deed recites that the levy was made by the sheriff of a certain county, and the sale was made therein.

2. A description in a sheriff's deed reciting that the levy was made on a tract off of the S. end "on" 800 acres, instead of "of" 800 acres, and calling the south side of the tract the south end, would not vitiate the levy.

Appeal from district court, Harris county: John G. Tod, Judge.

Action by William N. Crane and others against W. B. Turner and others. From a judgment for plaintiffs, W. B. Turner appeals. Reversed.

William N. Crane, Redick Crane, and William Butler, who are among the appellees, brought this action of trespass to try title against certain defendants, who are also appellees, and against the appellant, W. B. Turner, to recover certain land, consisting of 800 acres, a part of the headright league in Harris county granted to W. P. Harris, called the "Red Bluff League," less a tract of 137 acres excepted by the petition from the 800-acre tract. The description given of the 800 acres shows that its northern and southern boundaries have straight lines running east and west; that its western boundary is a straight line running north and south; and that its eastern boundary is Galveston Bay, the course of which at that place is not shown by the record. The 137 acres excepted from the tract is described so as to show that it lies in the southeastern corner. The appellant, Turner, by his pleadings, claimed a tract of 200 acres off of the south end of the 800-acre tract, and, as to that, pleaded not guilty, and alleged his title specially. The other defendants also pleaded not guilty. Upon the trial it appeared that the league of which the 800 acres is a part was granted to W. P. Harris, who, on December 11, 1840, conveyed the 800 acres, describing it as it is described in the petition, to Elijah Hunnings. On the 1st day of November, 1838, in the county court of Harris county, in a cause entitled "McCaskill & Doble, by McCaskill, Surviving Partner, v. Elijah Hunnings," a judgment was rendered in favor of plaintiffs against the defendant for \$132.06 principal and \$24 interest, and costs of the suit. The appellant, Turner, claims the 200 acres under a sale under execution issued upon this judgment, the evidence of which is as follows: The original execution, with its indorsements, was lost, and could not be produced at the trial. The execution docket of the district court was produced, in which was found an entry which does not, so far as the record shows, give the title of any cause or the name of any party, and which is otherwise as follows: "Judgment Nov. 1st, 1838. Debt, \$132.06; interest, \$24.20, —\$156.26. County clerk, \$10; sheriff, \$7.75; Atty., \$5.00; Clk. Lubbock, \$2.65. Issued and delivered to

<sup>1</sup> Writ of error denied by supreme court.

the sheriff of Harris county, October 24, 1843, and returned April 1, 1844, as follows: 'Levied on 200 acres of land, and sold to J. A. Southmayd the 6th of February, 1844, for 16½ cents per acre. For particulars, see execution.' Appellant also produced the record of a deed dated February 6, 1844, duly acknowledged and recorded February 17, 1844, from the sheriff of Harris county to J. A. Southmayd. This deed properly describes the judgment just referred to, except that it states that it was rendered against Elijah Hemmings. It further recites that an execution was issued thereon on the 11th day of November, 1838, from the office of the county clerk, and was returned, "Stayed by order of plaintiff;" that on the 17th of August, 1843, the papers in said cause were sent up to the clerk of the district court for said county for execution to issue thereon; that on the 24th day of October, 1843, an execution was issued from said office commanding the sheriff to levy on the property of Elijah Hemmings sufficient to satisfy the judgment; that the sheriff proceeded, in accordance with the writ, to levy upon "200 acres of land off of the S. end of 800 acres known as the 'Red Bluff League,' being a part of a tract sold by Wm. P. Harris to the said Hemmings"; that the sheriff sold this land on the 6th day of February, 1844, after having caused it to be appraised, giving the appraisal; that it was purchased by J. A. Southmayd, giving the amount of his bid, which was two-thirds of the appraisal, and that the purchase money was paid by Southmayd; and the deed proceeds to convey the land to the said Southmayd, and closes with the following: "To have and to hold the same to himself, his heirs and assigns, forever, in as full, good, and perfect a manner and estate as the said Elijah Hunnings, above mentioned, had, at or after the rendition of the above-cited judgment, in said premises became liable to satisfy the same, with damages and costs of court. Dated February 6, 1844." On the 17th of February, 1849, Southmayd conveyed the 200 acres, by the same description as that given in the sheriff's deed, to Robert Brewster, and the deed was duly recorded the same day. On the 31st of May, 1889, Robert Brewster conveyed it to William R. Baker by same description, this deed being also recorded the same day. Baker has paid taxes on this land since the date of his deed, and appellant claims under his will. The evidence further shows that Elijah Hunnings, on the 12th day of April, 1846, conveyed to James Morgan the 137 acres mentioned in plaintiffs' petition. Hunnings subsequently died, devising his estate to his daughter, Sarah Ann Crane, the wife of Whittington Crane. The will was probated in 1851. The plaintiffs are the heirs of Sarah Ann and Whittington Crane. Sarah Ann Crane and her husband, on the 13th of August, 1860, executed to John R. Harris a bond for title, recorded September 28, 1860, by which they agreed to sell to him 800 acres of land out of the W. P. Harris league, less

200 acres sold to Southmayd and 137 acres sold to James Morgan, leaving 463 acres, the same conveyed to Elijah Hunnings by deed, the record of which is referred to. On the 14th of January, 1861, Crane and wife executed to John R. Harris a deed, recorded March 22, 1861, conveying the following land: "800 acres of land out of the W. P. Harris league on Galveston Bay, less 200 acres sold by E. Hunnings to J. A. Southmayd, and 137 acres sold by him to James Morgan, leaving a balance of about 463 acres hereby conveyed, being the same tract conveyed by W. P. Harris to Elijah Hunnings by deed in Vol. F, page 565, and conveyed to Sarah A. Crane by said Elijah Hunnings by his last will and testament, duly probated in the county of Harris." John R. Harris subsequently conveyed to Mrs. Rebecca Williams the 800 acres, excepting 200 acres sold by E. Hunnings to J. A. Southmayd and 137 acres to James Morgan. The other defendants, besides Turner, have title under Mrs. Williams to the land conveyed by these deeds. By the judgment of the court below the plaintiff and those defendants were adjudged to have title to all of the land except the 137 acres not sued for, Turner's title under the sheriff's sale being held void. The court in its findings of fact found that the execution referred to was issued against Elijah Hemmings, and that his land was sold, and by conclusions of law held that the sale was insufficient to pass the title of Elijah Hunnings.

E. P. Turner, for appellant. Smith & Baldwin, for appellees.

WILLIAMS, J. (after stating the facts). On the statement given of the case, it is plain that, if the execution sale under which Turner claimed was valid to pass Hunnings' title to land sold, plaintiff should have recovered nothing; for the other muniments of title offered in evidence show that their ancestress had no title to any other part of the tract at the time of her death.

Two objections are made to the execution sale. The first is that the execution having been issued against Hemmings, and the land having been sold as the property of Hemmings, and not of Hunnings, no title passed. If the court's conclusion of fact, that the execution was issued against Hemmings, is correct, it may be conceded that the result contended for would follow. But it will be seen that the execution is lost, and its contents are to be inferred from the other evidence offered. The entry on the docket does not show against whom the writ issued. The court's conclusion, that the execution issued against Hemmings, is evidently based upon the recitals of the sheriff's deed. The court at the same time concluded that the execution was issued upon the judgment found in the record. The sheriff's deed, considered alone, is consistent with the conclusion that the writ issued either against Hemmings or Hunnings, because it gives both names. In

every particular but the names it describes the judgment with great accuracy. We think the more rational conclusion is that the execution issued correctly against the party against whom the judgment was rendered. There is evidently an error in one part of the deed or the other. Either the sheriff or the recorder might easily have made it, where the strokes of the pen made in writing the two names are so nearly identical. The deed recites that the judgment was against Hemmings, and that the land was conveyed to Hemmings, which clearly indicates that the error was in substituting that name for Hunnings. We therefore think it clear that it should be held that the execution followed the judgment, rather than that it issued against a person not named in that judgment. The presumption is that the clerk in issuing the execution performed his duty accurately, and as the execution was evidently issued upon this judgment, as the court properly states in its conclusion, it should be held that the execution was against the proper party. In order to hold this, it is only necessary to treat the names where first written in the sheriff's deed as a clerical error, and to accept as correct the name as given in the habendum clause of the deed.

It is urged that, where there is a conflict between the granting clause and the habendum clause of the deed, the former should prevail. This is doubtless the correct proposition where it has application; but the question here is simply one of fact, namely, against whom did the execution issue? If it issued against Hunnings, and his property was sold, the purchaser acquired title by his bid and by the payment of the purchase money, and the sheriff's deed was not at all necessary to that title. That deed is to be regarded as evidence tending to show the existence of the execution, the levy, and sale, and since, as we have before shown, it is consistent with the conclusion that such execution was against the defendant against whom the judgment upon which that execution issued was rendered, that conclusion is the proper one to adopt. This is also strengthened by the recitals in the other deeds above set out.

The next objection is that the land sold is not sufficiently described. It is first contended that the levy was upon 200 acres, without further description; this contention being based upon the clerk's memorandum upon the execution docket. The execution docket does not so state, but refers to the execution for particulars. To see what land was levied upon and sold, we must refer to the sheriff's deed, and, while the description there given is quite general, we think it is sufficient. It sufficiently points to the 800-acre tract, and indicates how the 200 acres are to be taken from it and identified. The description in the petition, which the statement of facts admits to be correct, shows that the south line of the 800-acre tract is a straight line running east and west, and the

200 acres sold are to be taken from the south end of that tract. This makes the south line the base upon which the other boundaries are to be formed, and it requires only the ministerial act of a surveyor to identify the 200 acres with that line as its southern boundary. The description seems to us to be as complete as if the sheriff had indicated that a line should be run east and west across the survey far enough north of the south boundary line to include 200 acres. This would give all the boundaries of the tract, and a better description could hardly be given without an actual survey.

We have examined all the authorities referred to by appellees' counsel, and many others, and find none which conflict with this conclusion. Since it is apparent that plaintiffs have no title to any part of the land sued for, the judgment will be reversed, and judgment will be here rendered that they take nothing by their suit. Reversed and rendered.

#### On Motion for Rehearing.

Nov. 17, 1898.

In an argument accompanying the motion, it is strongly and plausibly urged that this court, in reversing the finding of the lower court that the execution issued against Hemmings, and not Hunnings, violated the rule of appellate courts that a finding of fact of the trial court will not be disturbed when there is evidence to support it. Our conclusion was that there was no sufficient evidence to support the finding in question. The only conflict in the evidence was in the different recitals in the sheriff's deed. Our view of the question of fact arising was that but one conclusion could be legitimately drawn from such evidence, which was the one which rendered the act of the clerk in issuing the execution consistent with his duty under the law, and which supported his action under the presumption that such officers perform their duties correctly. This view was strengthened by the lapse of time, the long assertion of claim under the sheriff's deed, and an apparent recognition of it as a conveyance of Hunnings' interest in the deeds under which plaintiffs themselves claimed. The only question was as to the inference to be drawn from given facts, and we held, and still hold, that they admitted of but one conclusion.

It is further urged that we were in error in holding the description of the land to be sufficient. For the court to reject the deed, in the absence of extraneous evidence showing that the land in question cannot be identified by an application of the descriptive particulars to the ground, the conclusion must be reached that it is void on its face for uncertainty. The description is as follows: "200 acres of land off the S. end on 800 acres of land known as the 'Red Bluff League,' being a part of the tract sold by Wm. P. Harris to

said Hemmings." We have already held that the name "Hemmings" should be treated as "Hunnings." One of the objections urged is that the description does not state the county in which the land is situated. The deed states that the sheriff of Harris county levied upon it by virtue of an execution issued to him, and that the sale was made in that county. He could lawfully levy upon and sell land nowhere else than in that county. No practical business man, seeking in good faith to find land thus described, would, in our opinion, think of searching elsewhere. Why should a court indulge in speculations that the land might possibly lie elsewhere, when to do so would violate the presumption that officers act lawfully? *Wright v. Watson*, 11 *Humph.* 529; *Fresno Ex'ns*, 287. Courts have sometimes, in pointing out the uncertainties of descriptions, mentioned the fact that the county in which the land lay was not stated; but we think it very clear that such an omission, by itself, furnishes no ground for holding a levy void. Assuming, then, that the land upon which the sheriff intended to levy was in Harris county, can the court say, upon an inspection of the return, that it cannot be found by the use of the information given? The deed mentions a league, a tract of 800 acres, and a tract of 200 acres. The 200-acre tract is a part of the 800 acres, and it is equally clear, though the language is awkward, that the 800-acre tract is a part of the league, because it could not be, as the language literally states it is, known as the "League." The league could only be referred to to show that it contained the 800 acres. Can the court say that the league in Harris county known as the "Red Bluff League" could not be easily found? The petition in this case virtually states that the Harris league was so known, and the petition, in connection with the statement of facts, shows that the league was thus designated in the deed from Harris to Hunnings. Even if it be assumed that there might have been, in Harris county, two or more leagues thus known, the one meant could be ascertained by the answer to the inquiry, out of which of them did W. P. Harris convey 800 acres to Elijah Hunnings? For this last fact may have been well known and easily ascertained, even if the deed itself could not be had. A tract of land in a league, described as having been conveyed by one person to another, might be as well known as a farm or tract designated by name. If this levy had designated the 800 acres as "the Hunnings tract, in the Red Bluff league," no court could pronounce it void on its face without disregarding the adjudged cases. How, then, can it be assumed that the description given of the 800 acres is too uncertain, when the court cannot know that persons familiar with the league would not be able to identify the tract conveyed by Harris to Hunnings? We do not find anything in the record from which we can determine whether the deed from

Harris to Hunnings was recorded at the date of the levy or not. Upon examination of the description itself, it cannot be said that the 800-acre tract was not sufficient to advise purchasers of the locality of the 800 acres. That the land can be identified is left beyond doubt by the deeds offered in evidence.

The question which we regarded as most doubtful was as to the sufficiency of the description of the 200 acres. It is now urged that the description does not state that the tract sold is to be taken from the south end "of" the 800 acres, but "on" it. We fail to see the force of the objection. The land is, in either case, on the larger tract, and on its south side or end. It is also pointed out that the northern and southern boundary lines of the larger tract are longer than the eastern and western lines, and that hence the ends, properly speaking, are at the eastern and western extremities of the tract. This may be granted; but it does not follow that this inaccuracy of the sheriff, in calling the south side of the tract its south end, should vitiate his levy. The truth remains evident that the land intended lies along the southern boundary of the 800 acres, and is to extend far enough north to include 200 acres within the southern, eastern, and western boundaries, leaving only one line to be run, in accordance with a mathematical calculation.

Another ground of the motion presents a question which did not escape our attention in the original decision. The 200 acres sold by the sheriff and the 137 acres conveyed by Hunnings to Morgan conflict, and cover partly the same area, and therefore Hunnings, at his death, left unconveyed more than 463 acres, the quantity mentioned in the deed from plaintiffs' ancestress to Harris. But that deed conveys, by its terms, the whole of the 800 acres, with the specific exceptions of the two tracts mentioned, and consequently nothing remained to pass to plaintiffs from Mrs. Crane, through whom they claim. Overruled.

# MISSOURI, K. & T. RY. CO. OF TEXAS v. SETTLE.<sup>1</sup>

(Court of Civil Appeals of Texas. Oct. 13, 1898.)

## RAILROAD CROSSINGS—NEGLECT—ACTIONS FOR PERSONAL INJURIES—ABATEMENT—RETROSPECTIVE STATUTES—PLEADINGS—MEASURE OF DAMAGES.

1. The train on which plaintiff's testator was conductor stopped at the crossing over defendant's railroad, and, no approaching train being seen, proceeded. The engineer of plaintiff's train, while the train was on the crossing, observed an approaching train on defendant's road, and endeavored to clear the crossing ahead; but the last car was struck by defendant's engine, which caused testator's injury. The air brakes on defendant's engine refused to work, and the engineer did all he could do to stop his train. On learning that the air brakes would not work, if defendant's engineer

<sup>1</sup> Writ of error denied by supreme court.

had given signals, those on plaintiff's train would have been able to have avoided the accident. *Held* to show actionable negligence.

2. Act May 4, 1895 (Acts 1895, p. 143), providing that causes of action on which suit has been or may hereafter be brought by the injured party for personal injuries other than those resulting in death shall not abate by the death of the party, is not retroactive in its effect merely because in the case at bar the cause of action accrued before the passage of the act, where the death of plaintiff did not occur until after the passage of the act.

3. A complaint alleging that defendant railroad's trainmen approached the crossing where plaintiff was injured without any care, and without exercising any diligence whatever, is broad enough to allow a recovery on any negligence shown in the running of the train as it approached the crossing, notwithstanding the complaint also averred that the whistle was not blown, nor the bell rung.

4. In an action for personal injuries, where plaintiff died after suit commenced, and his executrix prosecuted the action (which, under Acts 1895, p. 143, gives the executrix the same cause of action as testator would have had), a charge that the amount which would have compensated testator (had the suit been tried just before his death) for his loss of time, diminished ability to make a living, and his physical and mental pain, is not objectionable as a statement of the measure of damages, on the ground that, if the suit had been tried just before testator's death, he would have been entitled to recover, not only for the loss of time and the diminished ability to make a living and the suffering which had already happened, but also for such as the jury might find probable would afterwards have occurred, since the jury would not assume that damages could accrue after his death.

5. It is negligence for a railroad train to approach a crossing, at which a train on an intersecting road is due, without giving a warning of its approach, especially where a collision might have been foreseen on account of its approach being obstructed from the view of the other train by a cut.

Appeal from district court, Harris county; William H. Wilson, Judge.

Action by Mrs. Kate M. Settle, as executrix of W. E. Settle, against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed on conditions.

Jones & Garnett, for appellant. O. T. Holt, for appellee.

WILLIAMS, J. Appellee's testator, W. E. Settle, while acting in the capacity of conductor upon a passenger train of the Houston & Texas Central Railway Company, was injured on the 25th day of December, 1894, in a collision between his train and the train of appellant, and brought this suit on the 23d day of December, 1895, against appellant to recover damages resulting from such injuries. He died on the 14th of January, 1897, while the action was pending, leaving a will by which appellee was made his executrix; and she subsequently made herself plaintiff and prosecuted the action to the judgment from which this appeal is taken. The action was based upon negligence of the servants of the appellant who operated its train, which was alleged as follows: "Defendant negligently and carelessly, and without any care or cau-

tion, approached the said crossing with its engine without stopping, or blowing its whistle or ringing the bell, or giving any warning or exercising any care or diligence whatever, but was running its train at a rapid and dangerous rate of speed, to wit, twenty miles per hour, and by reason thereof ran into and collided with the train of the Houston & Texas Central Railroad on which the deceased was a passenger and conductor, by which collision one of the cars in said train was damaged and demolished, and the deceased, W. E. Settle, was seriously and permanently injured by reason of said collision caused by the negligence and carelessness of defendant." The defendant answered by general denial, and by a special plea charging contributory negligence on the part of the deceased in failing to keep a lookout at the crossing of the two roads where the collision occurred, and in failing to stop his train before passing the crossing. The evidence showed that the roads of the two companies crossed each other at a point in Ellis county about a mile and a half west of Waxahachie. On the evening of December 25, 1894, the train on which Settle was conductor left Waxahachie and reached the crossing in question on time. The train was stopped, and the usual signals for the crossing were given. The engineer looked along the line of appellant's road, and, seeing no train, proceeded to cross. While his train was upon the crossing he observed the headlight of appellant's train approaching rapidly from the west or northwest. At a short distance before reaching the crossing, appellant's train had to pass through a cut and around a curve, so that it could not have been sooner seen by Settle and his co-employees. Upon seeing the train, the engineer upon Settle's train increased its speed, and endeavored to clear the crossing in time to avoid a collision. All the cars had gotten across except the last, and that was struck by the engine of appellant's train. The coach was broken into and overturned, and Settle and others were injured. The evidence shows that, at the place where appellant's train usually stopped for this crossing, its engineer undertook to apply the air brakes for the purpose of stopping, but discovered that they would not work. He then reversed his engine, and applied sand to the track; and this is all the engineer could do to stop the train with the engine. The evidence, however, warrants the further conclusion that, upon discovering that he could not stop the train with the air brakes, he did not give any signals of its approach, and that, had he done so, those upon the other train would have received notice of the danger in time to have avoided the accident, either by not entering upon the crossing, or by getting across in time to prevent a collision. The air brakes on appellant's train had been frequently used on this trip from Dallas to the point in question,—the last time at a place about four miles distant therefrom,—and had been found

in good order, and to operate satisfactorily. After the collision it was found that the angle cock upon the air pipe between the tender and the next car behind it had been turned so as to shut off the air, and make it impossible for the engineer to apply the air to the brakes upon the cars behind the tender by the use of the appliances upon the engine. How this occurred is not shown, further than by the statement that after the collision two persons, apparently tramps, were seen to get up from the ground at a point opposite the platform of the car behind the tender, and run away. The evidence does not show whether or not the cars were equipped with brakes which could have been applied by the brakeman who was present on the train. The evidence does show that there were arrangements upon the passenger coaches by which the conductor might apply the air to the brakes, but whether or not this could be done with the angle cock closed is not shown. It appears that there is a signal whistle to be given by the engineer, known as the "signal for brakes," with which the conductor and brakemen were acquainted, and that this signal was not given by the engineer. We conclude that the jury were warranted in finding that, in failing to give proper warning of the approach of their train, the appellant's employees were guilty of negligence which caused the collision, and that Settle was guilty of no negligence which should preclude plaintiff from recovery. The evidence further shows, and the jury found, under instructions from the court, that Settle did not die from the effects of the injuries, but from other causes. By force of the collision, Settle was thrown upon his head, and, as he expressed it, his neck was nearly broken. He was scarcely able to get out of the wrecked car, but, on account of its having taken fire, he did so; was helped down from the outside of it, and then started to walk into Waxahachie to report the accident; but after he had gone a short distance he fainted, and lay for some time unconscious. The weather was cold, and he was exposed to its effects on account of the collision, and caught a cold, which aggravated the injuries he had received. He was bruised and injured in his neck, hip, wrist, and hand. He was confined to his bed nearly three weeks. His neck remained stiff from the time he was injured until his death, and he walked in a constrained manner. His salary as conductor was continued during the time he stopped work, which was until the 1st of February, 1895. After that date he went back into the service, and continued in it until the middle of January, 1897. He did not, however, work constantly; and when he did work he experienced difficulties in performing his duties, on account of his physical condition. His salary was at the rate of \$110 per month, and besides that, before his injuries, he earned money which, together with his salary, amounted to about \$200 per month. He was 39 years of age at the time of the

accident. The evidence, however, shows that before the accident his throat was diseased, and that eventually this was ascertained to be consumption, from which he died. Some time before his death he lost his voice, and became incapable of discharging the duties required of him as conductor. The evidence renders it probable that both the diseased condition of his throat, and the injuries which he received, and the effects of the exposure contributed to the physical condition which made it necessary for him to abandon his work. The jury found a verdict for \$6,500, which we have concluded is excessive to the amount of \$3,000. The view of the law upon which this conclusion is partly reached will be expressed further on.

#### Conclusions of Law.

1. Under its first assignment of error, appellant contends that the court should have sustained its general demurrer to appellee's petition, on the ground that the cause of action which had accrued to Settle, and which the present plaintiff sought to prosecute, had abated upon Settle's death. By the act of May 4, 1895, it is provided "that from and after the passage of this act causes of action upon which suit has been or may hereafter be brought by the injured party for personal injuries other than those resulting in death, whether such injuries be to the health or to the reputation or to the person of the injured party, shall not abate by reason of the death of the person against whom such cause of action shall have accrued; but in the case of the death of either or both, such cause of action shall survive to and in favor of the heirs and legal representatives of such injured party and against the person, receiver or corporation liable for such injuries and his legal representatives; and so surviving such cause may be thereafter prosecuted in like manner and with legal effect as would a cause of action for injuries to personal property." Acts 1895, p. 143. This statute, by its express terms, prevented an abatement of the cause of action which accrued to Settle, and which had not abated at the time it took effect. It is contended that, because the cause of action accrued before the passage of the act, the law is retroactive in its effect, and is therefore unconstitutional. The answer is that no defense had accrued to appellant before the law was passed. Settle was alive, and the cause of action was in existence. Had he died, and his cause of action abated, before the passage of the act, the question would be different, for then a complete defense would have become vested in the defendant; but, inasmuch as the right of action was perfect when the statute was passed, it was within the power of the legislature to prevent the loss of it in future through Settle's death.

2. The court did not err in overruling appellant's exception to that part of the petition which sought to recover damages resulting from Settle's exposure to cold after his



injury. This was not set up as a distinct cause of action, but was simply alleged as one of the proximate consequences of appellant's negligence in causing the collision.

3. The charge of the court to which objection is made under the fourth and fifth assignments of error is not open to the objection that it submitted questions not raised by the pleading. The petition was broad enough to allow recovery upon any negligence shown in the running of the train as it approached the crossing. The allegation is that the crossing was approached negligently and carelessly, and without any care or caution, and without exercising any diligence whatever. The fact that the pleading also averred that the whistle was not blown, nor the bell rung, did not, we think, restrict the plaintiff to proof of those facts as the only negligence on which she could rely. As we have seen, however, the absence of those signals is made the ground of our finding of negligence. It is immaterial for us to inquire whether or not negligence could be imputed to appellant for approaching so near to the crossing at such a rate of speed that it could only control the movement of its train by the air brakes, without knowing that they were in order; for, as will be seen further on, the court below instructed that the failure to stop the train would be excused, if the train was equipped with proper air brakes, and if the servants of appellant were not negligent in not sooner discovering that such brakes were out of order, and used all other means to stop the train after making such discovery. Another objection to the charge raised by the propositions under these assignments is that it gives an improper measure of damages. The charge states the measure of damages thus: "You will find for the plaintiff, Mrs. Kate M. Settle, executrix, such an amount as, under the evidence, you find would have compensated the decensed, W. E. Settle (had this suit been tried just before his death), for his loss of time, diminished ability to make a living, his physical and mental pain and suffering." The objection urged is that Settle, if the suit had been tried just before his death, would have been entitled to recover not only for the loss of time and the diminished ability to make a living and physical and mental suffering which had already happened, but for such as the jury might find it probable would afterwards occur. This contention sounds plausible, but we think it is not sound. It will be observed that the charge does not refer to any right of the plaintiff to recover for any damage which might have occurred to Settle had he not died, but its language plainly refers to damages which had actually been suffered in the particulars mentioned. No jury of ordinary intelligence could assume that any damages could have accrued after Settle's death. Abstractly, the measure of damages by which plaintiff's right to recover is governed is exactly the same as that according to which Settle could have

recovered had he lived and prosecuted the action to judgment. The statute makes it so. Settle's damages would have been limited by the period of his natural life. So are those which plaintiff has a right to recover. The difference in the two states of case would be simply one of fact. In the one instance, Settle being alive, the jury would have been required to estimate the probable duration of his life, and to allow all damages accruing during such time; while, in the other, death having already occurred, the estimate would be limited to the time he actually lived. No jury in either case could ever assume that damages could accrue after his death.

4. The objection to the charge on the subject of contributory negligence, that it is too general, and does not particularize the acts and omissions in which Settle is alleged to have been negligent, cannot be held ground for reversal, in the absence of requested special charges upon the point.

5. The portion of the charge complained of in the seventh assignment of error does not assume or intimate that, in the opinion of the court, plaintiff had a cause of action of any character. The question is fairly submitted to the jury by other parts of the charge.

6. The court did not err in the part of the charge which allowed a recovery for the consequences of exposure to the weather, if the plaintiff was otherwise entitled to recover, and if such exposure was the proximate result of defendant's negligence. There is no comment upon the evidence in this instruction, but it simply submits to the jury a distinct element of damage, with the rule by which plaintiff's right to recover upon it is to be determined.

7. The tenth assignment of error is taken to a supplemental charge given by the court, which is the same as a special charge requested by the appellant, except the concluding portion of it, which qualifies the rule which appellant requested the court to give. The twelfth assignment of error complains of the refusal to give the special charge without qualification. The charges are too long to insert. They are addressed to the facts shown by the defendant as to the condition of the air brakes. The appellant sought to have the court to instruct that, if such condition were found to have come about without negligence on the part of its employes, and that such employes, after discovering such condition, did all they could to stop the train, a verdict for the defendant would necessarily result. The court qualified the instruction so as to make those facts excuse the failure to stop the train, but added, "But in this event there will still be left for your consideration the question whether there was in other respects any negligence of the defendant for which, under the main charge, it could be held liable, and also the question of contributory negligence." We think it is evident from the facts which we have stated that the qualification was proper. Even if the proposition

given by the court was correct,—which we find it unnecessary to decide,—and if it be conceded that the failure to stop the train was justified by the facts stated, it cannot be conceded that the failure to give warning of its approach to the crossing at which another train was due, and at which a collision might have been foreseen, was excusable.

8. The additions made by the court to the special charges set out in the eleventh and fifteenth assignments of error state the law correctly, and were properly made.

9. The requested instruction to the effect that the plaintiff was not entitled to recover for mental anguish or suffering of deceased was properly refused. The statute makes the cause of action which accrued to Settle survive to his heirs and legal representatives. For the same reason the charge mentioned in the nineteenth assignment of error was properly given.

10. All of the assignments of error except that which questions the amount of the verdict are disposed of by what we have said.

11. The plaintiff was entitled to recover only such damages as her deceased husband sustained during his lifetime. The case is not one in which a plaintiff who has been injured is alive, and in which his injuries will therefore continue to affect him during the whole of his natural life. He lived but little over two years after he received the injuries, and compensation is to be made only for damages sustained during that period. It is also evident that his disease contributed in some measure to his sufferings, and to the impairment of his earning capacity. As we have said before, we think the amount of the verdict is not warranted by any just view of the facts which can be taken, and that \$3,500 is the largest sum which the jury could properly have allowed. If appellee will remit the sum of \$3,000, the judgment will be affirmed for \$3,500; at her cost; otherwise it will be reversed, and the cause remanded.

### HILLBOLDT v. WAUGH.

(Court of Civil Appeals of Texas. Nov. 3, 1893.)

TRIAL OF RIGHT OF PROPERTY—BURDEN OF PROOF—RIGHT TO OPEN AND CONCLUDE—ASSIGNMENT OF ERROR—FRAUDULENT CONVEYANCE.

1. On the trial of the right of property, the court put the burden of proof on claimant, but, after the introduction of the evidence, changed its ruling, and instructed the jury that the burden of proof was on plaintiff, whereupon he requested the right to open and conclude the argument, which was refused. *Held* error, as Rev. St. 1893, art. 1299, entitles the party having the burden of proof to open and conclude the argument.

2. An assignment of error, that the court erred in not holding that a bill of sale, and the testimony of parties thereto, showed that the transaction was fraudulent, is unavailable, where the trial was had by a jury.

3. Purchaser from insolvent will be protected, unless he knew of fraudulent intent of vendor to defeat his creditors.

Appeal from district court, Colorado county; M. Kennon, Judge.

Action by C. S. Hillboldt against A. M. Waugh, as claimant of certain property. There was a judgment from which plaintiff appeals. Reversed.

J. S. Brewer and Geo. McCormick, for appellant. Foard, Thompson & Townsend, for appellee.

GARRETT, C. J. This action was a trial of the right of property in a stock of goods attached by the appellant for the debt of O. & P. Hahn, and claimed by the appellee. Preliminary to the trial the court heard evidence as to the possession of the goods at the time of the levy, in order to determine the question of burden of proof, and put the burden upon the claimant, who then proceeded to introduce his evidence. The issues in the case were made upon the tender of plaintiff in execution that the pretended sale of the goods by C. & P. Hahn to the claimant was made to hinder, delay, and defraud the creditors of the said C. & P. Hahn, and that A. M. Waugh accepted the same in order to aid and assist them in said fraudulent purpose. After all the evidence in the case had been heard, and before the argument commenced, the court announced that he had changed his mind as to the burden of proof, and would now put it upon the plaintiff in attachment, and would so instruct the jury. To this ruling the plaintiff excepted, and then asked that he be allowed to open and conclude the argument, which the court refused to do. To this action of the court the plaintiff reserved a bill of exceptions, and has assigned the same as error for which the judgment of the court below should be reversed. The burden of proof in cases of trial of the right of property is devolved by statute on the plaintiff in execution, when the property seized has been taken from the possession of the claimant. Rev. St. 1893, art. 5302. But when taken from the possession of the defendant in execution, or any other person, the burden is placed upon the claimant. Article 5303. Where there is a controversy as to whose possession the property was in, the court should hear evidence, and determine on whom the burden should rest. *Bank v. Foster*, 74 Tex. 513, 12 S. W. 223. But, if the facts call for it, the court should submit to the jury the question of fact on which the determination of the burden of proof should rest. *Brown v. Lessing*, 70 Tex. 544, 7 S. W. 733. The evidence on the preliminary hearing by the court showed that the goods remained in the storehouse that had been occupied by C. & P. Hahn, and that a clerk of that firm, who always kept the key to the store, had it then, and turned it over to the sheriff, but that the clerk had been told by the claimant that he had bought the Hahns out, and for him to keep on with the business the same as he had before. After hearing all the evidence produced at the trial, the court changed his rul-

ing, and announced that the burden was upon the plaintiff, and he would so instruct the jury. In view of the fact that the burden rested anyhow upon the plaintiff to show fraud in the transaction, the change of the ruling of the court as to the general burden may not have injured the plaintiff. But the statute (Rev. St. 1895, art. 1299) and the district court rules (rule 31, 20 S. W. xiv.) entitle the party having the burden of proof to open and conclude the argument, which is a valuable right in a case contested upon the facts. It was said by the court in *Belt v. Raguet*, 27 Tex. 481, where the right had been erroneously refused, "In a case of contested facts, where the opening and conclusion of the argument to the jury may be a matter of substantial right, such an error might, and probably would, be sufficient to require a reversal of the judgment." The least that may be said of the facts in this case is that they admit of a controversy as to the fraudulent character of the transfer of the goods in question. From an analysis thereof, it is hard to resist the conclusion that C. & P. Hahn sold the goods to A. M. Waugh to hinder, delay, and defraud their creditors, and that he had notice of such intent. The Hahns were very considerably indebted. Waugh knew this fact. He was the cashier of the Stafford Bank, and was the trustee in, and drafted, a deed of trust which they had just executed for their stock of cattle to secure an indebtedness of \$9,500 to that bank. The consideration for the goods in controversy, and a list of notes and accounts, which included a number of vendors' lien notes held by Mrs. Sandmeyer to secure a debt of \$6,500, was the assumption of the indebtedness of \$10,567 owned by the Hahns to the Simpson Bank, and \$1,000, evidenced by a negotiable promissory note payable one day after date, which was immediately paid, and the proceeds applied in part to the discharge of a vendor's lien on land conveyed about the same time by the Hahns to their mother for an alleged indebtedness of \$63,000. But the testimony about how this indebtedness was created is very unsatisfactory. The deed to the mother was dated November 13th. The bill of sale for the goods was dated November 16th. The bill of sale was left in the hands of the officer who took the acknowledgment, with instructions to file it when advised to do so by Peter Hahn, who left on the train that morning for Wharton, in which county nearly all of the lands and the stock of cattle were, to file the deed to his mother and the Stafford deed of trust for record. As soon as these instruments were filed in Wharton county, Peter Hahn telegraphed the fact to the officer in whose possession the bill of sale and a deed from the Hahns to their mother for the Colorado county real estate had been left, and that officer then filed them for record in Colorado county. All these instruments conveying and charging their estate subject to execution were executed within two or three days, and simultaneously filed for record by Peter Hahn,

the debtor, himself. Waugh was the son-in-law of Peter Hahn, and lived with him. He testified that he did not know that the Hahns were insolvent, and did not know of the debt or conveyance to their mother. He knew of the pressure for the payment of the two bank claims, and bought the goods in controversy to adjust that of the Simpson Bank. We have stated a sufficient number of the facts to show that, in view of the verdict against the plaintiff, he may have been injured by the error of the court in refusing him the right to open and conclude the argument. For this error the judgment of the court below must be reversed.

In view of another trial, we will pass briefly upon the several assignments of error presented by the appellant in his brief: The first assignment is "that the court erred in not holding that the bill of sale executed by C. & P. Hahn, and the testimony of appellee, A. M. Waugh, and Peter Hahn, sole parties to the transaction, showed that the transaction was a fraudulent one," etc. This assignment does not specify any error, because the trial was one by jury, and it does not point out how the court held as specified. No charge is set out or assigned as error, nor any ruling of the court that was made. The second, in so far as it complains of the charges of the court generally, is too general; and it does not appear that there was an undue reiteration of the language, "a preponderance of evidence," in the charge. An examination of the entire charge does not show any error committed therein by the court. It was necessary, under the facts in the case, for the court to charge, in the language of the statute, that Waugh would not be defeated by the fraudulent intent of the grantors, unless he had notice thereof. Although we are of the opinion that the evidence tending to show notice was very strong, still we cannot say that such a charge was not called for. The third paragraph of the charge of the court did not submit special issues as claimed by the appellant, but only tests by which the jury were to determine the character of the transaction. There is no error in the fourth paragraph, as contended under the sixth assignment. An examination of the charges numbered 1, 2, 3, and 4, requested by the appellant, which were refused, shows that the first and third charges were properly refused, because not the law. In the first requested instruction the appellant takes the view of the case that the execution of the negotiable promissory note and the assumption by Waugh of the Simpson Bank debt was no such consideration as would support the sale, and that the jury should find for the appellant. If the transaction was otherwise fair, the consideration was sufficient to make it valid. It was shown that the note was paid on the next day, and applied to the debts of the grantors. It was in fact a cash consideration, to that extent, and might come within the case of *Sanger v. Colbert*, 84 Tex. 668, 19 S. W. 863. Charge No. 3 was upon

the weight of the evidence, as well as incorrect as a legal proposition. The mere fact that Waugh might have known that the Hahns were insolvent and transferred their property to others would not of itself make the sale fraudulent. The other two instructions were sufficiently embodied in the main charge of the court. The last assignment of error is that a new trial should have been granted because the verdict was contrary to the law and evidence, because the facts show that the transfer of the goods was made only to hinder, delay, and defraud the creditors of C. & P. Hahn, and place the property out of their reach, and that appellee, knowing that fact, joined in the carrying out of the purpose of the said Hahns. As the judgment will be reversed because of the error of the court in refusing to allow the appellant the right to open and conclude the argument, we will not pass upon the facts in the case any further than we have already done in disposing of that question. Reversed and remanded.

#### BRINGHURST et al. v. MUTUAL BUILDING & LOAN ASS'N. 1

(Court of Civil Appeals of Texas. Oct. 27, 1898.)

CONTRACT FOR MECHANIC'S LIEN — MISTAKE — PLEADING—LEGAL CONCLUSION—BUILDING AND LOAN ASSOCIATIONS—BY-LAWS.

1. Where written contracts for improving a lot and parts of lots adjacent, intended to give the improver a lien therefor, show, together with the improvement, that a reference in the contracts to the frontage of the lots was made as descriptive, and not as restricting the lien to less land than the lot and parts of lots adjacent owned by the one contracting for the improvement, a mistake in the number of feet the frontage contained would not affect the extent of the lien.

2. An allegation in a petition to foreclose a mechanic's lien of a legal conclusion, in that, by contracts set forth, a lien on described property was given, is sufficient.

3. In connection with a provision which authorizes the collection of the debt on default of a member by foreclosure of a trust deed, a by-law of a building association provided that, where a borrower failed to pay interest and assessments, the association might ascertain the amount due from him by crediting him with dues paid and the withdrawal value of his shares of stock. Another by-law provided that on such default the loan should mature, and a right to sue result. *Held* that, under the by-laws, on default of a loan secured by a mechanic's lien, the amount due was ascertained in the same way as on foreclosure of a deed of trust.

4. Objections by defendant, sued by a building association to foreclose a mechanic's lien, to credits allowed him, and to the disposition made of his stock, must be pleaded.

Error from district court, Harris county; John G. Tod, Judge.

Action by the Mutual Building & Loan Association against Thomas Bringhurst and others. Judgment for plaintiff, and defendants bring error. Affirmed.

J. M. Coleman, for plaintiffs in error. W. C. Oliver, for defendant in error.

WILLIAMS, J. Appellee brought this action to recover of Thomas Bringhurst a sum of money alleged to be due for the value of material and labor furnished by plaintiff for the improvement of the homestead of said Bringhurst and his wife under a contract in writing with them duly executed and acknowledged as required by law, and to foreclose an express lien given by such contract on the homestead. The case was tried before the judge without a jury, and his findings of fact are in the record, in all things supported by the evidence. We therefore adopt them as a sufficient statement of the facts, and shall only pass briefly upon the objections urged to them by appellants.

1. The first contention, that there was no contract between appellants and appellee for the making of the improvements, cannot be sustained, consistently with the evidence and the findings of the trial judge.

2. The next contention, that the first contract did not cover with its lien all of the land on which a foreclosure was sought, and that the second contract, which did embrace it all, was made after the material and labor had been furnished, and hence created no lien, was properly disposed of by the court below. The property was described in the note given for the improvement as "lot number one and adjacent parts of lots two and twelve, in block 269." In the contract acknowledged by Bringhurst and wife the same description was given, with the further one, "fronting 62½ feet on Main street, and 125 feet on Milam street," and a lien was given upon the property thus described, "as well as on the dwelling house and other improvements to be built thereon." The subsequent instrument of August, by which it is sought to make the lien cover a frontage of 75 feet on Milam street, is not to be treated as a new contract, but simply as showing a mistake, in one particular, in the description given of the property in the original contract. In other words, the papers, taken together, with the construction put upon them by the parties themselves in the erection of the improvement, show that the reference to frontage was made as descriptive, and not as restricting the lien to less land than the lot 1 and adjacent parts of the other lots owned by appellants. Such a mistake in a merely descriptive particular should not affect the lien. The petition set up all the papers referred to, and alleged that by them a lien upon 75 feet frontage on Milam street was given. Such, we have said, was their legal effect, and an allegation of their legal effect was sufficient. It is not a case in which the correction of a mistake is sought, but one in which the court is simply called upon to determine the operation of the contract as it stands.

3. We are of the opinion that the by-laws

<sup>1</sup> Writ of error denied by supreme court.

of appellant authorized it, when Bringham failed to pay interest and assessments, to ascertain the amount due from him by crediting him with the dues paid and the withdrawal value of his shares of stock. The provision, it is true, is made in connection with one which authorizes the collection of the debt, upon default of the member, by foreclosure of a deed of trust. It is urged that it has no application when there is no deed of trust. But another by-law, as well as the contract, provides that by such default the loan shall mature, from which a right to sue for it results. The question then arises, how is the balance due to be ascertained? The situation is the same as that supposed by the by-law first stated, except that, instead of a deed of trust to be foreclosed by trustee, there is a lien to be foreclosed by a court. The debt due must of necessity be determined in the same way in the two cases. But appellants made no such issue by their pleadings. The debt was due, and appellee sued for it, allowing certain credits. Appellants, by their pleadings, made no objections as to the credits, or as to the disposition made of their stock, and, without pleadings, the point urged could not be made available: if otherwise sound.

4. The rate of interest charged was not illegal.

Affirmed.

**FIRST NAT. BANK OF MERIDIAN v. STEPHENS et al.**

(Court of Civil Appeals of Texas. Nov. 19, 1898.)

**VENDOR AND PURCHASER—LIEN—EXTINGUISHMENT—TRIAL—INSTRUCTIONS—APPEAL—REVIEW—CONSPIRACY—PLEADING.**

1. One holding land subject to a decree foreclosing a vendor's lien conveyed other land to the judgment creditor, in consideration of which he agreed to deliver a deed of the land subject to the decree. The evidence was conflicting as to whether there was a verbal agreement to first sell under the decree, and then convey, or whether the transaction itself involved a release of the lien. *Held*, that an instruction that if by the conveyance to the creditor it was the intention to procure a transfer of the decree, or that if the conveyance was for the purpose of extinguishing the lien, then it in fact became extinguished thereby, properly submitted the issue.

2. Where the jury was given the court's charge and the requests of the parties on Saturday, and then separated until Monday, the giving of further requests not asked until then was discretionary.

3. The refusal to give special requests will not be reviewed, unless such requests are set out in the brief.

4. Where plaintiff charges defendants with a conspiracy to defraud, an instruction requiring knowledge by one defendant of the other's fraud, in order to establish it against the former, is not erroneous, since a conspiracy involves such knowledge.

Appeal from district court, Bosque county; Richard Kimball, Special Judge.

Action by the First National Bank of Me-

ridian against W. C. Stephens and others to foreclose a trust deed. There was a decree granting the foreclosure as against defendant Stephens, and denying it as against the other defendants; and plaintiff appeals. Affirmed.

William M. Knight and Robertson & Robertson, for appellant. Word, Dillard & Word, for appellees.

**Statement of the Case, with Conclusions of Fact.**

TARLTON, C. J. The appellant brought this suit against W. C. Stephens, W. T. Farr, and P. E. Schow & Bros. to recover certain indebtedness due by Stephens to it, and to foreclose the lien securing that indebtedness, and evidenced by a deed of trust executed by Stephens upon lots 4, 5, and 6 in block 3 in the town of Clifton, Tex. The defendants other than Stephens were made parties as subsequent purchasers of the lots. A foreclosure was denied as against them, and hence this appeal. Prior to August 3, 1895, P. E. Schow & Bros. were the owners of the property above described. They conveyed it to one T. P. Turner, subject to a vendor's lien for about \$950. Turner subsequently conveyed the property to W. C. Stephens, subject to the same vendor's lien, though Stephens did not personally assume the payment of the debt. On August 3, 1895, Stephens executed the deed in trust in question to J. W. Rudasill, as trustee, for the benefit of the First National Bank of Meridian, and to secure an indebtedness amounting at the date of this suit to \$1,255.48. P. E. Schow & Bros. brought suit against T. P. Turner to foreclose their vendor's lien; making W. C. Stephens, the bank, and J. W. Rudasill parties defendant. On August 22, 1896, Schow Bros. recovered a judgment in the sum of \$948.22, with 10 per cent. interest from that date, and with a decree foreclosing their lien and ordering the sale of the property. On August 27, 1896, W. C. Stephens and wife executed a deed conveying to P. E. Schow & Bros. 366 acres of the Bridgeman survey, in Bosque county, reciting a consideration of \$1,400 in cash, and the assumption by P. E. Schow & Bros. of a note against the land amounting to \$1,060, with interest. On the same date Schow Bros. and W. C. Stephens entered into a written agreement whereby, upon condition that Stephens would deliver to Schow Bros. a warranty deed from himself and wife to 366 acres of land out of the Bridgeman survey, and on the further condition that Stephens should refund to Schow Bros. any sum of money which they should have to pay as interest to January 1, 1897, on a note of \$1,050 bearing upon the land, Schow Bros. agreed to execute and deliver to Stephens on or before January 1, 1897, a warranty deed to the three lots above mentioned; that is to say, they agreed to deliver a warranty deed to lots 5 and 6 in the event of the execution of

the deed to the 366 acres of land, and to deliver such a deed to lot No. 4 in the event that Stephens should pay said interest to January 1, 1897, on the note for \$1,050, or should refund to Schow Bros. any amount which they might be forced to pay as interest to January 1, 1897. They further agreed that in the event of their failure to comply with their contract they would, as a penalty, pay the sum of \$150 to Stephens for each lot, provided that Stephens should have performed his part of the contract in every particular. The contention of the appellant, finding support in some aspects of the evidence, is that the consideration for the deed executed by Stephens and wife to Schow Bros. was the assumption of the note for \$1,050 and interest, bearing upon the Bridgeman land, and the release by Schow Bros. of the vendor's lien on the lots in question, and that the transaction involved at the date of the agreement of August 27, 1896, an immediate discharge of the lien, or a transaction whereby W. C. Stephens then became the owner of the judgment foreclosing the lien. On the other hand, the opposing contention of the appellees, finding support in other aspects of the evidence, is that it was verbally agreed between these parties at the date of the written instruments above mentioned that the method adopted for the putting of the title by warranty deed to the three lots in Stephens should be as follows: Schow Bros. would have an order of sale issued upon their decree of foreclosure, and would at the sale buy in the property, and thereafter execute the conveyances to Stephens in accordance with their written agreement, crediting the amount of their bid on their judgment against Turner, and thereafter transfer to Stephens the balance of their judgment against Turner. Before this plan was consummated, W. C. Stephens and wife incurred an indebtedness of \$353 for merchandise purchased from P. E. Schow & Bros. Being unable to pay this amount, accruing up to December 15, 1896, it was agreed between Stephens and Schow Bros. that the agreement to execute a conveyance of the lots should be canceled, and that in lieu thereof Schow Bros. would give Stephens a credit upon his account of \$300. Accordingly, on October 12, 1896, Schow Bros. secured an order of sale on their decree of foreclosure; and a sheriff's sale was accordingly had in December, 1896, at which Schow Bros. became the purchasers of the three lots,—the sheriff executing to them on December 15th a receipt for \$150, as the amount of the bid, to be credited on the Turner judgment. He had previously, on December 7, 1896, executed a sheriff's deed conveying the lots to Schow Bros. On March 15, 1897, Schow Bros. conveyed lots 4 and 5 to W. T. Farr,—one of the defendants herein,—a bachelor, and brother-in-law of Stephens, residing with him. Schow Bros. are still the owners of lot No. 6, though Stephens occupies it. The con-

sideration in the deed to Farr is \$50 cash, a note for \$50 due August 1, 1897, and one for \$100 due October 1, 1898. On March 25, 1897, Schow Bros. executed to W. C. Stephens a transfer of the judgment against Turner, reciting a consideration of \$948.22. The verdict of the jury must be regarded as establishing the truth of the appellees' construction of the facts, and we accordingly so find.

#### Conclusions of Law.

1. In response to the contention of the appellant, the court's general charge contained the following instruction: "If you believe from the evidence that it was the intention and purpose of W. C. Stephens, in conveying to P. E. Schow & Bros. 366 acres of land by the deed of August 27, 1896, which has been admitted in evidence, and in entering into the contract or contracts on the same date which have been proven before you, to procure the transfer to himself at that time of the decree of foreclosure above mentioned, and that by such transfer of said judgment at that time it was intended that the lien foreclosed in said decree should be extinguished, then you will find for plaintiff a foreclosure of the lien of said trust deed as prayed for in this suit against all the defendants." The court in this connection also granted the second special instruction requested by the appellant: "Although you may believe from the evidence that Stephens did not become the absolute owner of the judgment in case of Schow Bros. v. Turner by executing and delivering his deed on the 27th of August, 1896, yet if you believe from the evidence that the execution and delivery of the deed was made for the purpose of paying off and extinguishing the lien of the judgment on the three lots, then you are instructed that no order of sale subsequently issued and levied upon said lots could pass a title thereto." We are of opinion that by the foregoing instructions the plaintiff secured the benefit of the proposition urged by it, asserting ownership in Stephens of the foreclosure decree, or, in the alternative, a release of the vendor's lien thereby adjudged. It seems quite manifest to us that these instructions would have entitled the plaintiff to a verdict against all the defendants, had the jury not rejected its construction of the testimony. The first, second, fifth, and sixth assignments of error are thus overruled.

2. The third and fourth assignments of error complain of the refusal of the court to grant special charges Nos. 5 and 6. A bill of exceptions informs us that the argument in the cause was concluded about half past 6 o'clock on Saturday evening; that thereupon the court read to the jury its charge, and special instructions 2 and 3 requested by the plaintiff; that thereafter the jury were discharged until Monday morning, when, at the opening of the court, before the papers were delivered to the jury, the plaintiff requested

these special charges 5 and 6, which the court declined to read to the jury, on the ground that the instructions were presented too late. We are not prepared to condemn this action of the court, as other than the exercise of a sound discretion. Having read the general charge on the Saturday before, it might have been improper that the court should on the succeeding Monday read these special instructions requested by the plaintiff, unless, indeed, it also should read again its general charge. Such a proceeding might have tended to give undue emphasis to the special instructions last requested. But, apart from this, we are unable to sustain these assignments. The brief does not set out charges 5 and 6. A statement contained in the brief suggests that a certain proposition was set out in special charge No. 5, but this proposition is embodied in special charge No. 2 granted at the request of the plaintiff. Hence the third and fourth assignments of error are overruled.

3. The plaintiff in its pleadings charges, in effect, a conspiracy between the defendant Stephens and the defendants Schow Bros. in the matter of procuring the order of sale under the foreclosure decree above referred to, for the purpose of fraudulently depriving the plaintiff of its lien. The charge of the court complained of in the twelfth assignment of error has reference to the issue thus raised by the averments of the plaintiff. We find no merit in this assignment. We deem it unnecessary to set out the charge. It is complained of on the ground that it required notice or knowledge on the part of Schow Bros. of the fraudulent purpose of Stephens, and such notice or knowledge was involved in the allegations of the plaintiff. The judgment is in all things affirmed.

#### WARDEN v. HARRIS et al.

(Court of Civil Appeals of Texas. June 18, 1898.)

#### TRESPASS TO TRY TITLE—BOUNDARIES—SURVEYS—OBJECTS CONTROL DISTANCES.

1. Where a call in the line of a survey is for an established object, the line would go there, though the distance called for was less than that to the object, since distance will give way to a call for an established object.

2. A call in a patent read, "Thence south with the east boundary line of the Thompson survey 1,344 varas, to the northeast corner on the S. B. line of the John Davis survey." The call for the S. B. line of the Davis survey was incorrect, as that line would have to be prolonged westwardly to be reached. *Held* that, the call for the corner of the Thompson survey and the distance being correct, they would control.

3. A call in a survey read, "Thence east with the south line of the Davis survey, \* \* \* to a stake and west line of the Becton survey." The south line of the Davis survey did not strike the west line of the Becton survey, but, if the latter were prolonged south, it would strike the Davis survey at the southeast corner. *Held*, that the call should go to the Davis southeast corner.

4. A call in a patent read, "Thence south 744

varas, to place of beginning." To reach such beginning it was necessary to go north 518 varas. *Held*, that the word "south" should read "north."

Appeal from district court, Hunt county: Howard Templeton, Judge.

Action by F. M. Warden against Jesse Harris and others. There was a judgment, from which plaintiff appeals. Affirmed.

Sherrill & Hefner and J. H. Morgan, for appellant.

BOOKHOUT, J. This suit was brought by appellant, F. M. Warden, November 20, 1896, against Jesse Harris and W. T. Childress, in trespass to try title to 82.87 acres of land, patented to G. W. McCafferty on October 28, 1889. Afterwards, by supplemental petition, W. T. Miller and J. B. Dodson were made parties defendant. On the trial suit was dismissed as to the two last-named defendants. The other defendants answered by plea of not guilty and statute of limitation of three, five, and ten years. On the trial it was admitted that plaintiff had title to the G. W. McCafferty survey, defendant Childress had title to the Mead survey, and the defendant Harris had title to the western part of the James Roads survey, and that the question involved was really one of boundary. The court found for plaintiff against both defendants as to all that part of the McCafferty survey lying east of a line drawn due south from the southwest corner of the James May survey, and against plaintiff for the remainder of the McCafferty survey lying west of said line. The defendant Harris, who claimed the land east of the supposed line, has not appealed from the judgment of the court in finding against him as to the remainder of the survey. The plaintiff has appealed, and assigns errors.

Conclusions of fact: The G. W. McCafferty survey was surveyed June 12, 1889, and the patent issued October 28, 1889. The plaintiff has title to all the land embraced in the McCafferty survey, and the field notes of the McCafferty survey cover all the land sued for by plaintiff, described in the petition, and no more. The defendant Harris owns land in the western part of the Roads survey, which adjoins the McCafferty survey on the east. He claims that the Roads survey extends to the southwest corner of the May survey, and that a strip off the east side of the McCafferty survey 241 varas wide and 931 long is part of the Roads survey. The trial court found, as a matter of fact, that it is not, and rendered judgment accordingly, and Harris has not appealed from this judgment. The defendant Childress owns the Mead survey, which is an older survey than the McCafferty; and claims that all the land covered by the McCafferty survey, except the said strip off the east end, is embraced in the Mead survey. The Mead is younger than any of the surrounding surveys. At the time the Mead survey was located and patented, there was a

tract of land subject to location, surrounded by the Becton, May, Roads, Stone, Thompson, and Davis surveys, described as follows: "Beginning at the S. W. corner of the Becton survey; thence east 20 varas to the N. W. corner of the May survey; thence south 914 varas to the S. W. corner of the May survey; thence east 241 varas to the N. W. corner of the Roads survey; thence south 931 varas to the N. B. line of the Stone survey; thence west 1,272 varas to the S. E. corner of the Thompson survey; thence north 1,344 varas to the N. E. corner and on the Thompson survey; thence east 1,011 varas, passing the S. W. corner of the Davis survey, to the S. E. corner of the Davis survey; thence north 501 varas to the beginning,—containing — acres of land." All the corners and lines of all these surveys are marked and defined. The field notes of the Mead survey, according to the patent, are as follows: "Beginning at the S. W. corner of the Becton survey; thence east 20 varas to the N. E. corner of the May survey; thence S. 600 varas to the N. B. line of the Stone survey; thence west 870 varas to the S. E. corner of the Thompson survey; thence north 1,344 varas to the N. E. corner of the Thompson survey and the S. B. line of the Davis survey, to the W. B. line of the Becton survey; thence S. with same 744 varas to the beginning." The beginning corner called for can be found without trouble. The first call, namely, "E. 20 varas to the N. W. corner of the May survey," is correct. There is an error in the second call. By running the distance named, 600 varas, the object called for—the N. B. line of the Stone survey—would not be reached by 1,245 varas. By disregarding the distance, and running south 1,845 varas, instead of 600 varas, the object called for can be found. There is an error in the next call. The distance called for is west 870 varas. The object called for is the southeast corner of the Thompson survey. The object can be found, but at 1,031 varas, instead of 870 varas. There is an error in the next call. By running the distance called for (1,344 varas), one of the objects called for (the northeast corner of the Thompson survey), can be found; but thereby the south boundary line of the Davis survey is not reached. If, however, the south boundary line of the Davis survey is prolonged about 170 varas west, it would strike the northeast corner of the Thompson survey. There is also an error in the next call. By running the distance east 850 varas with the S. B. line of the Davis survey the W. B. line of the Becton survey is not reached; but, if the west boundary of the Becton were prolonged south a sufficient distance, it would be reached at the southeast corner of the Davis. The next call, "S. 744 varas, to the place of beginning," is a mistake, in that the place of beginning is north 518 varas. The call "south 744 varas" is an obvious mistake, and should read "north." We find that the land claimed by

the defendant Childress is within the bounds of the Mead survey.

Conclusions of law: We conclude that the second call in the Mead patent—"south with the west line of same [May survey] 600 varas, a stake in the north line of a survey in the name of Jno. W. Stone"—would run to the north line of the Stone survey, notwithstanding the distance was much greater than 600 varas, called for in the patent. The north line of the Stone survey was well established. The rule is that distance will give way to a call for a well-established object. The same rule applies to the third call in the Mead patent. It reads, "Thence west with the north boundary line of same [Stone survey] 870 varas, to a stake in the southeast corner of the James Thompson survey." The southeast corner of the Thompson survey is well established, and the call for that corner will control, although the distance to that corner is 1,031 varas, instead of 870 varas, called for in the patent. The fourth call in the patent is, "Thence north with the east boundary line of the same [Thompson survey] 1,344 varas, to the northeast corner on the S. B. line of the Jno. Davis survey." Here the call for the northeast corner of the Thompson survey and the distance are correct. The call for the south boundary line of the Davis survey is not correct, but said south boundary line would have to be prolonged westwardly about 170 varas to be reached. We think it apparent that the call for the Davis survey was a mistake, and that, the call for the northeast corner of the Thompson survey and distance being correct, the same will control. The fifth call, "Thence east with the south line of the Davis survey 850 varas to a stake, and west line of the Becton survey," is incorrect, in that, while this line does run with the south boundary line of the Davis survey, it does not run to the west line of the Becton survey. It, however, would strike the west boundary line of the Becton survey if that line were prolonged south, and, if prolonged, it would run with the east boundary line of the Davis survey, and strike the south boundary of the Davis at its southeast corner. We think it apparent that this was the intention of the call, i. e. it was to run to the southeast corner of the Davis survey. The sixth call in the Mead patent reads, "Thence south 744 varas to the place of beginning," and is an obvious mistake. The beginning of the Mead survey is called for in the patent as the northwest corner of the Becton survey. The call "south," if read "north" would run to the southwest corner of the Becton survey,—the beginning corner called for in the patent. We think the word "south" in the call is a clerical mistake, and, it clearly appears, should read "north 744 varas, to the place of beginning." We conclude that the land owned by the appellee Childress is within the Mead patent, and that there is no error in the judgment, and it is therefore affirmed.



**SABINE & E. T. RY. CO. v. GULF & I. RY. CO.**

(Court of Civil Appeals of Texas. Oct. 13, 1898.)

Appeal from Jefferson county court; Ed. P. Gray, Judge.

Action by Gulf & Interstate Railway Company of Texas against Sabine & East Texas Railway Company to condemn right of way. From a judgment for plaintiff, defendant appeals to the court of civil appeals for the First district, which certifies questions to supreme court. On its opinion (46 S. W. 784) the judgment is reversed and rendered.

Baker, Botts, Baker & Lovett and Votaw, Chester & Martin, for appellant. Greer & Greer and Denson & Fickett, for appellee.

**PLEASANTS, J.** This is an appeal from a judgment of the county court of Jefferson county condemning for appellee a portion of the right of way of appellant, the condemnation being made to allow appellee to build a branch or spur of its main track across appellant's road, for the purpose of connecting appellee's road with the Texarkana & Ft. Smith Railway, in the city of Beaumont. The application for condemnation was resisted by appellant, both before the commissioners of condemnation and the county court. The appellee's charter authorizes it to construct a road from Bolivar Point, Galveston county, to a point beyond Beaumont; and its main track has been constructed over and across the appellant's road to its depot, situated east of appellant's track, and the land condemned to enable appellee to build its proposed branch or spur is distant about 270 feet from the present intersection of the tracks of appellant and appellee. The appellee now makes connection with the Texarkana & Ft. Smith Railway by using five or six hundred feet of the Gulf, Beaumont & Kansas City Railway. Our conclusions of fact, deduced from the evidence, were as follows: "That in 1890, appellant, in addition to its right of way, acquired the land which it is proposed to condemn, for yard purposes, and that it has been held in good faith for that purpose, and that, while it had not been used as a yard at the time of the institution of appellee's suit for condemnation, the officials of the appellee were notified two years before the institution of this suit that the land was required for yard purposes, and would be used for that purpose, and that appellant would not consent that appellee might build a track across it; that appellant is in need of increased yard facilities, and that the land is useful and desirable for yard purposes, and that it cannot be used as a yard by appellant, if it is crossed by the appellee's proposed track; that appel-

lant might construct and operate a yard further to the south on its property, but that this would subject appellant to large increase of expense in the operation of its road, so long as its present business relations with the Texas & New Orleans Railway is continued; that the appellee, without again crossing appellant's right of way, might effect a connection with the Texarkana & Ft. Smith Railway at a point 300 feet beyond the yards of the latter, by constructing a track from the point of crossing of the appellant's and appellee's tracks upon a curve of 20 degrees; and that, while curves in tracks are objectionable, they are not dangerous, when used in yards; the chief objection to such tracks being the increased wear of the rails and cars, and that several tracks with a curve of 20 degrees are being and have been used for years successfully in the yards of the Texas & New Orleans Railway at Houston and at Algiers, La." Upon the foregoing statement of the case, and our conclusions of fact, we propounded to the supreme court of the state the following questions: "First. Is the right of way of one railway subject to condemnation to enable a railroad, which has already crossed the track of the first, to make a connection with a third railway, when the routes of the two latter roads do not cross or intersect, but each of said railways has a depot and a yard in the town in which the connection is sought? Second. If the foregoing question be answered in the affirmative, can the property in question be condemned when, as we have found to be the fact, it was in good faith acquired, in 1890, for yard purposes, and that it has been since held with the intention and purpose to construct upon it side tracks, switches, and other improvements incident and necessary to a railroad yard, and that such yard is now needed by the appellant, and that it is not practicable to use the land for yard purposes if the appellee is permitted to construct its proposed track across it? Third. If the foregoing questions are answered affirmatively, should the question as to the right to condemn be made to depend upon a comparison of injury or inconvenience to appellant in allowing it, with that which appellee would suffer in adopting another route, and condemning other property, or should appellee's right to condemn be made to depend upon proof that the route sought is necessary?" That court, through Associate Justice Brown, made answer as appears in 46 S. W. 784.

These answers to our questions make it necessary to reverse the judgment of the county court, and to here render judgment for appellant, that appellee take nothing by its suit for condemnation, and that appellant recover of appellee costs incurred both in this and in the county court. Reversed and rendered.

**STORRIE v. WOESSNER.<sup>1</sup>**

(Court of Civil Appeals of Texas. Oct. 27, 1898.)

**MUNICIPAL CORPORATIONS — CHARTERS — REFERENCE OF PROCEEDINGS TO BOARD OF PUBLIC WORKS—ASSESSMENTS — CONSTITUTIONAL PROVISIONS — HOMESTEAD — WHAT CONSTITUTES — COURTS.**

1. When a municipal charter requires a reference of a proceeding of the city council to the board of public works, such reference must be formally made to the board; and the matter referred should be duly considered and determined by the board, and not by the members of the board acting each for himself, and without the benefit of conference with the others.

2. Const. art. 3, § 48, providing that the legislature shall not levy taxes except for specified purposes, does not prohibit the legislature from conferring on cities the power to impose special taxes on persons and property for street improvements.

3. Const. art. 3, § 56, forbidding the passage of any local or special law except for specified purposes, has no application to local assessments by cities.

4. A \$2,000 residence, a \$10,000 storehouse, and a barn were built by defendant on his city lot. Two small tenements, built on piling, were erected, and one of them was occupied by defendant for a dwelling before he purchased the lot, and while he occupied it under a lease. One of the two tenements was rented at the time in dispute, and the other was filled with goods of defendant, who testified that the tenements were not intended as permanent improvements, but that he intended to remove them and extend his business over the site of the buildings, and also that he purchased the lot for a domestic and business homestead, and ever since his purchase had occupied it as a homestead. Held to show that the premises were a homestead, since the uses to which the tenements were put do not evidence a dedication of such portions of the lot to other than homestead purposes.

5. Where one sues in the district court on a debt less in amount than \$500,—the minimum amount to confer jurisdiction,—and to enforce a lien on land, the suit will be dismissed for want of jurisdiction when it is found that no lien exists.

Appeal from district court, Harris county; William H. Wilson, Judge.

Action by R. C. Storrie against Charles Woessner. From a judgment for defendant, plaintiff appeals. Affirmed.

Ewing & Ring, for appellant. Hutcheson, Campbell & Myer, for appellee.

**PLEASANTS, J.** This was an action by appellant to recover of appellee a balance owing appellant for street-paving work, as evidenced by an improvement certificate issued to him against appellee, Woessner, by the city of Houston, under and by virtue of the provisions of the charter of said city, as amended by special act of the legislature, on April 10, 1891, and to foreclose the lien given by the charter upon certain lots owned by the appellee, and described in the certificate; the balance sued for being less than \$500. The appellee answered the petition, and, among other matters of defense, averred the property

to be exempt from the lien asserted by the plaintiff, because the property was the homestead of defendant, but did not plead want of jurisdiction in the court, or in any manner allege that the plaintiff's allegation of lien upon the property was fraudulently made to give jurisdiction. The case was tried without a jury, and judgment was rendered that plaintiff take nothing, and that the defendant go hence without day, with his costs. The plaintiff appealed to this court, and, among other assignments of error, makes the following: "(1) The court below erred in its conclusions of fact, in finding that no reference was made to the board of public works of the resolutions in question, such as required by the charter of the city. (2) The court below erred in its conclusions of law, in holding that the assessment in question was void, in view of the evidence, for want of reference of the resolution in question to the board of public works, in conformity with the city's charter."

We think, with the trial court, that when a charter requires a reference of any proceeding of the city council to the board of public works, such reference should be formally made to the board, and the matter referred should be duly considered and determined by the board, and not by the members of the board, acting each for himself, and without the benefit of conference with the others. But a majority of this court are of the opinion that the charter of the city does not require a reference to the board of public works by the city council of a resolution by that body declaring the improvement of any street to be a public necessity, and ordering the improvement to be made. We conclude, therefore, that this assignment is well taken, and the court erred in holding that the special tax complained of by appellee is void because the resolutions of the city council declaring the improvement of the street upon which appellee's property abuts a public necessity, and ordering such improvement to be made, were not referred to the board of public works before the council resolved to make the improvement.

The seventh and eighth assignments of error by appellant are: "(7) The court erred, in its conclusions of law, in holding that the legislation in question, either in relation to lien or personal liability, was void, as in contravention of section 48 of article 3 of the state constitution. (8) The court erred, in its conclusions of law, in holding that the legislation in question was inhibited by section 56 of article 3 of the state constitution, either in its relation to lien or personal liability." We are of the opinion that both of these assignments must be sustained. With the utmost respect for both the court trying this case and for the counsel representing the appellee, we think the questions here presented scarcely admit of discussion. It is, we think, firmly settled in this state by repeated decisions of our supreme court that section 48 of article 3 of the state constitution does not prohibit the legislature from conferring upon cities the power

<sup>1</sup> Writ or error granted by supreme court.

to impose special taxes upon persons and property for street improvements. *Adams v. Fisher*, 63 Tex. 651; *Taylor v. Boyd*, 63 Tex. 533; *Transportation Co. v. Boyd*, 67 Tex. 153, 2 S. W. 364; *Connor v. City of Paris*, 87 Tex. 32, 27 S. W. 88; *Adams v. Fisher*, 75 Tex. 657, 6 S. W. 772; *Storrie v. Cortes*, 90 Tex. 283, 38 S. W. 154; *Railway Co. v. Storrie* (Tex. Civ. App.) 44 S. W. 693. And these decisions seem to be in accord with those of the courts of nearly every state in the Union in which similar constitutional provisions to that under consideration have been construed. This provision of our constitution is a limitation upon the legislature in levying taxes for state purposes, and was not intended to restrict municipal governments in the assessment of special taxes for street improvements. This court has heretofore decided, in conformity, as we supposed then, and still think, with a previous decision of the supreme court (*Texas Sav. & Real-Estate Inv. Ass'n v. Pierre's Heirs* [Tex. Civ. App.] 31 S. W. 426, and *City of Dallas v. Western Electric Co.*, 83 Tex. 243, 18 S. W. 552), that section 56 of article 3, has no application to local assessments by cities.

The appellant's fifth and sixth assignments are: "(5) The court erred, in its conclusions of fact, in finding that the property on which the lien is sought to be foreclosed, is the homestead of Charles Woessner, the defendant below, and was such at and before the time of the improvement in question. (6) The court erred, in its conclusions of law, in holding that the property on which the lien is sought to be foreclosed was a homestead." We discover no error in the conclusions of the court complained of in these assignments. The property involved consists of a lot bounded by streets on three sides, and by an alley on one side, upon which is a mansion with six or eight rooms, the erection of which cost the appellee about \$2,000; a storehouse, in which he does business, which cost him \$10,000; a barn which cost him over \$2,000; and two small tenements, built upon piling, and erected by appellee, as he testified, before he purchased the lot, and while he occupied it under a lease; and in one of these tenements he then lived. In one of them he had some goods at the time of the trial, and the other was rented. Appellee testified that he purchased the lot for a domestic and business homestead; that ever since he had purchased it he had occupied it as a homestead; that the two small tenements were not intended as permanent improvements; that he intended, as soon as he could, to remove them, and to extend his business over the site of those buildings. The lot without the improvements would be of less value than \$5,000. The premises are inclosed by a fence on all four sides of the lot. There is a division fence between appellee's residence and his storehouse, extending west as far as the barn; but the western end of the barn does not extend to the fence on that side of the lot by some 35 feet, and the two small tenements are north of the barn, the one rent-

ed being that nearest to the western boundary of the lot. The only necessary upon the premises was inside the barn. This was the whole of the evidence upon the question of homestead, and we think it sufficient to support the finding of the court that the premises constituted the homestead of the appellee, and that the uses to which the two smaller houses were put did not evidence a dedication of those portions of the lot to other than homestead purposes.

Under his ninth assignment of error, appellant insists that, inasmuch as there was no plea in abatement filed by the appellee, the conclusion of the court that a finding against the lien claimed by the plaintiff would defeat the court's jurisdiction to render judgment for a personal recovery is erroneous. We think the law is conclusively settled adversely to this contention by appellant. When the amount sued for is under \$500, and the jurisdiction of the court is made to rest upon an alleged lien, if there be no lien the court is without jurisdiction to give judgment for the sum sued for. *Carter v. Hubbard*, 79 Tex. 356, 15 S. W. 392.

The tenth assignment, we think, is without merit. The error in the judgment is one of form, rather than of substance. The judgment rendered, that plaintiff take nothing by his suit, and that defendant go hence without day, and recover his costs, is in effect the same as a judgment that the suit be dismissed, and the defendant recover his costs. The defendant was entitled to his costs, under either form of judgment. The judgment is affirmed. Affirmed.

### HARRELL v. STORRIE.

(Court of Civil Appeals of Texas. Oct. 27, 1898.)

#### MUNICIPAL IMPROVEMENTS—FRONT-FOOT ASSESSMENT—ROLL OF OWNERSHIP—APPROVAL—JURISDICTION.

1. An assessment for local improvements based on the front-foot rule is valid, although it has no element of proportion between the public and the lot owner, or between different lot owners in the same taxing district.

2. A roll of ownership of property affected by a local improvement is not void because the engineer's certificate attached thereto does not contain the words, "and that I have honestly and faithfully prepared the same," prescribed by the city charter, where it states, "I certify that the foregoing roll of ownership and estimate sheet is correct," inasmuch as the words of the charter are directory, and not mandatory.

3. Where a street was improved after resolution providing therefor, and after due advertisement of such resolution, and the contract was let after an advertisement for bidders as required by law, and the work was done in accordance with the contract, the holder of an improvement certificate is entitled to a personal judgment of the contract price, whether the property rolls were approved as required by the city charter or not.

4. Where the amount sued for is within the jurisdiction of the court, the fact that the amount recovered is reduced to an amount be-

low that which originally gave the court jurisdiction, by reason of part of the amount being barred by limitation, is immaterial, unless the allegations of the amount sued for were fraudulently made to give the court jurisdiction.

Appeal from district court, Harris county; John G. Tod, Judge.

Action by R. C. Storrie against William Harrell. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. M. Coleman, for appellant. Ewing & Ring, for appellee.

PLEASANTS, J. The nature and result of this suit are thus given by appellant: This was an action, brought by R. C. Storrie against W. Harrell upon an improvement certificate issued to plaintiff by the city of Houston against the defendant for improvements made on Caroline street in the city of Houston; seeking to enforce a lien on the property described in plaintiff's petition, and a personal judgment against the defendant. The defendant answered that the property upon which it was sought to foreclose a lien was a homestead. The defendant also pleaded the statute of two years' limitation, and general denial. The defendant also specifically denied the proper levy of the assessment, especially in that it lacked any element of apportionment between the public and lot owner, or between the different lot owners in the same taxing district, and that there was never properly compiled and approved a certificate and assessment roll as required by law; and he also denied the right of plaintiff, Storrie, to recover upon the ground that there was no privity of contract between plaintiff and defendant, and there being no allegation of any transfer to plaintiff of any right which the city of Houston might have had. On the 12th day of August, 1897, the cause was heard without a jury, and a judgment rendered for plaintiff for the amount of the certificate, with interest and costs of court, and without foreclosure of lien, to which judgment the defendant excepted, and gave notice of appeal.

The first assignment of error is "that the court erred in not holding that the burden sought to be imposed upon defendant in this case was in contravention and in opposition to section 8 of article 3 of the constitution of this state." The question here presented is no longer debatable in the courts of this state, having been repeatedly decided by the supreme court of this state adversely to the contention of appellant. Vide *Storrie v. Woessner* (companion case to this, just decided by this court) 47 S. W. 837, and the authorities cited in the opinion delivered therein.

The second assignment is, we think, without merit. The assignment, in substance, is that the assessment which is the basis of the plaintiff's suit is invalid for the reason that it has no element of proportion between the

public and the lot owner, nor between different lot owners in the same taxing district; such proportion being held to be a fundamental requirement in the imposition of such burdens. It is true, as alleged in this assignment, that it has been held by eminent jurists that, without a proper proportion between the taxpayers, the tax assessed is fundamentally erroneous; but our supreme court has in several cases upheld the front-foot rule. See *Adams v. Fisher*, 63 Tex. 651; *Id.*, 75 Tex. 657, 6 S. W. 772; *Taylor v. Boyd*, 63 Tex. 533; *Transportation Co. v. Boyd*, 67 Tex. 153, 2 S. W. 364.

The third assignment is that the court erred in admitting in evidence, over the objection of appellant, the roll of ownership, because said roll did not have attached to it a proper certificate from the engineer; and the fifth assignment is that it was error in the court to hold that such roll of ownership constituted a levy or apportionment of the assessment on defendant's property, and that it afforded a sufficient basis for a judgment against defendant. These two assignments are submitted together. The objection to the engineer's certificate attached to the roll is that it does not contain the words, "and that I have honestly and faithfully prepared the same." The words of the certificate are, "I certify that the foregoing roll of ownership and estimate sheet is correct." This departure from the form of the certificate prescribed in the charter of the city does not make void the roll. The words of the charter are directory, and not mandatory. The law required the engineer to prepare and submit the rolls to the city council, and this was done, and the officer certified to their correctness. This, we think, was a substantial compliance with the requirement of the charter. Following the proposition submitted under these assignments is the statement "that there was no proof of the approval of the roll of ownership prior to the issuance of the certificate thereon, the only proof of approval being of a roll which did not contain property on Caroline street. The defendant's property is situate on Caroline street." It appears from the transcript that the following admissions were made by the defendant: "It was admitted that the contract refers to exhibits containing the original bid and specifications, which are made a part of the contract, and that the bids, which are referred to and made a part of the said contract, show that said Storrie was to do the work for the sums mentioned in paragraph five of the plaintiff's petition. It was admitted that bond in the sum of \$60,000 for the faithful performance of the contract was fixed by the city council, and given by said R. C. Storrie, and approved by the said city council. It was admitted that, as the work progressed, what purported to be rolls of ownership were made, and that the same were prepared by the city engineer; that one of the purported rolls of ownership is numbered 14, and covers that

portion of the work mentioned in the certificate sued upon; that said pretended roll No. 14 was filed in the office of the city secretary on the 28th day of April, 1894, and that notices with reference to the same were published and were mailed, as alleged in plaintiff's petition, the defendant in no manner dispensing with the necessity of introducing the roll, and in no manner waiving his objection to the validity of said roll of ownership, to wit, because it does not bear the proper certificate of the city engineer, and also because it does not show the proportional cost according to the area of the ground, as charged against the defendant in this case, and because the pretended roll gives the name of the owner of lots 6, 7, and 8 in block 24 as W. Harrall, while the certificate is in the name of W. Harrell. The roll is omitted by agreement of counsel, it being admitted that it is regular, except that it bears no certificate of the city engineer, except as follows: 'I certify that the foregoing roll of ownership and estimate sheet is correct. G. W. La Noue, City Engineer.' Upon this state of the record, we cannot say there was no proof of approval of the rolls before the certificate was issued. In the absence of evidence to the contrary, the certificate itself proves compliance with the charter in all the requisites to authorize the issuance of the certificate. And, besides, there is no pretense but that the street was improved in front of appellant's property after resolution providing for such improvement, and that such resolution was duly advertised, and the contract for the work was let to the appellee after an advertisement for bidders, as required, had been made, and that the work was done by appellee in accordance with the contract. Under these circumstances, we think the appellee was entitled, under the charter of the city, to a personal judgment for the contract price of the work, whether the property rolls were approved or not.

The complaint under the seventh assignment of error, that the court did not sustain the defendant's plea of limitation, is, as we understand the record, not sustained by the facts. The first installment sued for was not allowed by the court, judgment being rendered for only the remaining four installments.

Under the ninth assignment it is contended that as the first installment was barred when the suit was instituted, and the fact appearing upon the face of the petition, and plea of limitation having been interposed, and without the first installment the amount sued for would be below the jurisdiction of the court, the court was without jurisdiction to render a judgment for any sum. We do not so understand the law. Unless the allegation of the amount of the indebtedness sued for is fraudulently made to give jurisdiction, the court can render judgment for any sum found to be due. When the amount sued for is for a sum within the jurisdiction, if that

sum be reduced by the defendant, under pleas of payment, set-off, or statute of limitation, the jurisdiction of the court is not lost. From what we have said under previous assignments, we deem it unnecessary to further discuss this assignment.

We have not noticed the sixth and eighth assignments. The first has no supporting statement, and the second is based upon the assumption that the certificate is void for want of a valid roll to support it, and we have not been able to discover from the record that the roll is invalid; and, if it were so, the plaintiff was entitled to a personal judgment. The judgment is affirmed. Affirmed.

#### ALEXANDER v. BANK OF LEBANON.

(Court of Civil Appeals of Texas. Nov. 23, 1898.)

PREJUDICIAL INSTRUCTIONS—BILLS AND NOTES—  
COLLATERAL SECURITY—PRE-EXISTING DEBT—  
COURTS—COMMERCIAL LAW—DECISIONS OF OTHER  
STATES.

1. Defendant pleaded as a defense to an action on notes that they were executed without consideration; that when they were executed payee was indebted to plaintiff; that a suit by another party was pending against payee, which was unjust, but of doubtful result, and, to meet the contingency of a recovery, on the plaintiff's advice defendant took charge of certain property of payee, and executed the notes, payee indorsing them to plaintiff; and that it was agreed between all the parties that the notes were not to be collected. The court, in its charge, characterized defendant's defense as a fraudulent scheme. *Held* improper, as tending to prejudice the jury against him, as the transaction was not in fraud of plaintiff's right.

2. The holder of a negotiable note acquired before maturity as collateral security for a pre-existing debt will be protected as an innocent holder unless he had notice, when he acquired it, of equities existing between the maker and payee.

3. Notes payable in Texas were assigned in Tennessee as collateral security for a pre-existing debt. *Held* that, in the absence of a statute in the latter state regulating the matter, the courts of Texas would not be bound to accept the decisions of that state as to whether assignee was entitled to protection as an innocent holder, since, being a question of commercial law, each state could determine it for itself.

4. Where an assignee acquired at the same time a series of notes executed as part of one consideration, default in the payment of the first falling due would not be notice of the failure of consideration of those not due, so as to affect advances thereafter made on the notes as security, where they did not show on their faces that they were given for one consideration.

Appeal from district court, McLennan county; Marshall Surratt, Judge.

Action by Bank of Lebanon against S. J. Alexander. There was a judgment for plaintiff, and defendant appeals. Reversed.

T. A. Blair and John W. Davis, for appellant. S. E. Stratton and Sanford & Lee, for appellee.

KEY, J. Appellee sued appellant on three promissory notes, one of which was barred by limitation, and was eliminated from the case by the court's charge. Verdict and judgment were rendered for appellee for the amount of the other two notes, and the defendant has appealed. As to these two notes appellant interposed the following defense: "(4) Defendant further says, answering plaintiff's suit on the two eleven hundred dollar notes, described in his petition dated October 18, 1892, that said two eleven hundred dollar notes were executed and delivered to said E. Harper upon the distinct understanding and agreement between the said Harper and this defendant that said notes were never to be collected, but that they were merely executed as an accommodation to said Harper, not to be used by him in any way so as to make this defendant liable therefor, all of which was known to plaintiff bank and its cashier, S. G. Stratton, before the execution of the same, on the date of the execution of the same, and at the time that said notes were indorsed by said Harper, and turned over to plaintiff bank; that said Stratton, the cashier of said bank, at the time knew all about the arrangement, advised it, and was a party to it. Defendant further says: That no consideration whatever of any character or kind was paid by said Harper to this defendant for said notes, all of which was known to the plaintiff bank and its cashier, S. G. Stratton. That no consideration of any kind whatever was paid by said bank to said E. Harper, the payee in said notes, or anybody for it. That said notes were executed under the following circumstances and conditions: That at the time of the execution of the same E. Harper was indebted to plaintiff, and there was pending against said E. Harper in the courts of McLennan county, Texas, a suit by the son of C. C. Hancock, the former partner of E. Harper, in the partnership, as set out in clause 3 of this answer; that the claim of young Hancock was an unjust one, but of doubtful result, inasmuch as C. C. Hancock, the former partner, was aiding his son in establishing the same against said E. Harper, and which claim was defeated. But, in order to meet the contingency of a recovery by young Hancock against said Harper, said Harper, by the advice and instigation of S. G. Stratton, the cashier of plaintiff bank, had Alexander to make his notes to said Harper, which are the two eleven hundred dollar notes sued on herein, and other notes not sued on, and which two eleven hundred dollar notes sued on herein were indorsed by said Harper to plaintiff bank, but it was distinctly understood and agreed between said Harper, the plaintiff bank, and said Stratton, its cashier, that said notes were never to be collected. In order to cover up said property, as suggested by plaintiff bank, through its cashier, said property was turned over to defendant Alexander, to be sold by him for said Harper, and the proceeds of the sale of such stock to be paid by this defendant to said

Harper, and by said Harper to plaintiff bank, which has been done. This defendant did not want to go into this agreement, and said Harper promised him that it should never hurt him. Plaintiff bank knew all about it, was a party to it, and advised it, was protected by it, and received the benefit from it, and this defendant sold the stock that was placed in his hands by said Harper, and said Harper paid the same over to plaintiff bank, and plaintiff agreed to return said notes to this defendant. Said two eleven hundred dollar notes, by agreement between this defendant and said Harper, the payee therein, and with the knowledge, consent, and acquiescence of plaintiff bank, were never to be collected by said Harper or by the bank from this defendant, but the proceeds of said stock was to be paid over by defendant to said Harper, and by him to plaintiff, all of which was done as aforesaid, and all of which was fully, clearly, and distinctly understood and agreed on by said Harper, said Stratton, said bank, and this defendant; the only purpose of said notes being to show that said Alexander had property in his hands belonging to said Harper, which he was to sell, and turn over the proceeds to said Harper, and said Harper to plaintiff, all of which has been done. The proceeds of the sale of said stock was paid over to said Harper by said Alexander, was paid over by said Harper to plaintiff bank, and plaintiff bank promised said Harper to turn over said notes to this defendant. Wherefore, this defendant says that there was no consideration for said notes; that the same were never intended to be circulated; and that the proceeds of the property evidenced by same had been long since paid over to plaintiff bank in pursuance of the agreement between the parties. Whereby the defendant says the plaintiff ought not to have and maintain this suit on said notes against this defendant. All of which this defendant is ready to verify, puts himself upon the country, and prays the judgment of the court." Harper testified, in substance, to all the facts alleged in the answer quoted; but, in so far as his evidence tended to show the bank had notice of the transaction between him and appellant, he was sharply contradicted by the testimony of S. G. Stratton, the bank's cashier. Appellant also testified that the notes were executed in the manner and for the purpose alleged in his answer.

In charging the jury, the court used this language in describing the appellant's defense: "The defendant alleges that said two \$1,100 notes were executed by him to E. Harper under an agreement made between him and said Harper, with the knowledge and under the advice of plaintiff's cashier, and in furtherance of a fraudulent scheme, whereby said Harper transferred to defendant a large amount of personal property for the purpose of defrauding his creditors, and that said notes were executed by him as the apparent consideration therefor, and by the

said Harper indorsed to plaintiff, whose cashier had advised said fraudulent transaction, and who had full knowledge thereof, when it received said notes from Harper." And in another paragraph, in submitting to the jury the issues raised by the answer quoted, the court refers to the transaction alleged therein as a "fraudulent scheme." Appellant objects to the charge quoted, as improperly characterizing his defense, tending to prejudice the jury against him, and calculated to influence them in determining the credibility of his witness E. Harper. This objection is well taken and requires a reversal of the judgment. The pleading referred to expressly charges that the claim of young Hancock in his suit against Harper was unjust, and was ultimately defeated. If the claim was unjust, a judgment obtained upon it would have been unjust; and while the agreement pleaded may, in a restricted and technical sense, have been in fraud of Hancock's legal right to enforce a judgment obtained upon his unjust claim, if he should obtain such judgment, it involved no moral turpitude, and therefore was not fraudulent in the popular sense of that term. We think it probable that the jury accepted the court's language in its popular sense, and understood it as conveying the idea that the alleged transaction between appellant and Harper was reprehensible, and, if they so understood it, it was calculated to disparage both appellant and his witness Harper, and may have influenced the jury in deciding the case. It is manifest that the transaction referred to was not in fraud of the bank's rights, because it had a recorded mortgage on the very property Harper was pretending to sell; and therefore the pretended sale could not defeat its right to subject the property to its debt. Besides, the plea alleges that the bank was cognizant of, and agreed to, the transaction. In fact, the motive of Harper and appellant in the transaction referred to is immaterial in this case if the agreement as to the notes was as alleged, because, if appellant would not be liable on the notes if Harper were suing, he is not liable to the bank, unless it is an innocent holder, no matter how much they may have intended to defraud a third party. Therefore it was unnecessary for the court to use the terms "fraud," "defraud," or "fraudulent," in any sense, in its charge; and the use of them, as shown, was, we think, prejudicial to appellant.

According to the bank's testimony, the notes in suit, which are negotiable in form, were assigned to it as collateral security for a pre-existing debt; and counsel for appellant urgently insist that, under such circumstances, the bank cannot claim protection as an innocent holder, even granting that it had no notice of the want of consideration for the notes. This contention is based upon the proposition that, when no consideration is advanced when property is acquired, and it is taken merely as security for an antecedent

debt, the holder is not entitled to protection as an innocent purchaser. Whether or not the rule applies in cases like this, when the property acquired is negotiable paper, there is conflict in the decisions. Some courts apply this rule to negotiable instruments, while others do not; and the reasons given for making the distinction are not always the same. The question has been frequently considered by our supreme court, and the doctrine announced, that the holder of negotiable paper, acquired before maturity, as collateral security for a pre-existing debt, will be protected as an innocent holder, unless he had notice, at the time he acquired it, of the equities existing between the maker and the payee. *Greneaux v. Wheeler*, 6 Tex. 528; *Liddell v. Crain*, 53 Tex. 549; *Heffron v. Cunningham*, 76 Tex. 312, 13 S. W. 259; *Brown v. Thompson*, 79 Tex. 58, 15 S. W. 168; *Herman v. Gunter*, 83 Tex. 66, 18 S. W. 428. In some of these cases it does not appear that this identical question was involved, and the expressions of the court upon it appear to be dicta. In two of them, however (*Liddell v. Crain*, 53 Tex. 555, and *Brown v. Thompson*, 79 Tex. 58, 15 S. W. 168), counsel for appellant concede that the question was presented, and decided against their contention. It is urged that these cases were not well considered, that they are unsound in principle, and should be overruled. We are not prepared to concur with either of these views. In *Brown v. Thompson*, the opinion cites *Daniel*, Neg. Inst. 831a; *Tied. Com. Paper*, 168; *Bigelow, Cas. Bills & N.* 498; *Swift v. Tyson*, 16 Pet. 1; and *Railroad Co. v. National Bank*, 102 U. S. 28,—all of which support the doctrine announced. In *Railroad Co. v. National Bank*, supra, as in this case, the original payee had indorsed the note in blank, and had delivered it to the bank as collateral security for a pre-existing debt; and in two elaborate opinions, reviewing many authorities, the court held that the bank, having no notice of the equities existing between the maker and the original payee at the time it accepted the note as collateral security, was an innocent holder, and that the equitable defense interposed was not available. We are satisfied with the reasons given in that case in support of the doctrine announced. Therefore, because the question has already been settled in this state against appellant, and, as we believe, correctly settled, we rule against him on this point.

The further contention is made that as the notes were assigned to appellee in the state of Tennessee, and, as the court of last resort of that state has held that the holder of negotiable paper acquired before maturity, and accepted merely as security for a pre-existing debt, is not entitled to protection as an innocent holder, this court should apply that rule in this case. The notes are, in terms, payable in Texas, and neither party averred in the pleading that the contract by which ap-

pellee acquired them was made in Tennessee; hence appellee contends the question referred to is not in the case. But, if it be conceded that the question is presented for decision, we think it should be ruled against appellant. There was no proof of any statute of Tennessee regulating the matter; and, the question being one of commercial law, of common interest to all civilized nations, we are of the opinion that the courts of this state are not bound to accept the decisions of that state as the law of the case, although the contract was made in that state. The congress of the United States enacted a statute declaring that "the laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." 1 Stat. 92, § 34. In construing this statute in *Swift v. Tyson*, 16 Pet. 1, and *Railroad Co. v. National Bank*, 102 U. S. 15, it is held that the decisions of state courts generally are not laws within the purview of the statute quoted, which is limited to positive statutes of the states, and the construction thereof by local tribunals, and to rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character; and that the decision of the courts of last resort of the state of New York are not binding upon federal courts on the identical question now under consideration. The matter is not controlled by statute in this state; but the reasons upon which these decisions are founded are equally applicable when, in the absence of a statute regulating the matter, courts are asked to enforce the laws of another state. Commercial laws, and many other laws of universal application, are not exclusively the laws of any particular state, and therefore the courts of each state should determine such laws and their application for themselves. It appears that at the time appellant executed the two \$1,100 notes sued on, due November 1, 1893, and March 1, 1894, he also executed another note, likewise for \$1,100, and payable to the order of Harper. The time of the maturity of this note, which is not sued on, is not shown, other than in the spring of 1893. The bank acquired this note at the same time and for the same purpose that it did the two in suit, and it was not shown to have been paid. It was also shown by testimony that these three notes were all given for the same consideration, but they do not disclose that fact upon their faces. The court charged the jury, in substance, that the bank could claim protection as an innocent holder for any advances made to Harper before November 1, 1893, the maturity of the first \$1,100 note sued on, if the other facts were such as to entitle it to such protection. Counsel for appellant contend that, as there was a series of three notes, executed as part of one transaction, and all acquired by the bank at the same time, and for the same purpose, default in the payment

of the first one falling due was notice of the failure of consideration, even as to those not due. If the notes had shown upon their faces that each was given in part payment for a common consideration, this position would be tenable (*Harrington v. Claflin*, 91 Tex. 295, 42 S. W. 1055); but, not disclosing that fact, the rule invoked does not apply.

The third and fourth assignments of error are overruled, because the undisputed testimony shows that the Texas property referred to in the special charge asked belonged to Hancock & Harper and E. Harper, and not to the bank, though the latter held a lien upon it; and the question of Harper's agency of the bank in the transaction referred to was not in the case. For the error pointed out, the judgment is reversed, and the cause remanded. Reversed and remanded.

### PERRY v. BLAKEY.<sup>1</sup>

(Court of Civil Appeals of Texas. June 25, 1898.)

TRESPASS TO TRY TITLE—ADMINISTRATORS—SALES—CONFIRMATION—AUTHORITY—EVIDENCE—PRESUMPTION.

1. In trespass to try title, plaintiff relied on an administrator's deed dated May, 1850, reciting that it was confirmed by the probate court at its April term, 1850; and plaintiff introduced an order of confirmation, dated November, 1851, of a sale of undescribed land by the administrator to the same grantee. Held, that evidence for defendant of another deed by the same administrator to the same grantee, of different land, dated January, 1852, reciting that the sale had been confirmed by the probate court at its November term, 1851, and apparently referring to the order of confirmation introduced by plaintiff, was admissible to rebut any presumption that the November, 1851, order confirmed the sale in May, 1850.

2. Where a plaintiff in trespass to try title who claimed under an administrator's deed, failed to show authority in the administrator to make the sale, and the records of probate court are in existence, and no reason is given for failure to make such proof, the authority will not be presumed from lapse of time since the execution of the deed.

Appeal from district court, Cass county; J. M. Talbot, Judge.

Trespass to try title by Mrs. S. H. Perry against Levi Blakey. From a judgment for defendant, plaintiff appeals. Affirmed.

This is a suit of trespass to try title to 640 acres of land, brought by Mrs. S. H. Perry against Levi Blakey, as defendant in possession. The defendant pleaded not guilty. The case was tried by the court without a jury, and resulted in a judgment for defendant, from which plaintiff has appealed. Upon the trial of the case these facts were shown:

(1) Plaintiff read patent from the state to D. Calville, of date May 3, 1861, to the land sued for.

(2) Bond for title, upon cash consideration

<sup>1</sup> Writ of error denied by supreme court.



paid him of \$100, by D. Calville to James H. Johnson, dated July 3, 1843, same land.

(3) Warranty deed from J. D. Crawford and wife to plaintiff herein, to same land, dated April 19, 1839.

(4) John G. Wright, county clerk of Red River county, testified by depositions as follows: "I have searched the probate records of my office for the years 1848 to 1852, inclusive, in regard to the estate of James H. Johnson, deceased (No. 184), and find all the records from beginning to close of said administration here. I find nothing missing or lost, that I know of. I have examined the purported copies hereto attached, and find them materially correct, but not exactly so. I have made, and hereto attach, true copies of the record, which I certify to, and the same are marked 'Exhibit A.'" To the fourth interrogatory he answered: "I have made the true copies, and attach the same. There are none lost, that I can discover." To the first cross interrogatory he answered: "The records of the probate court for the year 1850 are in my office."

Exhibit A contains the following transcript of the orders of the probate court of Red River county:

"County Court. October Term, 1848. No. 184. Wm. S. Todd, Adm'r of the Estate of James H. Johnson, Deceased. And now at this day came the administrator, and filed his inventory and appraisement of said estate, duly sworn to by the appraisers of said estate, which was received by the court and ordered to be filed. The said administrator also filed his report and petition, praying an order of sale to sell the land belonging to the estate lying and being situated in the county of Cass; also, the interest of the deceased in the St. Starr Hotel, in the town of Clarksville,—which was granted by the court; and the administrator is hereby ordered to sell the above-mentioned property on a credit of twelve months, securing the payment of the same as the law directs, except so much of the same as may be necessary to raise an amount sufficient to pay the funeral expenses and taxes now due by said estate, and the expenses of administration which have accrued up to this date, for which said amounts the administrator is ordered to sell so much of the above property for cash as will be sufficient to pay the same; and it is further ordered that this cause stand continued until the next term of this court.

"County Court. November Term, 1849. William M. Lambert vs. The Succession of James Johnson, Deceased. W. S. Todd, Adm'r. No. 184. Petition for Sale of Property to Pay Debts. It appearing to the satisfaction of the court that the plaintiff's claims have already too long been deferred, and the administrator having reported that he has no funds belonging to said succession, and it appearing further that it is doubtful whether lands can be found sufficient in their sales to satisfy the claims, therefore it is ordered that

said administrator proceed to sell, on the first Tuesday of January next, at the county seat of Cass county, so much of the land belonging to the estate, if to be found, as will be sufficient to pay the debts; and, should the proceeds of said sale not be sufficient to pay the debts, it is further ordered that said administrator, on the first Tuesday of February next, proceed to sell at the county seat of Red River county so many of the slaves of said estate as will supply the deficiency; sales to be made on a credit of twelve months' credit, with bond security, and a lien on the property sold, according to law; and it is further ordered that said administrator be served with a copy of this order.

"Monday, November 25, 1851. Estate of James H. Johnson, Dec'd. W. S. Todd, Administrator. No. 184. Citation to Report Sale of Land. This day came the administrator, William S. Todd, and presented his report of resale of lands in the counties of Cass and Titus belonging to said estate, ordered at a previous term of this court, amounting to the sum of ——— dollars and ——— cents; and, the court being sufficiently advised that said sale was made in conformity with law, it is ordered that said sale be in all things approved and confirmed, and that said report of sale be recorded; and it appearing to the court that the bond of James H. Johnson, dec'd, is out for six hundred and sixty acres of the Canon Smith headright, it is ordered by the court that the sale, as to the (6) six labors and a fraction, be confirmed, so far as the same will not render it impossible to satisfy said bond, the purchasers having the right to accept or reject the sale under this qualified confirmation; and it is further ordered that said administrator proceed to convey to the purchasers, James S. Todd, Jephtha D. Crawford, R. P. Crump, Benjamin F. Cocke, and Bryant Taylor, all the right, title, and interest that the decedent, James H. Johnson, had in and to same at the time of his death, retaining a lien thereon to secure the final payment of the purchase money upon their complying with the terms of said sale; and it is further ordered that said administrator proceed against the defaulters at the first sale reported, for the deficit in the amount of sale, and five per cent. upon the original bid; and it is further ordered that said administrator be furnished with a copy of this order."

Plaintiff then offered in evidence a deed from W. S. Todd, as administrator of the estate of James H. Johnson, to four tracts of land, including the land in controversy. This deed recites that the consideration for the land had been paid the administrator aforesaid by the said purchaser, in claims he held against the estate. This deed also recites that said sale had been confirmed by the probate court of Red River county at the April term, 1850. The deed was dated May ———, A. D. 1850. It recites, "Now, for and in consideration of the premises, and by an order of the

said county court of Red River county at said April term, 1850." George T. Todd, attorney for plaintiff, testified for his client as follows: That in the year 1880 or 1891, after this suit was instituted, he went in person to Clarks-ville, in Red River county, and in the presence of, and assisted by, the county clerk, John A. Bagby, now deceased, they together searched the probate records of said Red River county for the years 1848 to 1852, inclusive, and could only find the three orders as now certified to by the present clerk. That some of the minute books of said court for said years seemed to be missing, but affiant cannot state for which years, or term of the court. No entries could be found for the year 1850 in the estate of James H. Johnson, and affiant does not know, and could not find, whether any orders were made in said year, or not, by the court. None could be found then or now. Upon cross-examination, George T. Todd testified that he did not know that the order of confirmation of April, 1850, was not in the office of the county clerk at Clarks-ville; that, if it was, he failed to find it. Plaintiff had paid taxes on the land from 1876 up to the trial.

Defendant read in evidence a deed from W. S. Todd, administrator of the estate of James H. Johnson, dated January 20, 1852, to James D. Todd and Jephtha D. Crawford, conveying different tracts of land from the one in controversy. This deed recites that the lands conveyed in this deed were sold on the first Tuesday in September, 1851, in pursuance of the former orders of sale, as recited in the two orders of 1848-49, and that such sale had been confirmed at the November term, 1851.

Geo. T. Todd, for appellant. O'Neal & All-day and L. S. Schluter, for appellee.

FINLEY, C. J. (after stating the facts). The foregoing statement presents all the material evidence upon which the case was tried, and on which the judgment of the court is based. This is the third appeal in this case. The decisions upon the former appeals will be found in 23 S. W. 804, and 38 S. W. 374.

The first assignment of error complains of the admission in evidence of the deed from W. S. Todd, administrator of the estate of James H. Johnson, dated January 20, 1852, to James D. Todd and Jephtha D. Crawford, conveying different tracts of land from the one in controversy. The deed introduced by appellant from the administrator of James H. Johnson to Jephtha D. Crawford was dated in May, 1850; and it recited in two places that the sale was confirmed by the probate court of Red River county at its April term, 1850. The appellant introduced in evidence what purported to be a confirmation of the sale of the same land (no description being given) sold by said administrator to Jephtha D. Crawford and others. This order was dated November, 1851,—several months after the said deed to Jephtha D. Crawford had been execut-

ed. This was offered by appellant as a confirmation of the sale which the deed offered by appellant recites was approved at the April term of the probate court of Red River county, 1850. The deed offered by appellee bore date January, 1852, and recited that the sale had been confirmed by the probate court at its November term, 1851, apparently being the same order of confirmation offered by the appellant in this cause. The court admitted and considered this deed only for the purpose of rebutting any presumption which might exist that the order of confirmation made in November, 1851, confirmed the sale of the administrator to Crawford in May, 1850. It was shown that the probate records of Red River county were in existence, and all the orders made in the administration of the Johnson estate were preserved in the county clerk's office of the county. The deed to Crawford under which appellant claims recites, as stated, that the sale was confirmed by an order made at the April term, 1850. The clerk swears that the records of 1850 are in his office, and no such order of confirmation is shown in the evidence. The order of confirmation made in November, 1851, which does not describe the land, would not, under these conditions, be presumed to refer to a sale made by the administrator to Crawford in May, 1850, of the land in controversy. The court tried the case without a jury, and it does not appear that this evidence was given improper effect. Indeed, we are of the opinion that no other judgment than that rendered could have been properly rendered upon the proof in the case, aside from this deed.

The plaintiff failed to show any lawful authority in the administrator to make the sale to Crawford, and as the records of the probate court are shown to be in existence, and no reason is shown for the failure to make such proof, the authority ought not to be presumed from the long lapse of time since the execution of the deed. The failure to show authority in the administrator to make the sale, by proper orders of court, was fatal to the title of appellant, and she was not entitled to recover the land. The case, as made by the record now before us, is materially different from the case as presented to us by the record on the former appeal. On the former appeal we did not have before us the recitals in the administrator's deed to Crawford in plaintiff's chain of title, the deed from the administrator to Todd and Crawford, introduced by the defendant, nor any proof tending to show that the complete record of the proceedings in the administration of the estate of James H. Johnson, deceased, was preserved and attainable as proof. Under the state of the proof as presented by this record, the plaintiff failed to show that her vendor, Jephtha D. Crawford, acquired the title to the land through an authorized administrator's sale, and there are no such facts developed as would justify the presumption that the administrator had authority to make the sale.

Tucker v. Murphy, 66 Tex. 355, 1 S. W. 76; House v. Brent, 69 Tex. 30, 7 S. W. 65. Judgment affirmed.

**MORRIS v. HOUSLEY et al.**

(Court of Civil Appeals of Texas. Oct. 29, 1898.)

**MORTGAGES — FORECLOSURE — SALES — PAYMENT — TRESPASS TO TRY TITLE — RES JUDICATA — APPEAL.**

1. The purchaser at a trustee's sale was the mortgagor's minor son, who had been emancipated by his parents, and whose disabilities had been removed by court. He had accumulated some money by selling his abstract business, and was engaged in business for himself. He had money in the bank, which he used in making the purchase. His father was insolvent, and there was no direct evidence that the son purchased for the father's benefit, though the father had advised him to buy. *Held*, that the evidence did not warrant a finding that the son purchased for the benefit of the father.

2. Where plaintiff in trespass to try title sued on the theory that he owned an absolute title, and defendant resisted on the ground that, if plaintiff had any interest, it was that of a mortgagee, and that the mortgage had been discharged, a judgment for defendant did not establish that plaintiff was a mortgagee.

3. The fact that in reviewing such judgment the appellate court stated that plaintiff was a mortgagee did not enlarge the legal effect of the judgment.

Appeal from district court, Dallas county; Edward Gray, Judge.

Action by E. E. Morris against D. W. Housley and others for the foreclosure of a mortgage. From a judgment in favor of defendant Housley, plaintiff appeals. Reversed.

Cobb & Avery, for appellant. T. F. Nash and W. A. Kemp, for appellees.

**RAINEY, J.** On April 13, 1886, G. W. Morris executed a deed of trust to T. P. Barry, conveying in trust the tract of land in controversy to secure the indebtedness then due by said G. W. Morris to Sanger Bros. On June 7, 1892, the trustee, Barry, sold said land under said deed of trust to Bunyan King, and executed to said King a deed thereto, the consideration being \$400. Subsequently thereto the said King conveyed said land to E. E. Morris, appellant herein. This suit was brought by E. E. Morris, appellant, against the appellees D. W. Housley and G. W. Morris, alleging, in effect, that when King bought at the trustee's sale there was an understanding between said King and G. W. Morris that said King would allow said Morris to redeem said land upon payment to said King of the consideration paid by King for said land; and the said G. W. Morris then and there executed to said King his promissory note for \$400, being the amount paid by said King for said land. Plaintiff further alleged that he paid to said King the amount of the said note executed by the said G. W. Morris, and the said King executed to him an absolute deed to said land, and transferred to him said note, and thereby he became

entitled to all the rights in said land possessed by the said King, which was that of mortgagee, and asked for a judgment for his debt and foreclosure of his mortgage. It was further alleged that said Housley was in possession of said land, claiming to own the same. Housley answered that G. W. Morris, after the date of said deed of trust, conveyed said land by warranty deed on August 7, 1887, to Jones & McClendon, who deeded said land to him (Housley); and further pleaded that before the sale under said deed of trust to Bunyan King the indebtedness secured by said deed of trust had been satisfied and discharged; also that said G. W. Morris was the real purchaser at the trustee's sale, and induced said trustee to convey said land to said King, and subsequently caused said King to convey said land to E. E. Morris, with full knowledge of defendant's rights therein; that said King never transferred the note to E. E. Morris, but that said note was paid off and surrendered to E. E. Morris by said King without any agreement between the said parties or G. W. Morris; that E. E. Morris should have no lien on account of said payment, and said deed to E. E. Morris was taken without any knowledge or authority from G. W. Morris, and the plaintiff has no lien on account of such transaction; that G. W. Morris was wholly insolvent, and that said transactions were made for the purpose of defrauding defendant out of the land. It was further alleged that E. E. Morris had theretofore brought suit in the district court of Dallas county in an action of trespass to try title to recover the land, and judgment was rendered against him. Therefore he was estopped from claiming a lien on the land. E. E. Morris, by his first supplemental petition in this case, pleaded a general denial to the allegations in defendant's plea; (2) the judgment removing his disabilities as a minor; (3) that in the action of trespass to try title above referred to the said Housley had set up in that suit that the deed from Barry, trustee, to Bunyan King, and the deed from King to plaintiff, did not convey the title in fee to plaintiff, but simply made King and plaintiff mortgagees of the land to secure the \$400 which King had paid for the land at the trustee's sale; and also set up all the matters and things herein pleaded in the defense of this suit; and he shows and proves to the court that said transactions made plaintiff simply a mortgagee of said land, and not the owner thereof, and in accordance therewith judgment was rendered against plaintiff, and that said Housley is now estopped to deny that plaintiff has a mortgage as claimed. On the trial of this suit G. W. Morris did not appear, but made default. The court submitted special issues to the jury, upon the answers to which, by the jury, the court rendered judgment for defendant Housley, from which judgment the appellant appealed to this court. There are various assignments of error urged, but they embrace but two propositions: (1)

That the findings of the jury are not supported by the evidence; (2) that the judgment in the action of trespass to try title was *res adjudicata* as to E. E. Morris holding a mortgage against said land.

We will first consider the first proposition above stated. The first question propounded by the court to the jury, which was answered in the affirmative, is as follows: "Had the trust deed lien from G. W. Morris to T. P. Barry, trustee, for Sanger Bros., on the land in question, been paid off and discharged by the said Morris in any manner before the sale thereunder to Bunyan King on June 7, 1892?" The only direct testimony on this issue was the evidence of T. P. Barry, trustee. The effect of his testimony was: That G. W. Morris was a merchant, and at various times had bought goods on a credit from Sanger Bros., and at various times had given liens upon various tracts of land to secure the amounts that were due the said Sanger Bros., or such amounts that might become due. At various times said Morris shipped to said Sanger Bros. cotton, the proceeds of which were placed to the open account of said Morris, and if any excess, it was applied on the liens existing. That at one time Sanger Bros. had as much as 130 bales of cotton shipped to them by Morris. That he did not know exactly how Morris' indebtedness stood at all times, but that he knew at the time he sold the land under the trust deed that the amount paid for said land by said King was not sufficient to pay off and discharge the amount then due on the indebtedness secured by said deed of trust. This being the state of the testimony, we are forced to the conclusion that the evidence was not sufficient to show that said lien had been discharged, and the jury were not warranted in so finding.

The second question propounded to the jury by the court, which was answered in the affirmative, is as follows: "Had the lien of such trust deed been released by Sanger Bros. by agreement with G. W. Morris prior to such sale to King on June 7, 1892?" We have examined carefully the evidence in this case, and, if there is any going to show any agreement between Sanger Bros. and G. W. Morris that such trust deed had been released, it is not contained in the record.

The third question propounded to the jury by the court, which was answered in the affirmative, is as follows: "In buying whatever rights which Bunyan King had in and to the land in controversy, was E. E. Morris, plaintiff, in reality acting for the benefit and for the interest of G. W. Morris?" The evidence relating to this question is, in substance, that G. W. Morris was the father of E. E. Morris; that E. E. Morris was a minor at the time of the conveyance by King to him, and that before his transaction with King his father told him that he would make a good bargain by purchasing the land from King; that, though a minor, E. E. Mor-

ris' parents had allowed him to do business for himself, and to use the money he made for his own personal benefit; that his disabilities had been removed by the district court, and that he had accumulated some money by selling his abstract business, and that at the time of his purchase he had the money in the bank to pay the consideration. Several witnesses testified as to his being a young man of good business habits, and of his having made money. There is no evidence direct that he bought the land for the benefit or for the interest of G. W. Morris, and the most that can be said as to the force of the evidence that G. W. Morris' money was used is that it might possibly raise a suspicion that such was the case, but the probative force thereof is not sufficient to warrant the finding of the jury that the money paid by E. E. Morris was in fact the money of G. W. Morris. It was shown that G. W. Morris was insolvent, and there is no evidence in the record which tends to show that he had possession of money or property sufficient to pay the amount that was paid. We are of the opinion that the answer of the jury to this question is not warranted by the evidence. If Bunyan King in fact paid his money, and not that of G. W. Morris, to buy in the land at the trustee's sale, then, under his contract with G. W. Morris, the deed to him was a mortgage, and he was entitled to recover that from the land; and if E. E. Morris paid his money to Bunyan King, and had the debt and land transferred to him, knowing the relations between G. W. Morris and Bunyan King as to the transaction, he was subrogated to all the rights in relation thereto, to which said King was entitled, and he stood in relation to said land as a mortgagee. If, as a matter of fact, King and Morris paid their money as above stated, and said trustee deed had not theretofore been paid off and discharged, the defendant Housley has no room to complain, for at the time of his purchase from Jones and McClendon said land was incumbered by said trust deed, and, before he could acquire a title free from said incumbrance, it was necessary that said trust deed should have been paid off and canceled. As before stated, we are of the opinion that the evidence on the three different findings of the jury was not sufficient to support the findings of the jury, and the judgment must be reversed.

As to the second proposition,—that the judgment in the action of trespass to try title was *res adjudicata*,—we are of the opinion that it was not such. In that action E. E. Morris was seeking to recover the land on the theory that he owned an absolute title thereto. Housley resisted on two grounds: (1) That, if E. E. Morris had any interest in the land, it was only a mortgage; and (2) that he had no real claim, as the Sanger deed of trust had been paid off by G. W. Morris. No plea in the alternative was made by Morris that, if it was adjudged that he had no

title, his claim be declared a mortgage, and for a foreclosure thereof. All that was necessary to be shown to entitle Housley to recover in that action was that the conveyance to Morris was not in fact an absolute deed. If his claim did not reach that dignity, it was immaterial what it was. The effect of the judgment was simply that Housley had the superior title to the land, and was entitled to recover. We do not think the language of the court of civil appeals, Fourth district, on appeal (34 S. W. 659), that Morris was a mortgagee, changes the effect of the judgment below. That court (civil appeals) was discussing the facts, and pointing out that under the facts Morris did not have the title. It is true, it says that Morris was a mortgagee, and, while such an utterance shows the court so believed, it does not change the legal effect of the judgment below. For the reasons above given, the judgment is reversed, and the cause remanded.

### HIGGINS et al. v. GAGER.

(Supreme Court of Arkansas. Nov. 5, 1893.)

STATUTE OF FRAUDS—PAROL LAND LEASE—CONTRACT TO BE PERFORMED WITHIN A YEAR—AGREEMENT NOT TO DO—INDIVISIBLE CONTRACT.

1. Sand. & H. Dig. § 3469, provides that "no action shall be brought: \* \* \* Fifth. To charge any person upon any lease of lands \* \* \* for a longer term than one year. Sixth. To charge any person upon any contract, promise or agreement that is not to be performed within one year from the making thereof, unless \* \* \* in writing," etc. *Held*, that subdivision 6 applied to contracts other than those relating to land only, since otherwise subdivision 5 was unnecessary.

2. Under Sand. & H. Dig. § 3469, subd. 5, providing that no action shall be brought on a parol lease of lands exceeding a year, a parol lease for one year to commence in the future is not invalid.

3. A parol agreement not to sell cigars during a year from a future time is void, under Sand. & H. Dig. § 3469, subd. 6, prohibiting action on a parol contract not to be performed within a year from its making.

4. A parol lease, for a year, of a saloon adjoining an hotel office, to commence in the future, stipulated that the lessor should not sell cigars in the office during the term. The consideration was entire, and not apportioned to different items, and the stipulation was a substantial part of the contract. *Held* that, as the contract was an entire one, the entire lease was void, the agreement as to the cigars being invalid, under Sand. & H. Dig. § 3469, subd. 6, providing that no action shall lie on a parol contract not to be performed within one year from its making.

Appeal from circuit court, Craighead county; Felix G. Taylor, Judge.

Action by Charles Gager against Higgins & Teal. There was a judgment for plaintiff, and defendants appeal. Reversed.

E. F. Brown and N. F. Lamb, for appellants. J. C. Hawthorne, for appellee.

WOOD, J. Appellants, on the 15th day of December, 1893, entered into a contract with appellee, which is stated by appellee

as follows: "We made a contract whereby the defendants [appellants] were to pay me \$55 per month, cash in advance, from January 1, 1894, during the entire year, for the use of the saloon room adjoining the hotel office of the Gager House, the small room back of the saloon room, one billiard table, one pool table, cues, racks, balls, wires for each, and other fixtures accompanying the same; and I was not to sell cigars in the hotel office, and was to leave the door between the hotel office and the saloon room open. The consideration was entire for all the property, and was not in any manner apportioned to the different items." Appellants failed to take the property. Appellee sued them, and they set up in defense the statute of frauds. Can appellee recover?

1. The provisions of the statute of frauds bearing upon the question are as follows: "No action shall be brought: \* \* \* Fifth. To charge any person upon any lease of lands, tenements or hereditaments for a longer term than one year. Sixth. To charge any person upon any contract, promise or agreement that is not to be performed within one year from the making thereof, unless the agreement, promise or contract upon which such action shall be brought, or some memorandum or note thereof, shall be made in writing, and signed by the party to be charged therewith, or signed by some other person by him thereunto properly authorized." Sand. & H. Dig. § 3469. The fifth subdivision applies to the lease of lands only, while the sixth applies to all other contracts, promises, agreements, etc., than those appertaining to lands. The sixth subdivision was not intended to apply to contracts concerning the lease of lands at all; for if it applies to contracts concerning the lease of lands, as well as to all other contracts, then it is obvious that the fifth subdivision was wholly unnecessary. According to familiar canons of construction, we are not to conclude that different parts of a statute mean and include the same thing, when they are susceptible of different and independent meanings, and may embrace different subjects. The fifth subdivision, read independently and consecutively with the qualification which properly concludes each of the sections, is as follows: "No action shall be brought to charge any person upon any lease of lands, tenements or hereditaments, for a longer term than one year, unless the contract upon which such action shall be brought, or some memorandum or note thereof shall be made in writing, and signed by the party to be charged therewith, or signed by some other person by him thereunto properly authorized." When the section is thus read, as it should be, it is clear that leases for a shorter term than one year are not within the terms of the statute, and hence need not be in writing. It will be observed that the words "from the making thereof" are not used in the fifth subdivision. They were doubtless omitted for the very

purpose of excepting from the purview of the statute verbal contracts to lease lands for one year or less, thus leaving such contracts valid, as they were at the common law, and thereby having the law to conform to what was the custom of the people of this state, as to such contracts. At any rate, "*Ita lex scripta est.*" The language of this (fifth) subdivision clearly has reference to the duration of the term from the time the tenant is to commence to occupy the premises, and not from the time the contract is made. There is not a word in the statute to warrant the conclusion that "the time between the making of the lease and its commencement in possession" is to be taken as a part of the term granted by the lease. Life is too short and time is too precious to review the many conflicting authorities, and to expatiate upon the vast and varied learning in the books, upon this subject. The view we have expressed is supported by the better reason and the highest courts of several states. *McCoy v. Toney* (Miss.) 5 South. 392; *Steininger v. Williams*, 63 Ga. 475; *Young v. Duke*, 5 N. Y. 463; *Becar v. Flues*, 64 N. Y. 518; *Sobey v. Brisbee*, 20 Iowa, 105; *Jones v. Marcy*, 49 Iowa, 188; 2 *Reed*, St. Frauds, § 813 et seq., where the question is discussed and authorities pro and con cited. The contract as to the lease of the rooms, had it stood alone, was good.

2. What was the effect of the stipulation of the lessor not to sell cigars in the hotel office? This clearly came within the provisions of subdivision 6, *supra*, prohibiting suit upon any contract, promise, or agreement that is not to be performed within one year from the making thereof, unless in writing. The contract was made December 15, 1893. It was to commence the 1st of January, 1894, and to continue one year, so that the agreement to refrain from selling cigars was not to be performed within one year from the making thereof. In *Meyer v. Roberts*, 48 Ark. 85, this court said: "But a contract for personal services to continue and hold the parties together for a longer period than one year is plainly within the statute. Thus, if at Christmas I orally hire a servant for a year, to begin from New Year's day, when he presents himself at the time appointed in fulfillment of that contract, I am not legally bound to receive him into my service. \* \* \* Nor does it make any difference that the contract, if for more than a year, is subject to determination sooner on a given event." "The object of the statute," says Pollock, C. B., in *Dobson v. Collis*, 1 Hurl. & N. 81, "was to prevent contracts not to be performed within the year from being vouched by parol evidence, when at a future period any question might arise as to their terms, and that a contract was not the less a contract not to be performed within a year because it might be put an end to within that period." The contract in *Meyer v. Roberts* was for personal services, to do certain work, for a

period longer than one year. The contract here was to refrain from doing a certain thing. Some of the courts have distinguished between an agreement to do a thing and an agreement not to do a thing, for a certain definite time, more than a year. Thus, in *Doyle v. Dixon*, 97 Mass. 208, where the action was upon an oral agreement that the defendant would not engage in a certain trade, at a certain place, for the term of five years, the court held that the agreement was not within the statute, because it was fully performed if the promisor performed it as long as he lived, and that the death of the promisor completed the agreement. We are unable to concur in that view. It is not proper to speak of a contract not to do a thing for a certain period, which is not to be performed within one year from the making of the contract, as fully performed if the promisor dies, after entering upon the performance of his contract, within the year from the time the contract was made. The contract in such event has been certainly terminated, but not performed or completed within the contemplation of the parties, at the time of making the contract. "Where the manifest intent and understanding of the parties, as gathered from the words used and the circumstances existing at the time, are that the contract shall not be executed within the year, the mere fact that it is possible that the thing to be done may be done within the year will not prevent the statute from applying. \* \* \* It is not enough that the thing stipulated may be accomplished in a less time by reason of the death of the promisor." "The accomplishment of the thing agreed upon must be a performance of the contract according to the understanding of the parties." *Browne*, St. Frauds, § 281; *Farwell v. Tillson*, 76 Me. 227; *Wood*, St. Frauds, § 272. We agree with the distinguished author (Mr. Browne) that the distinction between an agreement to do a thing and an agreement not to do a thing for a definite term of years is quite unsubstantial; for, as he says, "In each case the promisor undertakes that during the stipulated term of years he will submit to and observe a certain obligation which the agreement imposes upon him; and in each case, and in the same way in each case, his death only makes the performance of that obligation for the residue of the stipulated time impossible." *Browne*, St. Frauds, § 282b. The stipulation of Gager to refrain from selling cigars being within the statute of frauds, how does it affect the contract as a whole? The proof is uncontroverted that the agreement not to sell cigars was an item of the contract, and, in the language of some of the witnesses, a "valuable and substantial feature." Gager himself testified that the consideration was not in any manner apportioned to the different items. In other words, the contract was entire and indivisible. In view of this evidence, there would be nothing to justify a finding that the agreement to

sell cigars was not a substantial part of the contract. The law is well settled that where the several stipulations are so interdependent that the parties cannot reasonably be considered to have contracted but with a view to the performance of the whole, or that a distinct engagement as to any one stipulation cannot be fairly and reasonably extracted from the transaction, no recovery can be had upon such stipulation, however free from the statute of frauds it may be. *Id.* § 140. The suit was upon the contract as a whole. Where the consideration is single and entire, the contract is entire (*McQueeney v. Insurance Co.*, 52 Ark. 275, 12 S. W. 498); and, of course, if one of the substantive stipulations is within the statute of frauds, the whole contract must fail (*Phoenix Ins. Co. v. Public Parks Amusement Co.*, 63 Ark. 187, 37 S. W. 959, and authorities cited in appellants' brief).

Inasmuch as this settles the controversy presented by this record, we deem it unnecessary to discuss the question raised as to the other items of the contract. The court erred in refusing requests for instructions, which presented the view we have expressed. Reversed and remanded.

#### MUTUAL RESERVE FUND LIFE ASS'N v. FARMER.

(Supreme Court of Arkansas. Nov. 5, 1898.)

INSURANCE—DELIVERY OF POLICY—PREMIUM—  
PAYMENT—PRESUMPTIONS—AGENTS—AUTHORITY  
—APPLICATIONS—REPRESENTATIONS—MATERIALITY  
—CONSTRUCTION—FAILURE TO ANSWER—  
WAIVER—EVIDENCE—SUFFICIENCY.

1. Where an insured receives a policy by mail, the time of delivery, within a provision of the application requiring a delivery while he is in good health, is the time of mailing.

2. A by-law of a mutual insurance company making the agent effecting insurance insured's agent in receiving premiums does not make him his agent in receiving the first premium, where the contract between the agents and the company makes him its agent in collecting such premium by authorizing him to retain it as his fee.

3. A false answer to a question as to how long since insured had been attended by a physician for a mental or nervous disease will avoid a policy, where it stipulates that such answer is material, and insured warrants it to be true, though the court, but for such stipulation, would consider the answer immaterial.

4. An insurer can take no advantage of a false statement inserted in the application by the medical examiner, after it was signed, unless insured consented to, or knew of, such insertion.

5. An insurer cannot claim that a policy is void because insured suppressed facts by failing to make any answer to certain questions in his application, where the application was accepted by insurer without objection.

6. An insured, giving a negative answer to a question as to whether he had ever had certain ailments, qualifies such answer so as to mean that he has not had such ailments for 10 years, by answering to a succeeding question, as to how long since he has consulted a physician, that he has not been sick for 10 years.

7. The mere fact that an applicant for life

insurance had once attempted to take his own life by administering chloroform does not show that he had had "a mental or nervous disease," within a question in his application.

8. The fact that an insured had once become insensible by taking chloroform does not show that he had had an illness, within a question in his application.

9. Temporary disorders or functional disturbances, having no bearing on the general health or continuance of life, are not within a question in an application for insurance as to whether applicant has ever had any illness.

Battle and Riddick, JJ., dissenting.

Appeal from circuit court, Garland county; Alexander M. Duffie, Judge.

Action by Florence M. Farmer against the Mutual Reserve Fund Life Association. Judgment for plaintiff, and defendant appeals. Affirmed.

It appeared that Dr. Ellsworth, who inserted some of the answers in the application, was the medical examiner of the defendant association.

James A. Gray and Rose, Hemingway & Rose, for appellant. Wood & Henderson, for appellee.

BUNN, C. J. This is a suit to recover on a policy of life insurance, and the defenses are several, and the first in order is:

That the policy, notwithstanding its delivery, under an expressed stipulation contained in the application for it, never in fact became operative. The stipulation referred to is in these words: "That under no circumstances shall the insurance hereby applied for be in force until payment in cash of the first payment, and delivery of the policy, to the applicant during his life and in good health." The evidence in the case tended to show that the policy was placed in the mail at Hope, properly addressed to the insured at Hot Springs, early in the morning of the day in the afternoon of which the insured was taken with his last illness; and that in due course it should have reached him before he was taken sick, and the court appears to have so found, and to have determined accordingly. This, of course, involves also the question whether or not the placing of a writing in the mail, properly addressed, with postage prepaid, as in this instance, is a delivery as a general rule, as the trial court held. As to this we see no error, and, as the question is at last, does this case come under the general rule as to that particular? Or, in other words, was the first payment made before delivery, under special stipulations referred to above, so as to make the policy operative before the last sickness and death of the insured? All the other material issues in this case involved the breaches of special warranties. This one does not, but is a mere stipulation as to what shall not be a delivery so as to make the contract of insurance complete and effective. The policy itself contains this recital: "In consideration of the answers, statements, and agreements contained in the application for the policy of insurance, which are hereby made a part of

this contract, and of the payment of eighty dollars, as a first payment to be paid on or before the delivery of this policy, and the further payment of thirty dollars payable to the association within sixty (60) days from the date of this policy, for the general expense fund of the association, the Mutual Relief Fund Life Association does hereby receive Lucien Farmer, of Hot Springs, county of Garland, state of Arkansas, as a member of said association," etc. Other than the presumption that may arise from this recital, taken in connection with the mailing of the policy and the receipt of the same by the family of the insured, if not by himself, there was absolutely no evidence of this first payment having been made at all adduced on the trial. There is this to be said, also, that besides Hartin, the agent who solicited for the insurance and mailed the policy to the insured, and did all necessary things connected with the insurance, there was not one living who could testify as to this payment, since the officials of the company did not necessarily know whether or not it had been made; nor could the beneficiary, Mrs. Farmer. When Hartin was on the stand, testifying, neither party asked him as to this payment, and he said nothing in reference thereto. Each party seems to have been afraid of any answer on the subject he might make, and so the matter was left, each one claiming the benefit of the presumption that arises under such a state of things.

To guide the jury in concluding upon the evidence on this point, at the instance of the defendant company the court gave the following instruction, which was in no way modified or affected by any other, to wit: "(14) The possession of the policy by Farmer before his death is prima facie evidence that the first premium was paid, but it may still be shown that in point of fact it was not paid. The question for you to decide is whether the first premium was paid by Farmer while in good health; and in passing on this point you will fairly and impartially consider all the testimony in the case, and if you find, from the preponderance of the evidence, that the premium was not paid by Farmer while he was in good health, you will find for the defendant." This certainly made a delivery of the policy a presumption that the first payment had been made, and cast upon the defendant company the burden of showing that, in fact, it had not been made. It showed by its officers, whose duty it was to have received the money had the same been paid to it, that they had never received it; and then the defendant, by a sort of counter presumption, to rebut the presumption in favor of the plaintiff, referred to one of its by-laws, which made its agent and solicitor and the examining physician, in the collection of money, a representative and agent of the applicant for insurance, thus making the applicant responsible for money so paid until it was actually

paid into the treasury of the company. If this were all of it, it would seem that the former presumption would, in a way, be rebutted; but this is not all of it, for, whatever may be the case in respect to other payments and collections of money, as regards the first payment the following clause in the contract between Hartin and the company, made subsequent to and in view of the by-law mentioned, makes Hartin the agent of the company, and not only so, but gives him authority, after paying the examining physician's fee out of it, to appropriate this first payment—in this case \$80—to the payment of his own fee, thus: "The compensation to be allowed said J. F. Hartin for securing said business on the year distribution deposit plan [presumably the kind of policy involved herein] shall be \$8 for each \$1,000 of insurance, payable out of the first payment thereunder, less the medical examination fee, which is to be remitted to the association with the application, or a receipt therefor from the physician must accompany the same." The expression, "payable out of the first payment thereunder," especially when taken in connection with the manner of payment to the examining physician, makes it manifest that the agent had the right to retain as much of the payment as would pay his fee, which in this case is substantially the exact amount.

Nor is this clause, so far as third parties are concerned, changed by the subsequent provision in the contract, to the effect that the company might set off against the agent's commission any debt it might have against him, but what follows indicates that subsequent commissions are mainly, if not exclusively, referred to, in the provision. At all events, this part of the contract plainly makes Hartin the agent of the company in making the first collection; or, rather, authorizes him to act for himself, and in this he is not representing the applicant. The proof, therefore, that the payment was not in fact made to Hartin, we think was insufficient to rebut the presumption of payment arising from the recital of the policy, and the jury's finding cannot be disturbed as to that.

The other issues raised spring out of the alleged breaches of the warranties in answers to questions propounded in the application to the applicant, and answered by him through the agent, Hartin; he being, by a stipulation in the application, made the agent of the applicant, as is also the examining physician, as to all statements and answers in the application.

The following occurs in relation to the questions and answers of No. 15: "Q. How long since you consulted, or were attended by, a physician? [This, of course, means how long since applicant consulted a physician, concerning some disease or ailment of his own; probably such as are named in another question, preceding this, to wit, No. 14, "Any illness, local disease, injury, mental or nervous dis-



ease or infirmity?" and also how long since he had been attended by a physician for such purpose.] A. Don't know (about ten years). B. State name and address of such physician. B. Name (P. H. Ellsworth); address (Hot Springs, Ark.). C. For what disease or ailment? C. Have not been sick in ten years. [This answer substantially conforms to the statement made in the first answer, "about ten years," included in parenthesis marks.] D. Give name and address of each physician who has prescribed for or attended you within the past five years, and for what diseases or ailments? D. Name, —; address, —. [This last question was not answered at all.] If the part of the answer to the first of this question we have quoted,—"about ten years,"—was made by the applicant, or by his authority, or his acquiescence in, or adoption of, it, then it becomes one of his statements, which he warranted to be true. But it is undisputed that these words were inserted by Dr. Ellsworth, after the application had been signed by the applicant, and the real controversy is whether or not the applicant authorized or adopted them; and of this, whether or not he was so situated at the time as to have seen what was written by Ellsworth, or to have heard what was said in relation thereto between the doctor and Hartin, the agent, and understood it, and by his conduct adopted it as his statement. This may be said in a general way also, as to insertion of his name and address by Dr. Ellsworth in the answer to the next question.

It is not within our province to consider whether or not these questions and answers were or are material. By contract and stipulation of the parties to the contract, each and every one of them is made material, and every answer is, by agreement, warranted to be true. So, then, the trial court had only to consider, under this head, whether or not any one of these answers was made as it appears by the applicant, and, if so, whether any one of them was false. The applicant being dead, and he and Ellsworth and Hartin being the only persons present or who may be shown to be present at the time, the only witnesses available to settle this fact were Ellsworth and Hartin. Their testimony is, apparently, somewhat conflicting; but we think it is more indefinite and uncertain than conflicting, for the difficulty, at last, is to say positively, from their testimony taken together, what really was the situation, and to say as much from the testimony of either one. We express no opinion as to what weight should have been given to this testimony by the jury and the trial court, only we cannot say that, as we view it, it was so much in favor of the defendant as to persuade us that the finding for the plaintiff by the jury on the point was the result of prejudice or passion.

The instructions on this point given to the jury by the trial court we think fairly submitted to them the question whether or not the applicant consented to the insertion of the

words by Dr. Ellsworth. On behalf of the plaintiff the court instructed the jury as follows: "(2) \* \* \* And if said Ellsworth so wrote the said words after said application had been signed by the applicant, the said Lucien Farmer, and without the knowledge or consent of said Farmer, and if, after the said application had been so changed, the said Hartin, as such agent, forwarded it to the defendant at its home office for approval, and the said Farmer, at the time said application was so forwarded, did not know of such change, nor consent to the same, then the defendant is estopped from relying on the words so written by Ellsworth as a defense to this action." And for the defendant: (The defendant asked no instruction on this point, except one to the effect that the fact whether the applicant consented to the insertion by Ellsworth or not was not material, and this was refused, and we think properly so.)

The applicant made no answer to question marked "D," but left the spaces for answers as to the name and address of the physician, referred to, blank. If that was thought to be important, the application for the policy should not have been accepted until the answers were made by the applicant. Certainly we could not say, under the circumstances, by this failure to fill out the blank for the answer, the applicant was suppressing the truth, especially in view of his previous answers, indicating a want of knowledge on the subject.

Were any of these answers of the applicant to the questions propounded to him in the application in fact false? And this question is narrowed down to this: "Had the applicant ever had any illness, local disease, injury, mental or nervous disease, or infirmity?" And, "How long had it been since he had consulted or been attended by a physician?" He answered that he had not been sick in 10 years. The other question as to physician was answered by Ellsworth, applicant failing to answer the same. These answers were to questions numbered 14 and 15, and, on the evidence relating thereto, the court, over the objection of defendant, gave the following instruction, asked by plaintiff: "(4) In determining whether answer of Lucien Farmer to question 14 of the application is untrue, you will consider the same in connection with answers to question 15; and if you find from the evidence that said Farmer, in his answer to question 15, intended to qualify his answer to question 14 by saying that he had been ill, or had a disease or infirmity at some time more than ten years prior to that date, then if it should be a fact that he had had a spell of bilious fever, at some time more than ten years prior to the date of said application, that would not render the answer to question 14 false or untrue."

The conflict between the statements of the applicant in answer to question 14, and his answer to question 15, if conflict at all, con-

sisted in this: In answer to 14 (whether or not he had ever had any of the ailments named) he said, "No;" and, in answer to the corresponding question in 15, he said he had not been sick in 10 years. We think it but fair to say that he meant that he had not been sick in 10 years, and in saying so, in answer to 15, he intended to qualify his answer to 14 that far, and, as this apparent conflict appeared on the face of the application, the defendant should have refused to approve the application, if it was deemed important, and, in failing to do so, the point was waived, especially as the examining physician explained the nature of the ailment about 10 years previous.

The last question, No. 12, was, "Has the applicant ever had any illness, local disease, injury, mental or nervous disease or infirmity, or ever had any disease, weakness of the head, throat, heart, lungs, stomach, kidneys, bladder, or any disease or infirmity whatever." This question was answered by the examining physician, whose answers the applicant made his own. On this particular point, Dr. John H. Gaines, a practicing physician of Hot Springs, was the only, or at least the principal, witness, and he states, in substance, that, about one year or more before the death of the insured, "I saw him [Farmer] in an insensible condition. The room [in which he was at the time] was full of the fumes of chloroform, and he was under its influence, from which he soon recovered. I laid him on the floor, but, before anything was done, I saw that consciousness was returning. He had not taken enough chloroform to be in a really dangerous condition. I think I gave him a hypodermic injection. There was a vial there with a chloroform label on it, which contained a small quantity of that drug. Before I went away he recovered consciousness, and had spoken rationally. I think I stayed there not more than fifteen minutes. This was a year or more before Farmer died. After he took chloroform he spoke to me once about it. Mentioned my services, and his intention to pay for them. Said he regretted the act very much; that he was going to live a changed life, and be a different man. He never paid me anything. He was engaged in the fire-insurance and real-estate business. The chloroform he took would not permanently affect his health. I do not know whether he was sufficiently conscious to know that I was there. When called to go to see him I was at my office nearly on the opposite side of the street. I think he would have recovered if I had not done anything for him."

This presents a question rather difficult, if not impossible, of solution. It is contended that the attempt to commit suicide (assuming that such was shown) was an exhibition on the part of the applicant which, had it been known to the company, would have certainly deterred it from accepting the risk. We are inclined to think that may be a sound conclusion. But that is not exactly the question.

The question is, first, was such an attempt, or the condition of mind at the time which conduced to it, a nervous or mental disease, or any other disease named or contemplated in the question. The suicidal mania is held by many, and perhaps most, of the authorities on the subject to be a mental or nervous disease, and, if the stage of mania has been reached, it would seem that that view of it is correct; but the proof of the isolated attempt in this case is meager, while there is none as to a mania in the sense of disease. We know nothing of the circumstances which superinduced such an attempt, if such, indeed, was ever made, and therefore are not willing to say that applicant answered falsely the question propounded, in this view of it.

If the effect of taking the chloroform is the real subject of this inquiry, we are not sure that such is an ailment, in the meaning of the question. Nor are we sure, from Dr. Gaines' testimony, that the effect of the taking of the chloroform was so material as to become a subject of question and answer at all in the application.

In *Cushman v. Insurance Co.*, 70 N. Y. 72, quoted with approval by this court in *Assurance Soc. v. Reutlinger*, 58 Ark. 535, 25 S. W. 837, it was said: "In construing contracts, words must have the sense in which the parties used them, and, to understand them as the parties understood them, the nature of the contract, the objects to be attained, and all the circumstances must be considered. By the questions inserted in the application, the defendant was seeking for information bearing upon the risk which it was to take, the probable duration of life to be insured. It was not seeking for information as to merely temporary disorders or functional disturbances, having no bearing upon general health or continuance of life." This disposes of the question, also, of Dr. Gaines' attendance.

The instructions, taken together, seem to have presented the case fairly well; at least, we see no reversible error in the judgment, and the same is affirmed.

RIDDICK, J., dissents.

(Nov. 12, 1898.)

BATTLE, J. (dissenting). The contract of insurance sued upon provides that it shall not go into effect or become operative until the first payments due thereon should be made. I think the evidence falls to show that these payments were made; and, consequently, the policy or contract never was binding, and was of no effect.

In the contract of insurance—calling and referring to it as such in this opinion for the sake of convenience—Lucien Farmer, the insured, warranted the statements and answers to questions contained in his application for a policy of insurance "to be full, complete, and true," and agreed with the Mutual Reserve Fund Life Association, the insurer,

that, if they were not full, complete, and true, the policy or contract of insurance executed to him should be null and void. Were they full, true, and complete? To the following four questions: "How long since you were attended by a physician?" "State name and address of such physician;" "For what disease or ailment?" and, "Give name and address of each physician who has prescribed for or attended you within past five years, and for what disease or ailments, and date?"—he answered in his application as follows: To the first, "Don't know;" the second he did not answer; to the third, "Have not been sick in ten years;" and to the fourth he made no response. These questions and answers are contained in the application, which is dated "June 19, 1893." Some time in 1892, Dr. Gaines, a physician, was called to see him, when he was under the influence of chloroform and in an insensible condition. After this he spoke to the doctor about it; mentioned his services, and his intention to pay for them; and "said he regretted the act very much; that he was going to live a changed life, and be a different man." If my memory be correct, this evidence is uncontradicted and unimpeached. If it be true, which I do not doubt, the answers to the questions are not full, complete, and true, and the contract sued on is void.

In *Assurance Soc. v. Reutlinger*, 58 Ark. 528, 25 S. W. 835, a covenant was contained in the policy similar to that contained in the contract sued on in this case. Among the questions propounded to the insured was the following: "When and by what physician were you last attended, and for what complaint?" to which he replied: "Never called a doctor in his life." In speaking of this question the court said: "In the last-mentioned interrogatory two questions were combined in one: (1) He was asked, 'When and by what physician were you last attended?' (2) 'If so, for what complaint?' The object of asking 'for what complaint' was not to ascertain if he ever had any serious illness or personal injury. He had already answered a question propounded for that purpose in the negative. If such had been the object, it was wholly unnecessary to ask, in connection with it, 'When and by what physician were you last attended?' The question takes for granted that, if he had been attended by a physician, it was a case of sickness; and the words, 'for what complaint,' were added to ascertain what the sickness was, without regard to its being serious or trivial, and to show what kind of attendance of a physician was referred to. The obvious purpose of it was to ascertain the name of a person from whom information affecting the risk of insuring the life of Reutlinger could be derived."

The first three questions in this case which I have set out in this opinion are about the same as the one in the *Reutlinger* Case. In this case the question was, "How long since

you were attended by a physician?" In the *Reutlinger* Case it was, "When were you last attended by a physician?" The difference in these parts of the questions is: In the former the words "how long since," and in the latter "when," are used. The information sought by each is the same. By the remainder of the questions in the two cases the insurer seeks to find out the name of the physician, and the complaint or ailment for which he attended. In this case, as in the *Reutlinger* Case, the object of asking the question, "For what disease or ailment?" was not to ascertain if he ever had any serious illness or personal injury. He had already answered a question propounded for that purpose in the negative. If such had been the object, it was wholly unnecessary to ask, in connection with it, "How long since you were attended by a physician?" and "State name and address of such physician." The question takes for granted that, if he had been attended by a physician, it was in a case of sickness; and the words, "For what disease or ailment?" were added to ascertain what the sickness was, without regard to its being serious or trivial, and to show what kind of attendance of a physician was referred to. Why ask the insured to "state name and address of such physician?" Why was the address of the physician demanded? The obvious purpose of the three questions, as of the one in the *Reutlinger* Case, was to ascertain the name of a person from whom information affecting the risk of insuring the life of Farmer could be obtained. The answers of the insured do not give the information which the first and third questions were obviously intended to elicit, and are not "full, complete, and true," as the assured warranted them to be; and the contract sued on, according to its own terms, is null and void.

I think that the judgment of the circuit court should be reversed.

#### McCRACKEN v. PAUL et al.<sup>1</sup>

(Supreme Court of Arkansas. Oct. 8, 1898.)

EXECUTION SALES—NEW TRIAL—RESTITUTION—DAMAGES—MOTION.

1. Execution sale being had on judgment in the absence of supersedeas, and new trial and judgment for defendant being had thereafter, plaintiff is entitled to an order of restitution, so that he may be liable for loss of the property only in case he cannot restore it in specie; he being liable for price paid and interest if it was bought by a third person, and only for money paid if defendant bought.

2. Motion for restitution of property sold on execution, or in default thereof for damages, where subsequent to sale defendant has new trial and judgment, should clearly state the purchaser, or, if there were more than one, the amount purchased by each.

Appeal from circuit court, Green county; W. S. Luna, Special Judge.

Action by Joe McCracken against C. B.

<sup>1</sup> Rehearing denied November 26, 1898.

Paul and others. Judgment for defendants. Plaintiff appeals. Reversed.

J. S. Jordan and Rose, Hemingway & Rose, for appellant. G. B. Oliver and J. D. Block, for appellees.

BUNN, C. J. The appellant, McCracken, obtained judgment against the defendants, and caused their property, consisting mostly of timber, lumber, and sawmill machinery, to be levied on and sold to satisfy his judgment. An appeal was prayed from the judgment, but no supersedeas bond was given, and no supersedeas writ issued. At an adjourned day of the term of the court, the defendants having filed a second motion for a new trial,—on the ground of newly-discovered testimony, among others,—and after the execution sale, the court sustained the second motion and set aside the former judgment, under which the sale of the property was had. Defendants then filed their amended answer and cross complaint, claiming damages growing out of the sale of their said property under the judgment aforesaid, and the plaintiff first demurred, which being overruled, he answered; and a new trial was had, resulting in a verdict and judgment against the plaintiff for the full value of all the property sold. Plaintiff filed his motion for new trial, showing that he had newly-discovered evidence as to the sale of the property, tending to show who were the real purchasers; but this was overruled, and this appeal was taken. The record is too complicated and confused to justify a more extended statement of the case.

The trial court should have treated the amended answer and cross complaint of defendants—as we now treat it—as a motion or petition for an order of restitution, and prayer for damages in the alternative. That motion should have stated clearly and pointedly who was the real purchaser of the property sold at the execution sale, and how much of it each purchaser, if more than one, purchased at the sale, so that the plaintiff might have been permitted to restore the property to the defendants or to the court, as the case might be, and, failing to do so, show cause why he did not or would not do so. The plaintiff, in pursuing his remedy to collect his debt, was neither a trespasser nor wrongdoer, in the true sense, but had obtained a valid judgment fairly, and no supersedeas had been issued to stay his proceedings. He was therefore entitled to the protection of the rule now of universal application in such cases, which is, in substance, thus laid down by Freeman in his work on Judgments, and which we give here for the future guidance of the court in the trial of this cause: Plaintiff, purchasing at his execution sale, on reversal of the judgment under which the sale is made, is entitled to the benefits of the order of restitution, so that he may restore the property in specie, if he can.

If he cannot, he is responsible to the defendant for its loss. If the property is purchased by a third person, the measure of damages is the price it brought at the sale, and interest; and, if the defendant is the purchaser, there is no recovery against plaintiff, except for money paid, because the defendant has what he claims. Freem. Judgm. §§ 482-484. Reversed and remanded.

### CITY ELECTRIC ST. RY. CO. v. FIRST NAT. BANK.<sup>1</sup>

(Supreme Court of Arkansas. July 9, 1898.)

CORPORATIONS—LIABILITY FOR ACT OF OFFICER—RECOVERY ON COLLATERAL—FEES OF MASTER.

1. A bank is not liable to a company for proceeds of the company's note, made payable to one who was president of the bank and an officer of the company, though in negotiating it he used the bank's name, and though he deposited the proceeds in it; it having been to his own credit, and he having used the same.

2. One may recover on notes which he has assigned for collateral security, and does not have possession of at commencement of the suit; they having been returned by the assignee thereof, and filed for cancellation, when the decree is taken.

3. Fees of the master, appointed by consent, should be divided between the parties, though complainant is successful; he having to make extended investigations of the books and papers of both parties, in all of which were inaccuracies and falsehoods, due to one who was an officer of both.

Appeal from Pulaski chancery court; P. C. Dooley, Special Chancellor.

Suit by the First National Bank against the City Electric Street-Railway Company. From the decree, both parties appeal. Modified.

John McClure and Cockrill & Cockrill, for plaintiff. Rose, Hemingway & Rose, for defendant.

McCAIN, Special Judge. This is an appeal from the Pulaski chancery court. Two suits were consolidated in the court below. One of these was a suit brought by Nick Kupferle, as trustee, on an account which H. G. Allis had, or claimed to have, against the Electric Street-Railway Company, and which he had assigned to Kupferle as collateral security for his indebtedness to the First National Bank of Little Rock. The amount claimed in this suit was \$157,500. The other suit was an action brought by the receiver of said bank against the same defendant for an amount claimed to be due on several overdrafts and promissory notes, aggregating a little over \$110,000. The street-car company, by answer filed in each case, disputed the correctness of the claims sued on, denied any liability on either claim, averred that the receiver was not the holder or owner of certain of the notes embraced in his suit, and by way of counterclaim asked for judgment over against the receiver for the proceeds of certain notes alleged to have been nego-

<sup>1</sup> Rehearing denied November 26, 1898.

tiated by the bank for the street-car company. The chancellor appointed a master to state an account between the parties, and on the coming in of the master's report the receiver was awarded a decree against the street-car company for \$106,850.26. Both parties appealed.

1. We conclude that the street-car company has no right to complain of the chancellor for refusing to give judgment over against the receiver on the counterclaim. The contention of counsel on this point is plausible, but underlying it there is the fallacy that in negotiating the notes in question the action of Allis was the action of the bank. Allis was president of the bank, it is true; but he was also payee of the notes, and he was personally interested in their negotiation. This of itself made him a stranger to the bank, so far as the handling of these notes was concerned. An agent cannot prostitute the name of his principal to the service of his own personal ends, and this rule applies with full force to the official of a corporation in making use of the corporate name. *Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552; 1 Mor. Corp. § 517. Not only so, but it was held by this court in *Grow v. Cockrill*, 63 Ark. 418, 39 S. W. 60, that a national bank cannot engage in the brokerage business. It follows that officers of the bank had no authority to negotiate notes which did not belong to the bank. But it is said that the bank got the proceeds of the notes when they were discounted, and that for this reason the bank ought to account for the amount received. It is true that Allis deposited the proceeds of the notes in the bank, or—which is the same thing—he had the amount passed to the credit of the bank by its metropolitan correspondents, to whom he remitted the proceeds. To deposit money in bank is the same, in legal effect, as to place an amount, with its approval, to its credit in another bank. But the bank did not in this case get the proceeds of these notes, because Allis deposited the same to his own credit. It is no answer to this to say that he ought not to have done this, or that the bank ought not to have allowed him to do this. When you go to deposit money in bank, it must be a very extraordinary case in which the bank can challenge your right to say whether the deposit offered shall go to your credit, or to that of some one else. As Allis in this case had unlawfully used the name of the bank in procuring the money on the notes, the bank official making the entry might well have refused to credit Allis with the deposit, and might have placed it to the credit of the bills payable, or rediscounts; but we are not satisfied that there was anything in the circumstances of the case to require the bank to credit the amount to the street-car company, over the objection of Allis, or without his direction. It is said that the bank knew that this paper in Allis' hands was accommodation paper. We are not certain that the

bank did know this; but, if it did, that was the most satisfactory evidence that the street-car company intended him to have the money. If you intrust a friend with your negotiable note, either for his accommodation or your own, you would hardly be allowed to complain that some one had discounted the paper for your friend, and allowed him to have the proceeds. But, even conceding this, counsel say it was wrong for the bank to allow Allis to check out the money without Brown also signing the checks, as the latter was a joint payee with Allis in some of the notes. This is a matter of which it would seem that Brown alone could complain, but we may be sure that Allis did not get any money on a note payable to Allis and G. R. Brown without Brown's signature to the note, and an inspection of the notes filed show that they bear Brown's indorsement. This indorsement puts an end to any further demand for Brown's signature. We need not discuss what are the duties, if any, of a bank, when it finds a trustee depositing trust funds and checking them out in his own name. We do not think the street-car company have made a case calling for the determination of that question. It is a circumstance not to be overlooked, in this connection, that all these transactions took place long before either one of the corporations ceased to do business, and renewal notes were given by the street-car company after they knew, or had an opportunity to know, what had been done with the proceeds of the original notes. What we have said disposes of the contention that the street-car company is entitled to judgment against the receiver on the counterclaim. If we are wrong in our conclusion on this point, however, it would not follow that the street-car company should have the affirmative relief claimed, since the chancellor allowed the street-car company a credit for the amount claimed on the account sued on by Nick Kupferle as trustee; and, if the claim of Nick Kupferle were found to be just, then a credit on this is all that the street-car company could ask.

2. Counsel insist that the receiver of the bank should not be allowed to recover in this action on certain notes embraced in the decree, because these notes at the commencement of the suit were, as the receiver admits, in the hands of a St. Louis bank, who claimed to hold them as collateral security for a debt due the latter bank. It seems that after the suit was commenced the St. Louis bank and the receiver reached an agreement by which the notes were returned to the receiver, and the latter filed them in court for cancellation when the decree herein was taken. This defense, it must be agreed, is extremely technical,—so much so that counsel seems to concede that, if all the parties were solvent, this plea would hardly merit attention; but the apology offered for the interposition of this defense is that the insolvency of the corporation destroyed the right to make a

transfer of claims to be used as a set-off. Since we have determined, however, that the street-car company is entitled to no affirmative relief against the receiver, it has nothing to lose on this score. This court held in *Key v. Fielding*, 32 Ark. 56, that, where commercial paper is assigned as collateral, the assignee takes it as trustee of an express trust. Such a trustee under our statute may sue in his own name, but the assignor still has an interest in the paper assigned, and he is not an improper party plaintiff in a suit on the paper. If in this case the St. Louis bank had refused to surrender the notes to the receiver for cancellation, the receiver might have made the St. Louis bank a party, so as to adjust the rights of all parties; but the course pursued by the chancellor under the circumstances was proper, and accomplished the ends of justice.

3. As to whether the plaintiff receiver was entitled to recover on the account assigned to Kupferle is a question which seems to be full of difficulty. From what the receiver and his counsel say in their brief, we infer that the property of the street-car company has all been consumed by mortgages foreclosed since the commencement of this suit. They accordingly express themselves as being indifferent as to the amount of the judgment obtained against the street-car company. The court is pressed for time, with important litigation; and, taking counsel at their word, we decline to go into the questions raised by the appeal on this branch of the case, as it seems to be a matter of no practical interest or importance. We therefore grant the street-car company the relief asked on this point, and modify the decree to the extent of the judgment entered on the Kupferle account. If we are correct in the conclusions we have reached as to the street-car company's set-off or counterclaim, there seems to be no other defense to the notes sued on, except the counterclaim of \$6,124, which was allowed by the master, and approved by the decree of the lower court. We therefore deduct the sum of \$39,780.01 allowed on the Kupferle account from the judgment of \$106,850.26 rendered by the chancellor; leaving a balance of \$67,070.25, for which amount the decree and judgment of the court below is affirmed. The chancellor allowed the master a fee of \$800, and adjudged the same as costs against the street-car company. No complaint is made of the amount of the allowance, but the street-car company insists that the chancellor erred in taxing it as an item of costs against the street-car company. Ordinarily, costs in equity, as at law, are to be adjudged against the losing party; but, where there are equitable circumstances demanding a departure from this rule, the chancellor will tax the winning party with a portion, or even the whole, of the costs. *Trimbel v. James*, 40 Ark. 393. The large amount allowed to the master in this case without objection indicates that he must have ex-

pended quite an amount of time and labor in examining and adjusting the accounts between the two corporations. It can hardly be said that either of the two corporations was to blame for the confusion and complications in their account, since both of them were the victims of Allis' domination and fraudulent conduct of their affairs. The master seems to have been appointed by consent. His investigation extended to the books and papers of both corporations, and in the books and papers of both were found inaccuracies, not to say frauds and falsehoods. In view of these circumstances, and the large amount of the allowance, we think it would be equitable to require each party to pay half the master's fee, and it is so adjudged.

BATTLE, J., absent, disqualified.

### DICKINSON v. THORNTON.

(Supreme Court of Arkansas. Nov. 12, 1898.)

#### EJECTMENT—EVIDENCE.

1. In ejectment, a tax deed to plaintiff, of the land, executed after the commencement of the action, is inadmissible.

2. Where defendant introduces a deed from commissioner of state lands, showing the land in controversy forfeited for nonpayment of taxes, and donated to his predecessor in title, and there is no evidence that the forfeiture was illegal or void, or that the lands have been redeemed, or that plaintiff has, since the forfeiture, acquired title, the evidence is conclusive that plaintiff is not entitled to recover.

Appeal from circuit court, Chicot county; Marcus L. Hawkins, Judge.

Action by M. L. Dickinson against Joseph Thornton. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Rose, Hemingway & Rose, for appellant. John C. Connerly, for appellee.

BATTLE, J. On the 30th of June, 1891, this action was instituted by Mrs. M. L. Dickinson against Joseph Thornton to recover possession of a certain tract of land described in her complaint. The defendant denied her title and right to the possession thereof, and alleged that the land was forfeited to the state of Arkansas on account of the nonpayment of the taxes assessed against it for the year 1871, that it was donated by the state to one Peter Jones, and that he purchased it from Jones.

In March, 1895, the issues in the action were tried by a jury, and a verdict was returned and judgment was rendered in favor of the defendant for the land.

In the trial before the jury, evidence was adduced tending to prove that the defendant in January, 1894, signed and delivered to the plaintiff an instrument of writing whereby he admitted that the land was the property of the plaintiff, and that she was in possession, and thereby undertook to authorize the circuit court, in which the action was pending,

to enter a judgment at any subsequent term in favor of the plaintiff for the same. It is stated in the writing that the plaintiff, in consideration of the age and infirmity of the defendant and his wife, agreed to grant to them the right to use and occupy certain two acres of the land for and during their natural lives. But the instrument of writing was not signed by her. It appears that the defendant afterwards repudiated the writing and refused to comply with its terms, and continued to claim and hold the land as his own, and that the plaintiff never demanded that judgment be entered according to the terms, but used it only by reading it as evidence in the trial to prove what is admitted therein. Consequently we cannot consider it, except to determine how far it serves the purpose for which it was read.

Plaintiff offered to read as evidence a deed executed to her by the clerk of the county court of Chicot county, in which it appears that the land in controversy was sold for the taxes of 1890 on the second Monday in June, 1891, but the court would not permit it to be read. In this the court did not err. The sale having been made and the deed executed after the commencement of the action, it was inadmissible. *Percifull v. Platt*, 36 Ark. 456.

The undisputed evidence in the case proves that the defendant and his wife occupied the land as a homestead at the commencement of this action, and thereafter continued to occupy it as such until they were dispossessed by a receiver appointed to take possession of it by the circuit court. In the progress of the trial, defendant read as evidence a deed executed by the commissioner of state lands to one George E. W. Smith on the 2d day of February, 1887, whereby it appears that the land in controversy was forfeited to the state of Arkansas on account of the nonpayment of the taxes assessed against it for the year 1881, and that it was donated to Smith. No evidence was adduced to prove that the forfeiture was in any way illegal or void. It is true that the record shows that the plaintiff read as evidence receipts of the collector of revenue for taxes paid by her, but they do not appear in the records, and it is not shown for what years the taxes were paid. The evidence having failed to show that the forfeiture to the state was invalid, or that the lands had been redeemed, or that the plaintiff had since the forfeiture acquired title, the deed from the state to Smith was conclusive evidence in the trial that the plaintiff was not entitled to recover the land; for she must recover on the strength of her own title, and not upon the failure of the defendant to prove that he is entitled to possession.

Plaintiff assigns many errors, and insists that the judgment in this action should be reversed; but as it is right upon the whole record, and no verdict could have been properly returned except that upon which it is based, it is not necessary for us to consider them.

Let the judgment be affirmed.

WOOD, J., being disqualified, did not participate in the decision of the questions in the case.

COUCHMAN et al. v. COUCHMAN et al.<sup>1</sup>  
(Court of Appeals of Kentucky. Nov. 16, 1898.)

WILLS—ADMISSION OF CODICIL TO PROBATE.

Under Gen. St. c. 113, § 27, providing for an appeal to the circuit court, and thence to the court of appeals, from an order of the county court probating a will, and section 28, providing that the probate of a will before the county court shall be conclusive, "except as to the jurisdiction of the court, until the same is superseded, reversed or annulled," a codicil which is altogether inconsistent with the will probated at a former term cannot be admitted to probate as an appendage thereto, as such probate would impeach the validity of the original will.

Appeal from circuit court, Clarke county.  
"To be officially reported."

Appeal to the circuit court by John A. Couchman and others from an order of the county court admitting to probate a codicil to the will of B. W. Couchman. Judgment probating codicil, and the contestants appeal. Reversed.

Gibson Taylor, Breckinridge & Shelby, B. F. Buckner, Benton & Bush, and George B. Nelson, for appellants. Beckner & Jouett, for appellees.

WHITE, J. B. W. Couchman died August 12, 1887, in Clarke county, Ky. August 22, 1887, at the regular term of the Clarke county court, his will, bearing date January 4, 1886, was admitted to probate. By this will the testator devises to his wife, appellee E. J. Couchman, \$3,000 cash, and sufficient to purchase horse, harness, and carriage. This to be absolute. He also gave to his wife, during widowhood, his home farm, and the dividends on certain stock in turnpikes. He gave to his niece Amanda \$3,000; to the Bible College at Lexington, \$500; also, to the Foreign Christian Missionary Society, \$500; also, provided for the purchase of a scholarship in the Midway Orphan School; also, devised to his brothers and sisters \$100. He then directs that all the remainder of his estate shall be divided equally, per capita, among his nephews and nieces; and, to the end that an equal division may be had, he directs his executors to sell and convey his real estate, except the home place, devised to his wife. He then provides that, upon the marriage or death of his wife, the farm and turnpike stock devised to her shall be sold, and the proceeds divided as general estate, devised to his nephews and nieces. He appoints his wife, E. J. Couchman, his brother, John Couchman, and his friend R. T. G. Bush, as executors. This bears date January 4, 1886. Within a year after the probate of this will

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

the widow, E. J. Couchman, renounced the will, and elected to take under the law. On August 26, 1889, the widow, Elizabeth J. Couchman, propounded for probate a paper purporting to be, in substance, a codicil to the foregoing will; it being alleged that the original was lost or destroyed. This paper was probated as a codicil by the Clarke county court September 23, 1889, and reads: "I, B. W. Couchman, do make and publish this codicil to my last will and testament, as follows, to wit: (1) I give to my wife, Elizabeth J. Couchman, the home place, to have and to hold in fee simple, and the Curry place, to have and to hold during her natural life, and after her death to go to such of my blood kin as she may designate during her life, by will or otherwise. (2) I desire my said wife, in addition to the three thousand dollars given to her in my will, to have a sum equivalent to the rent of the land derived by her from her father's estate, and which I have used, or received rent from, since it became her property." It is claimed that this codicil was written in July, 1887, shortly before B. W. Couchman died. At the time this codicil was probated there had never been an appeal or other proceeding seeking to reverse, supersede, or annul the order probating the will, made August 22, 1887. Nor does it appear by this record that the judgment of probate of the will, of August 22, 1887, has ever been appealed from, superseded, or annulled. From the order and judgment probating the codicil dated September 23, 1889, an appeal was prosecuted to the court of common pleas of Clarke county in July, 1892. The trial in the circuit court of Clarke county resulted in a judgment probating the codicil, and from that judgment, after motions for new trial had been overruled, this appeal is prosecuted.

This record is very voluminous, and contains numerous exceptions to the admission and exclusion of testimony, and exceptions to the giving and refusing instructions to the jury, and other errors of the trial court. Among the questions raised by counsel, and urged, is the contention by appellants that the judgment of the county court admitting to probate the original will of B. W. Couchman was a bar to the subsequent proceeding to probate the codicil in the county court, and that, subject to review in a trial de novo on an appeal from it to the circuit court, it was absolutely conclusive. On behalf of appellees it is contended that the codicil being merely an appendage to the will, and its probate depending on the probate of the will itself, the order and judgment of probate of the will were not final and conclusive as to the codicil; in other words, that the jurisdiction of the county court as to probate was not exhausted till the whole will was probated, and that this includes all codicils. The county court and the circuit court necessarily took the appellees' view of the law on this question.

This question has never been passed on by this court, and is one of first impression. Counsel for appellees have cited, as tending to support their position, the case of *Reed's Will*, 2 B. Mon. 79, where Chief Justice Robertson uses this language: "A codicil, dated in 1840, and providing for the transportation of the emancipated persons to Liberia, or the sale of them in the event of their refusal to be thus transported, has not been proved or offered for probate; and therefore the only purpose of noticing it in this opinion is to suggest that it may be hereafter proved and recorded as an appendage to the will, if in fact it was legally published, and the testator was competent at the time of its publication." We are also referred to the case of *Schultz v. Schultz*, decided by the court of appeals of Virginia, reported in 10 Grat. 358, as sustaining this position of appellees. In that case the court said at page 373: "I think it certainly cannot be maintained that, in all cases where the probate court has admitted to probate a paper purporting to be a last will and testament, it has thereby fully exercised its entire jurisdiction over the subject of the testamentary disposition of the decedent's estate. To affirm this proposition would be, in certain cases, so far as the probate court is concerned, to compel a man to die intestate as to part of his estate, though it might have been his deliberate and expressed intention to dispose of the whole. A man's last will must not of necessity be confined to one testamentary paper. It may consist of several different testamentary papers, of different dates, and executed and attested at different times. It cannot be indispensable, either, that they should be propounded in the court of probate at the same time. If a will has been produced and admitted to probate in the proper court, and subsequently another testamentary paper be found, purporting to be a codicil to the former, it cannot be doubted that the probate court could also receive and admit it to probate at a subsequent period,"—citing *Reed's Will*, 2 B. Mon. 80. It may be remarked here that the decision of the Virginia court in the above case was by a divided court,—two dissents; also, that there was no question of codicil before it, but the contest was between two complete wills. That statute governing the probate of wills at the time of the *Schultz Case* was the same as our statute at the time of the case of *Reed's Will*, our statute being copied from that of Virginia. The statute in force at the time of *Reed's Will*, after providing that the county courts shall have power to hear and determine all causes, suits, and controversies testamentary arising within their respective jurisdictions, provides (section 11): "When any will shall be exhibited to be proved, the court having jurisdiction as aforesaid, may proceed immediately to receive the proof thereof, and grant a certificate of such probate; if, however, any person interested, shall within seven years aft-



erwards appear, and by his bill in chancery contest the validity of the will, an issue shall be made up whether the writing produced be the will of the testator or not, which shall be tried by a jury, whose verdict shall be final between the parties, saving to the court a power of granting a new trial for good cause, as in other trials; but no such party appearing within the time, the probate shall be forever binding; saving also to infants and femes covert and persons absent from the state, or non compos mentis, the like period after the removal of their respective disabilities." 1 Litt. Laws, p. 613. Under the statute, this court, in the case of Wells' Will, 5 Litt. 273, held that the decision of a county court on the validity of a will, whether for or against the will, is a bar to any subsequent proceedings thereon before that court; that the remedy is by writ of error, or by bill in chancery, within the statutory period. It was also held in *McMillin v. McMillin*, 7 T. B. Mon. 564, that, after the lapse of seven years from the probate, the will could not be successfully assailed in equity, unless complainants are under some disability. In the case of *Taylor v. Tibbatts*, 13 B. Mon. 177, this court, after quoting the statute, says: "The law makes no provision for a retrial in the same court, but, instead of permitting that to be done, substitutes a proceeding in a court of equity by which the validity of the will may be contested. The decision of the court of probate may also be revised in a superior tribunal, but the same court has no power at a subsequent term to set aside or vacate an order establishing a will, and directing it to be recorded. A decision of the county court upon the validity of a will is a bar to a renewal of the controversy in that court upon the same subject-matter." In the above statute there is no provision that the order or judgment of probate shall be binding and conclusive, except after the lapse of seven years, as quoted. By Gen. St. c. 113, § 26, it is provided: "Wills shall be proved before, and admitted to record by, the county court of the county of the testator's residence." By section 27: "An appeal may be taken from the county court to the circuit court of the same county, and thence to the court of appeals, from every judgment admitting a will to record or rejecting it. \* \* \* The appeal to the circuit court shall be within five years after rendering the judgment of probate or rejection in the county court, and prosecuted to the court of appeals within one year after the final decision in the circuit court." Section 28 provides: "No will shall be received in evidence until it has been allowed and admitted to record by a county court; and its probate before such court shall be conclusive, except as to the jurisdiction of the court, until the same is superseded, reversed or annulled." Under this statute this court, in *McCarty v. McCarty*, 8 Bush, 504, said: "A will once admitted to probate by the county court must be contested in the

manner pointed out by the statute. This special proceeding is adopted and regulated by law as applicable to wills alone, and the remedies afforded in such cases must be found in the statute, and nowhere else. There is no power given to the county court, after a will has been admitted to record or rejected, to grant to the parties a new trial, or at a subsequent term to annul all orders made in regard to the case at a previous term. The rights of parties to property acquired under a will would be almost worthless, if a county court, with its limited jurisdiction in such cases, could try and retry the question of will or no will whenever, in the opinion of that court, an erroneous judgment had been rendered." In all these cases supra the precise question here presented was not before the court, nor passed on. The question in each of those cases was as to complete wills. In the case of *Reed's Will* the question of the probate of the codicil was not before the court for decision, and, if the statute in force at that time was the same as that applicable to the case at bar,—which it is not,—that part of the opinion in the *Reed's Will* Case would not be binding, as it was obiter purely.

Counsel for appellants has referred us to the case of *Hardy v. Hardy's Heirs* (decided by the supreme court of Alabama) 26 Ala. 524, which reads: "The act of 1806 provides that, when any will has been admitted to probate, it may be contested by any person interested, by bill in chancery, within five years thereafter, and that unless so contested it shall be conclusive and binding upon all parties; extending, however, to infants, married women, lunatics, and persons absent from the state, the right of contestation to five years after the removal of their respective disabilities. Under this statute the probate is conclusive, unless the will is contested in the mode and within the time fixed. In the present case the application is to establish a paper which, if regarded as a will, is inconsistent with the provisions of the one which had previously been admitted to probate; and, as it is of later execution, it must operate as a revocation of the former, pro tanto. To this extent, therefore, it impeaches the validity of the will which had been established; and, if admitted to probate, the consequence would be that there would be two wills established, inconsistent with their provisions. It was to avoid such consequences that the statute to which we have referred was enacted. The paper offered for probate impeaches in part the will already admitted to probate, and this, as we have seen, can only be done in the mode and within the time prescribed by the act." We are also referred to the case of *Watson v. Turner*, 89 Ala. 220, 8 South. 20, where the court, after citing with approval the *Hardy Case*, supra, said: "To establish a later will is necessarily to disestablish a former one already proved. The same is obviously true of a codicil, any of the provisions of which are

inconsistent with those of the will itself. To prove a codicil is, pro tanto, to disprove so much of the probated will as it may revoke or modify. The distinction is one of extent, not of kind or quality. The attempt to set aside a probated will, therefore, by proving a later one, or by attaching to it a codicil with inconsistent provisions, is a contest of the validity of the former will. In point of reason, we can see no valid distinction between the two cases. The evil results flowing from each case are the same,—a like violation of the repose of titles, and a like uncertainty as to the conclusiveness of judicial determinations." We are also referred to the case of *Adsit's Estate*, Myr. Prob. 286, cited in Mr. Freeman's notes to *Waters v. Stickney*, 90 Am. Dec. 137, as supporting this doctrine; but the case is not accessible. This court, in the case of *Hughey v. Sidwell's Heirs*, 18 B. Mon. 260, said: "This was a petition in equity brought by appellants in the Mason circuit court to annul and vacate a paper which had been regularly admitted to probate by the county court of Mason as the last will and testament of Aaron Sidwell, deceased. \* \* \* The paper sought to be annulled had been regularly admitted to probate as the last will and testament of the decedent by a court of competent jurisdiction; and the order of probate establishing the will, until reversed, superseded, or vacated by another tribunal in the mode prescribed by law, was conclusive between the parties. It is a judgment of a court having jurisdiction over the subject-matter, and cannot be assailed collaterally, nor revised by any indirect proceeding. There is at present but one mode of reaching it, and that is by appeal to the circuit court of the county where the order was made." In the case of *Abbott v. Taylor*, 11 Bush, 335, this court said: "This was a proceeding in equity in the Franklin circuit court to establish the alleged last will and testament of Jasper Clayton, deceased, which it is charged had been destroyed or suppressed. \* \* \* Prior to the institution of this action a paper purporting to be the last will and testament of said Clayton was presented to, and proved in, and ordered to be recorded by, the Franklin county court,—a tribunal whose jurisdiction is not questioned. This judgment remains unreversed, and, unless affected by the judgment of the chancellor, is to-day in full force and effect. \* \* \* Now it is clear that the chancellor has no jurisdiction to vacate or modify the judgment of a county court admitting a will to probate. This question was directly decided in the case of *Hughey v. Sidwell's Heirs*. There is but one way in which such a judgment can be affected, and that is by appeal to the circuit court of the county in which the order is made. Proceedings in chancery to set aside or vacate wills that have been admitted to probate can only be maintained in two classes

of cases, and not in these cases until after action by the circuit court."

We are of opinion, from a careful review of these authorities, that a judgment probating a will in the county court is final and conclusive, except it be vacated, reversed, or annulled by some one of the modes provided by the statute. The first mode is by appeal to the circuit court within five years, and thence to this court within one year. This remedy is exclusive of all others while it may be invoked. The second is by a court of equity to impeach the judgment of the circuit court, as provided in sections 35, 37, c. 113, Gen. St. This right of appeal to the circuit court is a matter of right to any person interested, and the trial had in the circuit court is a trial de novo, without regard to any evidence heard or offered in the county court. Neither of the statutory remedies provided for was attempted to be used in this case; but the appellees asked the county court, two years after the original will was probated, to admit to probate the codicil, and it is contended that the county court had jurisdiction to probate this codicil as an appendage to the original will. To this we do not assent. While codicils can only be probated as appendages to the original wills, and may, where not in any way inconsistent with the original will, be probated by the county court at a subsequent term from the probation of the original will, yet in this case the codicil propounded is entirely inconsistent with the original will. The original will disposes of the whole of the estate of decedent, B. W. Couchman, and distributes the same to various parties. The codicil practically gives all of his estate to his wife. The parties who take under the original will are entirely ignored in the codicil, and the effect of the judgment probating the codicil would be to annul and vacate the former judgment of probation,—at least, in so far as the two are inconsistent,—and would divest devisees under the first judgment of probation of title to property, and vest the title in devisees as provided by the codicil. This power to annul and vacate its former judgment of probation, the county court did not have. It follows that the judgment of the county court probating the codicil, being not within its jurisdiction, was erroneous, if not void; and likewise the judgment of the circuit court, appealed from, probating the codicil, was erroneous, and must be reversed. Having taken this view of the case, it becomes unnecessary to determine many questions presented in the record, and urged by counsel as cause for reversal. Wherefore the judgment is reversed, and the cause remanded, with directions to grant appellants a new trial, and to render judgment reversing the judgment of the county court admitting the codicil to probate, and for other proceedings consistent herewith.

**LEWIS v. TOWN OF BRANDENBURG.**<sup>1</sup>  
(Court of Appeals of Kentucky. Nov. 16, 1898.)

**MUNICIPAL CORPORATIONS—ANNEXATION OF TERRITORY—AMENDMENT OF STATUTE—CONSTITUTIONAL LAW—STATUTE CONFERRING LEGISLATIVE POWER ON COURT.**

1. The amendment of March 16, 1894 (Acts 1894, p. 187), to the charter of towns of the sixth class, providing that "if, from failure to elect at the time fixed by law, or other cause, there shall be a vacancy in the entire board of trustees, then the county court of the county shall have power to appoint five trustees, who shall hold their office until the next regular election," and the amendment of March 19, 1894 (Acts 1894, p. 215; Ky. St. § 3692), providing that, "when a vacancy occurs in the board of trustees, the county judge may fill such vacancy by appointment until the next regular election," are not inconsistent, and the latter does not repeal the former; the one applying to a case where there is no board, and the other to a single vacancy.

2. Where a section of a statute was amended by adding thereto certain words, and subsequently, at the same session of the general assembly, was again amended by adding thereto certain other words, the former amendment was not repealed, though the words added thereby were omitted from the latter act in quoting the statute as amended after the words "so as to read as follows"; the two amendments not being inconsistent.

3. Ky. St. § 3665, empowering the circuit court to investigate and adjudge whether facts existed to authorize an ordinance of a town of the sixth class enlarging the boundaries of the town, is not unconstitutional, as conferring legislative power on the court.

Appeal from circuit court, Meade county.

"To be officially reported."

Petition by James W. Lewis against the town of Brandenburg, resisting the annexation of certain territory to the town. Judgment approving the annexation, and the petitioner appeals. Affirmed.

Chapeze Wathen and Fairleigh & Straus, for appellant. Murray & Murray, for appellee.

**DU RELLE, J.** In 1896 the trustees of the town of Brandenburg passed an ordinance reciting that it was desirable and necessary to extend the boundary of the town on the east, north, and west so as to include a described boundary of land, and declaring that the trustees proposed to annex such described boundary, which ordinance was adopted and published in accordance with section 3664, Ky. St. Within 30 days from the adoption of the ordinance, the appellant, who was a resident and freeholder of the territory proposed to be annexed, as permitted by section 3665, Ky. St., filed his petition in the circuit court, setting forth reasons why the territory should not be annexed. Upon the trial the circuit court found as a fact that less than 75 per cent. of the freeholders of the territory had remonstrated, that the addition of the territory to the town would be for

its interest, and that such addition would cause no material injury to persons owning real estate in the territory sought to be annexed, and approved the annexation. Appellant seeks a reversal here upon two grounds: First, that the trustees who adopted the ordinance did not constitute a legal board of trustees, and the ordinance was therefore void; and, second, that the act under which it was attempted to annex the territory was unconstitutional, as being in violation of section 28 of the present constitution,—these being the only grounds urged for reversal in this court. Though other contentions appear to have been made in the circuit court.

The petition states—and is not denied in this behalf—that no election had been held for the election of trustees by the voters of the town at the time of the adoption and passing of the ordinance, and that the persons who acted as trustees acted under an order of the court of Meade county appointing them trustees, and without other authority. The order of appointment recites that there being no election held for trustees at the last election, and vacancies existing, it was ordered that certain named persons be appointed the trustees for said town, who thereupon qualified; and it is claimed by appellant that the power of appointment to fill vacancies in such boards was given to the county judge, and not to the county court, by section 3092, Ky. St., being an amendment adopted March 19, 1894, to the act for the government of towns of the sixth class. By the original act (Acts 1891-93, p. 887, art. 7, § 20) it would appear that no provision was made for filling vacancies in the board of trustees, except by the board itself. By an amendment of March 16, 1894 (Acts 1894, p. 187), the section referred to was amended by adding the words: "And if, from failure to elect at the time fixed by law, or other cause, there shall be a vacancy in the entire board of trustees, then the county court of the county shall have power to appoint five trustees, who shall hold their office until the next regular election." This amendment is omitted from the Kentucky Statutes, possibly upon the theory that it was repealed by an act adopted three days later,—March 19, 1894 (Acts 1894, p. 215; Ky. St. § 3692),—by which it was provided that, "when a vacancy occurs in the board of trustees, the county judge may fill such vacancy by appointment until the next regular election." Appellant contends that the latter amendment took from the county court the power of appointment which had been given the court by the amendment adopted three days before, and conferred that power upon the county judge. On the other hand, it is argued for the appellee that the two amendments are perfectly consistent; the amendment of March 16th providing for the contingency of their being a vacancy in the entire board of trustees, in which event the county court was to have power to appoint five trustees to hold office until the next

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

regular election, while the amendment of March 19th provides that, "when a vacancy occurs in the board of trustees, the county judge may fill such vacancy by appointment until the next regular election," and that the provision for a vacancy occurring was obviously intended to apply to a vacancy caused by the death, resignation, or disqualification of some member of the board, and not at all to a case where there might be "a vacancy in the entire board of trustees," from a failure to elect (that is to say, when there was no board of trustees in being); that the grant of power to the county judge to fill a vacancy is not comprehensive enough to repeal by implication the grant of power to the county court to create an entire board of trustees; that the latter amendment is not specific enough to indicate a legislative intent to take from the county court the power of appointing an entire board, upon failure to elect; and that it would be an unfair construction to hold that the legislature, having given the power of appointment of an entire board to the county court, so that when exercised it became matter of record, intended to take that power from a court of record by the grant of a less power to the county judge. The difficulty with this construction is that the second amendment provides for amending the section "by adding thereto the following words: \* \* \*, so that said section as amended will read as follows," and that the language following excluded the addition made by the first amendment to the original section. This objection is met, however, when we consider that if to the original section, as amended by the act of March 16th, there be added the language provided to be added by the act of March 19th, it will not make the section "read as follows," viz. as it is provided it shall read by the act of March 19th, and that the latter act does not provide for striking out of the section the words which three days before had been added thereto by the first amendment. And we have reached the conclusion that the two amendments, fairly construed, are not inconsistent, and effect should therefore be given to each. It is therefore unnecessary to consider what application the case of *Pence v. City of Frankfort* (Ky.) 41 S. W. 1011, bears to the case at bar, upon the question whether this is a collateral attack upon the exercise of power by de facto officers.

It is further urged by appellant that the act is unconstitutional as being a delegation to the circuit court of legislative power, and so within the inhibition of section 28 of the constitution, which forbids the exercise by persons being of one of the departments of government of any power properly belonging to either of the others, except where expressly directed or permitted by the constitution. A number of authorities are cited to show that the power of establishing municipal corporations, and enlarging and contracting their boundaries, is legislative in its nature; and

the case especially relied on is *Forsyth v. City of Hammond*, 18 C. C. A. 175, 71 Fed. 443, from Indiana. The statute of Indiana provided that the board of county commissioners might make the order of annexation of territory, and also provided for an appeal by either party to the circuit court from the determination of the commissioners; and it was held (syllabus) that "the determination, under such statutes, by boards of county commissioners, is a legislative function, which cannot be performed by the court, and hence the provisions of the statutes giving the right of appeal to the courts from such determination are unconstitutional and void." It might be suggested that if counsel is right in his contention that the statute now under consideration, in substance, gives a right of appeal to the circuit court from the legislative action of the board of trustees, and the Indiana case therefore applies, it would merely result in cutting off the appellant from the remedy which he himself has sought. It has been decided in *Morton v. Woodford* (Ky.) 35 S. W. 1112, that the power conferred by the legislature on the circuit court to establish towns was constitutional, and not in conflict with section 28; and it would seem that, so far as constitutional authority is concerned, the power to establish a town would include the lesser power to enlarge its boundary. Moreover, by section 59 of the constitution it is provided that "the general assembly shall not pass local or special acts \* \* \* to authorize the opening, altering, maintaining or vacating roads, highways, streets, alleys, town plats," etc. By section 156 it is provided that the organization and powers of each class of cities and towns shall be defined and provided for by general laws. Under the latter section the statute was enacted which gave authority to towns of the sixth class to enlarge their boundaries, and by this general law the manner in which such annexation of contiguous territory was to be accomplished was fixed. It was provided first that an ordinance should be enacted and published, giving notice to the public of the intention of the board of trustees to annex the territory; then there was given, not a right of appeal to the circuit court, but, for the protection of the residents and freeholders of the territory proposed to be annexed, a right to a special proceeding, somewhat in the nature of an application for a writ of injunction, whereby, if the circuit court found the existence of certain specified facts alleged by the petitioner remonstrating, the town was prohibited from attempting to annex the territory for the space of two years. On the other hand, if the court found adversely to the contention of the petitioner its judgment did not work an annexation, but the judgment, when entered, was to "be certified to the legislative board of the city, who may thereupon annex to, or strike from, the city or town the territory described in the judgment." Granting, for the sake of argument,—

what we are by no means disposed to concede,—that under our constitution, with its evident purpose to take from the legislature its power of action by local statutes in such local matters as this, and confer it upon other bodies of magistracy, the power of enlargement of the boundaries of municipalities is a purely legislative power, it may be said that in this case it was conferred upon a legislative board, and that to the circuit courts was given, not the right of reviewing the legislative action of such board, but, by judicial investigation, to determine and adjudge whether facts existed which authorized such action by the local legislature. The judgment is therefore affirmed.

**WESTERN KENTUCKY ASYLUM v.  
WHITE.<sup>1</sup>**

(Court of Appeals of Kentucky. Nov. 23, 1898.)

**LUNATIC ASYLUMS—RIGHT TO SUBJECT PROPERTY OF PATIENT TO PAYMENT OF BOARD.**

Under Ky. St. § 257, providing that, where a patient who has been supported in a state lunatic asylum has or shall acquire an estate which may be subjected to debt, an action may be maintained in the name of the asylum to recover the patient's board and to subject his estate to the payment thereof, a pension collected from the United States government for a patient may be subjected, in the hands of his committee, to the payment of his board.

Appeal from circuit court, Green county.

"To be officially reported."

Action by the Western Kentucky Asylum against S. A. White, committee of George White, a lunatic, to subject money in the hands of defendant to the payment of the lunatic's board. Judgment for defendant, and plaintiff appeals. Reversed.

Henry & Woodward, for appellant. D. T. Towles and T. G. Poore, for appellee.

**PAYNTER, J.** In 1870 George White was, by appropriate proceedings, declared a lunatic; since which time he has been confined in the lunatic asylum, and the state has borne the expense of maintaining him. This action is based on section 257, Ky. St., which reads as follows: "Where patients, who have been or may be supported in either of said asylums, have or shall acquire estate which can be subjected to debt, the board of commissioners of such asylum, when reliably informed of the fact, is authorized and directed, in every such case, to sue for, in the name of the asylum, and recover the amount of such patient's board, at the rate of two hundred dollars per year, or so much thereof as such estate will suffice to pay for the time they shall have been respectively kept and maintained therein, and not otherwise paid for, and by proper proceedings to subject their estates, respectively, to the payment thereof.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

\* \* \* The net sum realized in such suits shall be paid over to the state auditor, who shall cover into the public treasury."

It appears from the averments of the petition that the committee has in his hands several hundred dollars which he has collected from the United States government as a pension allowed the lunatic, George White. The appellant is entitled to subject the money arising from the pension or any funds which may come into the hands of the committee to the payment of the claim in suit, and whatever sum may be recovered under this section goes into the public treasury, for the purpose of reimbursing the state for the expense incurred in the maintenance of the lunatic while confined in the asylum. The court erred in sustaining a demurrer to the petition. It should have been sustained to the answer. The judgment is reversed, with directions that the court set aside the order sustaining the demurrer to the petition, and for proceedings consistent with this opinion.

**BAKER v. COMMONWEALTH (two cases).<sup>1</sup>**  
(Court of Appeals of Kentucky. Nov. 17, 1898.)

**CRIMINAL LAW—REVERSIBLE ERROR—PEREMPTORY INSTRUCTION—FORMER CONVICTION.**

1. Errors not assigned as ground for new trial cannot be considered on appeal.

2. On a plea of self-defense a peremptory instruction could not be given.

3. A conviction of defendant for shooting J. cannot be pleaded in bar of his prosecution for shooting at F. on the same occasion.

Appeals from circuit court, Barren county.

"Not to be officially reported."

Sid Baker was convicted of maliciously shooting and wounding John Jackson, and of maliciously shooting at Frank Jackson without wounding him, and appeals in each case. Affirmed.

Herman Morris, for appellant. W. S. Taylor and M. H. Thatcher, for the Commonwealth.

**HAZELRIGG, J.** In the first-named case the appellant was found guilty of maliciously shooting and wounding John Jackson; the verdict being confinement in the penitentiary for five years. In the second case, which grows out of the first, and is in fact a part of it, appellant was found guilty of maliciously shooting at Frank Jackson without wounding him; the verdict being two years confinement in the penitentiary. The only grounds of complaint on this appeal in the two cases are that the court ought to have given a peremptory instruction to find the defendant not guilty, that the verdicts are contrary to law and the evidence, that the verdicts are excessive, and that the defendant has not had a fair and impartial trial. The additional ground in the second case is that the prose-

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

cution is barred by a former conviction. Learned counsel for appellant argues questions of evidence, and other alleged errors; but, as they are not set out in his motion for a new trial, we need not discuss them.

Appellant admits having shot John Jackson, who appears to have been wholly unarmed, and with whom appellant had no quarrel even, but only with his brother Frank. His plea was self-defense, but the contention is very slightly sustained by the proof. Besides, the question was with the jury. A peremptory instruction could not be given.

We cannot say that the verdict in either case is excessive, even if such a ground were permissible under the Code. Code Cr. Prac. § 271. Appellant had brought his pistol to a church-gathering of some kind, and left it at a convenient place, where, when the difficulty came up, he hurriedly repaired, and returned to renew the quarrel and engage in conflict.

The conviction of the appellant for shooting John Jackson cannot be pleaded in bar of the prosecution for shooting at Frank Jackson. The judgments are affirmed in both cases.

#### COMMONWEALTH v. CITY OF LOUISVILLE.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 19, 1898.)

##### TAXATION—PRIVATE PROPERTY OF A CITY—SUFFICIENCY OF ASSESSMENT.

1. Wharf property of a city, being of a private or proprietary character, is subject to taxation.  
2. Under Act May 23, 1890, the commonwealth may maintain an action against a city to recover taxes upon its wharf property, as such property cannot be seized and sold by a collecting officer.

3. Act May 23, 1890, authorizing an action by the state to recover taxes on property which cannot be seized and sold by a collecting officer, was not repealed by the revenue law of 1892.

4. Under Gen. St. c. 92, art. 6, § 12, providing that no error or informality in the description of property assessed shall invalidate the assessment if the property can, with reasonable certainty, be located from the description given, an assessment of the "wharf property" of a city is sufficient.

Appeal from circuit court, Jefferson county.  
"Not to be officially reported."

Action by the commonwealth against the city of Louisville to enforce a claim for taxes. Judgment for defendant, and plaintiff appeals. Reversed.

W. J. Hendrick, L. C. Woolfolt, and Junius C. Klein, for the Commonwealth. H. L. Stone, for appellee.

PAYNTER, J. The purpose of this action was to enforce a claim for taxes against the city of Louisville assessed upon its "wharf property." A municipality may have two characters of property,—one governmental, or public; the other private, or proprietary. *City of Louisville v. Com.*, 1 Duv. 295; *Roberts v.*

*City of Louisville*, 92 Ky. 95, 17 S. W. 210. The "wharf property" of the city of Louisville belongs to the latter class. *Id.* The property of a municipality which is of a private or proprietary character is subject to taxation. A municipality is compelled to pay taxes to the state upon its waterworks property. *City of Covington v. Com.* (Ky.) 39 S. W. 836; *Com. v. Makibben*, 90 Ky. 384, 14 S. W. 372. For the same reason that a city is compelled to pay taxes upon its waterworks property to the commonwealth, it is required to pay upon its wharf property. The waterworks property cannot be seized and sold by a collecting officer for taxes. *Louisville Water Co. v. Com.*, 89 Ky. 244, 12 S. W. 300; *Water Co. v. Hamilton*, 81 Ky. 517. Neither can the wharf property be seized and sold by a collecting officer for taxes. Therefore the commonwealth was entitled to maintain this action under the act approved May 23, 1890 (Acts 1880-90, vol. 1, p. 149). This act was not repealed by the revenue law of 1892. *Louisville Water Co. v. Com.* (Ky.) 34 S. W. 1064.

We think the property was sufficiently described by the officers making the assessments to authorize the enforcement of the claim for taxes. There certainly can be no trouble in locating the property assessed for taxation from the description of it which the officer making the assessment gave. Besides, section 12, art. 6, c. 92, Gen. St., reads as follows: " \* \* \* But no error or informality in the assessment, or in the description or location of the property, or in the name of the owner or party assessed, shall invalidate the assessment if the property can, with reasonable certainty, be located from the description given; and in case of such error and informality, the sheriff may receive the taxes, and by his receipt correct such error or informality." The commonwealth is entitled to recover the taxes for the five years preceding the filing of the petition. The judgment is reversed for proceedings consistent with this opinion.

#### TRAVELERS' INS. CO. OF HARTFORD v. EBERT.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 22, 1898.)

##### ACCIDENT INSURANCE—LIMITATION OF AGENT'S AUTHORITY—INSURANCE OF WOMEN AGAINST LOSS OF TIME.

1. A woman who purchased an accident ticket insuring her against loss of time is not bound by a limitation of the agent's authority, of which she had no notice, whereby he was authorized to insure women against death only.

2. Where an accident insurance ticket which was issued to a woman pursuant to an oral contract to insure her against loss of time, and paid for at the rate of such insurance, stipulated for indemnity both for loss of time and for death, and then recited, "Except that this ticket insures females against death only," the company was bound for the indemnity for loss of time by accident.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Appeal from circuit court, Barren county.  
"Not to be officially reported."

Action by Mrs. Alice (alias Mrs. Laura A.) Ebert against Travelers' Insurance Company of Hartford on certain accident insurance tickets. Judgment for plaintiff, and defendant appeals. Affirmed.

Pirtle & Trabue and Lewis McQuown, for appellant. Craddock & Sandidge and E. W. Hines, for appellee.

GUFFY, J. This action was instituted in the Barren circuit court by the appellee against the appellant, seeking to recover judgment against it upon two accident tickets issued to her in the sum of \$390 each. It is alleged in the petition that the appellant, by the terms of said contract in said accident tickets, agreed and promised that it would, in case of loss of time, pay to plaintiff—not exceeding 26 consecutive weeks, resulting to her from bodily injury effected during said 6 days, through external, violent, and accidental means, resulting independent of all other causes, immediately and wholly disabling her from transacting any and every kind of business—the sum of \$15 per week during the time she was so disabled, etc. The plaintiff also, by proper averments, alleged the receiving of the injuries, and the disabling effects thereof; and it is further stated that said ticket has these words printed in the body thereof: "Except that this ticket insures females against death only." Appellee further averred that, at the time said contract was made, she was a widow, and was well acquainted with said agent through whom said contract was made; that said agent knew her well at said time, and that she was engaged in business from which she derived a regular income, and upon which she was dependent for support, and this fact was well known to said agent; that it was at that time, and still is, the custom of defendant company to insure females so engaged in business against loss of time, as well as against death; that the agent through whom the defendant company made the contract sued on was authorized and empowered by the defendant in writing to insure females so engaged in business against loss of time, as well as against death; that the plaintiff applied for the ticket of insurance sued on for the purpose of securing insurance against loss of time, as well as against death, which said purpose was known to the agent of defendant through whom said contract was made; that it was the agreement between plaintiff and defendant that she should be insured against death, and also against loss of time, as is clearly shown by the stipulatory part of the contract sued on; but she says that the defendant had previously to the making of said contract furnished its said agent at Glasgow, through whom said contract was made, with blank form of policies of insurance to be filled out by him to suit each particular case; and that the defend-

ant, by its said agent, in reducing to writing the contract of insurance between plaintiff and defendant, used one of said blanks, and, by fraud or mistake (she does not know which), the said clause, "Except that this ticket insures females against death only" (which was printed in the blank form used), was permitted by defendant, through its said agent, to remain in and appear as a part of the contract of insurance sued on, when in fact and in truth the said clause was not a part of the contract of insurance between plaintiff and defendant, and was clearly in conflict with the previous stipulation of said contract, and the same was in this way inserted in said contract of insurance by fraud or mistake of the defendant, she does not know which. She says that the said ticket of insurance was taken in the hurry of travel, and she did not read the same, or know that said stipulation above quoted was in said contract until after she was injured. She says that the amount which she paid for said ticket was the amount which defendant was in the habit of charging for tickets insuring persons against loss of time, as well as death. Defendant demurred to the petition, which demurrer was overruled, and upon defendant's motion, over plaintiff's objection, the action was transferred to equity. The substance of defense interposed is that the tickets sued on do not authorize any recovery for loss of time, or, in other words, they were not indemnity tickets, and that no recovery could be had on account of the insurance except in case of death. It is further pleaded that the agent Pemberton had no authority to issue a ticket to plaintiff entitling her to indemnity for injuries or loss of time. After the issues were fully made up and proof taken, the court rendered a judgment in favor of the plaintiff upon each ticket for the sum claimed.

It is not seriously contended that plaintiff did not receive the injuries complained of, and if she had been entitled to indemnity, but what she suffered loss, and would have been entitled to the judgment prayed for; nor is it contended but what plaintiff could recover the amount specified in each ticket to the extent she was entitled to recover at all. The material part of the ticket reads as follows: "Travelers' Insurance Company of Hartford, Conn., for the terms fixed by the coupons still attached hereto against loss of time, not to exceed twenty-six consecutive weeks, resulting from bodily injuries effected during the term of this insurance through external, violent, and accidental means, which shall, independently of all other causes, immediately and wholly disable him from transacting any and every kind of business, or in the event of death solely therefrom within ninety days, will pay the principal sum to his legal representative: EXCEPT that this ticket insures females against death only; does not insure persons under 16 or over 70 years old, employes on public conveyances," etc.; the latter part containing a

great many exceptions, and, except the word "except," in very small type. The preponderance of the evidence establishes the fact to be that the plaintiff contracted for indemnity for loss of time; and also, according to one of the books of the company, that she was entitled to such indemnity, provided she had made application for insurance for a sufficient length of time, and that the same had been issued by proper authority, which contract, it is claimed, the agent had no authority to make.

It is insisted for appellant that the agent, Pemberton, had no authority to make such a contract as the one claimed by appellee, and, further, that, as the contract contained the exceptions mentioned, she must be bound thereby. It is evident that the agent was authorized to issue accident policies of some kind, and it nowhere appears that appellee had any notice or information to the effect that his power in that respect was limited; hence we are of opinion that the appellant is bound by the representations and contracts in respect to insurance made by any agent authorized to make any contract of insurance. It would be unreasonable to expect the community at large to be cognizant of the authority and restrictions which an insurance company might impose upon an agent; and we deem it no more than reasonable and just that appellant should be bound by the contract and representations of its agent in respect of the kind of insurance sold to the appellee, and for which the agent received pay. It will be further seen from the ticket of insurance that it is a complete contract to insure appellee against loss of time not exceeding so many weeks. It is true, after that stipulation is clearly expressed, that the word "except" is printed in large letters, followed by numerous exceptions which would defeat a right of the insured to recover, none of which tend to defeat appellee's right save the fact that she was a female. The face of the receipt clearly shows that the agent knew that the insured was a female, and he specifically insured her against loss of time; and it would be a harsh and unreasonable rule that would require her or her son, who acted to some extent for her, to examine the ticket fully to see whether it was a palpable contradiction of the contract entered into verbally and also reduced to writing. No such diligence should be required of a person in the hurry of travel. It is perfectly manifest from the proof in this case that the appellee thought at the time of the trade that she was purchasing indemnity insurance, and that her son so thought, and that he received and paid for the tickets under that belief; and it also appears from the testimony of Allen and others that the agent himself, after the appellee received the injury, was of the opinion that she was entitled to indemnity, and read, from one of the books of the company, rule 37, to show that she was so entitled. It is true, however, that the agent explains that, and, among other things,

says that he had the wrong book, and that he made these statements without due deliberation or consideration. Taking into consideration the law and the facts in this case, we are of the opinion that the judgment of the court below is fully sustained, and the same is affirmed, with damages.

#### ANDERSON v. LIKENS.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 19, 1898.)

ELECTIONS—TIME FOR NOTICE OF CONTEST—MANDAMUS TO COMPEL RECANVASS BY CANVASSING BOARD—AMENDMENT OF NOTICE—STATEMENT AS TO RETURNED BALLOTS—FAILURE OF CLERK TO WRITE NAME ON BALLOT—TEMPORARY ABSENCE OF ELECTION OFFICERS—ORAL TESTIMONY AS TO MAKES ON DESTROYED BALLOTS—STAMPING OF BALLOT BY ELECTION OFFICERS—DEFECTIVE CERTIFICATE ON STUB BOOK—CHANGE OF VOTING PLACE.

1. The issuance and delivery of the triplicate certificates of election provided for in Ky. St. § 1508, is "the final action of the board of canvassers," within 10 days after which notice of contest of the election of a circuit court clerk must be given, as provided by section 1535; and a notice given after the issuance and delivery of such certificates is not premature, though the canvassing board made its finding without canvassing certain ballots returned by the election officers.

2. After a candidate has given notice of contest, he does not forfeit his right to contest by applying for a writ of mandamus to compel the canvassing board to reassemble and count certain ballots which have not been canvassed.

3. Where sealed envelopes containing ballots returned by the election officers were not opened by the canvassing board, the circuit court had not jurisdiction, in a proceeding instituted by a candidate, after he had given notice of contest, to determine and direct the canvassing board what ballots contained in such envelopes should be counted, or how they should be counted; and its judgment attempting to do so did not conclude either party on the trial of the contest.

4. Under Ky. St. § 1535, providing that notice of contest shall state the grounds of the contest, "and none other shall afterwards be heard as coming from such party," where the original notice assigned as grounds of contest that the ballots of certain voters were stamped by the officers of the election at certain precincts without the previous oath of the elector of his inability to read the English language, an amended notice containing the names of additional electors whose ballots were stamped under the same circumstances was properly rejected.

5. Under Ky. St. § 1482, providing that doubtful ballots returned by the election officers shall be accompanied "with a true statement as to whether they have or have not been counted, and if counted, what part, and for whom," returned ballots cannot be considered, unless the required statement is full and complete, is made upon a separate paper, and signed by all of the officers of the election, and not merely by the clerk, and its relation to the particular ballot it refers to is clearly shown by attaching them together, or in some other satisfactory manner, and it is sealed up and returned to the clerk of the county court with the returns.

6. The vote of a precinct will not be rejected because the clerk has failed in several in-

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.



stances, as required by Ky. St. § 1471, to write his name on the back of the ballot before handing it to the elector, and in other instances his name was written by another officer; there being no evidence that either candidate was prejudiced thereby.

7. Under Ky. St. § 1469, requiring the polls to be kept open continuously from 7 o'clock in the forenoon until 4 o'clock in the afternoon, the temporary absence of the officers does not render the election void, in the absence of evidence that any elector was thereby prevented from voting, or that such absence was voluntary.

8. As the statute requires ballots, after being counted, to be destroyed, oral testimony cannot be received as to how such ballots were stamped.

9. Ballots stamped by the election officers without the electors being previously sworn as to their inability to read should be rejected.

10. The fact that the certificate of the officers required by statute to be made on the stub book was not signed by all of the officers does not authorize the rejection of the vote of the precinct, where there were duplicate certificates duly made out and signed by all of the election officers.

11. Under Ky. St. § 1443, providing that "if for any good cause the election cannot be held at the house appointed the judges of the election may, on the morning of the election, adjourn to the most convenient place, after having publicly proclaimed the change and posted notice of same on said house," where C., at whose house the last election had been held, because the original voting place had become unfit for the purpose, refused to allow the election to be held there, and it was held at the house of G., about a half mile therefrom, and about 50 yards from a public highway,—that being the nearest house that could be procured,—and notice of the change being posted prior to the time of election at the original voting place and at C.'s, the election was not void; there being a substantial compliance with the statute, and no evidence that any elector was misled.

Appeal from circuit court, Ohio county.

"To be officially reported."

Contest by G. B. Likens of the election of S. A. Anderson to the office of circuit court clerk. Finding by the contesting board in favor of the contestee, and appeal by contestant to the circuit court. Judgment for contestant, and the contestee appeals. Reversed.

Heavrin & Taylor and E. D. Guffy, for appellant. Ben D. Ringo, James S. Glenn, H. P. Taylor, and Sweeny, Ellis & Sweeny, for appellee.

LEWIS, J. S. A. Anderson and G. B. Likens being opposing candidates for the office of circuit court clerk of Ohio county at the November election, 1897, the canvassing board found the former had received 2,408 votes, and gave him a certificate of election, while the latter had received only 2,303 votes; and that finding was affirmed by the contesting board of the county. But the Ohio circuit court, to which an appeal was taken, adjudged that Likens had received a majority of 97 of all the votes cast for the candidates for circuit clerk at said election, and was duly and legally elected, that the certificate of election issued to Anderson by the canvassing board be canceled and held for naught, and

that he deliver possession of said office, and all the books, papers, and furniture connected therewith, to Likens. On the appeal from that judgment various questions arise, necessary to be determined by this court.

The first question we will consider is whether the notice of contest was premature. It appears that the finding of the canvassing board was made, and certificate of election issued and delivered to Anderson, November 5, 1897, and notice of contest was served on him November 13, 1897. But there were sealed envelopes, containing numerous ballots, returned from the various precincts to the clerk of the county court with the returns of the election, in compliance or attempted compliance with article 3, § 37, of the election law. Those envelopes not having been opened by the canvassing board, and the ballots therein counted or passed on, prior to its finding and delivery of certificate of election to Anderson, the Ohio circuit court, in a proceeding instituted by Likens November 27, 1897, caused the envelopes to be opened in court, proceeded to investigate the ballots in order to determine which of them should be counted and for which candidate counted, and thereupon caused a writ of mandamus to be issued, requiring the canvassing board to count said ballots in the manner and for the two candidates, respectively, as then adjudged by the court. It appears that the canvassing board, in obedience to said writ, on December 1, 1897, reassembled and counted said ballots, but the previous finding was not thereby changed. By section 1508, Ky. St., it is provided that within two days next after an election the sheriff shall deposit with the clerk of the county court the returns of the different precincts. On the next day the canvassing board, composed of the judge of the county court, the clerk thereof, and the sheriff, or one of his deputies, if he cannot act, is required to meet in the clerk's office between 10 and 12 o'clock in the morning, open and canvass the returns of such election, and issue triplicate or more written certificates of election, over their signatures, of those who have received the highest number of votes for any office exclusively within the gift of the voters of the county; one copy of the certificate to be retained in the clerk's office, another delivered to each of the persons elected, and the other forwarded by the county clerk to the secretary of state, at the seat of government. Section 1534 provides that the judge of the county court and two justices of the peace residing nearest to the court house in each county shall be a board for determining the contested election of any officer elected by the voters of the county or any district therein. Section 1535 provides that no application to contest the election of an officer shall be heard unless notice thereof, in writing, signed by the party contesting, be given, in the case of a circuit court clerk, within 10 days after the final action of the board of canvassers. Whether the notice of

contest in this case was premature depends upon when, in meaning of the statute, the final action of the board of canvassers, or in the language of subsection 2, § 1534, "the decision" of that board, occurs. It is plain to us that the issuance and delivery of the triplicate certificates provided for in section 1508, which follows the opening and canvassing of the returns as therein provided, is the final action of the canvassing board, and, to maintain a contest, the party contesting must give the required notice within 10 days next after that time. Moreover, we think, Likens having, in the manner provided by statute, acquired the right to contest, that right was not forfeited or waived by the institution of the proceeding for the writ of mandamus. Whether the Ohio circuit court had power to require the canvassing board to reassemble and count the ballots contained in the sealed envelopes, as directed by the court, we need not now determine, because the previous finding was not changed or affected thereby. Nor, for the same reason, would it be indispensable for us to now determine whether the Ohio circuit court had jurisdiction to open said envelopes, and adjudge what ballots were fit to be counted, and how they should be counted, if counsel had not earnestly contended that judgment was final, and had concluded both parties as to the manner in which the ballots should be counted. While the Ohio circuit court had jurisdiction to hear an application for a writ of mandamus, if applied for in due time, and to command the canvassing board to open the sealed envelopes and canvass the ballots therein contained, we are clearly of the opinion it did not have jurisdiction, at that stage of the case, and in that character of proceeding, to determine and direct either what ballots contained in said envelopes should be counted, or how they should be counted. Consequently the judgment did not conclude either party; for the mode and time of judicial investigation as to the meaning, legality, and regularity of the ballots thus required to be sealed up and returned to the clerk of the county court as the statute provides is by appeal to the contesting board, evidently intended to be invested with judicial functions, thence by appeal to the circuit court, and thence to the court of appeals.

2. The next question is whether contestant (now appellee) had the right to file the amended notice that was not given until December 6, 1897, which both the contesting board and circuit court refused to hear. It seems to us, subsection 1, § 1535, is decisive of that question; being as follows: "The notice shall state the grounds of the contest and none other shall afterwards be heard as coming from such party." But it is contended the amended notice in question did not, nor was intended to, contain additional or other grounds of contest, but merely to make more specific the grounds already stated. Some of the grounds, as set out in the original notice, were that the

ballots of various designated voters were, by officers of election at certain precincts, stamped without the previous oath of such elector of his inability to read the English language, required by section 1475 to be made. The amended notice contained the names of additional electors whose ballots were stamped under the circumstances mentioned. Ordinarily such an amendment would be allowable and just, but, looking to the manifest policy and purpose of the statute, we are satisfied that the amended notice comes within the inhibition of subsection 1, § 1535. That policy is to require the proceeding for contesting the election of an officer, for public reasons, to be commenced as soon as practicable after the final action of the canvassing board, and terminated by judicial decision, without continuances or delays usually tolerated in litigation of other matters.

3. Of the whole number of ballots contained in the sealed envelopes referred to, the lower court, upon appeal from the contesting board, adjudged that 15 be counted for Likens, and 2 for Anderson. But it appears from an inspection of those ballots that none of them were accompanied "with a true statement as to whether they had or had not been counted, and if counted what party and for whom," as required by article 3, § 37. There was no statement at all in relation to any of them, except five or six; and the statement as to each of them was not only meager, but was signed alone by the clerk of the election, and not all of them signed by him officially. We think the statement should be full and complete, as required by the statute, and signed officially by all the officers of the election. Moreover, section 1476 seems to prohibit such statement being made upon the ballot itself, as was done by the clerks in the cases referred to. Consequently the statement, in order to carry with it verity, must be made upon a separate paper, signed by all the officers of the election; and its relation to the particular ballot it refers to must be clearly shown by attaching them together, or in some other satisfactory manner, and sealed up and returned to the clerk of the county court with the returns of the election. Questions as to the fitness of some of the ballots contained in the sealed envelopes to be counted, and for whom counted, were decided by the lower court, and have been argued by opposing counsel in this court. But as, for the reasons stated, none of them afford competent evidence of any fact, or can be considered for any purpose, we need not discuss or determine any question relating to the efficacy or meaning of any of them.

4. Another ground of contest is that at one of the precincts the clerk failed in several instances, as required by section 1471, to write his name on the back of the ballot before handing it to the elector, and in other instances the name of the clerk was actually written by another officer. As there is no evidence—even if, in absence of the destroyed

ballots, any could be heard on the subject—showing that the nonperformance or improper performance of that duty was prejudicial to either candidate, we do not think it would be proper to do the only thing that could be done in such case; that is, throw out the entire vote of that precinct.

5. Another ground of contest is that at two or more precincts some of the officers of election were absent from the polling places while the election was being held. Section 1469 requires the polls to be opened at 7 o'clock in the forenoon, and kept open continuously up to, and closed at, 4 o'clock in the afternoon of the same day; and not only was the presence of all the officers contemplated, but it is the implied duty of each one to be present while the polls are open. But the evidence does not show for which one of the parties to this contest, during the absence of any one of the officers of election, votes were given, nor that any elector was hindered or prevented from voting by reason of the temporary absence of any one of the officers, or that such absence was not involuntary. The court therefore is, we think, not authorized for that reason alone to throw out the vote of an entire precinct, and thereby deprive the electors of their right of suffrage. Punishment, if inflicted at all, must be, not upon the voters, but upon the officers who have neglected or violated the duty imposed upon them by law. We do not, however, decide that such conduct of officers of an election might not be so flagrant or fraudulent as to wrong one or another of opposing candidates, and defeat a free and fair election.

6. There is evidence showing that at two of the precincts 15 ballots were counted for Anderson, although the cross was stamped by the several voters, not in the square containing the Republican device, nor in the small square containing the name of Anderson, but alone in the square containing the name of James G. Bailey, candidate for clerk of the court of appeals, and whose name was at the head of the Republican ticket; the name of Anderson being on the same ticket below. There were also six ballots counted for Likens, stamped alone in the square containing the name of Samuel J. Shackelford, candidate for clerk of the court of appeals, also at the head of the Democratic ticket. The lower court adjudged those ballots improperly counted, resulting in a gain of nine votes for Likens. All those ballots were destroyed by the officers of election, and consequently the manner in which they were stamped could be shown only by oral testimony, which it seems to be the policy of the law not to hear or consider in such case. It is true that this court has held, in the case of *Major v. Barker*, 35 S. W. 543, that it may be shown by secondary evidence that a ballot was stamped by officers of election without the previous oath of the elector required by statute, and, when the fact is thus established, the ballot, al-

though counted and destroyed, is to be treated as a nullity, and the vote deducted from the candidate receiving it.

In such case the act is expressly forbidden by statute, is always committed before the ballot is put in the box and counted, and could not be shown by the ballot, if present, but must be established, if at all, by oral testimony alone. But in what particular square of a ballot the cross has been stamped by the elector is shown by the ballot itself, and as the statute requires ballots, after being counted, to be destroyed, it would seem to be the legislative intention to exclude oral testimony as to how it had been stamped.

7. The evidence shows that 17 ballots, stamped at the various precincts by officers of election without the electors being previously sworn, were counted for Anderson, and 14 for Likens; making a net gain for the latter, according to proper finding of the lower court, of 3 votes.

8. It is made a ground of contest that at East Fordsville precinct, where Anderson received a majority of 55, the certificate of the officers required by statute to be made on the stub book was not signed by all the officers of the election. Upon that ground the vote of that precinct was by the lower court thrown out. But as there were duplicate certificates duly and fully made out and signed by all the officers of the election, and which were competent evidence of correct returns of that precinct, the defect of the original certificate did not render the election held at East Fordsville void.

9. It is contended that the election held in Bartlet precinct, which gave Anderson a majority, was invalid, and the vote thereof should be rejected. The evidence shows Bartlet's school house, the original place of voting, had become unfit for the purpose of holding an election, and the election of 1896 was held at Chapman's dwelling house. But he forbade the election of 1897 being there held, and consequently it was held at the Gray house, about one-half mile therefrom, and about 50 yards from a public highway. It satisfactorily appears that Gray's was the nearest house to Chapman's that could be procured; that written notices of the change were posted prior to the day of the election at Bartlet's school house and at Chapman's. It does not satisfactorily appear that any elector was misled or misinformed of the change, or failed to attend the election by reason of the change. The statute on the subject is as follows: "If for any good cause an election can not be held at the house appointed as the place of voting, the judges of the election may, on the morning of the election, adjourn to the most convenient place, after having publicly proclaimed the change, and posted notices of same on said house." Ky. St. § 1443. In our opinion, the law being substantially complied with, the vote of an entire precinct should not be rejected by reason of a change of the voting place,

where it appears, as it does in this case, that the place selected is the nearest that could be obtained to the former voting place, and when it does not appear either that the change was fraudulently made, or that any elector was thereby deprived of his privilege of voting.

It will be observed that, according to the evidence in this case that we deem competent, there should be deducted only three votes from the majority found by the canvassing board in favor of Anderson. Wherefore the judgment of the lower court is reversed, and the cause remanded for proceedings consistent with this opinion.

### THRUSTON v. PRATHER.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 17, 1898.)

#### WILLS—PROBATE OF CODICIL.

After a will has been probated, a paper which is not consistent therewith cannot be probated at a subsequent term as a codicil thereto.

Appeal from circuit court, Jefferson county.  
"Not to be officially reported."

Appeal by Ellen Thruston to the circuit court from an order of the county court refusing to admit a paper to record as a codicil to the will of Hamilton Pope. Judgment dismissing appeal, and the contestant appeals. Affirmed.

Matt O'Doherty and T. Burgevin, for appellant. W. S. Hogue, for appellee.

PAYNTER, J. The late Hamilton Pope died in November, 1893, leaving a widow. The appellant, Ellen Thruston, was his niece. On the 6th of December, 1893, a paper was probated as his last will and testament. It was written and signed by the testator, Pope, and reads as follows: "In the name of God, amen, I, Hamilton Pope, of the city of Louisville and state of Kentucky, do make this, my last will: Knowing, as I do, that my dear wife will make, at her death, such disposition of my property as would be acceptable to me were I alive, I give and devise to her, my said wife, Henrietta, all the real and personal estate I may die seised or possessed of in fee simple, absolutely and as fully as words can express it. I appoint her executrix of this will, and request that no surety be required of her. In witness whereof I hereto set my hand this 9th day of June, 1868." On March 27, 1894, another paper, which was written and signed by Pope, the testator, was probated in the Jefferson county court. It reads as follows: "In the name of God, amen, I, Hamilton Pope, of the city of Louisville and state of Kentucky, do make this, my last will: I give and devise to Hamilton Pope Prather my watch (which his father presented me), and its accompaniments, to be handed him when my wife, his grandmother, shall deem advisable. All the

rest and residue of my estate, real, personal, or mixed, legal or equitable, I devise absolutely and in fee simple to my dear wife, Henrietta, and I appoint her my executrix, and request the county court not to require security of her; and I also request that she will not return any inventory and appraisal of my personal estate. In witness whereof I hereto set my hand this 8th day of September, 1891." No appeal has been prosecuted from the orders of the county court admitting either of the above papers to record; neither have the orders been vacated or annulled. It will be observed that, by the paper which was first probated as the will of Pope, his entire estate was devised to his wife, Henrietta. The other paper, dated September 8, 1891, made the same disposition of his property, except that he gave his watch to Hamilton Pope Prather. Mrs. Pope died in 1895. She disposed of the estate by will, and the appellant, Ellen Thruston, was not a beneficiary to any extent under it. At the November term, 1895, the appellant began a proceeding in the Jefferson county court to compel the production of a paper which was claimed to be a codicil to the will of Hamilton Pope. It not being produced thereupon, she tendered and moved the county court to establish and admit to record a purported copy of the alleged codicil. It reads as follows: "To My Dear Wife: I am now old, in bad health, and very feeble, and have been hard run and despondent. I have maintained you in some style, and tried to gratify your desire to travel. I recommend when I am gone, which will not now be long, you will sell your home, my twenty acres, and my office, and, indeed, all I have, if necessary to maintain you. I am under no obligation to your family or mine. All I ask is, when you go, you will not leave all you have to yours, but that you will share it with Ellen Thruston." It is not dated, and the county court seems to have rejected it, upon the ground it was not made to appear that it was written subsequent to the date of the papers which had been probated as the wills of the testator. The appeal was prosecuted from the order of the county court refusing to admit the paper to record as a codicil to the will. The appellant chose to file what she termed a petition in this proceeding, setting out the facts substantially as we have stated them; and, further, alleged that the paper offered was dated after the execution of the papers which had been previously probated as the wills of the testator. The court sustained a demurrer to the petition, and dismissed the appeal, from which order this appeal is prosecuted.

It is urged by counsel for appellant that the paper offered is of a testamentary character, while counsel for appellee is equally earnest in urging that it is not of that character. Counsel for appellant also contends that the court erred in sustaining the demurrer and dismissing the appeal, because she was entitled to have a jury pass upon the question as to

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

whether or not it was a codicil to the will. Counsel for appellee contends that, although the testator may have written the paper, still the court was the judge as to whether it was of a testamentary character, and, if it correctly reached the conclusion that it was not of that character, then the appellant was not prejudiced because the court dismissed the appeal. The necessity of deciding these questions is obviated by reason of the opinion of this court in *Couchman v. Couchman* (delivered on the 16th of this month) 47 S. W. 838. If the paper in question is of a testamentary character, it is inconsistent with the one which was first probated as the will of Hamilton Pope, deceased. The order of the court admitting that paper to probate could not be assailed or affected by a proceeding to probate another one inconsistent therewith, as a codicil thereto. The only remedy against the order probating the will was that prescribed by the statute, which was either by appeal from it, or, in a certain state of case, by a proceeding in equity, neither of which remedies have been pursued in this case. As the question involved in this case is elaborately discussed in the *Couchman Case*, we deem it unnecessary in this opinion to again state the reasons which influenced the court to reach its conclusion. The judgment is affirmed.

**BOARD OF COUNCILMEN OF CITY OF  
FRANKFORT v. BANK OF  
KENTUCKY.**

**SAME v. FARMERS' BANK OF KENTUCKY.<sup>1</sup>**

(Court of Appeals of Kentucky. Nov. 18, 1898.)

**APPEAL AND ERROR—LIMITATIONS—COMPUTATION  
OF TIME.**

Under Civ. Code Prac. § 745, providing that "an appeal shall not be granted except within two years next after the right to appeal accrued," and section 681, providing that, "if a certain number of days be required to intervene between two acts, the day of one only of the acts may be counted," an appeal granted January 21, 1898, from a judgment rendered January 21, 1896, was in time.

Appeals from circuit court, Franklin county.  
"To be officially reported."

Actions between the board of councilmen of city of Frankfort and the Bank of Kentucky and the Farmers' Bank of Kentucky. From the judgments, the board of councilmen appeals. Motion to dismiss appeals. Overruled.

W. H. Julian and T. H. Crockett, for appellant. D. W. Lindsay and Humphrey & Davie, for appellee Bank of Kentucky. W. S. Pryor and John W. Rodman, for appellee Farmers' Bank.

LEWIS, C. J. In each of these two cases the judgment was rendered January 21, 1896, and

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

the appeal was granted by the clerk of the court of appeals, upon application of appellant, January 21, 1896. And now, in each case, a plea of limitation is filed, and motion made to dismiss the appeal, under section 745 Civ. Code Prac., which provides: "An appeal shall not be granted except within two years next after the right to appeal accrued." In *Smith v. Cassity*, 9 B. Mon. 192, where the decree was rendered on the 25th day of September, 1845, and writ of error sued out on the 25th day of September, 1848, it was held that the then existing statutory period of limitation (three years) had not expired; the court using the following language: "The universal rule of computing time from one day to another is to exclude one and include the other." But in *Chiles v. Smith's Heirs*, 13 B. Mon. 460, where the final decree was rendered October 18, 1848, and writ of error sued out October 18, 1851, it was held the limitation was complete. In that case the court said: "The rule in regard to the computation of time seems to be that, when the computation is to be made from an act done, the day in which the act was done must be included, because, since there is no fraction in a day, the act relates to the first moment of the day in which it was done. But when the computation is to be from the day itself, and not from the act done, there the day in which the act was done must be excluded." Both of these cases were decided before adoption of the Civil Code of Practice, section 681 of which is as follows: "If a certain number of days be required to intervene between two acts, the day of one only of the acts may be counted." Applying the rule of computation there prescribed to this case, it seems to us that appellant had the right to take the appeal on the 21st of January, 1898: for though, according to the rule laid down in the case of *Chiles v. Smith's Heirs*, January 21, 1896, when the judgment was rendered, which was the act done, must be included in the computation, necessarily, if any force or meaning is to be given to section 681, Civ. Code Prac., January 21, 1898, must be excluded. And, such being done, the appeal in each of these cases must be held to have been taken within two years next after the right of appeal first accrued. Motion overruled.

**LOUISVILLE & N. R. CO. v. EAKINS'  
ADM'R.<sup>1</sup>**

(Court of Appeals of Kentucky. Nov. 16, 1898.)

"Not to be officially reported."

Additional dissenting opinion.

For majority opinion, see 45 S. W. 529.

For former dissenting opinion, see 46 S. W. 496.

GUFFY, J. Since the filing of my dissenting opinion of June 15, 1898 (46 S. W. 496), a

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

petition for rehearing has been considered and overruled by the court. The majority opinion has, however, been modified by striking therefrom the following: "This entirely leaves out of view the fact that deceased necessarily applied a certain proportion of the money earned by him to his own support." This modification of the opinion, however, leaves the majority opinion open to the construction that damage to the estate of the decedent is all that can be recovered,—in other words, that no recovery can be had beyond the number of dollars that the decedent would earn over and above his necessary expenses of living,—and entirely leaves out of view any damages resulting to any person for the loss of the society or personal care or attention of the deceased. Such a construction is not, as I think, authorized by the language used in the constitution, or supported by reason or humanity. There can be no damage to the estate except in dollars, for the only meaning that can properly be attached to estate is money or property.

Section 241 of the constitution reads as follows: "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The general assembly shall provide how the recovery shall go and to whom belong; and until such provision is made the same shall form part of the personal estate of the deceased person."

It will be seen from the foregoing provision that the constitution uses the term, "in every such case, damages may be recovered for such death." But, if it be true that only the damage to the estate can be recovered, then it follows that in many cases no damages can be recovered, because the injured party would be incapable of adding anything to his estate, while in many other cases he or she could add nothing in excess of what was necessary for his or her support, and thus the decision of the court would, in effect, destroy a plain provision of the constitution. It will be further seen, from the provision of the constitution, that it was not intended by the framers of the constitution that the damages should constitute necessarily any part of the estate of the decedent, because it is provided that the general assembly may provide how the recovery shall go, and to whom belong, with the further provision that, until such provision is made, the damages shall form part of the estate of the deceased person, the latter provision evidently being inserted to prevent confusion until the legislature acted. It seems clear to me that the rule announced in the majority opinion is in conflict with the plain meaning of the constitution, and also inequitable, because in

many instances the survivor would not be seriously injured except on account of the loss of the society of the decedent, but would nevertheless be entitled to have a large judgment. For instance, a judge of the supreme court of the United States earns at least \$10,000 a year for life, and \$2,000 for personal expenses, I take it, would be a very liberal allowance, and, if his expectation of life was 15 years, the damage to his estate by the destruction of his life could not be less than \$120,000; while another man might not be able to earn more than \$1 per day, and more than one-half of that would be required for his support, and his expectation of life might be the same, while the recovery for his death could not exceed \$2,500, and yet, as a matter of fact, his death would entail more want and suffering upon those depending upon him than those in the former case. Again, many railroad presidents, and presidents of other large establishments, receive \$25,000 per year, and it is liberal to allow \$2,000 per year for their personal expenses, and, applying the same rule of damages, the recovery for the death of such a one would be \$345,000. It is perfectly clear that the estate would be damaged to that extent, unless we should assume that he would not be able all his life to earn such a salary. Similar results would attend the recovery in case of death of a great number of officers who hold during life. It seems to me that the framers of the constitution never intended any such results. The parties most interested in the life of another are the wife, husband, parent, and child, and evidently the framers of the constitution intended that they should be entitled to recover such damages as they sustained, and, as before indicated, the loss of society and personal protection is the chief element of damage. Can it be that the framers of the constitution intended that the husband or wife, although incapable of earning a dollar per month, might be killed by the negligence of some person, and the survivor be unable to recover any damages? I think not. It seems clear to me that the legislature, which met soon after the adoption of the constitution, understood the constitutional provision as I now understand it. Section 6 of the Kentucky Statutes provided for the enforcement of the constitutional provision, and thereby discharged the duty imposed upon it. Said section reads as follows: "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then in every such case, damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same, and when the act is wilful or the negligence is gross, punitive damages may be recovered, and the action to recover such damages shall be prosecuted by the personal representative of the deceased. The amount recovered, less funeral expenses and the cost of administration, and such costs about the

recovery, including attorney fees, as are not included in the recovery from the defendant, shall be for the benefit of and go to the kindred of the deceased in the following order, viz.: (1) If the deceased leaves a widow or husband, and no children or their descendants, then the whole to such widow or husband. (2) If the deceased leaves either a widow and children or husband and children, then one-half to such widow or husband and the other one-half to the children of the deceased. (3) If the deceased leaves a child or children, but no widow or husband, then the whole to such child or children. If the deceased leaves no widow, husband or child, then such recovery shall pass to the mother and father of deceased, one moiety each, if both be living; if the mother be dead and the father living, the whole thereof shall pass to the father; and if the father be dead and the mother living, the whole thereof shall go to the mother; and if both father and mother be dead, then the whole of the recovery shall become a part of the personal estate of the deceased; and after the payment of his debts, the remainder, if any, shall pass to his kindred more remote than those above named, as is directed by the general law on descent and distribution."

It will be seen from the section supra, that after the payment of funeral expenses and the cost of administration, and such costs about the recovery, including attorney's fees, as are not included in the recovery from the defendant, the amount recovered shall go, first, to the widow or husband, in the event that the deceased left no children or descendants; but if the deceased leaves a widow and children, or husband and children, then one-half to such widow or husband, and the other to the children, of the deceased. Further provision is made, in the event of the deceased leaving neither descendant, widow, nor husband, that the recovery shall pass to the mother and father; and, in the event that the deceased leaves none of the relatives mentioned, it is provided that the recovery shall become a part of the personal estate of the deceased, and, after the payment of his debts, the remainder, if any, shall pass to his kindred, under the general law of descent and distribution.

Thus, it will be seen that the legislature utterly failed to recognize or treat the damages as a part of the "personal estate" of the decedent, in the common acceptation of the term. It is further provided in the section supra that when the act is willful, or the negligence gross, punitive damages may be recovered. If the true meaning of the constitution is that the damage to the estate of the decedent is all that can be recovered, then it must follow that no punitive damages can in any case be recovered, for it is impossible for the willfulness or grossness of the act to increase the damage to the estate. When a party is dead, his capacity to earn money is effectually and entirely destroyed, and the damage to his es-

tate can neither be increased nor decreased by the character of the act causing his death. The mental anguish to the widow, husband, parent, and children may be increased because of the grossness or willfulness of the act, and, indeed, such would always be the case, but the character of the act can in no wise affect the estate.

The court below in the case at bar authorized the jury to find for the plaintiff the damages sustained by the widow and children, not exceeding the amount sued for, which instruction is condemned by the majority opinion. It is suggested that they are not parties to the suit, but we have seen, from the statute heretofore quoted, that they were the chief beneficiaries, or, in other words, entitled to most of the recovery, and, in my opinion, the prime object of the provision in the constitution was for the benefit of the surviving widow, husband, parent, or children. Some quotations from decisions of other states are embodied in the majority opinion in support of the opinion. It does not appear whether or not the decisions referred to were rendered under such provision as we find in our organic and statutory law. I therefore assume that such was not the case, but, if my assumption is wrong, I still have no hesitancy in holding that such opinions are radically wrong. I think it was the intention of the framers of the constitution that all damages that a survivor sustained by the loss of life, as specified in the constitution, should be recovered, and that it was the intention that the loss of society, care, and protection reasonably given and expected to be given by the decedent should be considered in estimating the damages, and therefore the plaintiff in such case should be allowed to prove whether the decedent left a companion, or children or parents, and that the damages suffered by such bereft relative should be recoverable. Such a rule would be fair, reasonable, and humane. Where there are no such relatives as those mentioned in the statute, a money consideration, or, in other words, the damages to the estate, would be the just and proper criterion: for, as a rule, a creditor or distant relative would sustain no damage except to the extent that the death of the party lessens the amount of money which he would leave for distribution.

It is difficult to understand how the estate of decedent is to be compensated for damages caused by the destruction of decedent's power to earn money. Estate is property. If the decedent owned an estate at the time of his death, the same remains. Estate is not a person capable of suing or being sued, nor can it be affected by sorrow or joy; hence I conclude that it cannot suffer damages nor be compensated. But I can understand how a husband or wife, parent or child, may be damaged by the death of a relative or companion and I can understand how some compensation might be made, and it seems to me that the constitution has provided that such injured

party may be compensated for not only the power of decedent to earn money, but for the loss of the society of decedent, which is often more valuable and desirable than the money he could earn. Take the case of a wife and children who have sufficient estate to enable them to supply every want or demand, the death of the head of the family would, so far as money is concerned, be little or no damage, although he was earning \$10,000 per year; but the loss of the society and protecting care of the decedent would be very great damage to the wife and children, and for such damage, it seems to me, they are entitled to recover. On the other hand, I can imagine the case of an old and infirm couple who have accumulated enough to live upon, but who are now unable to earn a dollar. It is possible, if not probable, that the wife may lose her life by the negligence or wrongful act of some one, and yet, as she has no capacity to earn money, no recovery could be had under the doctrine of the majority opinion, as I understand it, yet it cannot be denied that the damage to the bereaved husband would be very great. It appears clear to me that the constitution says that the husband is entitled to damages for the loss of his companion, and that enjoyment of her company is one of the elements of damages for which a recovery is allowed. The law is not harsh. If the killing be not the result of negligence or wrongful act, no recovery can be had. If it be the result of negligence or wrongful act, the wrongdoer should make reparation in all cases. If no recovery can be had except for the destruction of the power of the decedent to earn money, less the necessary cost of living, then there can be but little recovery in the great majority of cases, and in many cases there can be no recovery at all, while in a few cases the recovery must be immense. Section 54 of the constitution provides that "the general assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property." It appears to me that the majority opinion limits the recovery provided for by excluding one of the elements of damage, viz. loss of company, society, and association, which, to my mind, is usually the chief damage sustained by the party damaged. The importance of the questions involved is my only apology for this earnest, but respectful, dissent.

#### CHISM v. BARNES.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 16, 1898.)

##### LIMITATION OF ACTIONS—NEW PROMISE.

A promise to pay a debt barred by limitations will not be implied from a conditional or qualified acknowledgment of the debt.

"To be officially reported."

Petition for rehearing. Denied.

For original opinion, see 47 S. W. 232.

DU RELLE, J. The petition for rehearing is based upon a distinction between a new promise to pay a debt barred by the statute of limitations and a promise to pay a debt from which the debtor has been relieved by discharge in bankruptcy, and the cases of *Trousdale v. Anderson*, 9 Bush, 279, and *Warren v. Perry*, 5 Bush, 450, are especially relied on. But the evidence in the case at bar does not come within the ruling of either of those cases. In *Trousdale v. Anderson* the rule was thus stated: "It therefore follows that, in order to take a case like this out of the statute, there must be an express promise to pay, or an unqualified acknowledgment that the debt is a subsisting debt, which the party is willing to pay; and this promise or acknowledgment must be made to the party to whom the debt is owing, or his agent authorized to collect or control it." In *Warren v. Perry*, Chief Justice Robertson stated the law as follows: "As said by this court in the case of *Head's Ex'r v. Manner's Adm'r*, 5 J. J. Marsh. 256, it might have been well doubted whether, as an original question, a promise to pay a debt, barred by the statute of limitations, should be implied from a simple acknowledgment of the continued subsistence of the debt. But as therein concluded, on the score of mere authority, we now, from still longer recognition, repeat that an unqualified acknowledgment, without more or less, if clearly and satisfactorily proved, will be sufficient to imply a promise to pay. But the implication may be repelled by an act or circumstance indicating that, nevertheless, there was no intention unconditionally to waive the statute and to pay." The evidence in this case neither shows an express promise to pay, nor an unqualified acknowledgment that the debt is a subsisting debt, which the party is willing to pay; nor does it show an "unqualified acknowledgment, without more or less." On the contrary, the letter of Chism, while acknowledging the indebtedness, couples that acknowledgment with a qualification that, if he got a pension, and got enough to pay the debt, Barnes might look for his money, which necessarily rebuts any implication of an unqualified promise to pay. The same remarks apply to the evidence of Spear, appellee's attorney, as to an acknowledgment of the debt; for Spear distinctly stated that the acknowledgment was coupled with an offer of compromise, and a distinct statement that appellant could not pay more on it, and that the compromise proposed must be taken in full settlement of the debt. Nothing in the letter, in the testimony of Spear, or in that of the appellant, was sufficient to authorize the instruction given, by which the jury were told that they might imply a promise to pay from the acknowledgment recited in the testimony. The petition for rehearing is overruled.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.



**ROYER WHEEL CO. v. TAYLOR COUNTY**  
et al.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 23, 1898.)

**TAXATION—ASSESSMENT—EXCESSIVE VALUATION—FAILURE TO APPLY TO BOARD OF SUPERVISORS—INJUNCTION—INCREASE OF VALUATION BY STATE BOARD OF EQUALIZATION.**

1. Where the list of the taxpayer is at his instance made out by the assessor, he cannot complain that the assessment was made without the list having been previously furnished by him.

2. A taxpayer failing to ask a hearing by the board of supervisors, from whose decision he might have appealed to the county judge, cannot thereafter complain of excessive valuation.

3. A taxpayer, upon mere opinion of excessive valuation, cannot prevent, by injunction, the collection of taxes due the state or county.

4. Under Ky. St. § 1839, providing that "the fiscal court shall levy an ad valorem tax on all property subject to taxation within the county as assessed for state purposes," and section 1853, providing that, "where special taxes are levied to pay interest and bonds, the tax shall be collected by the officer whose duty it is to collect the state and county revenue, and at a time and in a manner provided for collection thereof," an increase of valuation by the state board of equalization applies to the county revenue and other special taxes as well as to state taxes.

Appeal from circuit court, Taylor county.  
"To be officially reported."

Action by the Royer Wheel Company against Taylor county and others to have plaintiff's tax list corrected. Judgment for defendants, and plaintiff appeals. Affirmed.

S. A. Russell, for appellant. H. S. Robinson, for appellees.

**BURNAM, J.** In this action appellant seeks to have its tax list corrected, upon the grounds that it was improperly assessed, and that the valuation placed upon its property is excessive. The proof as to the assessment is conflicting. The general manager of appellant testifies that the assessor of Taylor county, "or one of his deputies," called upon him for appellant's tax list just as he was starting to Lebanon; that he informed him that he had given a list to the town assessor, and that the list was satisfactory to the company, and, if that list would be satisfactory to him (the assessor) for the county assessment, it would be satisfactory to the company; that the assessor replied that he would accept the list as given in to the town, and that he relied upon this agreement on the part of the assessor, and was prevented thereby from going before the board of supervisors, as he did not know that any other valuation had been placed upon appellant's property until after the final adjournment of the board of supervisors. On the other hand, the deputy assessor testifies that he called upon the manager of appellant for its list soon after he began his duties as assessor

for the year, and that he declined to give it, on the ground that he was just starting to the town of Columbia; that subsequently he again called upon the manager for the list, who then informed him that he was going to Lebanon, and that he told witness to go ahead and take the list himself; and that, pursuant to these directions, he did go upon the premises of appellant, and make out a carefully itemized list of its property, fixing thereon a fair and reasonable valuation.

The statute provides that, after a taxpayer has given in his list, the assessor may fix a valuation thereon, but he has ordinarily no power to make the assessment without such list; and, if a taxpayer fails or refuses to give the list to the assessor, it is his duty to report the delinquent to the supervisors. But, if the list of appellant was made out by the assessor at the suggestion and instance of appellant, it cannot be heard to complain that the assessment was made by the assessor without the list having been previously made out and furnished by it; and this is a question of fact, which has been properly passed upon by the court below.

There is no contest made over the items assessed, the whole complaint being that the valuation placed thereon is excessive. It was held in *Ward v. Beale*, 91 Ky. 60, 14 S. W. 967, that there was no revisory power to correct an assessment placed upon property after the board of supervisors had acted thereon; but after the opinion was rendered in that case the legislature, by the act of March 15, 1894, provided that, "if any taxpayer should feel himself aggrieved by the action of the board of supervisors, he may appeal to the county judge of the county within ten days after the final adjournment of said board."

It was the duty of appellant to furnish the list when called upon by the assessor, and, if it was not convenient for it to do so at that time, it should have made out a list of its property and furnished it within a reasonable time thereafter; and, if the valuation placed upon the property by the assessor was thought exorbitant, it had a right to a hearing before the board of supervisors; and, if it felt itself aggrieved by the action of the board of supervisors, it could have appealed to the county judge within 10 days after the final adjournment of that board. This is the remedy provided by the statute.

Besides, individual grievances as to assessment, which are founded only upon opinion that the property has been assessed too high, furnish no ground for enjoining the collection of taxes due either the state or county. See *Russell v. Carlisle* (Ky.) 8 S. W. 14. And the soundness of this position is evident. If taxpayers, upon a mere opinion of excessive valuation, can prevent, by injunction, the collection of the revenues due the state or county, confusion and inconvenience would speedily result therefrom.

It is also contended for appellant that.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

where the valuation of property is raised by the state board of equalization, the raise applies only to state taxes, and does not affect the valuation fixed upon the property by the county board of supervisors for the county revenue and other special taxes. Section 1839, Ky. St., provides that "the fiscal court shall levy an ad valorem tax on all property subject to taxation within the county as assessed for state purposes"; and section 1853 provides that, "where special taxes are levied to pay interest and bonds, the taxes shall be collected by the officer whose duty it is to collect the state and county revenue, and at the time and in the manner provided for collection thereof." There is nothing in the statute which indicates that county taxes should be collected upon a different basis of assessment from that upon which the state taxes are collected. On the contrary, it is evident that all these taxes, which are collected at the same time and by the same officer, must be levied and collected on the same assessment. By the failure of appellant to pursue the remedy provided by the statute, it has lost its right to complain where the sole ground relied on is excessive valuation. Wherefore the judgment is affirmed.

#### WHITTINGTON v. PENCE'S ADM'R.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 22, 1898.)

##### EXECUTION—LIABILITY OF SHERIFF FOR SALE OF EXEMPT PROPERTY—EVIDENCE.

1. In an action to recover damages for the sale by defendant, as sheriff, of exempt property under execution, the testimony of a witness that he offered to lend plaintiff the money to pay off the execution, and take a bill of sale for the property, which plaintiff declined, saying that, if he did so, he would lose his action against the sheriff, was inadmissible.

2. A peremptory instruction should have been given to find for plaintiff the value of exempt property sold by defendant, as sheriff, under execution, less the excess of sale bond over the amount of execution.

Appeal from circuit court, Nelson county.

"Not to be officially reported."

Action by E. A. Whittington against A. D. Pence's administrator to recover damages for the sale of exempt property under execution. Judgment for defendant, and plaintiff appeals. Reversed.

Geo. S. & John A. Fulton and C. T. Atkinson, for appellant. John S. Kelley, for appellee.

WHITE, J. This is the second appeal of this case. The opinion on the former appeal was rendered January 22, 1897. 38 S. W. 843. That opinion clearly states the facts. On the trial below, the court, over objection of appellant, admitted evidence of one Huston, who testified that he offered to lend appellant the money to pay off the execution, and take a bill of sale for the horse, which appellant declined

to accept; saying that, if he did, he would lose his action against the sheriff. This evidence was incompetent, and should not have been admitted. Its only effect could be to prejudice the jury against appellant. For the reasons given in the former opinion, we are of opinion that the peremptory instruction asked for should have been given to the jury, to find for appellant the reasonable value of the horse sold, less the sum of \$19.45, excess of sale bond. Judgment reversed and cause remanded, with directions to award a new trial, and for proceedings consistent herewith.

#### BROOKS et al. v. TROUTMAN et al.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 19, 1898.)

"Not to be officially reported."

Petition for rehearing. Denied.

For original opinion, see 47 S. W. 271.

PAYNTER, J. In adjudicating the rights of the parties to this controversy, it does not require the consent of the life tenant or the trustee of the remainder-men to enable the court to determine them. It is said in the petition for rehearing that the life tenant has not given his consent that his interest in the fund shall be estimated in fixing the liability of the representatives of his surety; and also that the trustee for the remainder-men does not desire the value of the interest of the life tenant to be ascertained. While this may be true, still the trustee comes into court, and seeks to fix the liability of the representatives of the surety in the bond, and recover whatever that amount may be. In doing this, the duty is imposed upon the court to ascertain what that liability is. The representatives of the surety do not owe the remainder-men one cent on the bond on account of the interest of the principal in the bond. When the trustee of the remainder-men seeks to appropriate the fund, he can only be adjudged the value of the interest of said remainder-men. The petition has been considered as the law requires, and is overruled.

#### LOUISVILLE & J. FERRY CO. v. COMMONWEALTH.

CENTRAL RAILWAY & BRIDGE CO. v. SAME.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 23, 1898.)

##### TAXATION—VALIDITY OF STATUTE—IMPOSING FRANCHISE TAX ON CORPORATIONS—FAILURE OF CORPORATION TO REPORT TO AUDITOR—SPECIAL LEGISLATION.

1. Ky. St. §§ 4077, 4078, requiring the corporations named therein, and every other corporation having or exercising any special or exclusive privilege or franchise, or performing any public service, to pay annually a tax on its franchise, in addition to the other taxes im-

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

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posed on it by law, and to make to the auditor, in such form as he may prescribe, a verified statement of certain facts, as a basis of the valuation of the franchise, are not unconstitutional.

2. Under Ky. St. § 4087, providing that any corporation willfully failing or refusing to make the report required by section 4078 shall be fined \$1,000, and \$50 for each day the same is not made after October 1st of each year, an indictment charging the failure to report by the time given, and also the continued failure to report, charges but a single offense.

3. To constitute a willful failure to report, it is not necessary that the corporation shall have actual knowledge of the law requiring the report.

4. Requirement of the statute that the auditor shall prescribe the form of report does not make it his duty to furnish that form to the party required to report.

5. The fact that the statute imposes upon corporations, for failure to report, a penalty different from that imposed upon an individual who fails to list his property for taxation, does not render it objectionable as special legislation.

Appeal from circuit court, Franklin county.  
"To be officially reported."

The Louisville & Jeffersonville Ferry Company and the Central Railway & Bridge Company were convicted of the offense of willfully failing to make to the auditor of public accounts certain reports, and they appeal. Affirmed.

George M. Davie, Humphrey & Davie, and D. W. Lindsey, for appellant Louisville & J. Ferry Co. C. J. Helm and W. W. Helm, for appellant Central Railway & Bridge Co. Robt. B. Franklin, for the Commonwealth.

GUFFY, J. These two appeals are by consent ordered to be heard together. The indictment in the first-named case charged the appellant of the offense of willfully and unlawfully failing to make and deliver to the auditor of public accounts of this state, between the 15th day of September and the 1st day of October, 1897, and for 117 days consecutively from and after the 1st day of October, 1897, the statement by law required, and by said auditor of public accounts prescribed, in order that the state board of valuation and assessment might determine and fix the value of defendant's franchise for the purpose of state and local taxation. The indictment in the last-named case accuses the appellant of substantially the same offense as that charged in the first-named case. The demurrer of the defendant to the indictment having been overruled, it entered a plea of not guilty, and by consent the law and facts were submitted to the court, without the intervention of a jury, upon an agreed state of facts. The defendant offered no testimony. The court found the defendant guilty, and fixed the fine at \$1,000, to which defendant excepted, and filed motion in arrest of judgment, which was overruled. The motion in arrest of judgment is in substance as follows: "Came the defendant, and moved the court to arrest judgment on its findings herein, because the indictment does not state facts con-

stituting a public offense,"—among other reasons, because the statute under which it is drawn and found, to wit, section 4085 of the Kentucky Statutes, is in conflict with the fourteenth amendment of the constitution of the United States. The grounds relied on for a new trial are, in substance: (1) That the court erred in overruling the demurrer to the indictment; (2) the court erred in not finding for the defendant, on defendant's motion, when the commonwealth rested; (3) that the finding of the court is not sustained by any evidence; (4) that the court erred in overruling defendant's motion in arrest of judgment. The motion for a new trial having been overruled, the appellant prosecutes this appeal.

In the first-named case the defendant filed a demurrer upon the following grounds: "(1) Because it appears from the indictment that the offense was not committed within the legal jurisdiction of this court; (2) because more than one offense is charged in the indictment; (3) because the facts stated do not constitute a public offense,"—which demurrer was overruled by the court, after which appellant moved the court to "require the plaintiff to elect which one of the several alleged offenses or causes of action set out in the indictment it will prosecute, to wit, whether it will prosecute the alleged offense of failing to file report, and fine of \$1,000 therefor, or whether it will prosecute the alleged offense of delaying the filing thereof, and the fine of \$50 per day therefor," which motion was overruled by the court. Afterwards the appellant entered the plea of not guilty. At the conclusion of the evidence for the prosecution, the defendant moved for a peremptory instruction to find defendant not guilty, on several grounds therein named, which motion was overruled; and at the conclusion of all the testimony the motion was renewed, and again overruled. A jury trial resulted in a verdict and judgment in favor of the commonwealth for \$2,500, and, appellant's motion for a new trial having been overruled, it prosecutes an appeal to this court. The grounds relied on for a new trial are, in substance, as follows: (1) The court erred in refusing to sustain the demurrer to the indictment herein; (2) the court erred in refusing to require the commonwealth to elect which of the two alleged offenses set up in the indictment it would prosecute therein; (3) the court erred in excluding from the jury competent and legal evidence offered by the defendant to be introduced to the jury in defendant's behalf; (4) the court erred in admitting evidence to the jury, over the objections of the defendant, which was incompetent, and the admission of which was injurious to defendant; (5) the court erred in refusing to grant the peremptory instruction to find defendant not guilty asked by the defendant at the close of the commonwealth's evidence; (6) the court erred in refusing to grant the peremptory instruction asked by the defendant at the close of all the evidence; (7) the court erred in refusing

to give to the jury instructions Nos. 1 to 15, inclusive, and each of them, asked by defendant, by which action the court refused to properly instruct the jury; (8) the court erred in giving to the jury instructions Nos. 1 to 3, inclusive, given by the court to the jury, and in giving each or any of them, by which the jury were misinstructed; (9) the verdict and judgment are not supported by any evidence, and there was no evidence before the jury to show any guilt on the part of defendant, and the verdict of the jury was against the evidence; (10) the verdict of the jury was rendered under the influence of passion and prejudice against the defendant, through misconduct of the jury. (11) The verdict and judgment are contrary to law, and defendant has not received a fair trial.

The statute under which this prosecution was instituted may be found in subdivision 1 of chapter 108, Ky. St. Sections 4077 and 4078 of said chapter read as follows:

"Sec. 4077. Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace-car company, dining-car company, sleeping-car company, chair-car company, and every other like company, corporation or association, also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the state, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The auditor, treasurer and secretary of the state are hereby constituted a board of valuation and assessment, for fixing the value of said franchise, except as to turnpike companies, which are provided for in section four thousand and ninety-five of this article, the place or places where such local taxes are to be paid by other corporations on their franchise, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the board of valuation and assessment, and for the discharge of such other duties as may be imposed on them by this act. The auditor shall be chairman of said board, and shall convene the same from time to time, as the business of the board may require.

"Sec. 4078. In order to determine the value of the franchises mentioned in the next preceding section, the corporations, companies and associations mentioned in the next preceding section, except banks and trust companies whose statements shall be filed as hereinafter required by section 4092 of this article, shall annually between the fifteenth

day of September and the first day of October, make and deliver to the auditor of public accounts of this state a statement, verified by its president, cashier, secretary, treasurer, manager, or other chief officer or agent, in such form as the auditor may prescribe, showing the following facts, viz.: The name and principal place of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a bona fide sale within twelve months next before the fifteenth day of September of the year in which the statement is required to be made; the amount of surplus fund and undivided profits, and the value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest on investments, and incomes from all other sources for twelve months next preceding the fifteenth day of September of the year in which the statement is required; the amount and kind of tangible property in this state, and where situated, assessed, or liable to assessment, in this state, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and such other facts as the auditor may require."

Section 4087 of said chapter reads as follows:

"Any corporation or officer thereof, willfully failing or refusing to make reports as required by this chapter shall be deemed guilty of a misdemeanor, and for each offense shall be fined one thousand dollars, and fifty dollars for each day the same is not made after October first of each year."

The questions involved in each case being substantially the same, they will now be considered together. The appellants allege a number of objections to the judgment, and assign numerous reasons for a reversal.

So far as the constitutionality of the law imposing the tax upon the appellant, and the manner of assessing the same, is concerned, it seems to us that the decision in *Henderson Bridge Co. v. Com.*, 90 Ky. 623, 31 S. W. 486, conclusively sustains the validity of the law, which decision was also affirmed by the supreme court of the United States. 166 U. S. 150, 17 Sup. Ct. 532. It is therefore unnecessary to again enter into a discussion as to the constitutionality of the act imposing such tax, or the validity of the law as to the manner of assessing the same. The statute in question being constitutional, it follows that the court properly overruled the demurrers, as well as the motion to elect. In our opinion, it was proper to indict not only for the failure to report by the day given, but also to include in the indictment the charge of continued failure to report; and it was proper to try the entire charge under one indictment, which in fact constituted one

offense. We do not think the court erred, to the prejudice of appellant's substantial rights, either in the admission or rejection of testimony, nor in refusing the peremptory instruction asked by appellant, either at the close of the commonwealth's testimony, or at the close of all the testimony.

It is very earnestly argued for appellant that it could not be guilty of the offense charged, unless it actually knew of the existence of the law requiring the report to be made, and that its failure to report should have been with that knowledge, and that the term "willful" necessarily means a deliberate determination to refuse to make the report, for the purpose of defrauding the state, or evading or hindering it in the collection of taxes. We are unable to concur in this view. The rule of law is universal which presumes all persons to know the law, and, if there be any exceptions to this rule, we are satisfied that the case at bar does not fall within them. The term "willful," as used in the statute, simply means the voluntary act of a party, as distinguished from coercion, or, in other words, that he was free to report or not to report; and the term "willfully fail" can, as we think, have no other rational construction. It may be that a party in fact believed that the report had been forwarded to the proper officer, or in fact might have been sent, and by accident failed to reach its destination, in which event it would be a failure to report, but would not be willful or intentional, for the reason that the party had in good faith attempted to comply with the statute.

It is further insisted for appellant that it was the duty of the auditor to notify the party required to report, and that until such notification had been received the appellant was not in default; and it is argued that, inasmuch as the law required the auditor to prescribe the form, the meaning is that he must furnish that form to the party required to report, thus notifying him that he is required to report. In the case at bar it appears that the auditor had prescribed a form for reports required by statute, but he had not notified the appellants thereof, nor mailed to them a copy of the prescribed form. We are not of the opinion that the statute is susceptible of the construction contended for by appellants. It seems to us that it would be impracticable, if not almost impossible, for the auditor to ascertain the name and location of every person in the state who is required by law to make reports required by the statute. The auditor is required to keep his office at the capital of the state, and it seems to us that the manifest intent of the law is that the reports must be made by the parties to the auditor, at the state capital. They certainly know where the auditor is located, and, as before remarked, all persons are presumed to know the law; hence it seems clear that the report should be made to the auditor, at his office in Frankfort, and the duty devolved upon him is merely to pre-

scribe the form in which the report should be made. It would certainly involve much labor and expense if the auditor was required to go or send throughout the state, and find the location of all the parties who come within the purview of the law in question, and demand of each that they make a report; and, unless the statute clearly required the auditor to perform such services, we are clearly of the opinion that he should not be required to take upon himself such a laborious duty.

The suggestion that the statute imposing the penalty upon appellants for failing to list or report is local or special legislation, because it is different from that imposed upon an ordinary citizen who fails to list his property for taxation, is not tenable, for the reason that it is not special in the sense of the constitution. This court, in *Stone v. Wilson*, 39 S. W. 49, in discussing local legislation, said: "Local" or "special" legislation, according to the well-known meaning of the words, applies exclusively to special or particular places, or special and particular persons, and is distinguished from a statute intended to be general in its operation, and that relating to classes of persons or subjects." In *Com. v. Taylor*, 38 S. W. 10, this court at some length discussed the same question, and reaffirmed the same doctrine announced in the case *supra*. The syllabus in the last-named case reads as follows: "The provisions of the constitution do not prohibit the assessment of property by any other person than the assessor elected in the county, but, on the contrary, provide that the legislature may abolish that office and provide that the assessment of property shall be made by another officer. The mode provided for assessment of distilled spirits is not a local or special act, within the meaning of section 59 of the constitution, but general in both purpose and detail." The parties required to make the reports in question may truly be said to constitute a distinct class from, and exercising many privileges not enjoyed by, the individual citizen; hence to require different duties, and impose different penalties for failure, is in no sense a violation of the state or federal constitution. The property of all persons, as well as appellants, is by law required to be assessed at its fair cash value.

Appellant complains of the refusal of the court to give to the jury the 15 instructions asked, but we are of opinion that the court did not err in that respect. Appellant also complains of instructions 1, 2, and 3 given by the court, which instructions are as follows, and correctly present the law applicable to the case: "(1) The court instructs the jury that the law requires that, in order to determine the value of the franchise of defendant company, it was incumbent on said company to make and deliver to the auditor of public accounts of this state between the 15th of September and the 1st of October, 1897, a statement, verified by its president, manager, cashier, secretary, treasurer, or other chief officer,

in such form as the auditor might prescribe, showing the following facts, to wit: The name and principal place of business of the said defendant; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which said stock was sold at a bona fide sale within twelve months next before the said 15th day of September, 1897; the amount of surplus fund and undivided profits, and the value of all other assets; the total amount indebtedness, as principal; the amount of gross or net earnings or income, including interest on investments, and income from all other sources, for twelve months next preceding the 15th day of September, 1897; the amount and kind of tangible property in this state, and where situated, assessed, or liable to assessment, in this state, and the fair cash value thereof, estimated at the price it would bring at a fair, voluntary sale; the length of the entire lines operated, owned, leased, or controlled in this state, and in each county, incorporated city, town, or taxing district in this state, and the entire lines operated, controlled, leased, or owned elsewhere; the gross and net income and earnings received in this state and out of this state on business done in this state; and the entire gross receipts of the corporation in this state and elsewhere during the twelve months next before the 15th day of September of the year in which the assessment is required to be made; and such other facts as the auditor may require. And if the jury believes from the evidence, beyond a reasonable doubt, that the said auditor of public accounts had prior to the 15th day of September, 1897, prescribed a form by which the said facts above indicated and set forth could be shown, and if the jury shall further believe from the evidence, beyond a reasonable doubt, that the defendant, in this county, and before the finding of the indictment herein, did willfully fail to make the report above indicated and set out, to the auditor of public accounts of this state, on or before the 1st day of October, 1897, they ought to find the defendant guilty, and fix its punishment at a fine of \$1,000. (2) If the jury find the defendant guilty, under the first instruction herein, and they shall further believe from the evidence, beyond a reasonable doubt, that the defendant willfully failed to make the report above set forth to the auditor of public accounts of this state for any number of days after the said 1st day of October, 1897, they may also impose a fine and penalty of \$50 for each day said defendant willfully failed to make said report after said 1st day of October, 1897, not exceeding 117 days. (3) Every fact and circumstance necessary to constitute the guilt of the defendant ought to be proven to the satisfaction of the jury, beyond a reasonable doubt; and, unless the defendant has been proven guilty beyond a reasonable doubt, they ought to find the defendant not guilty."

We deem it unnecessary to notice the other reasons assigned for a reversal. We have carefully examined the record, and perceive no error prejudicial to the substantial rights of the appellants; and the judgment in each case is affirmed, with damages.

DU RELLE, J., not sitting.

# CITY OF LUDLOW v. DETWELLER.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 19, 1898.)

## MUNICIPAL CORPORATIONS—INJURY TO PROPERTY IN GRADING OF STREET.

Under Const. Ky. § 242, providing that "municipal and other corporations and individuals vested with the privilege of taking private property for public use shall make just compensation for the property taken, injured or destroyed by them," the owner of abutting property may recover damages for injury to his property caused by the grading of a street, whereby the natural flow of water has been changed, or the ingress and egress to and from his property permanently interfered with.

Appeal from circuit court, Kenton county.  
"Not to be officially reported."

Action by Mary Detweller against the city of Ludlow to recover damages for injury to property. Judgment for plaintiff, and defendant appeals. Affirmed.

Walter T. Riddle, for appellant. James P. Tarvin, for appellee.

BURNAM, J. This suit was instituted by appellee against the city of Ludlow, alleging that she was the owner of a house and lot fronting Elm street, in that city; that appellant, in pursuance to an ordinance of its city council, caused the grade of Elm street in front of and adjoining her property to be raised from 10 to 20 feet; that without her consent it took possession of and appropriated from 20 to 25 feet of the entire end of her lot adjoining Elm street, by extending the footings for the embankment over it; that the natural flow of water has been turned in upon her lot; and that ingress and egress to and from her property have been permanently interfered with, to its material damage. Appellant's defense is that the fill was made with appellee's consent, and that there was no damage done to the lot by reason thereof for which she has a right of action; and it denies that the embankment complained of has interfered with the entrance to her lot, or that the natural flow of water has been changed to her damage. The case was tried out on these issues before a jury, and resulted in a verdict for appellee for \$550, from which judgment this appeal is prosecuted; divers errors being relied on for reversal.

It is the contention of appellant that appellee cannot recover for the actual invasion and appropriation of a part of her lot—First,

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

because the averments of the petition do not authorize any relief on this ground, and because the proof shows that plaintiff united in the petition to appellant to grade the street in front of her lot, and consented that the city might use the portion of her lot taken for the purpose of securing a footing for the necessary embankment, and that, upon a fair construction of the allegations of the petition, the suit is really only an action for consequential damages resulting from grading Elm street, for which no recovery can be had; and, second, that the verdict of the jury is excessive, and palpably against the weight of the evidence.

With respect to the averments of the petition, while it is somewhat indefinite, we think they are sufficient to authorize recovery, both for the land alleged to have been appropriated by appellant, and also for any other damages which she may have sustained by reason of the construction of the street in front of her property. It may be admitted, as contended by appellant, that under the rule as laid down by this court in *Keasy v. City of Louisville*, 4 Dana, 154; *Bridge Co. v. Foote*, 9 Bush, 284; *Wolfe v. Railroad*, 15 B. Mon. 323,—and other cases, municipal corporations, acting under legislative authority to grade streets, if they do not actually trespass upon or invade private property, and do the work with reasonable care and skill, were not liable to the adjoining owner, whose lands were not actually taken or invaded, for consequential damages to his premises. But this court in *City of Henderson v. McClain*, 43 S. W. 700, held that section 242 of the present constitution, which provides that "municipal and other corporations and individuals invested with the privilege of taking private property for public use, shall make just compensation for the property taken, injured or destroyed by them," made a change in the organic law of the state, and abolished the requirement of direct physical injury to the property in order to establish a claim for consequential damages, and required compensation in all cases where it appears that there has been some physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained special damages with respect to his property, in excess of that sustained by the public generally; thus changing the rule laid down on this subject in the cases relied on by appellant. But under the proof in this case the old rule contended for by appellant could have no application, as appellant did not keep within the limits of the street in making the improvements, but actually invaded and appropriated a part of appellee's lot; and the instruction given by the court submitted to the jury the question of waiver relied on.

The proof as to the amount of damage sustained by appellee, resulting from the appro-

priation of a part of her lot, and consequential injury thereto, is conflicting, and was properly submitted to the determination of the jury; and, after a careful reading of the proof, we do not feel authorized to say that the verdict is palpably against the weight of the evidence. Wherefore the judgment is affirmed.

#### OHIO VAL. RY.'S RECEIVER v. LANDER.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 19, 1898.)

"To be officially reported."

For majority opinion, see 47 S. W. 344.

BURNAM, J. The validity of the act of the legislature known as the "Separate Coach Bill" has been approved in a number of decisions rendered by this court; and the opinion of the United States supreme court in *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138, in which a majority of that court concurred, seems to finally settle the question as to the constitutional right of the states to pass such laws. If the question were an open one, I should feel it my duty to dissent in this case, as in my opinion the act in question is an unwarrantable interference with the rights of railroad companies to conduct their business in the interest of the general public, and to promote the safety and comfort of their passengers; is founded upon race prejudice, which tends to engender bad feeling between the white and colored races; and is, in its operation, prejudicial to the public welfare.

DU RELLE, J. It appears to be well settled by adjudicated cases that a railroad company may lawfully adopt a rule of conduct for its passengers in the terms of the separate coach law. It seems to me indisputable that whatever a carrier of passengers may do by regulation the government of the state may, in the exercise of its inherent police power, by law require the carrier to do. The policy of such a law, its ultimate purpose, or the reasons which led to its enactment, are not matter for our consideration. Whether a law is a justifiable exercise of the police power does not depend upon those considerations. That a judge differs with the legislature upon a question of policy does not authorize him to say that a law in pursuance of such policy is not a legitimate exercise of the police power of the state. For example, a judge may disagree entirely with the reasons which induce a legislature to adopt a quarantine law. He may believe that the disorder whose spread is thereby sought to be prevented is not infectious or contagious. Such belief, however, would not justify him in holding that the law was not within the inherent police power of the government. And so with re-

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

gard to the laws for the suppression of lotteries. Illustrations might be multiplied. So believing, and being further of opinion that the question is settled by the majority opinion of the supreme court in *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138, I concur with the conclusion reached in the opinion of this court. I do not at all concur in the views therein expressed of the policy or wisdom of the enactment.

### JOHNSON'S ADM'R v. JOHNSON.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 19, 1898.)

PERSONAL PROPERTY—LIFE ESTATE—EXCESSIVE VERDICT—REMITTITUR—PRESUMPTION ON APPEAL.

1. As a gift for the life of the donee may be made of personal property which will not be consumed in the use, a deed conveying to the grantor's wife for her life certain household and kitchen furniture, books, pictures, vehicles, and animals, passed to the grantee a life estate therein, the property reverting to the grantor on her death.

2. Where a verdict is excessive by reason of an error in the instructions directing the jury to find for plaintiff certain items to which he was not entitled, plaintiff may be required to reduce his judgment on the penalty of a new trial, if the amount of the items thus embraced can be ascertained from the proof, and defendant cannot then insist upon a new trial.

3. In the absence of the instructions and evidence, the court will presume, on appeal, that an order requiring the plaintiff to reduce his judgment, and thereupon overruling defendant's motion for new trial, was authorized by reason of error in the instructions directing the jury to find for plaintiff certain items which he was not entitled to recover, and that the amount of such items was ascertainable from the proof.

Appeal from circuit court, Fayette county.

"To be officially reported."

Action by R. F. Johnson against M. A. Johnson's administrator to recover certain personal property. Judgment for plaintiff, and defendant appeals. Affirmed.

J. R. Morton and Geo. Denny, Jr., for appellant. J. Henning Nelms, for appellee.

HAZELRIGG, J. Appellee, Johnson, who was the plaintiff below, claimed to be the owner of certain household and kitchen furniture, books, pictures, plate, silver, carpets, tables, and chairs, one piano, rockaway, rockaway horse, phaeton, milch cows, and other like articles, and which he averred had been sold by appellant, Robertson, claiming to be acting as administrator with the will annexed of Mildred A. Johnson, as well as acting in his own right, and the proceeds of which sale had been converted to Robertson's own use, to the damage of the plaintiff in the sum of \$2,000. The basis of his claim to the property or its value was stated to be that, having once been the owner of certain real estate and the personal property named, he had, many

years before, through the intervention of a trustee, conveyed the real estate and personal property to his wife, Mildred A. Johnson, for and during her natural life, as her sole and separate estate, with remainder over to their children so far only as the real estate was concerned. And it is appellee's contention that, having made no disposition of the personal property beyond the lifetime of his wife, Mildred A., such of it as remained at her death reverted to him, or belonged to him, because it had never been given away, except to the extent of its use to Mildred A. during her life. On demurrer the trial court sustained the appellee's contention, and on a trial of the remaining question of value the jury found for the appellee the sum of \$300. On appellant's motion for a new trial because of error of law in overruling his demurrer to the appellee's petition, and because the verdict was excessive, the court adjudged that the verdict was excessive, and that it would sustain the motion, and grant a new trial, unless the plaintiff would abate the judgment to the sum of \$201; and, further, that, if the plaintiff would abate his judgment to this extent, the court would overrule the motion. The plaintiff did so abate his judgment, and the court modified it accordingly, over the objections of both plaintiff and defendant; but only defendant is here complaining.

Two questions are presented: (1) Was the husband the owner of the property? and (2) did the court err in overruling the defendant's motion for a new trial, having determined that the original judgment was excessive?

In considering the first question, we are to ascertain merely the intention of the grantor in thus limiting the wife's interest in the personality to her natural life, and in not giving it to her absolutely, and in not disposing of it beyond her life, as he did with the real estate. In ascertaining this intention, we have to do with the circumstances surrounding the parties and the nature of the property, rather than with the technical rules of law. It may be conceded that, technically, an estate proper cannot be created in personal property, and hence there could not formerly be an estate for life in such property. But we understand it to be well settled now that gifts for and during the life of the donee or the life of another may be made of personal property; and, except when the nature of the property is such as that it will be consumed in its use, the donee shall have only the use for the specified term, and shall account for the body of the gift to the person entitled thereto. When the nature of the property is such as that its use means its consumption, then the donee takes it absolutely. It is not unlikely that some of the property in contest was of this nature. There is no bill of evidence, but it is certain that in the main it was not of such character. In *Major v. Herdon*, 78 Ky. 124, it was held that work stock and farming implements were not such things as would be consumed in their

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.



use, and a life estate in them was upheld for the benefit of the ulterior legatees. It was competent, therefore, for the grantor to give his wife a life interest merely in the property in contest, and this temporary interest is all she owned. This deed of gift was made in 1879, and there was no change of possession of the property, so far as the record discloses, but the husband and wife used and enjoyed it together until about the time of the wife's death, in 1894. The property as described in the deed is in the nature of the personal belongings of the head of the family. The conveyance, as recited in the trust deed, was made to the end that the wife and children of the grantor might have a "home." The grantor and his wife were then in the joint use and occupancy of the home and its complements, and continued to be for many years. We think it was his intention merely to make secure to the wife, so long as she lived only, these personal effects, and that he did not intend to surrender his final ownership thereto should she die before he did. Owning them absolutely, he merely surrendered to his wife a temporary use of them. They were hers for her life only, and at her death they belonged to the husband simply because he had not given them away.

On the second point involved, the appellant relies on the case of *Brown v. Morris*, 3 Bush, 81, where the lower court, conceiving that a verdict of \$4,000 in a case of malicious prosecution without probable cause was excessive, announced that he would grant a new trial unless the plaintiff would accept \$1,000 in satisfaction of his damages. The plaintiff did so abate his judgment, and this court held that this was error,—error to the prejudice of the defendant if he was entitled to a new trial, and error to the plaintiff's prejudice if defendant was not entitled to the new trial,—and that it was, in effect, an assessment of the damages by the court. The same conclusion was reached in the similar case of *Railroad Co. v. Earl's Adm'r*, 94 Ky. 370, 22 S. W. 607. But we have a different state of case before us here. There is no bill of evidence, and, while we must assume that the verdict of \$300 was excessive, we must also assume that the court from the proof was able to pick out the particular items constituting the excess, and discard them. We might assume the verdict was excessive because the jury had allowed to the plaintiff pay for certain articles for which he was not, under the proof, entitled to pay, in the opinion of the court; that, therefore, the excess could be remitted by the court, without an unwarranted interference with the province of the jury. In *Masterson v. Hagan*, 17 B. Mon. 325, it was held that a party might remit the excess in an excessive judgment, provided "the remainder shall not only be no more than, upon the law and evidence, the jury might have justly found, but shall be certainly no more than the verdict itself proves him to be entitled to by the principles of law applicable to

the case, and in obedience to which the remittitur is made." All possible presumptions are to be indulged in to support the action of the court in requiring this reduction. If the court's instructions, which are not before us, failed to require the jury to omit from their findings the value of such property as, by reason of its nature, vested absolutely in the wife, and it was ascertainable from the proof what amount had in fact been allowed by the jury on account of such property, then the court could properly have required a reduction of the judgment to the extent of the value of such property. And this question might properly be considered by the court on the motion for a new trial made by appellant on the ground of an excessive verdict, without in terms relying on erroneous instructions. We do not suppose, therefore, that the trial court undertook to revise or interfere with the values placed on the articles sued for by the jury, but rather that he reduced the finding by rejecting certain amounts allowed by the jury for articles which were not recoverable by the plaintiff under the proof. Whereupon the judgment is affirmed.

#### GAINS v. ÆTNA INS. CO.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 18, 1898.)

##### **LIBEL—MATTER ALLEGED IN ANSWER.**

Matter alleged in an answer, if pertinent and relevant, can never give a right of action for libel, though false and alleged with malice.

Appeal from circuit court, Henry county.

"To be officially reported."

Action by W. T. Gains against the Ætina Insurance Company for libel. Judgment dismissing petition on demurrer, and plaintiff appeals. Affirmed.

J. Harding, W. S. Pryor, W. B. Moody, and H. K. Bourne, for appellant. J. Barbour and J. D. Carroll, for appellee.

**WHITE, J.** The appellant, W. T. Gains, brought this action in the Henry circuit court against appellee, Ætina Insurance Company, for damages for libel. A demurrer entered to the petition was sustained, and the petition dismissed, and plaintiff appeals.

The petition, after charging that appellee is a corporation, and authorized to sue and be sued, alleges that in 1895 the plaintiff (appellant) instituted suit on a certain policy of insurance for the loss of tobacco, and that in that action the defendant (appellee) "filed an answer on the 11th day of May, 1895, and continuing in which it made the following false and malicious allegations of and concerning this plaintiff, to wit: 'Defendant, for further answer, avers that the barn and

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

its contents, including the tobacco insured, were destroyed either by the gross and reckless carelessness and negligence of the plaintiff, or were intentionally destroyed by him for the fraudulent purpose of rendering this defendant, and the other companies which had insured the barn and corn therein, and also the tobacco, liable for the amount of the insurance, which greatly exceeded the actual value of the property insured,—meaning by said language to charge the plaintiff, and thereby charging him, with the felonious offense of burning said barn and its contents, including the tobacco insured by the defendant, for the purpose of collecting from defendant and the other companies which had insured it the amount of insurance thereon. Plaintiff says that said allegations were false and absolutely groundless; that the defendant, by its aforesaid agents and attorneys, at the time of and before the composing, uttering, or publication thereof, knew they were false and without the color of truth or probability, and that they could not be sustained by proof. But in order to defame, injure, and ruin plaintiff, the defendant, by its said agents and attorneys, falsely and maliciously composed, uttered, and published said words of and concerning plaintiff, and maliciously used said legal proceedings, in bad faith, as a cloak to said libelous utterances, and that plaintiff was damaged thereby in the sum of ten thousand dollars.” It will be noticed that the petition is not defective in any way as to form, and, if the demurrer was properly sustained, it was because of substance. The allegations of the petition being taken as true on demurrer, it presents the question, does an action lie for false, malicious, and libelous matter contained in an answer filed in an action pending, if the party making such allegations acted in bad faith in making such allegations, and knew at the time and before that they were false and without color of truth or probability, and they were made in order to defame, injure, and ruin a plaintiff? Mr. Coolsey in his work on Torts (page 211), divides privileged communications into two classes. One, he says, are absolutely privileged, so that no action will lie. To this class are those uttered or written in judicial proceedings, when pertinent and relevant. The other class are those that are held to preclude any presumption of malice, but still leave the party liable if both falsehood and malice are affirmatively shown. Townsh. Sland. & L. § 221, says: “In a civil action, whatever the complainant may allege in his pleadings as or in connection with his grounds of complaint can never give a right of action for libel. The immunity thus enjoyed by a party complaining extends also to a party defending. Whatever one may allege in his pleadings by way of defense to the charge brought against him, or by way of countercharge, counterclaim, or set-off, can never give a right of action for libel. In such cases the

protection is absolute, and no one shall be permitted to allege that it was said or written with malice.” This same doctrine is asserted to by Odger in his work on Libel and Slander. Counsel for appellant, though strongly insisting that the demurrer should have been overruled; that the alleged libelous matter was not privileged, but actionable,—cites no authority or precedent for his position. We are of opinion that the demurrer was properly sustained. The paragraph of the answer objected to as libelous was certainly pertinent and relevant to the defense presented by appellee to that action, and though the allegations be untrue, and were known to be untrue when made, and also conceding that they were made with bad motives, still, for obvious grounds of public policy, no action will lie therefor. Their truth has been inquired into in the former case. We recognize the well-known doctrine that an action will lie for the malicious prosecution of a civil action, but this rule and its reasons could hardly apply to a defense. While a party may be liable for an unwarranted, malicious, and vexatious action begun by him, we know of no court holding that a party is liable for damages caused by a vexatious and spurious defense, even though it be for delay merely, to a just demand. If the defense presented be pertinent and relevant, and one permitted by law, a party has a right to make it, without subjecting himself to an action for libel if he fails to maintain it. This is absolutely privileged. There being no error, the judgment is affirmed.

#### CARROLLTON FURNITURE MFG. CO. v. CITY OF CARROLLTON.

(Court of Appeals of Kentucky. Nov. 19, 1898.)

“To be officially reported.”

Petition for rehearing. Denied.

For original opinion, see 47 S. W. 439.

Winslow & Winslow and Gaunt & Downs, for appellant. J. B. Duncan, for appellee.

PAYNTER, J. With more earnestness than discrimination, counsel for appellee declares in the petition for rehearing that the opinion delivered in this case is in conflict with five cases heretofore decided by this court, to wit: City of Louisville v. Com., 1 Duv. 295; Com. v. Makibben, 90 Ky. 384, 14 S. W. 372; Roberts v. City of Louisville, 92 Ky. 95, 17 S. W. 216; Clark v. Water Co., 90 Ky. 515, 14 S. W. 502; City of Covington v. Com. (Ky.) 39 S. W. 836. In the cases of City of Louisville v. Com., and Roberts v. City of Louisville this court recognized that a municipality may have two characters of property,—one governmental or public; the other private or proprietary. In the Roberts Case the court

held that "wharf property" belonged to the latter class. The opinion in the case under consideration does not hold otherwise, or even discuss the question as to whether the "wharf property" of the city of Carrollton is of a governmental or private character. It was held in *City of Covington v. Com., Com. v. Makibben, and Clark v. Water Co.* that a municipality is compelled to pay taxes to the state upon its waterworks property. In reaching this conclusion, of course the court recognized that the waterworks property was not essential to the government of a city; and further recognized the distinction, which had been recognized in previous opinions of this court, as to the character of property which a municipality might own. There is not an expression or a word in the opinion delivered in this case from which any one should conclude that it is in conflict with those to which we refer. In fact, none of the questions involved in those cases were discussed in the opinion delivered in this case. We hold that section 203 of the constitution was intended to apply alone to private corporations. The mere fact that a municipality may own property not used for public or governmental purposes does not make it a private corporation, nor does the fact that it may own property which a private corporation might own indicate that the constitutional convention intended section 203 to apply to municipalities. The evils which it sought to remedy are not such as have been ordinarily produced by municipal governments. This section is found in the constitution under a subdivision with a heading "Corporations." Every section under that heading relates to private corporations. There is a subdivision with a heading "Municipalities," but no such provisions as contained in section 203 are found under it. When we keep before us the distinction between a municipal and private corporation, it is easy to see that this section relates alone to private corporations. The distinction between these corporations is well stated in *City of Louisville v. Com.*, as follows: "But in this respect there is an obvious and essential distinction between municipal and private corporations. A private corporation, like a bank, or railroad, or turnpike company, is, in the technical sense, altogether personal. But a municipal corporation, like a state, a county, or the city of Louisville, is much more than a person. While nominally a person, it is vitally a political power, and each, in its prescribed sphere, is imperium in imperio. All are constituent elements of one total sovereignty. The city of Louisville, to the extent of the jurisdiction delegated to it by its charter, is but an effluence from the sovereignty of Kentucky, governs for Kentucky, and its authorized legislation and local administration of law are legislation and administration by Kentucky, through the agency of that municipality." The petition for rehearing in this case has been passed upon in the manner required by law, and overruled.

## STATE v. CLARK.

(Supreme Court of Missouri, Division No. 2.  
Nov. 7, 1898.)

HOMICIDE—INDICTMENT—INSTRUCTIONS—REASONABLE DOUBT—EVIDENCE—CONTINUANCE—JURY—APPEAL—REVIEW—BILL OF EXCEPTIONS.

1. An indictment for homicide which charges an assault with a pistol against Lizzie Clark, and the shooting and striking "of one Lizzie Hatch," is bad, as the assault and the battery must be alleged to have been made on the same person.

2. Where a person shoots at one person and kills another, malice will be implied as to the latter, and therefore the indictment must allege the assault as made on the person killed.

3. Where an indictment contains one good and one bad count, a general verdict will be held to be founded on the good count.

4. Where the court instructs only on one of two counts in an indictment, the other count will be presumed to have been abandoned.

5. An application for a continuance on the ground of absence of witnesses, which does not show that defendant is unable to prove the same facts by other witnesses, or what steps were taken to procure the testimony of the absent ones, or that the testimony is material, or that it can be procured, or that the witness was not absent by the connivance of defendant, or that the application is not made for vexation or delay, as required by Rev. St. 1889, § 4181, is properly denied.

6. A finding of fact by the trial court as to a jury list which was excepted to, being unauthorized, cannot be considered in reviewing the question.

7. Affidavits in support of an exception to a jury list are worthless on review, as such matters should be contained in the bill of exceptions.

8. Matters regarding an exception to a jury list, which are recited in the record instead of being brought up in a bill of exceptions, cannot be considered on review.

9. Where, after the discovery that in the jury list of the state the name of a juror who had been challenged for cause had been substituted in place of another juror, the mistake is immediately corrected, the error is harmless.

10. Where no exception is saved to a ruling on an objection, the question cannot be reviewed.

11. Accused, after his wife left him, broke into the house where she was staying, and shot her to death, in accordance with a threat which he had made on the same day. After the act he told a witness that he was not ashamed of what he had done. He remained in hiding for two days, and then escaped to another state. A number of witnesses testified that for several weeks after his wife left him, and before the crime, he had acted strangely, talked disconnectedly, refused to eat, and had become moody and melancholy. *Held*, that a verdict against defendant on the defense of insanity was proper.

12. Under Rev. St. § 4208, providing that "the court must instruct the jury, in writing, upon all questions of law arising in the case which are necessary for their information in giving a verdict, which instructions so given shall include, whenever necessary, the subjects of good character and reasonable doubt; and a failure to so instruct in cases of felony shall be good cause, where the defendant is found guilty, for setting aside the verdict and granting a new trial."—it is error to fail to instruct on reasonable doubt, whether such instruction is requested or not.

Appeal from criminal court, Jackson county; John W. Wafford, Judge.

Thomas Clark was convicted of murder in the first degree, and appeals. Reversed.

E. L. Snider, for appellant. The Attorney General and Sam. B. Jeffries, for the State.

SHERWOOD, J. The conviction in the case at bar was of murder in the first degree. The indictment was as follows: "The grand jurors for the state of Missouri, in and for the body of the county of Jackson, upon their oath present that Thomas Clark, whose Christian name in full is unknown to these jurors, late of the county aforesaid, on the 5th day of June, 1897, at the county of Jackson, state of Missouri, then and there being, in and upon one Lizzie Hatch, then and there being, feloniously, willfully, deliberately, premeditatedly, on purpose and of his malice aforethought, did make an assault, and with a dangerous and deadly weapon, to wit, a certain revolving pistol then and there loaded with gunpowder and leaden balls, which he, the said Thomas Clark, in both his hands then and there had and held, at and against her, the said Lizzie Hatch, then and there feloniously, willfully, deliberately, premeditatedly, on purpose and of his malice aforethought, did shoot off and discharge, and with the revolving pistol aforesaid, and the gunpowder and leaden balls aforesaid, then and there feloniously, willfully, deliberately, premeditatedly, on purpose and of his malice aforethought, did shoot and strike her, the said Lizzie Hatch, in and upon the body of her, the said Lizzie Hatch, then and there with the dangerous and deadly weapon, to wit, the revolving pistol aforesaid, and the gunpowder and leaden balls aforesaid, in and upon the body of her, the said Lizzie Hatch, feloniously, willfully, deliberately, premeditatedly, on purpose and of his malice aforethought, then and there thereby giving to her, the said Lizzie Hatch, one mortal wound, of which said mortal wound the said Lizzie Hatch then and there instantly died. And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Thomas Clark, her, the said Lizzie Hatch, in the manner and by the means aforesaid, feloniously, willfully, deliberately, premeditatedly, on purpose and of his malice aforethought, did kill and murder, against the peace and dignity of the state. And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge that said Thomas Clark, on the 5th day of June, 1897, at the county of Jackson and state of Missouri, then and there being, in and upon one Lizzie Williamson, alias Lizzie Clark, then and there being, feloniously, willfully, deliberately, premeditatedly, on purpose and of his malice aforethought, did make an assault, and with a dangerous and deadly weapon, to wit, a certain revolving pistol, then and there loaded with gunpowder and leaden balls, which he, the said Thomas Clark, in both his hands then and there had and held, at and

against her, the said Lizzie Williamson, alias Lizzie Clark, then and there feloniously, willfully, deliberately, premeditatedly, on purpose and of his malice aforethought, did shoot off and discharge, and with the revolving pistol aforesaid, and the gunpowder and leaden balls aforesaid, then and there feloniously, willfully, deliberately, premeditatedly, on purpose and of his malice aforethought, did shoot and strike one Lizzie Hatch, then and there being, on the body of her, the said Lizzie Hatch, then and there with the dangerous and deadly weapon, to wit, the revolving pistol aforesaid, and the gunpowder and leaden balls aforesaid, in and upon the body of her, the said Lizzie Hatch, then and there and thereby feloniously, willfully, deliberately, premeditatedly, on purpose and of his malice aforethought, giving to her, the said Lizzie Hatch, one mortal wound, of which said mortal wound she, the said Lizzie Hatch, then and there instantly died. And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Thomas Clark, her, the said Lizzie Hatch, in the manner and by the means aforesaid, feloniously, willfully, deliberately, premeditatedly, on purpose and of his malice aforethought, did kill and murder, against the peace and dignity of the state. Frank M. Lowe, Prosecuting Attorney."

1. The first count in the indictment is undoubtedly good. As much, however, cannot be said of the second. The evidence shows that Lizzie Hatch is the mother, and Lizzie Williamson, alias Lizzie Clark, is her daughter. Now, the second count charges an assault with a revolver upon Lizzie Williamson, alias Lizzie Clark, then the discharge of the pistol had and held against Lizzie Clark, alias Williamson, then the shooting and striking "of one Lizzie Hatch," etc. Who Lizzie Hatch is—whether she is the same person mentioned in the first count—we are not informed. If the words had been, "the said Lizzie Hatch," then, under the rulings in this court and elsewhere, the reference to the person mentioned in the first count would perhaps have been sufficient. *State v. Wagner*, 118 Mo., loc. cit. 629, 24 S. W. 219, and cases cited. But had the words "the said," etc., been used, the count would still have been insufficient, for the reason that, as the count stands, the assault is alleged to have been made on one person, to wit, Lizzie Williamson, etc., and the battery done upon another, to wit, Lizzie Hatch. But an assault is always necessary to be charged when a battery occurs in the perpetration of a murder. *Lester v. State*, 9 Mo. 666; 2 Bish. New Cr. Proc. § 537; Whart. Hom. § 808; 1 Whart. Cr. Law (9th Ed.) § 518; 1 Archb. Cr. Prac. 789. And, of course, both the assault and the battery must be alleged to have been made and done on the same person, or else there would be a murder perpetrated by means of a battery without an assault having first been made. But an objection still more grave confronts the validity of the count under review, because,

"where the party shoots at one man and kills another, malice will be implied as to the latter; and the felonious intent is transferred, on the same ground, where poison is laid to destroy one person and is taken by another. 1 Hale, P. C. p. 466." 3 Chit. Cr. Law, 729. And where the felonious intent is thus transferred, the indictment must be drawn accordingly, to wit, it must allege that the assault was made on the party murdered, and so on, in all respects, just as if the party killed had been the party shot at. So are all the precedents in this state and elsewhere. *State v. Henson*, 81 Mo. 384; *State v. Payton*, 90 Mo. 220, 2 S. W. 394; *State v. Jump*, 90 Mo. 171, 2 S. W. 279; *State v. Montgomery*, 91 Mo. 52, 3 S. W. 379; *State v. Gilmore*, 95 Mo. 554, 8 S. W. 359, 912; *State v. Pollard*, 139 Mo. 220, 40 S. W. 949; 1 Hale, P. C. pp. 469, 470. See, also, cases cited in note 2 to 9 Am. & Eng. Enc. Law, 553; *Reg. v. Michael*, 9 Car. & P. 356. For these reasons the second count must be adjudged bad, and, this being the case, the verdict, being a general one, will be held to be founded on and attach to the first count, that being a good one.

2. But, aside from any other consideration, the verdict should stand because, first, there was no evidence to support the second count, and because, second, even if there were, the court did not instruct on that count, and this is tantamount to an election by the state of an abandonment of the second count and a reliance on the first. *Stephens v. State*, 36 Tex. Cr. R. 386, 37 S. W. 425.

3. The correctness of the denial of the application for a continuance will now be discussed. The defendant was arrested in August, 1897. He pleaded to the indictment on the 27th day of September, 1897, and on that day the cause was set for trial on December 18, 1897. On the 2d day of October, 1897, T. A. Spurgeon was appointed as counsel for defendant. On the 20th of September, 1897, the cause was set down for trial on the 17th day of January, 1898. When the counsel was appointed who tried the cause, and who now appears in this court on his behalf, does not appear, nor does it appear when the first counsel severed his connection with the case. The application shows no diligence whatever. It fails to show that defendant is unable to prove the same facts by other witnesses within reach of the process of the court, or what steps were used to procure the testimony of the absent witnesses. One of the letters in regard to the defendant's mental condition bears date September 30, 1897, at Chicago. This letter shows that the alleged witness who signed the letter would not swear defendant was insane, and it shows, also, that the whereabouts of that witness must have been known to defendant over six weeks prior to the time the cause was first set down for trial; and yet no attempt is alleged to have been made to take the deposition of the witness nor to procure his attendance, nor that his testimony is material, nor that affiant be-

lieves it to be true, nor that it can be procured, nor in what time, nor that the witness is not absent by the connivance, etc., of the defendant, nor that the application is not made for vexation or delay, etc. This application was not filed until January 17, 1898,—the very day the cause was set down for trial. It is enough to say of this application that it in no respect complies with the provisions of section 4181, Rev. St. 1880, nor with any of our numerous rulings upon that section. It was properly denied.

4. Next for discussion is the action of the court in regard to the list of 47 jurors from which the panel of 12 jurors was to be selected. The trial court made a formal finding of the facts on this point, but such finding, being wholly unauthorized by law, amounts to nothing. Equally worthless are the affidavits on this subject, filed by defendant's counsel and others. We have long since decided, and frequently decided, that affidavits are valueless to supplant, supplement, or supply matters which properly belong to the bill of exceptions alone,—the sole and proper repository of matters of mere exception. *State v. Hayes*, 81 Mo. 574, and many subsequent cases. The same rule holds as to attempting to preserve matters of pure exception by recording or reciting them in the record proper. Neither court nor clerk can thus quo warrant to a bill of exceptions, and so oust it of its ancient office and customary functions. *Nichols v. Stevens*, 123 Mo., loc. cit. 119, 25 S. W. 578, and 27 S. W. 613, and cases cited; *Ryan v. Growney*, 125 Mo., loc. cit. 480, 28 S. W. 189, 755; *State v. Taylor*, 134 Mo., loc. cit. 137, 33 S. W. 92; *State v. Prather*, 136 Mo., loc. cit. 25, 37 S. W. 805; *Critchfield v. Linville*, 140 Mo., loc. cit. 192, 41 S. W. 786; *State v. Wear* (Mo. Sup.) 46 S. W., loc. cit. 1111. The bill of exceptions, so far as concerns the point in hand, is the following: "After the list of jurors had been given defendant, and after both parties had made their challenges, and when the jurors selected to try the cause were about to be sworn, the defendant objected to the list because it contains the name of Henry Garth, who had been challenged for cause. Defendant also objects to the list because he is allowed only nineteen challenges according to the list given. Defendant objects to the list because the list furnished the attorney for the state is not identically the same as furnished the defendant, in this: that in the list furnished the state the name of John E. Williams appears to have been stricken off, and the name of Henry Garth, who was disqualified, inserted. This mistake was discovered, and the name of Henry Garth was stricken off, and the name of John E. Williams reinstated. (Objection overruled by the court; to which action of the court defendant then and there excepted.) The defendant further objects for the reason there are only forty-six jurors on the list able to serve furnished the defendant. (Overruled because it isn't a fact; that the juror W. H. Adams, who is now re-

ported sick, was present in court, and well and able to serve, when the venire of forty-seven was selected by the court for the trial of this cause, and his name was on the list furnished defendant, and, after both the state and defendant had made their challenges, the state struck him off as one of its challenges, and reinstated the name of John Crist, who had been challenged by the state when the list was furnished defendant, allowing the defendant twenty challenges, as he is entitled to.)" It cannot be understood, from defendant's first objection above stated, when the discovery was made that Garth's name had been substituted for that of Williams. If, as appears to have been the case, the name of Williams was on the list furnished defendant, surely he had a valid list on which to make his challenges, and the subsequent discovery that the state's list had substituted the name of Garth instead of Williams could have worked defendant no hurt, as instantly upon the discovery the proper correction was made. As to the second objection raised by defendant, respecting Adams' name, this objection is not before us, because no exception was saved to the action of the trial court in this regard.

5. Who Lizzie Williamson was—what relation she sustained to the defendant, whether wife or concubine—does not appear. It does appear, however, that she had left him on some former occasion, and was for some time absent. Her absence the second time had only lasted about three weeks. On the afternoon of June 5, 1897, defendant saw Lizzie Hatch, and threatened to kill her. He carried his threat into execution that same night, when he visited the locality, in another part of the city, where she lived, burst in the door, shot her down in cold blood, went into another room and shot Mrs. Robinson in the leg, breaking the bone, and then on into the kitchen, where he shot Lizzie Williamson, whom he "loved so well," then pursued her with bullets as she fled out into the back yard, and, when she fell expiring, he lovingly caressed her by beating her over the head with the butt of his pistol. Speaking of that same night, Richard Green, testifying, said: "I know the defendant. On June 5th I saw the defendant after 9 o'clock at night. He was first on the sidewalk in front of my house, swearing. He then came into the house, and told me that he had killed Lizzie and the old lady. He said that he just went in, and shot through the door. He said there was a clique of them that kept Lizzie harbored, and that he had made out to kill the whole clique of them." On being told, "You ought not to have did that," defendant replied, "I am sorry I ever saw a gun." Defendant also said to the wife of this witness, in reply to her question, that he was not afraid or ashamed on account of what he had done. This witness, Green, discloses, perhaps, the motive which animated defendant's conduct on the fatal occasion. Defendant, it seems, remained in hiding for some

two days in Kansas City, and then effected his escape to Chicago, whence he was brought back in August, 1897, as aforesaid. A witness testified that after defendant's female companion left him—that is, some three weeks before the tragedy—he "acted kind of queer," and, when asked what was the matter, "motioned to his head and walked off"; that at another time witness met defendant, spoke to him, but he just walked off without saying anything. Another witness testified that he had known defendant about 2½ years; that shortly before the homicide witness "thought that defendant was out of his mind," and, as reasons for thinking so, he stated that defendant talked about Lizzie Williamson having gone away; that he refused to go on a train to a school picnic on the 1st of June, because, if he did, she was going, but would not do so if she were to see him on the train; that he and witness would drive through the country, and if he could see her she would come back home; that he thought she had been induced to go away; that he could not talk on any subject with any sense; would be talking on one subject, and jump off onto another; would begin to talk very sensibly, then would branch off on something else; before this he had talked intelligently. The brother of defendant testified that shortly before the killing "he seemed to be crazy. You could not get any sense out of him. He would talk in a way, then he would change off onto something else, and then he would stop all at once and study along. He was not always this way, and it grew worse after his wife left him. He would come to my house, and talk to me about his wife; if he only knew where she was, he believed he could get her to come back. He said he got so he could not work, and he had to get his brother to do his work for him. He would stand around, and always complain of his head. I told him there was no use to worry so. When he was a boy about eight years old, he fell down a pair of stairs and struck his head, and from that time he was always complaining of his head, and used alcohol on his head all the time. At times he was in such a condition he could not do anything at all, and we had to make him stay in the house. He would talk at random, and seemed to completely give up. He acted more strange every day. His condition seemed to grow worse. He would be worse at times when there was something troubling him. It seemed to wear on him for about a week after his wife left him. He was at my house talking to me and running around, and said he thought she was in Leavenworth." Defendant's sister also testified that: "I live at 31st and Cherry streets, and am a sister of defendant. Shortly before the killing, he was in such a condition that he could not eat. When we would get anything for him, he would take about two mouthfuls, and I would say to him, 'Eat your dinner,' and he would say that he could not

eat. I had to do his work. He would let the fires go out, and I had to do his general janitor work. Sometimes his head would bother him, and he would complain of it, and I would get him to lie down. He would talk foolish stuff, and would say that 'Lizzie was happy,' etc. Q. You speak of his refusing to eat at times. What would he say? A. 'If Lizzie was here I could eat,' or something like that." Other witnesses testified that they thought defendant insane from his manner, and from his becoming excitable, after the woman he called his wife had left him, and the conversation turned on that subject. Dr. Logan, for whom defendant worked in 1894, and for whom he had worked as janitor from October, 1895, down to the time of the homicide, on June 5, 1897, testified that: "After the first few days, possibly a week or ten days, after his wife left, he was very excitable,—he had always been very quiet,—he was very excitable, running from one place to another hunting her. He finally, in the course of a week or ten days, quieted down, and became moody, melancholy, and I considered seriously the propriety of turning him off. Q. From his general conduct, from what you saw of him, what was your conclusion as to his mental condition; as to whether he was sane or demented,—insane? A. I never examined him as a physician. I was called away from home at the time. I had a brother who had died up in Platte county. I considered his condition such that I was going to turn him off as janitor. I never at that time considered that he was really insane, but I saw that his condition was such that he would become so. He had been very much excited, he never ate or slept. He was very much excited. Then he lapsed into a despondent, melancholy condition. For the first ten days after his wife left him, he was in a very excited condition. He was running all over the country; was neither eating nor sleeping. Then he lapsed into a melancholy condition, depressed. He was in a melancholy condition. He would sit with his hands over his face. He didn't attend to his business. I had but little conversation with him. In fact, I wasn't much at home then. I was running back from home. He wasn't the same man that he had been." These extracts from the evidence adduced are sufficient to show what the jury had to consider and pass upon in reference to the question of defendant's sanity at the time of the occurrence of the homicide. If there was evidence tending to show insanity, certainly there was evidence to show sanity. His previous threats, followed by their speedy consummation; the avowal by defendant shortly thereafter that he had done the bloody deed, and was not ashamed or afraid by reason thereof; his concealment of himself in Kansas City for two days, preparatory to his ultimate flight to Chicago,—afford ample basis on which to build the rational inference that defendant knew what he was about;

knew that he had violated the law, would be punished if caught, and therefore planned and effected his escape and flight to another state. And the instruction on the point of insanity was such as has frequently received approval of this court. See *State v. Pagels*, 92 Mo. 300, 4 S. W. 931, and subsequent cases.

6. Relative to the other instructions given on behalf of the state, speaking in a general way, they followed approved precedents, with the exception of instruction No. 10, as follows: "The court instructs the jury that the law presumes the innocence, and not the guilt, of the defendant, and this presumption of innocence attends the defendant throughout the trial, and at the end entitles the defendant to an acquittal unless the evidence in the case, when taken as a whole, satisfies you of defendant's guilt beyond a reasonable doubt, as defined in these instructions." There was no other instruction, however, in which the term "reasonable doubt" was defined, and so that term was left without definition. Exception was taken to all of the instructions given for the state. The duty of the trial court in a criminal case has been made statutory, as follows (Rev. St. 1889): "Sec. 4208. Order of Trial. The jury being impaneled and sworn, the trial may proceed in the following order: First, the prosecuting attorney must state the case, and offer the evidence in support of the prosecution; second, the defendant or his counsel may then state his defense, and offer evidence in support thereof; third, the parties may then respectively offer rebutting testimony only, unless the court for good reason in furtherance of justice, permit them to offer evidence upon their original case; fourth, the court must instruct the jury, in writing, upon all questions of law arising in the case, which are necessary for their information in giving their verdict; [and a failure to so instruct in cases of felony shall be good cause, when the defendant is found guilty, for setting aside the verdict of the jury and granting a new trial;] fifth, unless the case be submitted without argument, the counsel for the prosecution shall make the opening argument, the counsel for the defendant shall follow, and the counsel for the prosecution shall conclude the argument. (Rev. St. 1879, § 1908, amended.)" This section (originally section 1908) was first enacted in 1879, and is found in the revision of that year. In *State v. Brooks*, 92 Mo. 542, 5 S. W. 257, 330, decided in 1887, it was held unnecessary to instruct the jury on an extrajudicial confession unless requested by the defendant so to do. This ruling I have discussed in *State v. Murphy*, 118 Mo., loc. cit. 17, 25 S. W. 95, and I do not care to go over the subject again, except to say that, at the next session of the legislature after that case was decided, the legislature enacted in 1889 an addition to that section, which I have inclosed in brackets, making the failure to instruct on all questions.

etc., a distinct ground for granting a new trial. Time passed on, and at the October term, 1889, in *State v. McNamara*, 100 Mo. 100, 13 S. W. 938, it was held, in regard to an alleged offense which occurred in 1887, that, unless a proper instruction were asked on the subject of good character, the instruction, being improper, was properly refused, and such improper instruction constituted no basis for the trial court to give a correct instruction on the point. In *State v. Murphy*, 118 Mo. 7, 25 S. W. 95, no instruction whatever on the subject of good character was asked by defendant, and it was ruled not reversible error to fail to instruct in such circumstances on that matter. This was at the October term, 1893. At the next legislative session, section 4208, *supra*, received this further amendatory addition, to wit: "Which instructions so given shall include, whenever necessary, the subjects of good character and reasonable doubt." *Laws Mo. 1895*, p. 161. It would seem that this last amendment should at least include the subjects of "good character and reasonable doubt," whatever may have been heretofore thought of section 4208.

7. But another reason exists why an instruction should have been given on the subject of reasonable doubt, and this aside from the statutory provisions before noted; and that is that defendant asked an instruction on that subject, which, though faulty, furnished the proper foundation for a correct instruction on the subject, and excepted to its being refused. This being the case, it constituted reversible error for the trial court to refuse, upon that footing, to give the proper instruction. This has been the law in this state for a great many years, as witness the following cases: *State v. Matthews*, 20 Mo. 55; *State v. Jones*, 61 Mo. 232; *State v. Kilgore*, 70 Mo. 546; *State v. Lowe*, 93 Mo. 547, 5 S. W. 889; *State v. Hickam*, 95 Mo., *loc. cit.* 332, 8 S. W. 252. In the face of all these authorities, *State v. McNamara*, *supra*, announces a contrary doctrine, but it should not be followed. For the single error in failing to give an instruction defining reasonable doubt, the judgment must be reversed, and the cause remanded. All concur.

## STATE v. WILLIAMS.

(Supreme Court of Missouri, Division No. 2.  
Nov. 7, 1898.)

CRIMINAL LAW—APPEAL—BILL OF EXCEPTIONS—  
LARCENY—VENUE—CONVICTION—VACATION.

1. Exceptions in a criminal case cannot be inserted in a bill of exceptions at a term subsequent to that at which they were taken.

2. Remarks of a prosecuting attorney in arguing to the jury cannot be preserved for consideration on appeal in affidavits or the motion for new trial.

3. Where a thief stealing a steer transports it into another county, the venue of the theft is properly laid in the latter county, as each

transportation of stolen property from one county to another is a fresh theft.

4. A judgment of conviction cannot be set aside at a term subsequent to that at which it was rendered, on the ground that a witness for the prosecution was guilty of perjury.

Appeal from circuit court, Pulaski county; L. B. Woodside, Judge.

P. W. Williams was convicted of theft, and he appeals. Affirmed.

Robert Lamar, Frank H. Farris, and C. H. Davis, for appellant. Edward C. Crow, Atty. Gen., Sam. B. Jeffries, Asst. Atty. Gen., and W. W. Graves, for the State.

SHERWOOD, J. A steer stolen in Pulaski county forms the basis of the present prosecution; and, because defendant was convicted of such theft, he comes up to this court, and makes inquiry whether he was legally convicted.

1. It is firmly established by our rulings that matter excepted to at one term of court must be *ad tunc et ibidem* saved by a bill of exceptions filed at such term, and cannot at a subsequent term be "warmed over" by being inserted in a bill of exceptions filed at such subsequent term. *State v. Taylor*, 134 Mo. 109, 35 S. W. 92; *State v. Ware*, 69 Mo. 333; and other cases. For this cause it is that exceptions taken at the March term, 1897, and not preserved at such term as aforesaid, could not at the September adjourned term, 1897, have a place in the bill of exceptions filed at that term, and should not have been inserted therein.

2. The cross-examination of James Shelton (indicted with defendant, and afterwards severed from him) was in accord with prior decisions of this court. *State v. Avery*, 113 Mo. 475, 21 S. W. 193, and subsequent cases.

3. As to the remarks of Murphy made in his closing argument to the jury, it is enough to say that the fact that they appear in the motion is no evidence that they appear in the bill of exceptions; nor do they so appear in such bill,—the only place where such matters can be preserved. They cannot be preserved in affidavits nor in motion for new trial. *State v. Levy*, 126 Mo. 554, 29 S. W. 703; *State v. Clark* (decided at present term) 47 S. W. 886.

4. It does not matter that the steer was first stolen in Texas county, and afterwards taken into Pulaski county, inasmuch as each transportation of stolen property from one county to another is a fresh theft. The venue of the theft was, therefore, properly laid in Pulaski county. *State v. Smith*, 66 Mo. 61; *State v. Ware*, 62 Mo. 597. This was the rule at common law, and our statute on the subject is but declaratory of that rule.

5. There was ample evidence on which to convict defendant, and there is no ground of objection on that score.

6. The judgment in this cause was rendered in October, 1897. At the same term, defendant took an appeal. At the March term, 1898, but before the bill of exceptions was



filed, defendant filed a motion to set aside the order granting an appeal and to grant him a new trial. This motion was based on the affidavit of Satterfield that he (a witness against defendant) had committed perjury at the trial. After the term at which the judgment was rendered, it was beyond the power of that court to set that judgment aside. But even if Satterfield had committed perjury, still the testimony of Laughlin would have remained. But whether this was so or not so, the court had no power to grant the motion. Judgment affirmed. All concur.

### STATE v. BOWLES.

(Supreme Court of Missouri, Division No. 2.  
Nov. 7, 1898.)

HOMICIDE—INTENTIONAL ACT—DEADLY WEAPON—MALICE—PREMEDITATION—INSTRUCTION—SELF-DEFENSE—PHYSICAL DISPARITY—USE OF KNIFE IN FIST FIGHT.

1. Deceased and accused (acquaintances, without previous ill feeling) got into a fist fight over a scarecrow placed by the deceased and others, for a joke, at the roadside, along which accused passed shortly thereafter. It was dark, and in the fight accused stabbed deceased with a knife. *Held*, that the stabbing was not unintentional, and an instruction as to murder in the second degree was proper.

2. In a fight, accused struck deceased with a sharp instrument, inflicting a fatal wound, from which the deceased died in a few hours. *Held*, that the knife used was a deadly weapon.

3. Deceased and accused, without previous ill feeling, got into a fist fight over a scarecrow placed by deceased and others, for a joke, on a roadside hedge at night to scare passers-by, of whom defendant was one. Accused and his companion indulged in offensive and insulting oaths and epithets, and the companion threatened to shoot deceased. In the fight, which occurred in the dark, accused drew a knife, and stabbed deceased in the right groin, severing the iliac artery and penetrating the peritoneum. *Held*, that the evidence was sufficient to go to the jury on the question of malice and premeditation, and hence a charge on murder in the second degree was proper.

4. Where an indictment did not charge conspiracy or a joint offense, and there was no effort to connect another with the crime for which accused was being tried, a charge that the jury could not consider anything said by such other person at the time of the difficulty as bearing on the accused's conduct was unnecessary and properly refused.

5. Where a killing resulted from a fist fight, in which accused drew a knife and stabbed deceased, a heavier and stronger man than himself, and the defense was self-defense, it was error to exclude accused's evidence that at the time of the difficulty he was suffering from an acute nervous disease, especially affecting his hip joint; that he was unable to perform manual labor, to ride horseback, or to move out of a walk, and continually had to take hypodermic injections to allay the pain caused by the affliction,—since it tended to show great disparity in the physical condition of the two men.

Appeal from circuit court, Platte county; C. A. Anthony, Special Judge.

C. C. Bowles was convicted of murder in the second degree, and he appeals. Reversed.

E. C. Hall and Witten & Hughes, for appellant. Edward C. Crow, Atty. Gen., Sam. B.

Jeffries, Asst. Atty. Gen., and W. W. Graves, for the State.

GANTT, P. J. The defendant was indicted for murder in the second degree,—of Hugh Hall, in Clinton county, on the 6th of March, 1897,—and was convicted as charged. No error is assigned or perceived in the record proper. The evidence, briefly stated, establishes that the homicide occurred near a small village called "Lilly." There are two stores in the place. The deceased was a clerk in one; and defendant, in the other. There is no evidence of ill feeling between the two prior to the night of the homicide. On that night the deceased, Hall, and several others, in the spirit of a joke, made a scarecrow, by cutting openings for a human face in a paper box, and placing a lamp inside, for the purpose of frightening John Shaver, the proprietor of the store in which defendant clerked, and one Atcherson, a young man visiting in the neighborhood. Shaver lived on his farm, about one-half of a mile north of Lilly. Having constructed their scarecrow, the deceased and his party, about 9 o'clock that night, went up the road leading from Lilly to Shaver's house, about a quarter of a mile, and placed the scarecrow in a hedge fence on the east side of the road. Opposite to this place was a haystack, in a field across the road. Two of the party went into an adjoining cornfield, and the deceased and others went behind the haystack to await the coming of Shaver and Atcherson. About 9 o'clock that evening, Shaver closed his store, and he and the defendant, Bowles, started to his home together, up the said public road; Shaver riding a pony, and defendant walking. The night was dark and cloudy. When they reached the point in the road where the scarecrow had been placed in the hedge fence, Shaver discovered it, and shot at it with his pistol. Thereupon the young men in hiding all laughed, and indicated their hiding place. Shaver said to defendant: "There they are behind the haystack. You shoot them on that side, and I will shoot the sons of bitches when they come around on this side." The deceased was then on top of the stack, and rose up and said, "Shoot me, if you wish." After a wordy altercation, deceased came down, and, being asked, said he had put up the scarecrow. Defendant thereupon said: "Hugh, you ought not to have put that there. It might make trouble." A quarrel ensued, and resulted in a mutual encounter between deceased and defendant with their fists. According to the defendant's evidence, deceased struck him first with his fist; but it was dark, and the witnesses could not state definitely which struck first, but both were engaged in it. The fight continued between these two until defendant was forced or knocked back to the ditch on the side of the road, when defendant was seen to strike deceased with a swinging lick; and, as he did, Hall, the deceased, cried out: "He has a knife. He has stabbed me, and stabbed me

bad,"—and leaned or fell against a post. He began to sink down, and was caught by some of his companions and laid on the ground. One of the party immediately went after a physician. Defendant's evidence tended to show that deceased was striking him when the fatal stab was given, and that defendant had seen deceased make a motion towards his pocket, as if to get a weapon, but that it was so dark defendant could not see whether he had anything in his hand. On the other hand, the state's evidence tended to show that before the fatal blow was given the combatants had ceased fighting for a few moments, and deceased was standing still, and his hands had dropped to his side, when defendant suddenly sprang forward and stabbed him. The wounded man was taken back to the store, and when the physician came it was ascertained that deceased had been cut in the right groin. The wound had been inflicted by a sharp instrument. It cut through "two parts ligament, severed the iliac artery, and cut through the peritoneum." The physicians testified that the wound was in a vital part, and was necessarily fatal. The body of deceased was examined that night, and no weapon found upon him, and the state's witness testified he made no attempt to use any in the fight. On the part of defendant, he and his brother testified to finding an open knife next morning near the place of homicide, which they identified as either belonging to defendant, or being very similar to one he usually carried. This evidence, in turn, was rebutted by the state.

1. The first, and we think the most serious, contention of the learned counsel for defendant is that under the facts there is no murder in the case, and it was error to instruct upon the elements of murder in the second degree, as was done by the circuit court. The propriety of this charge depends upon the law. In this state it has been uniformly and consistently adjudged that, when one intentionally stabs another in a vital part with a deadly weapon, the law presumes that he intended the natural consequences of his act, and from the use of the deadly weapon the existence of malice may be inferred, and he will be guilty of murder in the second degree, in the absence of qualifying or mitigating circumstances, or of proof of circumstances showing deliberation. The learned counsel concedes that, abstractly stated, this is the law, but insists that it has no application to the facts disclosed on the trial of this case, for the reason that it was an unintentional stab, and the weapon was not shown to be a deadly weapon. The first contention is out of the question. The whole evidence shows that defendant purposely and intentionally stabbed deceased. His own testimony unequivocally establishes that fact. The character of the knife with which defendant did the stabbing was shown by the nature of the wound inflicted with it. There was ample evidence, in the description of the wound and

its effect, to demonstrate that the knife used was a deadly weapon. A deadly weapon is any weapon or instrument by which death would likely be produced, when used in the manner in which it may appear it was used in the affray. It needs no argument to prove that a knife capable of inflicting a wound of the dimensions and depth shown in this record, and in a vital part of a grown man, was such a weapon as the law denominates deadly or dangerous. It does not follow, because no witness testified to seeing the knife, or detailed its exact dimensions, there was no proof as to its dangerous or deadly character. The deadly effect it produced was confirmation strong of its lethal qualities. There is no evidence to indicate that the blow in the vital part of deceased was in any sense the result of accident or was unintentional. *Harris v. State*, 34 Ark. 469; *People v. Rodrigo*, 69 Cal. 601, 11 Pac. 481. By the discussion as to the character of the weapon used we are, of course, not to be understood as intimating that it is necessary to charge in an indictment that a murder was committed with a deadly weapon. On the contrary, it is clear that it is not at all necessary to so charge. *State v. McDaniel*, 94 Mo. 301, 7 S. W. 634; 2 Bish. Cr. Proc. (3d Ed.) § 514; *State v. Hyland*, 144 Mo. 302, 46 S. W. 195. We have been dealing only with the presumption arising from the use of a deadly weapon, and the sufficiency of the evidence in this case to establish that the knife with which the homicide was effected was a deadly weapon. Finally, upon this point, is the case so wanting in circumstances tending to show malice that the trial court and this court can say, as a matter of law, upon the whole evidence, that there was no evidence of murder, and that issue was erroneously submitted to the jury? While it was eminently proper to instruct the jury as to manslaughter in the fourth degree, it does not follow that the court erred in submitting to the jury, under the evidence, whether the stabbing was not with malice. The common law implied malice in every unlawful killing, and the burden of proof of extenuating circumstances, unless they arose out of the evidence against the defendant, lay on him. *State v. Dunn*, 18 Mo. 419. That there was evidence that this homicide was the result of a quarrel may be admitted, and yet, from other testimony, the conduct of the defendant might be characterized as indicating a heart fatally bent on mischief. There was absolutely nothing in the mere hanging of the scarecrow in the hedge to give any reasonable man any provocation for assaulting the perpetrator of such an antiquated and innocent joke, and yet the uncontradicted testimony is that Shaver and defendant both indulged in the most offensive oaths and epithets to the deceased because of his participation therein; Shaver even threatening to shoot him. It is altogether probable that, but for the very insulting epithets ap-

pled to deceased and his companions by Shaver and defendant, no difficulty whatever would have occurred. There was evidence that the defendant was admonished three times by deceased to keep his hands off of him; thus indicating that the defendant was the aggressor, and from which the jury might have inferred that defendant went into the rencounter with deceased with the knife in his hands, and stabbed him after deceased had ceased to fight. The evidence is quite conclusive that deceased at no time used or attempted to use any weapon, and that defendant in the dark did purposely use a deadly weapon upon deceased. Upon the whole, we think there was sufficient evidence upon which to submit to the jury the question of malice and premeditation. It was not at all necessary for defendant to have preconceived the crime before starting up the road that night. If, with no more provocation and justification than the finding of a scarecrow in the hedge, he began to abuse the deceased, and assaulted him until he provoked him to a fist fight, and had time to think, and intended to kill deceased, it was sufficient, if he had this intention for a minute, as well as an hour or a day, before he stabbed him, to constitute premeditation in the eye of the law. As already said, if the jury found the other alternative, to wit, that deceased was the aggressor, and by his blows aroused a sudden passion in defendant, and, in the sudden quarrel, defendant, without malice or premeditation, struck deceased with his knife, and killed him, then it was only manslaughter in the fourth degree.

2. Defendant assigns as error the admission of the dying declarations of deceased. The objection was that these statements were not made under a sense of immediate dissolution. We think the preliminary inquiry clearly developed that the deceased was fully convinced that there was no hope of his recovery, and so expressed himself. In fact, he died an hour later. The circuit court was exceedingly careful to elicit all the circumstances before admitting the testimony, and, we think, was fully justified in admitting the dying declarations. Their competency otherwise is not questioned. They related only to the identification of the prisoner as the perpetrator of the homicide, and the circumstances immediately attending it; thus bringing them within the conservative rule announced in 1 Greenl. Ev. § 156, so often approved and followed in this court. *State v. Draper*, 65 Mo. 335, and subsequent cases.

3. Counsel for defendant requested the court to instruct the jury that they could not consider anything said by John W. Shaver at the time of the difficulty as bearing upon the conduct of defendant. There was no charge of conspiracy or joint offense in the indictment, and no effort to connect Shaver with the crime for which defendant was being tried, and the instruction was unnecessary. The court, in its discretion, might have

given it without committing error, but it was not reversible error to refuse it.

4. There was no error in the eleventh instruction given by the court, on the law of self-defense. It was such as has often met the approval of this court.

5. The defendant called Dr. Stowers, and proved by him that he knew the defendant, and had treated him professionally for the past two years. Defendant then offered to prove by this witness that the defendant at the time of the difficulty charged in this indictment was suffering from acute disease, affecting his nerves, and especially his hip joint, and that the defendant was unable to perform ordinary manual labor, unable to ride horseback, was bound continually to take medicine by hypodermic injections for the purpose of allaying the intense pain caused by this affliction, and was unable to run or to move out of a walk, on account of this affliction. The court sustained an objection to this evidence, and the defendant duly excepted. One of the principal defenses in this case was self-defense. It was urged by defendant that the deceased was a much heavier and stronger man than defendant; that deceased had forced him back into the ditch, and he stabbed him to prevent great bodily harm. Upon that theory the court instructed the jury. Under such a state of facts, it seems to us that evidence tending to show great disparity in the physical condition of the two combatants was of prime importance to defendant. If defendant was suffering from an acute affliction of the hip joint, which forbade his retreat, or rendered him utterly powerless to resist the onslaught of deceased, certainly it would have gone far with the jury to excuse his use of a knife on his assailant, if such they believed the deceased to have been. Such evidence is uniformly held admissible in cases of this character. In *Selfridge's Case*, cited in *Whart. Hom. Append. No. 1*, Chief Justice Parker expressly charged, "You must make up your mind from all the circumstances proved in the case, such as the rapidity and violence of the attack, the nature of the weapon with which it was made, the place where the catastrophe happened, the muscular ability or vigor of the defendant, and his power to resist or fly." In that case evidence was received of the defendant's debility, and this was considered one of the chief points for the jury to consider,—whether danger to the defendant was apparent. *Fain v. Com.*, 78 Ky. 183; *Hinch v. State*, 25 Ga. 699; *State v. Benham*, 23 Iowa, 154; 1 *Bish. Cr. Law* (7th Ed.) § 873; *Whart. Cr. Ev.* §§ 83, 84. Error is presumptively harmful. It is only when we can say that it clearly worked no injury that it can be said to be harmless. In a mutual rencounter, such as this record discloses, it cannot be maintained that a fact so patent as the diseased condition of defendant could be excluded from the consideration of the jury without injury to his de-

fense. The case was otherwise carefully and well tried, but for the exclusion of this evidence it must be, and is, reversed and remanded.

SHERWOOD and BURGESS, JJ., concur.

# REYNOLDS v. CITIZENS' RY. CO.

(Supreme Court of Missouri. Division No. 1.  
Nov. 17, 1898.)

## APPEALS—BILL OF EXCEPTIONS—MOTION FOR NEW TRIAL—EXCEPTIONS.

1. Where the motion for a new trial, which was overruled, is not preserved by the bill of exceptions, matters of exception not constituting a part of the record proper will not be noticed on appeal.

2. Where an exception is not taken and preserved by the bill of exceptions to the overruling of a motion for a new trial, there is nothing to review except the record proper.

Appeal from St. Louis circuit court; James E. Withrow, Judge.

Action by Elvira Reynolds against the Citizens' Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Virgil Rule, for appellant. Smith P. Galt, for respondent.

MARSHALL, J. The plaintiff sued the defendant for \$5,000 damages for injuries alleged in the petition to have been sustained by her while a passenger on one of its cars, by reason of the sudden starting of the car when she was attempting to get off of it. The answer is a general denial and a plea of contributory negligence. There was a trial in the circuit court, and a verdict for the defendant. The testimony on the merits is not preserved, and the only point presented by the appellant for review is the testimony and ruling of the lower court as to the competency of George F. Moritz as a juror, and the correctness of the ruling of the circuit court in overruling plaintiff's peremptory challenge of the juror. The bill of exceptions sets out in full the questions, answers of the juror, and the rulings of the court, and the record recites that a motion for new trial was filed and overruled. But the motion for new trial itself is not preserved by the bill of exceptions, and hence does not appear in the transcript. We cannot, therefore, ascertain whether the alleged error of the court was distinctly called to the attention of the circuit court by the motion for new trial, and that court given an opportunity of correcting its own (alleged) error or not, nor can we be informed whether the plaintiff properly saved exception to the overruling of the motion for new trial. In this shape the record presents nothing which this court will review. *State v. Galtner*, 77 Mo. 304; *State v. Robinson*, 79 Mo. 66; *State v. McCray*, 74 Mo. 305; *State v. Griffin*, 98 Mo., loc. cit. 674, 12 S. W. 358. In short, as was said by Sherwood, J., in the

case last cited: "Under the well-settled practice and rule of this court, the evidence, the motion for new trial and in arrest, application for continuance, and instructions,—in short, all matters of exception not constituting part of the record proper,—had to be incorporated in the bill of exceptions, or else they would not be noticed by this court; and the same rule applies in criminal as in civil cases. *Rev. St. 1879, §§ 1921, 3635, 3636*; *State v. Shehane*, 25 Mo. 585; *Jefferson City v. Opel*, 67 Mo. 394; *Baker v. Loring*, 65 Mo. 527; *Stevenson v. Saline Co.*, Id. 425; *Sturdivant v. Watkins*, 47 Mo. 177; *State v. Wall*, 15 Mo. 208; *State v. Treace*, 66 Mo. 124; *Blount v. Zink*, 55 Mo. 455; *State v. Marshall*, 36 Mo. 400; *Tower v. Moore*, 52 Mo. 118; *State v. Dunn*, 73 Mo. 586; *State v. McCray*, 74 Mo. 303; *State v. Robinson*, 79 Mo. 66; *McCarthy v. McGinniss*, 76 Mo. 344." To this may be added, *State v. Farmers' & Merchants' Nat. Bank*, 144 Mo. 381, 46 S. W. 148; *State v. Whitesell*, 142 Mo. 467, 44 S. W. 332; *Ross v. Railroad Co.*, 141 Mo. 390, 38 S. W. 926, and 42 S. W. 957. In the case last cited, Burgess, J., said: "It has been uniformly held by this court that, unless an exception be taken and preserved by bill of exceptions to the action of the court in overruling a motion for a new trial, there is nothing before the supreme court to review, save and except the record proper." The rule is so well settled in our state that it is useless to multiply citations. The motion for new trial in this case is not preserved by bill of exceptions, nor does it appear that exception was saved to the action of the court in overruling that motion. No error is apparent upon the face of the record proper, and there is therefore nothing open to review here. The judgment of the circuit court is affirmed. All concur.

# STATE v. COLE et al.

(Supreme Court of Missouri. Division No. 2.  
Nov. 7, 1898.)

## INDICTMENT—MOTION TO QUASH—PRESUMPTIONS—EVIDENCE—APPEAL.

1. Where the evidence introduced by agreement on a motion to quash an indictment as found without evidence is not incorporated in a bill of exceptions to an order sustaining the same, the court below will be presumed to have ruled correctly, and to have sustained the motion on the ground that the indictment was so found.

2. Where it appears by competent evidence on a motion to quash that an indictment was found without evidence, the motion should be sustained.

3. Proof, on a motion to quash an indictment, that it was made without evidence, may be made by the prosecuting attorney.

Appeal from circuit court, Adair county; Andrew Ellison, Judge.

Charles Cole and another were indicted for violating the local option law, and moved to quash the indictment. The motion was sustained, and the state appeals. Affirmed.

Edward C. Crow, Atty. Gen., and Sam B. Jeffries, for the State. Campbell & Campbell, for respondents.

**BURGESS, J.** Defendants were indicted in the circuit court of Adair county for violating the local option law by selling, as druggists, in the city of Kirksville, in said county, intoxicating liquors to one S. N. Denton, in less quantity than four gallons, without him, the said Denton, having first obtained a written prescription from a regular registered and practicing physician, authorizing such sale. At the October term, 1897, defendants filed their motion to quash the indictment upon the following grounds: (1) Because it does not allege that the city of Kirksville was an incorporated city; (2) because the local option law is unconstitutional; (3) because said indictment was found, if found at all, by the October grand jury, without having any evidence touching the guilt or innocence of the accused. The motion was sustained, and the state appealed.

While the record discloses that, by agreement of parties, evidence was heard upon the motion to quash the indictment, the evidence is not incorporated in the bill of exceptions, so that we are unable to pass upon its legal effect; and, under the circumstances, the presumption must be indulged that the court ruled correctly. If an indictment be found by a grand jury without any evidence, it will be quashed, on motion of defendant, if he sustain the motion by proper and competent evidence; and proof of such fact may be made by the testimony of the prosecuting attorney, but it seems that it cannot be made by a member of the grand jury. *State v. Grady*, 84 Mo. 220, and authorities cited. It will be presumed that it was upon this ground that the motion was sustained. The judgment is affirmed.

**GANTT, P. J., and SHERWOOD, J., concur.**

#### FANNING v. DOAN.

(Supreme Court of Missouri, Division No. 1.  
Nov. 15, 1898.)

#### APPEALS—EJECTMENT—CARRYING OUT MANDATE OF APPELLATE COURT—INCIDENTAL STEPS.

While the rule is that, where a cause has been remanded with a direction to the trial court to enter a certain judgment, the jurisdiction of the trial court is limited to the precise action which it is authorized by the mandate to take, yet, where a cause in ejectment is remanded with direction merely to enter up judgment for plaintiff for the premises, the trial court may include damages, rents, and profits as found by a jury, as incidental steps necessary to carry the mandate into execution, since Rev. St. 1889, § 4641, provides that in case plaintiff prevails in ejectment the judgment shall be for the recovery of the premises, the damages assessed, and the accruing rents and profits from the time of rendering the verdict until the possession of the premises is delivered to plaintiff.

Appeal from circuit court, Grundy county; P. C. Stepp, Judge.

Ejectment by John H. Fanning against Sarah A. Doan. From a judgment for plaintiff, defendant appeals. Affirmed.

Harber & Knight, for appellant. A. H. Burkholder and Hall & Hall, for respondent.

**WILLIAMS, J.** This case is here for the third time. It is an action of ejectment. Upon the last appeal the judgment below was reversed, "and the cause remanded to the circuit court with directions to enter up judgment in favor of the plaintiff for the undivided one-fifth of the premises described in the petition." *Fanning v. Doan*, 139 Mo. 392-416, 41 S. W. 742. When the case came up again in the circuit court, the mandate of this court was presented; and the plaintiff asked that judgment be rendered awarding him possession of an undivided one-fifth of the land, and, as incident thereto, that the damages, rents, and profits be assessed and included in said judgment. The defendant interposed an objection to the assessment of damages, rents, and profits, on the ground that the trial court had no power to do anything in the case beyond that which it was directed to do by this court; that its jurisdiction was limited to entering judgment in the manner and form prescribed in the mandate, which only authorized a judgment for possession of the land. This was overruled. A jury was impaneled, evidence introduced, and the damages, together with the future rents and profits, were fixed by the verdict. Judgment was then rendered in plaintiff's favor for the recovery of an undivided one-fifth of the premises described in the petition, and also for the damages, rents, and profits assessed by the jury. 30 S. W. 1032. The defendant has appealed, and assigns as error here the action of the trial court to which she objected as above stated.

The principle contended for by appellant is correct. The application is erroneous. It is undoubtedly true that, when a cause is remanded by an appellate tribunal with special directions, the jurisdiction of the lower court is limited to the precise action which it is authorized by the mandate to take. It cannot go beyond its "special power of attorney." *Stump v. Hornback*, 109 Mo. 272, 18 S. W. 37. We do not think that rule was violated in the case at bar. This court did not undertake upon the last appeal to set out the proper form of the judgment to be entered, or to go into details as to its terms. It was held that plaintiff was entitled to recover an undivided one-fifth of the land described in the petition. The cause was remanded with directions to enter a judgment in his favor therefor. It is an ejectment suit, and the statute declares what the judgment shall be, and prescribes what it shall contain. If plaintiff prevails in ejectment the language of the statute is, "The judgment shall be for

the recovery of the premises, the damages assessed, and the accruing rents and profits, at the rate found by the jury from the time of rendering the verdict until the possession of the premises is delivered to the plaintiff." Rev. St. 1880, § 4641. See, also, sections 4638, 4640. The plain meaning of the mandate is that a statutory judgment in ejectment should be entered in favor of plaintiff for an undivided one-fifth of the land, which this court held he was entitled to recover. Authority was conferred upon the lower court to take such incidental steps as were necessary to carry the mandate into execution. *State v. Edwards*, 144 Mo. 467, 46 S. W. 160; *Chouteau v. Allen*, 74 Mo. 56; *Finkl. App. Prac.* 118. This is all that was done. Every step taken by the lower court was essential to the rendition of a proper judgment under the former opinion and order of this court remanding the case. The statute says, as above stated, that, if the plaintiff prevails in an action of ejectment, the damages shall be assessed, and the judgment shall include the same, as well as the rents and profits from the time of the verdict until possession is delivered. When this court decided that plaintiff was entitled to the land sued for, and sent the case back for the entry of a judgment in the ejectment suit in his favor, the lower court was empowered to enter such a judgment as is provided by the statutes in such cases, and had the right to do whatever was necessary for that purpose. *Brace, P. J.*, in *State v. Edwards*, supra, in answer to a complaint, upon a second appeal, that the trial court had gone beyond its jurisdiction in assessing attorney's fees, etc., in a tax suit, when the only direction given by the supreme court upon the first appeal was to enter judgment for the taxes, said: "For authority to do so, it was not necessary that the mandate should have specifically mentioned interest, collector's fees, attorney's commissions, or any other items, liability for which, under the law, necessarily resulted from the liability for the taxes for which judgment was directed to be entered. These followed as a matter of course, and were as well within the scope and meaning of the mandate as the principal sum." We think the circuit court correctly construed the mandate, and find no fault with its action. The judgment is affirmed. All concur.

#### MACKIE v. MOTT et al.<sup>1</sup>

(Supreme Court of Missouri, Division No. 2.  
July 6, 1898.)

#### PARTNERSHIP—REAL PROPERTY—PARTICIPATION IN PROFITS—CONTRACTS—EVIDENCE.

1. Though two or more persons owning real property contract with another respecting the improvement of such property, and the profits arising therefrom on the sale thereof, mere participation in such profits does not consti-

tute such persons a co-partnership, as such fact depends on the intention of the parties, as ascertained from all the circumstances proved.

2. Plaintiff sued to dissolve an alleged co-partnership and for an accounting, and testified that defendants, who had certain unfinished houses, proposed to furnish the money required, and to give him one-third of the profits from the sale of such houses, when completed, if he would attend to the completion thereof, and that he did the work required, according to such agreement, and used therein money of his own to a certain amount. The property was in charge of one of the defendants, who testified that plaintiff did the work thereon as a contractor. It was also shown that plaintiff had previously proposed in writing to furnish all labor and materials for such purpose, and that he thereafter gave receipts as "contractor," receipted to defendants for certain moneys "on account of contract for" such work, and gave orders on them for work done and materials furnished by others. *Held*, that such alleged co-partnership was not proven.

Appeal from St. Louis circuit court; John M. Wood, Judge.

Suit by James H. Mackie against Frederick W. Mott and another. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Hornsby & Harris, for appellants. Dawson & Garvin, for respondent.

BURGESS, J. This is a suit by plaintiff—who alleges in his petition that he was a partner with defendants under a verbal agreement, by the terms of which he was to superintend the completion of four partly-constructed houses belonging to defendants, which upon their completion were to be sold, and the net proceeds or profits divided equally between the three—for a dissolution of the partnership, an accounting, a sale of the property, and distribution of the profits, if any. Defendants deny the partnership, and allege that plaintiff did the work on the houses as contractor with them. The evidence adduced by plaintiff was substantially as follows:

Plaintiff, in his own behalf, testified, in substance: That in the fall of 1893 defendant Mott stated to him that he (Mott) had four houses on the property described in plaintiff's petition, which one Rowe had started to build for him, and had abandoned; and Mott asked plaintiff to give him an estimate of the amount required to finish these houses. Mott proposed to give plaintiff one-third of the profits to be derived from these houses; if plaintiff would give his time and attention to the completion of the houses; defendants furnishing the money required to complete the same. When the houses were completed, they were to be sold, and the profits, after reimbursing Mott and Sauer, were to be divided equally between the three. Plaintiff and defendant agreed then to this, and plaintiff started to work on the houses. There was at that time a deed of trust for about \$5,500 on the property; also, mechanics' liens amounting to about \$1,500. Defendants were to borrow sufficient money on the property

<sup>1</sup> Rehearing denied November 21, 1898.

to pay off these debts and to complete the houses. They were to borrow \$4,000 on each house and lot,—\$16,000 in the aggregate. This money was borrowed from Farish on the two east houses, and from M. D. Lewis on the west house. Part of the money borrowed from Farish was used in paying off the mechanics' liens, and the existing deed of trust held by O'Reilly. The balance of the money borrowed by defendants of Farish and Lewis was used in completing the houses. An additional loan of \$4,500 was subsequently made of Carpenter, to be used in completing the houses. The cost to complete the houses when witness took charge was \$13,466, and \$6,200 was the amount of existing incumbrances. When defendant Mott asked plaintiff to make an estimate of the cost to complete these four buildings, Mott asked him to make a written bid, so that he (Mott) could show it to another builder, named Wright, who, Mott said, wanted to figure on the work; and Mott stated that he wanted to be able to show Mackie's bid to Wright, so that Wright would see that Mott had given him a chance, but that he had failed to get the job. Mott did not want Wright to get the job, but did not want to offend him. So plaintiff then made Mott a bid to do the work for about \$11,000. When this money was borrowed from Farish and Lewis, a bond was given to them against mechanics' liens. When witness started on the work he received the plans and specifications, and suggested several changes, which were agreed to by Mott. Defendant Sauer lived in Ohio, and left the entire management of the property to his co-tenant, defendant Mott. Defendant Mott called to see the houses when the work was almost finished, and seemed pleased. The first time witness knew that Mott claimed witness was doing the work on the houses as a contractor was when witness gave a man an order on Mott for some money, and Mott told the man that he had overpaid Mackie on the contract. The actual cost of completing the houses was \$13,466, of which \$2,105 was for extras. The money was paid out by Mott, either by cash, or by orders on Farish, Lewis, and Carpenter. Several of the subcontractors having bills unpaid enforced their liens, and obtained judgments against the property. Some of these have been paid by Mott. Witness paid \$1,500 or \$1,600 out of his own funds on account of these houses. On cross-examination plaintiff testified that the agreement with defendant Mott whereby he was to be a partner in the houses was all made prior to his giving the written bid or estimate to Mott. Mott and Sauer exchanged three of these Flad avenue houses, which were incumbered for \$12,000, with Mr. James M. Carpenter; receiving from Carpenter a house and lot on Morgan street, which they valued at \$11,000, but which witness told Mott was not worth \$11,000. This sale was made through the efforts of witness, and in order to get money to clear

the debts on the Flad avenue houses. After this exchange, \$4,500 was borrowed on the Morgan street property to pay off debts on the Flad avenue houses. These houses were completed in August, 1894. By witness' agreement with defendants, he was to finish the houses, they furnishing the money, and he to get one-third of whatever margin or profit remained after everything had been paid,—deed of trust and all. Mott and Sauer borrowed \$16,000 on the houses, and with this they paid off the existing O'Reilly deed of trust and all existing lien claims; and the balance of the money was paid out direct by the parties who made the loans, on Mott's order, for labor and material. Witness had to get an order from Mott for everything he wanted. Witness would give an order, and get Mott to sign it; and the party holding the order would then present it to Lewis or the others, and get the money. Although the houses were finished in August, 1894, witness had the keys until the spring of 1895. He notified Mott in January, 1895, that the keys were at witness' office. Witness held the keys subject to the order of Sauer and Mott. The houses were vacant and idle during the time. The partnership agreement between the plaintiff and defendant was not in writing. The money that witness received from Mott on account of these buildings was deposited in bank in witness' individual account, and checked out as he used it to pay for labor, etc. Witness identified the papers subsequently offered in evidence by defendants, namely, receipt dated April 28, 1894; order dated May 2, 1894; order for \$300 dated May 1, 1894, signed by witness; two bonds dated April 14, 1894, signed by witness; a receipt dated June 22, 1894, signed by witness; a bid or proposition dated February 8, 1894, in witness' handwriting,—but denies that the word "Contractor" after his signature on the receipt of April 28, 1894, is in his handwriting. Witness states that the Flad avenue house remaining unsold is worth \$7,000 or \$8,000,—"somewhere there." W. J. Holbrook testified on behalf of plaintiff: That he was in the real-estate business. Had several conversations with Mott and Mackie about the trade of three of the Flad avenue houses for Carpenter's Morgan street property. Witness understood from Mackie and Mott that they and Sauer owned the Flad avenue property. They said that they were the owners. Witness acted as agent in making the trade. According to witness' recollection, he did not know until the contract for the exchange was signed that the title to the Flad avenue property was in Mott and Sauer. The Carpenter property on Morgan street was worth \$10,000 when this trade was made, in August, 1894, but has depreciated in value now. It might sell now for \$8,750 or \$9,000. The cash value of the Flad avenue houses at the time of the trade with Carpenter was about \$6,750 each, and \$7,000 for the corner house. J. H. Farish testified

for plaintiff: That he is a real-estate agent in St. Louis. On the solicitation of plaintiff, witness considered the advisability of loaning \$8,000 on two of the Flad avenue houses. He saw Mott about the matter. Witness made the loan through the Mississippi Valley Trust Company. From conversations with Mott and Mackie, witness learned that these Flad avenue houses "belonged to Mott and Sauer, and that the building contractors who had the buildings originally left them, for some reason, in an unfinished condition, and that Mackie came to an agreement with Mott that, if the money was furnished, he would finish the houses, and he was to get a certain interest (one-third) in the houses when they were sold." Witness loaned Mott and Sauer \$8,000 on two of the Flad avenue houses, and retained his commissions out of the amount of the loan. Witness identifies the receipts signed by Mackie for money received by him of witness, and introduced in evidence by defendants. These receipts were delivered by Mackie to the Mississippi Valley Trust Company, who thereupon paid out the money to Mackie on witness' check. The conversations as to Mackie's interest in this property were sometimes in the presence of both Mackie and Mott, and sometimes with Mackie alone. W. J. Templeman testified that he lived on Flad avenue, adjoining the Mott and Sauer houses; that on one occasion Mott called on him in reference to witness' getting a purchaser for one of the houses, and Mott introduced Mackie, saying, "He is interested with us in the construction of those houses." John Brackett testified: That he did the stonework at the Flad avenue houses, for which work Mackie gave him an order on Mott, who declined to pay it. Mott said, "You take that order back to Mackie, and tell him to pay his own orders." He then went back to Mackie, who paid him. Martrom D. Lewis testified on behalf of plaintiff: That in 1894 he made a loan to Mott and Sauer of \$4,000 on each of the two Western Flad avenue houses. He never had anything to do with Mackie in the matter. He paid the money out on Mott's order, some to Mott himself, some to Mackie on orders from Mott, and some to material men, and \$500 retained by witness to cover street improvements, and \$200 retained as his commissions for negotiating the loans.

Plaintiff offered letters from J. W. Kerr, attorney for plaintiff, to defendant Sauer, and letters from Sauer to Kerr, as follows:

"St. Louis, February 20, 1895. Mr. Geo. H. Sauer, New Haven, Huron Co., Ohio—Dear Sir: I write you in reference to the matter between yourself, Mackie, and Mott, in reference to certain houses, corner Flad avenue or street. You will remember that Mackie was to put in his superintendence, labor, and attention; that Mott was to furnish the money to complete the houses, all to be sold, and the profit divided between yourself, Mackie, and Mott. Now it turns out that

Mott has failed to furnish the money, whereby Mackie was compelled, in order to save the property and finish it up, to spend \$10,550.95 received from Mott, and to advance the sum of \$2,723.75 of his own money,—total, \$13,274.70; leaving amount advanced by Mackie of \$2,723.75. I have been to Mott several times to get him to reimburse Mackie, but can get him to do nothing; he making, one kind and another, frivolous excuses for not doing so. Mackie offered to take a second mortgage, or a secured note of any kind which he could get discounted, for he needs the money; but Mott stands still and refuses to do anything. All the houses are now complete, and the last one is ready for sale, but Mott will do nothing. The matter is placed in my hands, and I told Mackie that, before I sued, I would write to you, and let you know the circumstances, and see what you had to say. There is several hundred dollars more to be paid, and there are mechanics' liens being filed therefor. Now, if nothing is done, I will have to put the matter in the court, and have a receiver appointed, and the property sold and proceeds applied. There is nothing else left for me to do. Please answer by return mail, and oblige, yours, truly, John W. Kerr."

"New Haven, Huron Co., Ohio, Feb. 23, 1895. John W. Kerr, Esq., St. Louis, Mo.—Dear Sir: Your communication of twentieth received this evening too late to reply, all mails having gone for to-day, and on Sunday we have no mail; so you will understand delay in receiving reply. In regard to Flad avenue property, will say that am surprised at condition of affairs. Have had no communication from Mott in regard to it since December 30, 1894, when he wired me, had a chance to sell both pieces property. I replied at once to go ahead and sell, and have been expecting daily to hear from him. On February 7th he wrote me from Jefferson City, acknowledging receipt as secretary of building association, and in letter he said he would write me about Flad avenue property in a day or two, since which time have heard nothing from him. So you see I know nothing about affairs, am sorry to say. Trust you will delay action of any kind until I hear from Mr. Mott, to whom I sent copy of your letter, and advised to settle matter immediately, and let me know at once his intentions, and all about the matter. It seems to me there can be nothing complicated, and an understanding should be arrived at easily. Believe Mackie will do what is right, and with same spirit he displayed when I saw him last. The trouble seems to be Mr. Mott's neglect. Hoping he will meet you soon after he gets my letter, and arrange matters, I remain, yours, truly, Geo. H. Sauer.

"Will write you as soon as I hear from Mott, if in a reasonable time. If not, will write any way. S."

"St. Louis, Mo., March 2, 1895. Mr. Geo. H. Sauer, New Haven, Huron Co., Ohio—Sir: In the matter of Mott, Sauer, and Mackie,



there has been judgment mechanic's lien rendered for \$183. And suit has been brought for a \$700 lien, and a further suit for \$329 lien. \$1,212 judgment liens will soon be on the property. If possible, don't delay, but get Mott and yourself to do something. What Mackle is anxious about is the actual money he advanced, which, under the contract, should have been advanced by Mott. Can't an arrangement be made at once for a second mortgage to raise the money and pay off these liens and Mackle, and he will wait for his labor and costs of his share of the profits until later. What we are after is to get an advance and protect the property. Yours, truly, J. W. Kerr.

"I have been looking for a second letter from you, but none has come yet. Kerr."

"New Haven, Huron Co., Ohio, March 4, 1895. Jno. W. Kerr, Esq., St. Louis, Mo.—Dear Sir: Yours of twenty-eighth received Saturday evening. Think you must surely have heard from Mott, or seen him, ere this reaches you. I have not heard from him, yet there may be letter in office now,—have not been up town yet to-day,—although our mail does not reach here from the south until 5 p. m., after this goes out; but will write you soon as I hear from him, and, if do not hear from him to-day, will by next mail address him again. The matter shall not drag, even if I have to make a trip to straighten it out. Of course, want to save unnecessary expense; and there is no reason, that I can imagine, why Mott cannot fix matters without putting me to any such expense. There is no use in delaying matters. The facts will be the same in future as they are at present. Meet them as well now as any time,—is what I wrote Mott. Yours, etc., Geo. H. Sauer."

"St. Louis, March 14, 1895. Mr. George H. Sauer, New Haven, Huron Co., Ohio: Last week for April term. Shall I ask for receiver? Any prospect of settlement? Answer. John W. Kerr."

"New Haven, Huron Co., Ohio, March 14, 1895. Jno. W. Kerr, Esq., St. Louis, Mo.—Dear Sir: Your telegram received this evening. In reply, will say that I deem it unnecessary to ask for receiver; for this matter is bound to be settled, and that just and equitable, and at an early date. I don't hear from Mott, and cannot imagine why. Will send him letter in morning that will elicit reply. Would go to St. Louis myself, if could get away, but my family is in just such condition that cannot leave. My wife is liable to be taken sick (confinement) at any hour, and others in family not well; but, if this settlement is not effected soon, will as early as possible arrange to get there and see about it. I cannot understand why Mott has failed to furnish money. Have no statement; cannot imagine from Mackle's estimate and money borrowed; there should not have been much more necessary; but, without statement, cannot say anything about it. Have written for it, and should have it now. The legislature of Missouri will

adjourn this week, I think, and Mr. Mott can probably attend to business then. Think whole trouble arises from dabbling in politics. Yours, etc., Geo. H. Sauer."

James England testified on behalf of plaintiff: That he painted the Flad avenue houses. That there is due him for that work a balance of \$320. He thought Mackle was a contractor for the erection of these houses. Did not know he was a partner. He obtained judgment on a mechanic's lien suit for this amount due him.

Plaintiff offered in evidence the written notice of lis pendens, referring to this suit, duly acknowledged and recorded. Plaintiff also offered in evidence the deed dated August 23, 1894, from defendants and their respective wives to James M. Carpenter, conveying three of the four Flad avenue houses for the consideration of \$23,000. Plaintiff also offered two statements of account of M. D. Lewis in account with Mott and Sauer, dated August 10, 1894, each showing the items of disbursement of one of the two loans of \$4,000, each made by Lewis to defendants on part of the Flad avenue property; also, statement of account of James M. Carpenter with defendants, showing the mode of disbursement of the sum of \$4,500 loaned by Carpenter to defendants on the Morgan street property acquired by defendants of Carpenter in exchange for three of the Flad avenue houses; also, statement of account of Mississippi Valley Trust Company of account with Storm & Farish, showing items of disbursement of loan of \$8,000 made by Storm & Farish to defendants on part of the Flad avenue property.

John P. Rousch testified on behalf of defendants: That he is a builder. That about October, 1895, he saw the Flad avenue houses, and did considerable work on one of them, at request of defendant Mott, in order to put it in tenable condition. The expense of the work and material furnished by him in repairing this house was \$342.78. Mr. Bruno testified on behalf of defendants: That he is a builder. That he examined one of the Flad avenue houses, at the request of defendant Mott, in the summer of 1893, and found it to be in poor condition,—out of repair. He did work there amounting to \$4.50. Defendant Mott testified in behalf of defendants, in substance: That he and his co-defendant, Sauer, owned this property on Flad avenue. That, when he had the conversation with plaintiff regarding the property, there were four unfinished houses on the land. He said to plaintiff that they (defendants) "had some property they wanted to finish, and would like to have him look at it, and see what it would cost to finish them. Mr. Mackle went out and made an examination, and said he thought he could probably finish them at a cost of a certain amount of money." Defendant Sauer, witness' co-tenant, lived in Ohio. "I told Mackle we would take bids, and to say what he could complete

the houses for." All defendants cared for was to get their money out of the property. "I told Mackie to make a bid, and I told L. B. Wright to make a bid, and Mackie's bid was \$11,753. It was a bid to complete the entire four houses according to plans and specifications." Wright's bid was larger than Mackie's. "When Sauer was here, he suggested that we take bids; that, if Mackie was the lowest bidder, to give the bid to Mackie. I told him I had known Mackie, and always, so far, found him perfectly straight, and up to that time had unbounded confidence in him. Mackie was the lowest bidder, and I told him to 'go ahead and do the work, and we will pay for the work, up to that amount.' Mackie started in to do the work. The first thing we did was to negotiate a loan." The real-estate firm of F. W. Mott & Co. tried to get a loan, and Mackie then suggested that defendants negotiate a loan through his friend J. H. Farish, who in turn obtained the money for the loan from the Mississippi Valley Trust Company. Of the money borrowed of Farish, \$2,811.83 was used in paying off part of an existing deed of trust on the property held by O'Reilly, and \$8,356.53 was paid to Mackie on account of work on the houses. Later on, defendants borrowed \$8,000 of M. D. Lewis. Of this the sum of \$2,861 was paid O'Reilly, balance due on his deed of trust, \$500 for street improvements, and the balance to Mackie for work on the houses. About this time witness went with Mackie to see W. J. Templeman, who testified for plaintiff at the trial of this cause, and who, witness understood, wished to buy one of the houses. Witness said to him: "Mr. Templeman, this is my friend Mr. Mackie. He is interested in building those houses for Sauer and myself." Defendants were anxious to sell this property, and Mackie informed witness that a friend of his, named Holbrook, could trade the property for defendants. Defendants valued the three houses traded to Carpenter at \$20,000 or \$21,000, and he and Mackie agreed that Carpenter's Morgan street property was not worth \$11,000. It was a very dilapidated building, fronting on an undesirable street, and continually vacant. In making the exchange of property with Carpenter, he agreed to loan defendants \$4,500 on the Morgan street property, which they were taking in exchange for three of their Flad avenue houses, incumbered for \$12,000. The consideration in the deed from defendant to Carpenter conveying the Flad avenue houses was stated at \$23,000, under an understanding with Carpenter; it being \$3,000 more than the value of the Flad avenue property. Witness tried for 18 months to sell the Morgan street property, holding it at \$9,000, but could only get \$8,000, and sold it for that price about October, 1894; the purchaser paying \$150 cash, assuming the \$4,500 incumbrance, and paying the balance of the purchase money in monthly installments of \$50 and interest. This was the best offer wit-

ness could get for the property. Witness paid out on account of this property \$270 interest, and also the taxes. Of the \$4,500 borrowed on the Morgan street property, \$500 was paid to Holbrook for his services in making the trade, and the balance was paid to Mackie for work on the houses. In addition to the amount borrowed on the Flad avenue property, and expended in its improvement, witness paid M. B. O'Reilly \$405.10, being commissions and costs of advertisement due him in order to redeem the property from foreclosure sale made by O'Reilly under a prior deed of trust; he agreeing to permit defendants to retain the property upon payment of these expenses. Witness also paid \$80 for insurance on the Flad avenue property; paid W. J. Templeman \$41 for water pipe on Flad avenue; paid insurance on Morgan street house, \$10. Witness denies the statement made by plaintiff in his testimony, that witness asked Mackie to bid on the completion of the houses merely to show such bid to Wright. Witness says he told Mackie he wanted Wright, also, to bid. Witness testified that J. H. England, who painted the houses and testified for plaintiff, was not paid. He sued Mackie, and got judgment, with a lien on the property; but, the judgment being invalid as to the property, witness declined to pay it. Witness states that the receipt signed, "J. H. Mackie, Contractor," and shown plaintiff when on the witness stand, and other receipts put in evidence by defendants, were received by witness from the Mississippi Valley Trust Company just before the trial. He had never seen them before. The word "Contractor" was on the receipt when witness received it from the trust company.

Defendant offered in evidence the following papers, all of which were identified by Mackie when on the stand: The bid of Mackie, in words as follows: "St. Louis, Mo., February 8, 1894. F. W. Mott, Esq., St. Louis—Dear Sir: I propose to furnish all labor and material to finish and complete the four unfinished houses on Flad and Cabonisa avenues for the sum of (\$11,753) eleven thousand seven hundred and fifty-three dollars. Respectfully, yours, J. H. Mackie, 901 Wainwright Building." Also, receipt of April 28, 1894: "St. Louis, Mo., April 28, 1894. Received of Storm & Farish two hundred dollars paid out on labor to carpenters and stone masons on Flad avenue houses, lots 27 and 28, city block 2117. \$200. J. H. Mackie, Contractor." Also, receipt dated May 12, 1894: "St. Louis, Mo., May 12, 1894. Received of Storm & Farish two hundred dollars, of labor of carpenters on Flad avenue residences, lots 27 and 28, city block 2117. \$200. J. H. Mackie, Contractor." Also, receipt dated June 22, 1894: "St. Louis, Mo., June 22, 1894. Received of F. W. Mott eighteen hundred and seventy-five dollars on account of contract for house No. — on Flad avenue, in block 2117. \$1,875. Received payment. J. H.

Mackie." Also, order on Farish: "Mr. Farish: Please pay to Dooly & Lancaster, on account of plumbing on two houses on Flad avenue, for Mott and Sauer, \$300. J. H. Mackie." Also, order on Farish: "St. Louis, May 2, '94. Mr. J. H. Farish: Please give Mr. Fletcher a check for \$48.00 (forty-eight dollars) for sand delivered on Flad avenue on Mr. Mott's houses. Respectfully, yours, J. H. Mackie." Indorsed across the face, "Paid 5/2/94 as per receipt." Also, the following bond: "Bond against Mechanics' Liens. Know all men by these presents that George H. Sauer and F. W. Mott, of the city of St. Louis, state of Missouri, as principal, and J. H. Mackie and E. C. Robinson, of St. Louis, Missouri, as securities, are jointly and severally held and firmly bound unto De Lacy Chandler, of St. Louis, Missouri, in the sum of thirty-seven hundred and fifty (\$3,750) dollars, lawful money of the United States of America, well and truly to be paid to the said De Lacy Chandler, for which payment, well and truly to be made, we bind ourselves, and each of us, by himself, our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and signed with our hands this fourteenth day of April in the year of our Lord eighteen hundred and ninety-four. The conditions of the above obligation are such that whereas, the said George H. Sauer and F. W. Mott have on the date of these presents borrowed from the said De Lacy Chandler the sum of thirty-seven hundred and fifty (\$3,750) dollars to complete a certain residence, situated on lot 27 in the city block 2117, according to plans and specifications now in possession of said De Lacy Chandler: Now, if the said George H. Sauer and F. W. Mott shall keep the said De Lacy Chandler harmless and indemnified from and against all and every claim, demand, judgment, liens, and mechanics' liens, costs and fees of every description incurred in suits or otherwise that may be had against him and against the building to be erected on said lot, and shall repay the said De Lacy Chandler all sums of money which he may pay to other persons on account of work and labor done or materials furnished on or for said building, and if the said George H. Sauer and F. W. Mott shall pay to the said De Lacy Chandler all damages he may sustain, and all forfeitures to which he may be entitled, by reason of the nonperformance or malperformance on the part of said George H. Sauer and F. W. Mott of any of the covenants, conditions, stipulations, and agreements contained in said plans and specifications, then this obligation shall be void; otherwise the same shall remain in full force and virtue. Witness our hands and seals. George H. Sauer. [Seal.] F. W. Mott. [Seal.] J. H. Mackie. [Seal.] E. C. Robinson. [Seal.]"

In rebuttal plaintiff testified: That he made two bids for this work, and approximated it at \$12,000. The first bid was in writing. It was just an approximation on a

slip of paper about what it would cost. This was in February, 1894.

The court made a finding of facts and rendered judgment as follows:

"And further the court finds from the evidence that on or about the 25th day of February, A. D. 1894, the plaintiff was by his trade or profession a contractor and builder, and that the defendants, Frederick W. Mott and George H. Sauer, were the owners of and in possession of 200 feet of ground on the northwest corner of Spring and Flad avenues in the city of St. Louis, Missouri, to wit, lots Nos. 25, 26, 27, and 28 in block 13, Tyler place, in city block 2117,—each having a front on Flad avenue of 50 feet by 123 feet 4 1/4 inches, to a 15-foot alley; that some time prior thereto there had been commenced the building of a brick house on each of said lots. The court further finds from evidence: That on or about said date plaintiff and defendants entered into an agreement in reference to the same whereby it was contracted and agreed that plaintiff should go on and finish the houses, and improve the premises; each house to be a two-story brick, containing ten rooms, cellar, and finished attic, slate roof, with all modern improvements and conveniences in and about the same; and the grounds and property to be put into complete order for market. That plaintiff was to give his time, superintendence, and personal attention to the work; to manage and direct the buildings and improvements, and the work to be done. That the defendants, Frederick W. Mott and George H. Sauer, agreed to furnish the money necessary for the completion of the buildings and improvements. The court further finds from the evidence that the agreement was that, when finished, the property should be sold, and after deducting or refunding the moneys advanced, and paying the incumbrances on the lots, the balance arising from the sale of the same was to be equally divided between the three parties,—James H. Mackie, Frederick W. Mott, and George H. Sauer. The court further finds from the evidence that on March 1, 1894, plaintiff entered upon the work and completed and finished the houses and improvements, under said agreement.

"The court further finds from the evidence:

"That it was the intention of the parties, and that the said contract entered into constituted a co-partnership between the parties to this suit.

That the defendants, Mott and Sauer, borrowed on said property and the proceeds thereof the sum of .....	\$20,500 00
That the said Mott and Sauer, defendants, paid out or advanced the sum of .....	22,008 45

Leaving surplus advanced above loan .....	\$ 1,508 45
That, they (defendants) having refused to advance any other or further sums, plaintiff advanced the sum, to save the property, of.....	976 65

That the remaining assets of the co-partnership are secured notes on certain Morgan street property .....	\$3,500 00
And the Flad avenue lot No. 25, the equity therein of .....	3,000 00
Total assets .....	\$6,500 00
Deducting advances by defendants .....	1,508 45
Balance of assets, $\frac{1}{2}$ due plaintiff .....	\$4,991 55
Add amount advanced by plaintiff..	976 65
Amount due plaintiff.....	\$ 2,640 50

"The court also finds from the evidence: That the following notices of mechanics' liens arising from the buildings and improvements of said houses and premises were filed against plaintiff and defendants and the property as mechanics' liens, and that the liens applied to lot No. 25 aforesaid, and judgments were rendered thereon, to wit: No. 163. Central Mantel Company vs. plaintiff and defendants, lien for \$183; being No. 6,841 (trans. filed February 9, 1895) in circuit court. No. 164. S. S. Dooly and James Lancaster vs. Mott, Sauer, and plaintiff, for \$701; being No. 6,840 (trans. filed February 9, 1895) in circuit court. Claim and judg. of England vs. Same for (before Justice Kline) \$320; being No. 6,852 (trans. filed February 19, 1895) in circuit court. That defendants in accounting have received credit for the same; it appearing from the evidence that they had paid the same, and had the same assigned to them, or to Frederick W. Mott, except the claim of England for \$320 interest and costs. The court further finds from the evidence that there is still remaining on the said lot No. 25 a trust deed dated June 5, 1894, to secure notes,—one for \$4,000, at 3 years, and semiannual interest notes, at 6 per cent. The court further finds from the evidence that the plaintiff filed in the recorder's office in the city of St. Louis on the 11th day of May, 1895, a notice lis pendens of his claim for an equitable lien on said lot No. 25, and the same was regular and as required by law. The court further finds from the evidence: That the said defendants, Frederick W. Mott and George H. Sauer, failed and refused to carry out the co-partnership agreement, and wholly refused to account with the said plaintiff, but wrongfully and willfully converted all of the assets of said co-partnership to their own use, refusing to pay to said plaintiff the said or any amount due him. That the remaining assets consist of secured notes, sale of Morgan street property, \$3,500; the remaining Flad avenue lot, equity therein (lot No. 25), \$3,000; total, \$6,500.

"Now, therefore, it is ordered, adjudged, and decreed that said co-partnership be, and is hereby, dissolved; that said defendants enter satisfaction of record for said claim and judgment of Central Mantel Company for \$183, interest and costs, and S. S. Dooly and James Lancaster judgment for \$701, and interest and

costs, and in default thereof that this decree shall stand in satisfaction of the same; and that the plaintiff have and recover of and from the said defendants, Frederick W. Mott and George H. Sauer, and each of them, the said sum of \$2,640.50, and interest and costs in this behalf expended. It is further ordered that the said sum, from and after May 11, 1895, be, and is hereby decreed to be, a lien on said lot No. 25 in block 13, Tyler place, in city block 2117, in the city of St. Louis, Missouri, and all the improvements thereon, and the sums herein found to be due be levied of the real estate, and that the same be sold subject to the said trust deed for \$4,000 and interest unpaid, and that the proceeds be applied first to the payment of costs herein, next to payment of claim and judgment of said England for \$320, interest and costs, and the balance, if any, applied in payment of the judgment herein rendered. And it is further adjudged that, if the same be not sufficient to satisfy said debt and costs and said sum ordered to be paid, that the residue of said debt be levied of the goods and chattels, lands and tenements, of said defendants, Frederick W. Mott and George H. Sauer."

After an unsuccessful motion for a new trial, defendants appeal.

The first assignment of error is that the court committed error in ruling that there was a partnership between the parties. It is insisted by defendants that the relation of a partnership does not exist between persons associated in a common undertaking, unless each one has the right to manage the whole business, and to dispose of the entire property involved in the enterprise, for its purposes, in the same manner and with the same power as all can when acting together. Upon the other hand, it is urged by plaintiff that, if in fact the parties intended to become partners in improving and marketing the Flad avenue property, he can, in equity, enforce the rights of a partner against defendants. It is not, we think, absolutely necessary, in order to constitute a partnership in the net proceeds arising from the management and improvement of real property, that each member of the partnership should have the power of disposal of the property; but the mere fact of a "participation in the profits and loss does not necessarily constitute a partnership between the parties so participating. It is a question of intention on the part of the alleged partners, and is one which the triors of the fact will have to determine upon all the circumstances proved." McDonald v. Matney, 82 Mo. 358. Each case must be determined by its own peculiar facts. It will hardly be contended that two or more persons owning the fee in property, as in the case at bar, may not enter into a partnership with another with respect to improving the property, and the profits arising therefrom upon its sale. To so hold would be to deprive the parties of the right to contract, and all partnerships are formed by contract, expressed or implied. The question then is,

do the facts and circumstances disclosed by the record show that plaintiff and defendants were partners, as alleged by plaintiff? In *Parsons on Partnership* (page 58) it is said: "It should be added that whether two or more persons are partners, as to each other, must generally, and perhaps always, be determined by the intention of the parties, as the same is expressed in the words of their contract, or may be gathered from the facts and from all the circumstances which are available for the interpretation or construction of the contract." Plaintiff testified that Mott had four houses on his property, which one Rowe had started to build for him and had abandoned, and that Mott proposed to give him one-third of the profits to be derived from these houses, if plaintiff would give his time and attention to their completion, defendants furnishing the money required to complete the same, and when the houses were completed they were to be sold, and the profits, after reimbursing Mott and Sauer, were to be divided equally between them; that under this arrangement he went to work on, and furnished between fifteen and sixteen hundred dollars on, the houses, and completed them according to the terms of the contract, on his part; that the first time he knew that Mott claimed witness was doing the work on the houses as a contractor was when he gave a man an order on Mott for some money, and Mott told the man that he had overpaid Mackie on the contract. Mott testified that Mackie did the work under contract. The formation of a co-partnership is one of intention by all the parties thereto, which must be arrived at from the contract itself, and surrounding circumstances; and there is nothing in this record showing that defendants ever intended to enter into a co-partnership with plaintiff in regard to the completion of the houses, and the profits to be derived therefrom. It is true that W. J. Templeman testified that on one occasion Mott introduced Mackie, saying, "He is interested with us in the construction of those houses;" but all these facts are not inconsistent with the position of Mackie as contractor. Moreover, Mackie on the 8th day of February, 1894, proposed to Mott, in writing, to furnish all labor and material to finish and complete the four unfinished houses for the sum of \$11,753. Besides, he thereafter gave receipts, as "contractor," for money received from Storm & Farish, paid out to carpenters and stone masons on the buildings. He also on the 22d day of June, 1894, receipted to Mott for \$1,875 on account of contract for house on Flad avenue, and gave two orders on Mott in favor of different persons for work done and material furnished on said buildings. The receipt to Mott for the money, and the two orders, were not, however, signed by him as contractor. It is true that plaintiff undertook to explain his bid of \$11,753 for the completion of the houses, and to show that it was not inconsistent with the idea of a partnership

between himself and defendants; but, to say the least of it, his explanation was very unsatisfactory. The facts mentioned, and many others connected with the transaction, not necessary to mention, force us irresistibly to the conclusion that there was no partnership existing between plaintiff and defendants, as alleged in the petition; and, with due deference to the conclusion reached by the court below, we so find. The solution of this question necessarily disposes of all others raised upon this appeal. The judgment is reversed.

GANTT, P. J., and SHERWOOD, J., concur.

### KEITH et al. v. RIDGE<sup>1</sup>

(Supreme Court of Missouri, Division No. 1.

July 6, 1898.)

#### PARTY WALLS—UNCOMPLETED CONTRACTS—RECOVERY ON QUANTUM MERUIT.

Where a party wall was erected under a written agreement duly executed by adjoining landowners, whereby defendant owner was to pay one-half its value when he should use it, but it was not completed in the manner contemplated in the contract, in that a space was left in the wall for light and ventilation, and defendant subsequently used and enjoyed the wall as a party wall by filling up the space, he was liable on a quantum meruit.

Appeal from circuit court, Jackson county; C. O. Tichenor, Special Judge.

Action by Richard Keith and others against Isaac M. Ridge to recover under a contract and on a quantum meruit for half of the cost of a party wall. From a judgment for plaintiffs on the quantum meruit, defendant appeals. Affirmed.

Lathrop, Morrow, Fox & Moore, for appellant. Fryke, Yates & Fryke, for respondents.

BRACE, P. J. The plaintiffs Keith & Perry are the owners of a lot in Kansas City fronting 100 feet on Walnut street, and running back 115 feet to an alley, and the defendant, Ridge, is the owner of a contiguous lot of the same frontage and depth. On the 7th of July, 1896, the parties entered into a written contract which provided as follows: "(1) That whichever party shall first build adjoining said lines shall erect a party wall thereon, half on each side thereof, of such depth as such party shall see fit, and of sufficient strength and thickness to sustain a building of not less than five stories in height, of good material and workmanship, and in conformity with the building laws for the time being in force, and shall keep the same in repair until used by the owner of the other parcel; after which the same shall be kept in repair at the joint expense of the owners of said adjoining parcels of land for the time being. (2) That, whenever the owner for the time being of the other parcel uses said wall, he shall pay to the person at the time of such

<sup>1</sup> Rehearing denied November 15, 1898.

use owning the parcel first built upon one-half of the then value of such wall, including in the word 'wall' the stone and brick foundations and any other substructure, together with the coping. (3) That either party, his or their heirs or assigns, on either side, may build said wall higher or deeper, taking due care not to injure the other owner, and doing the work wholly from his or their side, unless the other side be vacant, and doing all that may be necessary, as by carrying up flues and the like, to leave the other owner as near as may be in as good condition as before, and using good material and workmanship and conforming to existing building laws; and one-half of the value of any such additions, when used, shall be paid for like the original structure."

Soon after the agreement was made the plaintiffs Keith & Perry commenced the erection of a building on their lot, six stories high on Walnut street, and seven stories on the alley, the center of the south wall of which was, in pursuance of the agreement, located on the dividing line between their lot and that of the defendant, Ridge. The foundation of the wall was of stone, solid and continuous from Walnut street to the alley. The remainder was of brick, laid continuously thereon, except that from about 2 feet above the stone foundation, and about 50 feet from the front wall, the plaintiffs recessed their south wall on their own lot for a distance of 16 or 17 feet, to the top, thus leaving a space of that length of the wall unoccupied by their building, thereby forming a court therefor, on their own premises, for the purposes of light and ventilation. Their building was completed some time in the year 1888, and afterwards, in the year 1890, the defendant erected a building on his lot of the same depth, four stories high on Walnut street, and five stories high on the alley, using the wall thus constructed by the plaintiffs for the north wall of his building, making the same a continuous, solid, blank wall between the two buildings by filling up the space aforesaid left by the plaintiffs as aforesaid, which ever since has been used and enjoyed by both parties as a party wall for their buildings. After the defendant had thus erected his building, the plaintiffs demanded payment of one-half of the cost of the wall thus used by the defendant, and, payment having been refused, this suit was instituted.

The petition is in two counts,—the first upon the contract; the second upon a quantum meruit. The answer is a general denial, except as to the making of the contract, with allegations of specific violations thereof. The case was tried by the court without a jury. The finding on the first count was for the defendant. On the second count it was for the plaintiffs, on the theory that the defendant, having used the wall as a party wall, ought to pay one-half of the reasonable value of the wall actually used by him at the time it was so used, less one-half of the reasonable value

of the part of said wall built by defendant, at the time it was built; and upon this theory plaintiffs' damages were assessed at the sum of \$1,247.67, and judgment for that amount rendered in their favor, from which the defendant appeals.

The contention of the defendant is that a party wall is a solid blank wall, without windows or openings therein; that such was the wall contemplated in the contract; and that, by reason of the space aforesaid having been left above the foundation, unbuilt in, such wall was not a party wall, within the meaning of the contract, although the contract provided that plaintiffs using it build the wall of such depth as they saw fit, and in all other respects the wall below and on each side of this space was a solid blank wall, without windows or openings therein, built in accordance with the requirements of the contract, and subjected, by the character of its construction, to no exclusive servitude for plaintiffs' benefit. To this extent the contention of the defendant was sustained by the circuit court, by its finding in his favor on the first count of the petition, and that ruling, not being before us for review on his appeal, need not be discussed. The contention, however, goes further, and it is insisted that, the work not having been completed in accordance with the terms of the contract as construed by the court, the court committed error in holding that the defendant was liable to the plaintiffs for anything on account thereof, although the same was accepted and used by the defendant for a party wall as contemplated in the contract. In support of this contention a number of cases are cited in which it has been, in effect, held that where a wall has been erected by the owner of a lot on the boundary line between his own and an adjoining lot, resting partly on each, the law imposes no obligation on the owner of the adjacent lot to contribute to the cost of its erection, in the absence of an agreement or promise to do so (*Preiss v. Parker*, 67 Ala. 500, and cases cited; *List v. Hornbrook*, 2 W. Va. 340; *Sherred v. Cisco*, 4 Sandf. 480; *Orman v. Day*, 5 Fla. 385),—a general proposition that may be conceded for the purposes of this case. On this principle, it is contended that, although the wall in this instance was erected in pursuance of a written agreement duly executed, acknowledged, and recorded, and in conformity thereto, except in the respect mentioned, and of great value to the defendant for the very use intended in the agreement, and to which use it was subjected, and ever since has been enjoyed, by the defendant, yet, the wall not having been completed in the manner contemplated in the contract, the consent of the defendant thereby given was forfeited, the plaintiffs became trespassers ab initio, and can claim nothing on account thereof, notwithstanding their large expenditure therefor, under the contract, for the defendant's benefit. This contention wholly ignores that salutary and equi-

table principle, early introduced into the common law, and which has become firmly imbedded in our system of jurisprudence, that "if one party, without the fault of the other, fail to perform his side of the contract in such a manner as to sue on it, still, if the other party has derived a benefit from the part performed, it would be unjust to allow him to retain that without paying anything. The law therefore generally implies a promise on his part to pay such a remuneration as the benefit conferred is reasonably worth, and, to recover that quantum of remuneration, an action of indebitatus assumpsit is maintainable." *Yeats v. Ballentine*, 56 Mo. 530, and cases cited. "The established rule extracted and deduced from all the cases is that, where a party fails to perform his work according to the stipulations of his agreement, he cannot recover on the special contract; but if the services rendered by him, or the materials furnished, are valuable to the other party, and are accepted by such party, then he would be liable to pay the actual value of the work performed or the materials furnished, not exceeding the contract price, after deducting for any damages which had resulted from a breach of the agreement." *Eyerman v. Association*, 61 Mo. 489. The principle upon which this rule is based is so fair, just, and equitable that, while at first its application was limited to a certain class of contracts, it has now become in this state a rule of general application to all contracts, where it can be applied without doing the defendant injustice. *Moore v. Manufacturing Co.*, 118 Mo. 98, 20 S. W. 975; *Halpin Mfg. Co. v. School Dist.*, 54 Mo. App. 371. So far as our decisions go, the only exceptions, perhaps, thus far developed, are contracts for labor for a specified term. *Earp v. Tyler*, 73 Mo. 617, and cases cited. We fail to discover in the argument of counsel for the defendant, drawn from the nature of the interest acquired by the coterminous proprietors in a party wall built as this one was, any sound reason for not applying this rule to the case in hand, as was done by the circuit court in its judgment, which ought to be, and is therefore, affirmed. All concur.

#### SNODDY et al. v. JASPER COUNTY.

(Supreme Court of Missouri, Division No. 1.  
Nov. 15, 1898.)

##### APPEAL—ABSTRACT OF RECORD.

Appellant's abstract, in the absence of a counter abstract, must contain enough of the record to enable the court to pass on alleged errors, without going to the transcript for further information.

Appeal from circuit court, Jasper county; W. M. Robinson, Judge.

Proceeding by Jasper county to establish a road. Mary L. Snoddy and others, who

filed a remonstrance, appealed from adverse judgment to the circuit court, where judgment was again against them, and they again appeal. Affirmed.

Wm. Thompson, for appellants. Howard Gray, for respondent.

WILLIAMS, J. This is a proceeding begun in the county court of Jasper county, to establish a new public road. Appellants complain of the absence from the record of necessary recitals to show jurisdiction in that court. They further object to rulings alleged to have been made upon a trial anew in the circuit court, where the case was taken on appeal. The abstract of the record presented for our consideration does not contain any of the orders of the county court. It is entirely silent concerning the jurisdictional facts shown by the record of that court. If any judgment was rendered by the circuit court, it is omitted from the abstract, and no allusion is made to it. Exceptions may have been saved to the rulings of the trial judge, but, if so, we are left in ignorance of them. If a bill of exceptions was filed, no mention is made of it. Appellants seem to concede the insufficiency of the abstract by pointing us to the transcript for proof of assertions in their brief. Our rules require that "the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the assigned errors." This rule has been so often construed and applied that no doubt can remain about its requirements. *Sedgwick Co. v. Newton Co.*, 144 Mo. 301, 46 S. W. 163; *Ramsey v. Shannon*, 140 Mo. 281, 41 S. W. 732; *Walser v. Wear*, 128 Mo. 652, 31 S. W. 37; *Carlisle v. Russell*, 127 Mo. 465, 30 S. W. 118; *Nolan v. Johns*, 126 Mo. 159, 28 S. W. 492; *Jayne v. Wine*, 98 Mo. 404, 11 S. W. 969. *Sherwood, J.*, said, in *Ramsey v. Shannon*: "The obvious object of these rules is that no reference to the record need be made, but that the court may rely for its information on the abstract alone." If the court, after examining the appellants' abstract, when only one is furnished, and the case is submitted upon that, must still search through the transcript for the basis of the errors assigned, the abstract will be a burden rather than a benefit. It will increase labor rather than diminish it. Two documents must then be examined instead of one. Of course, where a counter abstract is presented, we have to go to the record to ascertain which is correct in the particulars wherein they differ. When the case is submitted upon appellants' abstract alone, it must contain enough of the record to enable us to pass upon the alleged errors, without the necessity of going to the transcript for further information. The abstract in this case fails to disclose that error was committed, as alleged, and the judgment is affirmed. All concur.

**ROTHROCK v. CORDZ-FISHER LUMBER CO.**(Supreme Court of Missouri, Division No. 1.  
Nov. 15, 1898.)**SUPREME COURT—JURISDICTION—TITLE TO REALTY  
—TRESPASS.**

An action of trespass to recover damages for cutting and removing trees from plaintiff's land, where the title to the land is a collateral issue, does not involve "the title to the real estate," within Const. art. 6, § 12, so as to give the supreme court jurisdiction of an appeal.

Appeal from circuit court, Shannon county;  
W. N. Evans, Judge.

Action by James Rothrock against the Cordz-Fisher Lumber Company. From a judgment for plaintiff, defendant appeals. Appeal transferred.

James Orchard, for appellant. John C. Brown, for respondent.

**BRACE, P. J.** This is an action instituted in the circuit court of Shannon county to recover the sum of \$1,200 damages of the defendant, for cutting down, removing, and converting to its own use 2,500 pine trees and 700 oak trees, standing and being on a certain tract of land described in the petition, of which it is therein alleged that the plaintiff is the owner, in which the plaintiff obtained judgment in said court for the sum of \$300, from which judgment the defendant appeals to this court.

This action does not involve the title to real estate, within the meaning of the constitution, and the appeal should have been taken to the St. Louis court of appeals. In the recent case of *Price v. Blankenship*, 144 Mo. 203, 45 S. W. 1123, Marshall, J., after reviewing the decisions to date on this head, expressed the doctrine of this court upon this subject in the following language: "It is now firmly settled that to give this court jurisdiction under section 12 of article 6 of the constitution, because the title to real estate is involved, it must appear that the title to real estate will in some way be directly affected by the judgment to be rendered in the case. It is not sufficient that the question of title may be incidentally, collaterally, or necessarily inquired into, to settle the issues. The judgment to be rendered must directly affect the title itself to the real estate. If the judgment rendered by the lower court could be satisfied by the payment of money, without affecting the title to real estate, the case would not fall within our jurisdiction, under this provision of the constitution." Under the Code of this state, "the action of trespass is strictly personal." *Railroad Co. v. Mahoney*, 42 Mo. 467. As *Wagner, J.*, who delivered the opinion of the court in that case, says: "The primary object in trespass is to recover damages, not to try title to real estate; and it matters not which side is successful, the title remains unaffected. The plaintiff cannot obtain judgment without showing title, where his ownership is denied; but his proof

of title is collateral, and a mere incident of the real issue,—his right to damages. If the plaintiff shows title sufficient to enable him to maintain his cause of action, the judgment does not operate on the real estate or affect the title thereto. The proof of title only amounts to a link in the chain, among others, of the evidence by which he supports his issue and recovers a general judgment for the wrong done him by the defendant." See, also, *Gregg v. Railway Co.*, 48 Mo. App. 491. It is true that in the case of *Musick v. Railway Co.*, 114 Mo. 309, 21 S. W. 491, it was held "that, when the record in an action for injury to real property shows that the defense rests upon adverse claim of right to the possession of the land in question, the cause involves title to real estate, within the meaning of the language defining the jurisdiction of the supreme court"; but, as this ruling is inconsistent with the doctrine of this court on this subject established by a long line of cases precedent and subsequent thereto, it ought to be, and is, overruled, and this cause is transferred to the St. Louis court of appeals for determination. All concur.

**STATE v. MILLER.**(Supreme Court of Missouri, Division No. 2.  
Nov. 7, 1898.)**CRIMINAL LAW—APPEAL—STRIKING FROM DOCKET.**

Cause will be stricken from supreme court docket, no appeal having been granted by the circuit court, nor writ of error issued from the supreme court.

Appeal from circuit court, Caldwell county;  
E. J. Broadbush, Judge.

David B. Miller was convicted of forgery, made application for appeal, and prosecuted the same. Stricken from docket.

C. A. Loomis, for appellant. Edward O. Crow, Atty. Gen., and Sam B. Jeffries, Asst. Atty. Gen., for the State.

**GANTT, P. J.** This cause must be stricken from the docket because no appeal was granted by the circuit court, and no writ of error was issued from this court. A minute examination discloses, furthermore, that what purports to be a bill of exceptions was never signed by the judge of that circuit, and has no place in the transcript. Stricken from the docket.

**SHERWOOD and BURGESS, JJ., concur.**

**GANNON v. LACLEDE GASLIGHT CO.**  
(Supreme Court of Missouri. Nov. 16, 1898.)**DIRECTING VERDICT.**

Where one party offers testimony to sustain his burden of proof, and the other party offers nothing to contradict it, a direction of a verdict against him is proper.

Per Sherwood, Brace, and Marshall, JJ., dissenting.



Dissenting opinion. For majority opinion, see 46 S. W. 968.

**MARSHALL, J.** The importance of the legal principles involved in this case, and the fact that in some respects it is the first case of its kind that has reached this court, demands that I shall give my reasons for my dissent from the opinion of the majority of the court. To understand the points involved, and to appreciate the force of my dissent, it is necessary to state the case more fully than is done in the opinion of the majority.

The suit is an action for damages for the death of plaintiff's husband. The petition avers that the defendant is a duly-incorporated Missouri corporation, organized for the purpose and engaged in the business of furnishing electric light in the city of St. Louis; that it had wires strung on poles set up on the public streets, conveying and charged with "a certain dangerous and life-destroying fluid and current, known as 'electricity'"; that on April 18, 1894, it had such wires, so strung and charged, in a public alley in the rear of house No. 2737 Thomas street, and that "the defendant negligently and carelessly permitted its said wires, to the number of six or seven, then and there charged as aforesaid, to become broken in two and to fall to the pavement of said alley, and to remain broken in two and down for a long time, then and there, while full charged with electricity as aforesaid, when it knew, or ought by the exercise of any care and caution to have known, that the said wires were so as aforesaid broken and down, and charged as aforesaid to destroy human life"; that, while the wires were so down, plaintiff's husband, while walking along the alley, struck his foot against one of the wires, and was instantly killed. The answer is a general denial and a plea of contributory negligence on the part of plaintiff's husband. The reply denied contributory negligence.

The evidence for plaintiff was substantially as follows:

Annie Gannon testified that she is the widow of William Gannon, who was killed on April 18, 1894; that he was 38 years old, employed in the fire department, and was a strong, healthy man.

Ernst Hilgendorf testified that he is the city telegraph operator; that it was his duty to receive alarms of fire, and distribute them to the engine houses and other city departments; that on April 18, 1894, at 10:56 a. m., he received an alarm from box No. 129, in the neighborhood of Leffingwell avenue and Thomas street; that the Laclede Gaslight Company have connection with his office, but he could not say whether they were given the alarm on that occasion.

Peter J. Dolan testified that he was standing on Glasgow avenue, between Sheridan and Cass (three blocks from the fire), when he heard the alarm; that he ran to the fire, saw smoke coming from the shed, went into

the alley about 10 feet, to a point 30 or 40 feet from the burning shed, and saw two wires down, and there may have been more; that the fire department got there two or three minutes later, and within two minutes after that he was put out of the alley by a policeman; saw a man (not identified as the deceased) lying in the alley when the policeman was putting him out of the alley; that at that time the flames had not burst out of the top of the shed.

Frank J. Hildebrand testified that he was at work in his barber shop, 2601 Sheridan avenue, cutting witness Sullivan's hair; that when the fire alarm sounded he and Sullivan ran to the fire, which was a block and a half west of his barber shop; that the smoke was dense, and it was "pretty hot"; that he went into the alley, and saw an electric wire lying north and south across the alley; that from two to four minutes later the fire department arrived; that Gannon came into the alley from the south, and was killed very soon after he got there; that he (witness) assisted in pulling the hose into the alley, and got a pair of nippers and gloves to cut the wire; that he was excited on account of seeing Gannon lying on the wires, and he got the nippers after the man was hurt.

John Sullivan, a police officer, whose hair Hildebrand was cutting, testified: That he heard the alarm at half-past 11 o'clock in the morning, or between 11 and 12. That he ran to the fire. Noticed a lot of smoke, and the adjoining shed, across from it, was smoking, too. That he went into the alley, but as it was getting "pretty hot" he went into the yard. That "three or four minutes after that the fire department came, and when the fire was over—pretty near over—I seen Mr. Gannon, a fireman, coming out from the hallway; and I noticed a black wire about two feet from where he stepped out, and I noticed him having a nozzle in his hand. As he came out, I saw him step on this wire. I think it was the right foot. And I noticed him give a groan, and halloo 'Oh! That is all I noticed.'" Witness further testified that the wire was down when the fire department arrived, and that when he saw the wire the flames had burst out on top of the shed.

James Cain testified that on April 18, 1894, he was pipeman in No. 17 company, which was stationed on Easton avenue, between Leonard and Compton, 5 blocks west of the fire; that his company was among the first to reach the fire; that they started down the alley, when somebody hallooed that the wires were down, and to look out for the horses, just in time for them to stop; that the alarm came in about 11 a. m.; that Gannon belonged to chemical No. 4 company, and got there after he (witness) did; that Gannon came into the alley from Thomas street, through the yard, out of a hallway or door in the alley, with a pipe in his hand; that he saw him fall; was 10 or 12 feet from him; that a man threw a rope around him and pulled him

away from the wire as soon as possible; that the fire was nearly under control when Gannon was killed, which was 20 minutes after witness reached the fire, and he reached the fire 2 or 3 minutes after the alarm came in; that the wire which killed Gannon was a large wire, and hung down along the pole; that Hester, assistant chief, tried to cut it with an ax, striking it against the pole; that Gannon's engine was stationed on Washington avenue and Twentieth street, about 10 blocks south and 5 blocks east of the fire; that the defendant's power house or plant was located at the foot of Mound street, which was about twice as far from the fire as Gannon's engine house was from it; that everybody knows that when wires are down they are dangerous; that firemen carry wire cutters; that he could see from the west end of the alley that the wires were down; that his company played on the fire quite a while before Gannon's company arrived; that No. 5 company came in from Sheridan avenue on the north side of the alley, and that Dolan and then Shively were knocked down by the wires, and a few minutes afterwards Gannon fell; that he did not see any one attempting to cut the wires before Gannon or Dolan fell.

Luke McConn testified that he is a member of hook and ladder company No. 8, which was stationed at the same engine house with Gannon's company; that they went to the fire together; that he, Gannon, and Cronin worked on the Thomas street side of the shed 10 or 12 minutes before going into the alley, and then some one called to bring the chemical line into the alley, and witness and Gannon pulled the pipe into the yard, on the Thomas street side; that he and Gannon stepped into the alley, when he got a shock, jumped to another part of the alley, and shouted, "Look out, Billy!" that Gannon was right behind him, and, as he looked around, Gannon stepped out into the alley, reeled, and fell over; that there was from four to six inches of water in the alley, from the hose and the rain, it being just after a thunderstorm; that the wires came down in a looped shape, and looked pretty big to him when he stepped into the alley; that all those wires were insulated, "if they don't get burned or torn off"; that he did not know how the insulation got off of these wires.

Robert E. Cronin testified that he belonged to the same chemical company with Billy Gannon; that he was at the fire; that they took the hose through the yard to the shed; that he did not see the accident to Gannon; that it was a pretty fierce fire for a shed fire; that it was a two-story shed, with a hallway through it; that all firemen know that electric wires are dangerous if they are down or disarranged.

Charles Swingley testified: That he is chief of the fire department. Knew Gannon, as a fireman, about four years. That he was at the fire. That, on arriving there, found a fire raging. "It was a pretty fierce blaze when

they commenced playing on it. Ques. by the Court: When did you first notice those wires that were down there? Ans. On entering the alley. Ques. And then, you say, the fire was raging? Ans. Yes, sir. Ques. It had been for some time? Ans. It appeared to me so. Ques. by Counsel for Defendant: It was raging pretty fierce, with the flames away up in the air? Ans. Yes, sir."

Andrew J. O'Reilly testified that he has been a professional electrician for 12 or 15 years, and is supervisor of city lighting in St. Louis; that he is acquainted with the electric light wires in the city; that he arrived at the fire about 20 minutes after it started, when it had burned out; that he found seven wires down, —one telephone wire belonging to the city fire department, and six copper wires belonging to defendant; that the wires were strung on poles, east and west, in a public alley. Witness produced six wires which were cut on the day of the fire from the wires in the alley, and testified that the five copper wires were used by the defendant to furnish electricity for light and power purposes under contract with the city, and for private lights and power north of Washington avenue; that the large wire produced by him was part of the Brush incandescent light system, being the main wire supplied with electricity from defendant's power house on the Levee and Mound street, and carried a charge of 2,200 to 2,300 volts; that the power circuit carried about 500 volts, which would shake one up seriously and burn him; that 1,100 volts will kill a man; that there was no current at that time on the small wires of the alley-lighting circuit, except at night; that when he arrived at the fire he found the big wire burnt in two; that, if a wire breaks, the defendant has no automatic method of knowing where the break is; that the only way it finds out that the wire is broken is that the lights beyond the break go out, and the customer reports the fact to defendant, who then sends out a man to repair it; that defendant uses the multiple system; that there is less danger in using the multiple system than the series system, because the latter requires more voltage; that the voltage used in these wires was no more than was required by defendant's contract with the city; that all the electric companies in St. Louis have a system of receiving fire alarms; that the defendant, under contract with the city, furnishes electric light to the various engine houses and other public institutions along the line, and is required by that contract to keep the circuit of electricity in operation all the time,—day as well as night; that the pieces of wire exhibited by him were cut off for him by an inspector of the lighting department while he was at the fire, and that in his opinion these wires were broken by reason of heat underneath; that when he saw the wires, the day of the fire, quite a length of the insulation was burned off; that before the fire the wires were strung in accordance with the city ordinances, without any unusual sagging be-

tween the poles, and were 25 feet above the ground; that he knew Gannon, and had talked with him about his work; that all firemen know the dangers of electric wires, and he thought Gannon had spoken to him about it; that Gannon was a lineman before he was a fireman; that the defendant's contract with the city required it to keep the lights burning on this circuit all the time, to furnish light to the engine houses Nos. 28 and 29 and the mounted police station; that in his opinion those wires could not have set fire to the shed; that the large wire belonged to defendant's incandescent Brush system, which was a metallic circuit, having no ground connection, and was supplied with electricity generated at defendant's station at the foot of Mound street; that defendant has appliances which show when both wires of the circuit are down, but that in this case only one of the wires was down, and that defendant had no way of knowing the fact in such cases; that defendant's contract required it to keep a constant current of 2,000 volts for that part of the city, which was a proper current for that purpose; that the large wire was strung almost over the shed, and that the burning of the shed would have produced heat enough to affect the wire; that in his opinion the breaking of these wires was caused by "the wires becoming overheated at this particular point, lost their strength, and there was a reduction of cross section, due to the tension in the wires, and a consequent break"; that in his opinion the break in the wires was caused by the fire; that he examined the wires at the time of the fire, and there was no sagging; that, if the wires between these poles had sagged enough to cause the wires to touch the shed, the wires on the other spans would have sagged, too, but they were all tight, and there was nothing to indicate that the wire had sagged and set fire to the shed; that engine house No. 28 is west of where the fire occurred, and that a telephone message was received that day at about 10 minutes past 11 o'clock, from engine house No. 28, that its lights went out at 11 o'clock, which was a short time after the fire alarm was given, which occurred at about 5 minutes before 11 o'clock; that it was impossible for these lights to have continued burning after the break in those wires; that at 15 or 20 minutes past 11 the defendant was notified from witness' office that the lights were out at No. 28 engine house; that the firemen had gone to the fire before the notice was given to defendant.

This was all of plaintiff's evidence. Thereupon defendant demurred to the evidence, the court overruled the demurrer, and defendant duly excepted. The defendant then introduced evidence as follows:

S. A. Keightley testified that he was present at the fire; was filling an ice box right north and a little northwest of the fire when his attention was first attracted to the fire; that he ran to the fire, and at the request of a lady he ran to the alarm box on the northeast corner of Leffingwell avenue and Dick-

son street, a block and a half from the fire, and turned on an alarm, and then came back to the fire; that the firemen arrived in three or four minutes; that before he turned on the alarm there was considerable fire,— "the whole back part of the stable was blazing"; that he noticed the electric wires on the poles before he turned on the alarm; that none of the wires were down, or he would have noticed it; that on coming back, after turning on the alarm, he noticed three or four wires down.

J. W. Beyer testified that his attention was called to the fire when Keightley was fixing the ice box; that he ran to the alley, walked into it 10 or 15 feet and watched the fire; that when he arrived the whole back of the shed was ablaze; that the wires were then up on the poles; that about a minute after he went into the alley, and before the firemen came he saw the wires fall, and because of the wires being down and because of the heat he got out of the alley; that he saw Gannon when he reached the fire, when he went into the alley, and when he fell.

E. M. Wordsworth testified that he lived at 2733 Thomas street, the second house from the fire; that he heard the commotion, and went to the alley and saw the fire; that the wires were all up when he arrived at the fire; that he saw the wires burn in two and fall, and thinks some of the firemen were there when they fell.

August Kell testified that he lived on Leffingwell avenue, on the corner of the alley that runs midway between Thomas street and Sheridan avenue (which is the alley in question, and would make his house about 75 feet from the fire); that he was in the second story of his house when he noticed the smoke coming out of the shed; that he ran into the stable, and saw it was on fire downstairs; there was some wash strung up in the stable, which he took down and laid it on the steps, and by this time a man got a garden hose and began squirting it on the stable, but it got so hot that he could not go back through the alley; that when he went through the alley the wires were all up on the poles, and when he got out of the stable the blaze was shooting up, and he saw the wires curl up and drop down into the alley; that this was two or three minutes before the firemen arrived.

Miss Josie Kell testified that she is a sister of August Kell, and lived with him; that she smelt the smoke, and her brother called "Fire," and ran out of the house; that she looked out of the window; could only see smoke at first; then some one burst open the door, and the flames shot out; that the electric wires were all up on the poles; that when the flames shot up, the covering of the wires caught fire, and the wires burned in two and fell.

John Fitzgerald testified that he reached the fire before the firemen came; that he stood at the entrance of the alley on Leffingwell

avenue, and saw the smoke burst out around the windows and doors; that the electric wires were all up; that he helped a lady to get her surrey out of a stable on the opposite side of the alley from the fire, and pulled it out through the alley; that the wires were up then; that he saw the wires fall, and he got out of the alley as soon as he could.

Thomas J. Foster testified that he went to the fire with Fitzgerald; that he saw the wires burn in two a few minutes after he arrived at the fire; that he warned the driver of No. 17 reel that the wires were down, and he just had time to stop; that the rubber around the wires caught fire and burned, and the wires fell close to him, and he halloed to Mr. Sweeney that the wires were coming down, and Sweeney got his pants burned in getting out of the alley.

William Gallagher testified that he is the general foreman of the electric light department of the defendant company, and remembered the fire; that the alarm was given about 11 o'clock; that defendant's lines and circuits in that vicinity were at that time in first-class condition; that defendant has an instrument known as a "circuit breaker," when both of the wires are down, but that it would not indicate the falling of only one wire, if the other was up, and that he knows of no device which would do so; that the first notice defendant had that the wires were down was about 7 minutes past 12 o'clock, which was received by telephone from the city lighting department, and up to that time there had been no indication of any disturbance on that circuit; that he immediately went out to repair it; that, if one wire of a circuit is down, it is not necessarily dangerous, but if both are down, and you touch one of them, it is very dangerous; that if both wires are down, and resting in a pool of water, the circuit would be continuous, and the circuit breaker would give no indication of the break; that there was no indication at the company's works that morning that there was any grounding of the circuit; that defendant furnishes light for the city institutions, and is required by contract to keep the lights burning all day; that defendant got the fire alarms at the same time the fire department did, and that on this occasion the alarm came from the box at Leffingwell avenue and Dickson street; and that defendant had no live wires in that neighborhood, and knew nothing about any disturbance until the report came that the lights were out in No. 28 engine house.

Robert Quain testified that he is general foreman of the city fire and police department; that he was familiar with the wire in question; and that it was in good condition when put up, and was a well-constructed line, erected in compliance with the city ordinances.

M. B. Pittsworth testified that he is a city inspector of fire and police telegraph; that he was at the fire at 11:30, and cut the wires

off the poles; found the line in good condition, except some of the wires were down.

This was all the evidence in the case. The plaintiff introduced no evidence in rebuttal. Thereupon defendant asked, and the court refused to give, the following instruction,—defendant duly saving its exception: "The court instructs the jury that, upon the pleadings and all the evidence, the plaintiff cannot recover." The court then instructed the jury in various respects, but as no point is urged here as to the correctness of the rulings in this respect, it is unnecessary to refer to that feature of the case. There was a verdict for plaintiff for \$3,000, and, after unsuccessful motions for new trial and arrest, the defendant appealed to this court.

1. The opinion of the majority of this court, after laying down the undisputed proposition that a petition which alleges facts sufficient to authorize a recovery is good, notwithstanding it contains other allegations not necessary to make out the plaintiff's case, holds that "plaintiff's petition was complete when the charges had been made that her husband had met his death upon one of the public alleys of the city, when in the discharge of his duty as fireman, and without fault upon his part, by stepping upon an electric wire of the defendant, charged with electricity, that defendant had negligently suffered to become broken in two and fall to the pavement of the alley." And after thus adjudging the petition sufficient, and disregarding the other allegations of the petition as unnecessary, the opinion proceeds: "It is scarcely necessary to assert that it was the duty of the defendant company to so keep at all times its electric wires, over which was continuously being transmitted that most dangerous energy, force, or fluid known to man, called 'electricity,' out of the way of the citizen, that contact with them would not occur as he went to and fro in the prosecution of his business. It was a matter of the plainest duty for the defendant to see that the streets and alleys of the city, along which, by permission, it was suffered to place its overhead wires for its own private gain, were at all times maintained in the same condition as to safety from electricity as they were before its overhead use thereof was begun; and a most imperative duty was placed upon defendant, in assuming the overhead use of the public alley with its wires, to see that persons passing along and using the alley are not injured thereby; and when proof, under the allegations of plaintiff's petition, was made that one or more of defendant's wires, charged with its death-dealing force, was down upon one of the public alleys of the city, and that plaintiff's husband met his death in the discharge of his duty, a prima facie case of negligence was made out against defendant, and the burden was then put upon it to show that its wires were down in the alley through no fault of its agents and servants, notwithstanding the plaintiff had al-

leged further that said wires were permitted to become broken in two and to remain down and broken in said alley for a long time, when it knew, or ought to have known by the exercise of care and caution, the broken condition thereof. \* \* \* Plaintiff by her testimony made out a *prima facie* case of negligence against defendant, although her proof was not in full after the manner the negligence was charged in the petition. The proof of the facts that were alleged was adequate to cast the burden upon the defendant of showing the nonexistence of negligence on its part, notwithstanding plaintiff went further in her petition, and charged that the negligent acts complained of were done under circumstances that could not be defended against." And, having reached this conclusion, the opinion holds that when the burden is thus shifted to defendant to exonerate itself, and it does so by positive evidence that it was wholly without fault or negligence, and when the plaintiff introduces no evidence whatever countervailing defendant's complete exoneration, the court must submit the case to the jury, and cannot direct a verdict for defendant, because the jury are the triors of all questions of fact, and have the right in any case to say, "The uncontradicted testimony does not satisfy or convince us," and to find a verdict in the teeth of the evidence, and that, unless the trial court sees fit to set the verdict aside, this court is powerless to interfere. These conclusions are so much at variance with my understanding of the law and of the prior decisions of this court, that I feel compelled to dissent, and to express my reasons.

Analyzed and reduced to syllogisms, the majority opinion asserts two propositions: First. A live electric wire down on a public highway; the plaintiff injured by contact with it. Conclusion: A *prima facie* case of negligence made out against defendant. Second. A *prima facie* case made by plaintiff as stated; the burden shifted to defendant to exonerate himself, which he does by competent testimony which is not assailed or contradicted by plaintiff nor the witnesses attempted to be impeached. Conclusion: A question of fact is presented, which the jury alone has the right to determine. I cannot agree to either proposition, and especially so under the facts in this case. The reasoning of the court may be expressed in a nutshell. It is that it is the duty of a person having such wires strung over a public highway to see that the pedestrians on the highway are as safe from the danger of electricity as they were before the wires were placed there. This can only mean that such users of the highway are at least quasi insurers of the traveling public. No American case that the industry of learned counsel has cited holds such a doctrine. The opinion cites none. After patient research I have found none. *Thomp. Electricity*, § 65, refers to the decision of Mr. Justice Blackburn, in the court

of exchequer chamber, in the case of *Fletcher v. Rylands*, L. R. 1 Exch. 265, where the obligation of a landowner who collects water on his own land, and it escapes and injures others, was decided, and says: "It may be doubted whether persons or corporations employing for their own private advantage so dangerous an agency as electricity ought not to be regarded as quasi insurers, as to third persons, against any injurious consequences which may flow from it." The distinguished author cites no authority to support the intimation of his opinion contained in the text quoted, but contents himself with a reference to *Fletcher v. Rylands*, supra, which even a casual consideration will show is not applicable. Water collected on one's land for his own purpose is not, like electricity, conveyed along a public highway for the public purpose of lighting the streets, and furnishing light and power to citizens in their business houses or residences abutting the streets. However, the author says (section 66) that the doctrine of *Fletcher v. Ryland* has not met with approval in all American jurisdictions, and cites, *inter alia*, the case of *Morgan v. Cox*, 22 Mo. 373, in which Leonard, J., speaking for this court, held that negligence in the performance of a lawful act confers a right of action upon one injured thereby, and that "reasonable care" means such care as is proportionate to the probability of injury that may arise to others. The cases cited by plaintiff's counsel do not maintain the doctrine that the defendant is an insurer. A fair type of those cases is *Railway Co. v. Conery* (Ark.) 83 S. W. 426, in which the rule is stated to be: "In cases where the wires carry a strong and dangerous current of electricity, and the result of negligence might be exposure to death or more serious accidents, the highest degree of care is required. This is especially true of electric railway wires suspended over the streets of populous cities or towns. Here the danger is great, and the care exercised must be commensurate with it. But this duty does not make them insurers against accidents; for they are not responsible for accidents which a reasonable man, in the exercise of the greatest prudence, would not, under the circumstances, guard against." The degree of care required in law is proportionate to the dangers that reasonable men would apprehend under the circumstances. The failure to exercise such degree of care is negligence. But negligence is the gravamen of the action, and there is no element of insurance or quasi insurance in it. There may be a difference in the degree of care required of an electric company and of a steam or street railway company using or crossing a public highway. All increase the dangers to the pedestrians. But none are required to see to it, at their peril, that the danger to the pedestrian is no greater after they use the highway than it was before. The danger to the pedestrian on a highway increases in proportion to the increased trav-

el and methods of travel on the highway, and in proportion to the ever-increasing burdens cast upon the highway in large cities by the exercise of new and necessary uses, which are lawful because they subserve a public purpose.

The case of *Haynes v. Gas Co.*, 114 N. C. 203, 19 S. E. 344, more nearly resembles the doctrine announced in the majority opinion in this case than any case that has been cited, or that I have found. It announces the doctrine that proof of a "live" wire down in the highway, and injury to a pedestrian, makes a "complete prima facie case of negligence," and the burden is cast upon the defendant to show that the live wire was in the street through no fault of its servants or agents. That court undertook to support the doctrine by reference to other cases and authorities, but an examination thereof easily shows that they go only to the extent of holding that care commensurate with the dangers to be apprehended must be used. In our progressive day, electricity is a recognized necessity,—as much so to light the streets and alleys, the business houses, and the private residences, as to furnish the motive power for rapid transportation. It can only be conveyed by means of wires strung above or below the highways. It is lawful to so string them, under the laws of this state, if proper consent of the public authorities is obtained, for such uses of the highway subserve a public purpose. Being lawfully on the street, the duty is cast upon those who erect and maintain them to use such care and skill in the erection and maintenance of them as is commensurate with the dangers that reasonable and prudent men would apprehend or expect to flow to the public from their presence, and no further. But it is not the law that it is their duty to see to it, at their peril, that the highway is kept as safe and as free from danger after they were erected as it was before. Their very presence and nature increase the dangers on the highway. If the doctrine announced by the majority opinion is the law, then one of two conclusions must follow: Either it is not lawful to put them there, or else those who do so do it at their peril, and become insurers. I respectfully disagree with such conclusions. The cases in other jurisdictions upon liability in such cases do not proceed upon the idea that the defendant is under such a duty to the public. They are predicated upon the theory that the defendant is liable only for negligence, and turn upon a question of practice as to the proper manner of presenting the case. They hold that when the plaintiff proves that such a wire is down, and that he was injured thereby, he has made out a good prima facie case of negligence, because such things would not usually occur where the defendant has exercised care, and the fact that they did occur in the particular case is presumptive evidence of negligence on the part of the defendant, and that, as the defendant is in a better position

than the plaintiff to know and show whether or not there was negligence, the burden is shifted to defendant to disprove negligence. The cases of *Ugla v. Railway Co.*, 160 Mass. 351, 35 N. E. 1128; *Clarke v. Railroad Co.* (Sup.) 41 N. Y. Supp. 78; *Gilmore v. Railroad Co.* (Sup.) 39 N. Y. Supp. 417; *Jones v. Railway Co.* (Sup.) 46 N. Y. Supp. 321; and *Mullen v. St. John*, 57 N. Y. 570 (a leading case on the subject),—cited and relied on by plaintiff, assert this doctrine, but none of them hold that it is the duty of the defendant to keep the highway as safe after the erection of wires upon it as it was before. If such is the duty of the defendant, then it may well be asked, what defense could a defendant interpose in such a case? He could not show there had been no negligence on his part; for, in the language of the majority of the court, "A most imperative duty was placed upon defendant, in assuming the overhead use of the public alley with its wires, to see that persons passing along the alley are not injured thereby"; and again, "It was a matter of the plainest duty for the defendant to see that the streets and alleys of the city along which, by permission, it was suffered to place its overhead wires for its own private gain, were at all times maintained in the same condition, as to safety from the danger of electricity, as they were before its overhead use thereof was begun." Yet, in spite of this duty, with its resultant consequences, the majority opinion holds that proof that the wires were down in the highway, and that the plaintiff was injured by coming in contact with them, makes only a prima facie case of negligence against defendant, and shifts the burden upon defendant to disprove negligence. Manifestly, the defendant is not liable at all events simply because the highway is not as safe from the dangers of electricity after the wires are strung above it as it was before they were put there, while at the same time it has a right to disprove negligence. Against an absolute liability there is no defense. The fact that the majority opinion holds that, once a prima facie case is made out, the burden shifts to defendant to disprove liability, establishes beyond cavil that there is no absolute liability, and that negligence is imputed to the defendant, and that he may rebut the imputation by showing that he exercised all the care commensurate with the dangers to be apprehended which careful and prudent men would have exercised under the circumstances. If he does this, he has discharged his full duty to the public, and is not liable. *Electric Co. v. Nugent*, 58 N. J. Law, 658, 34 Atl. 1069; *Hutchinson v. Gaslight Co.*, 122 Mass., loc. cit. 222; *Association v. Talbot*, 141 Mo. 674, 42 S. W. 679. It is fair, therefore, to assume that the majority opinion inadvertently announced an absolute liability, and intended only to assert the doctrine commonly called "*Res ipsa loquitur*." The reasoning employed in this doctrine is doubtless based upon the common-law rule of pleading that "less par-

ticularity is required when the facts lie more in the knowledge of the opposite party than of the party pleading." Steph. Pl. § 194. It is applicable only in rare cases. Ordinarily "the obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue." 1 Greenl. Ev. (15th Ed.) § 74. It is often loosely said the burden of proof shifts, but, strictly speaking, the burden of proof never shifts. In cases where the doctrine of *res ipsa loquitur* is applied, the presumption of negligence supplies the want of proof of negligence, and the defendant is obligated to rebut a presumption, instead of evidence; but the case remains one of negligence, and the burden of proof is always on the plaintiff. The question always is, was the defendant negligent? The presumption of negligence arises only in cases where the circumstances surrounding the accident are such as to indicate that the accident could only have happened through some negligence of the defendant, and are inconsistent with any other theory. The case of *Hutchinson v. Gaslight Co.*, 122 Mass. 219, fairly illustrates the rule. In fact, when properly read, *Mullen v. St. John*, 57 N. Y. 567, asserts nothing more, although it is frequently referred to as holding a broader doctrine. Many cases might be cited illustrative of this doctrine, but for present purposes it will suffice to refer to those collected in 16 Am. & Eng. Enc. Law, p. 449, note 1. As before stated, the rule simply supplies the want of proof by plaintiff of negligence of defendant by a legal presumption, arising from the nature of the accident and the circumstances surrounding it, that, if care had been used by defendant, the accident would not have happened; and, as the facts lie more in the knowledge of the defendant than of the plaintiff, the burden of the evidence (not of the proof) is shifted to defendant to show that he was not guilty of negligence. In bearing the burden thus cast upon him, the defendant is not required to show that he used every absolutely necessary precaution, care, and skill known to science to prevent the happening of the accident, for this would make him liable in all cases except cases of inevitable accident; but it is sufficient to relieve him from liability if he shows that he used the degree of care commensurate with the dangers which men of prudence would have anticipated under the circumstances. If a defendant makes such a showing by competent testimony, he overcomes the presumption of negligence; and if then the plaintiff introduces no countervailing testimony, and does not impeach defendant's witnesses, the defendant is entitled to a judgment, as a matter of law. *Read v. Morse*, 34 Wis. 315; *Railroad Co. v. Stumps*, 55 Ill. 367, 375; *Hutchinson v. Gaslight Co.*, 122 Mass. 219-222; *Ward v. Telegraph Co.*, 71 N. Y. 81; *Allen v. Telegraph Co.*, 21 Hun, 22; *Electric Co. v. Nugent*, 58 N. J. Law, 658, 34 Atl. 1069. The same principle is applicable in ordinary civil cases arising in the commercial world. *Hamilton*

*v. Marks*, 63 Mo. 167; *Johnson v. McMurry*, 72 Mo. 278; *Henry v. Sneed*, 99 Mo. 407, 12 S. W. 663.

Applying these principles of law to the case at bar, and giving the fullest force to the doctrine of "*Res ipsa loquitur*," it cannot, in my judgment, be successfully maintained that a presumption of negligence attaches to defendant. Prior to the fire the wires were in good condition. If they had been down or grounded, it would at once have been discovered by the lights going out in the engine house. The fire alarm was sounded at 10:56 a. m. When plaintiff's witnesses, who resided in the neighborhood, arrived, the fire had progressed so that it was "pretty hot" in the alley. The fire department began to arrive in 2 or 3 minutes. At 10 minutes after 11 a. m. the office of the city supervisor of electric lighting was notified by engine house No. 28, which was on the line of wire west of the fire, that the electric lights went out at 11 a. m. This establishes beyond doubt that the wires were not down at 10:56, when the alarm of fire was turned on, and also that the wires broke and fell at 11 a. m. The fire was then burning fiercely, and so hot that the spectators had to retreat from the proximity of the fire. This fact is corroborated and confirmed by the testimony of James Cain, a pipeman in No. 17 company, and one of plaintiff's witnesses, that when his engine reached the fire and started down the alley the bystanders warned them the wires were down. Andrew J. O'Reilly, the city supervisor of electric lighting, a witness for plaintiff, testified to the proper and safe construction of the wires before the fire; that they were in good condition when he reached the fire, except those that were down, and that in his opinion the wires had not sagged or set fire to the stable, but that the insulation around the wires had been burned off and the wires broken by the heat; that there was no device known to art or science by which the defendant could have ascertained when only one of the wires composing the metallic arc or circuit was down, and that the wires were only charged with the amount of electricity required of defendant by its contract with the city to keep lights constantly burning in the engine houses and public institutions by day as well as by night; and that defendant was notified at 15 or 20 minutes after 11 o'clock that the lights were out at No. 28 engine house. Plaintiff's testimony further showed that her husband was killed about 22 or 23 minutes after the alarm was sounded, which would be about 18 or 19 minutes after 11 a. m. Upon this showing no presumption of negligence on defendant's part can properly be indulged. Admitting that properly erected and maintained wires do not ordinarily break in two and fall without some negligence on the part of those having them in charge, it is equally true that the rubber insulation around any wire will burn when subjected to heat, and that the wires them-

selves will also burn and break when so subjected. That it was the fire which burnt the wires, and not the wires which caused the fire, and that the wires did not fall until after the fire affected them, is clearly shown by the fact testified to by plaintiff's witness O'Reilly, that when he reached the fire, before it was out (it burned out in about 20 minutes), he found seven wires down,—one telephone wire belonging to the city fire-alarm system, and six copper wires belonging to defendant, of which five were small wires, and had no current of electricity in them except at night, and then only enough to shake a person up and burn him, but not half enough to kill him, and one, the large wire, which carried 2,200 to 2,300 volts all the time, day and night. It was therefore this large wire which caused the accident in this case. Manifestly, therefore, it was the fire which burnt the seven wires in two; for it cannot be presumed that all seven wires went on a strike simultaneously, of their own accord, without any outside interference. This being the condition presented by plaintiff's case, and the circumstances surrounding the accident, instead of a presumption of negligence attaching to defendant, it appears plainly and affirmatively that the accident was not caused by any defective construction or any improper or negligent maintenance of its wires, but by the fire; and as defendant was not notified that the wires were down until 15 or 20 minutes after 11 a. m., and as the accident occurred at 18 or 19 minutes after 11 a. m., the defendant had no actual notice of the condition of its wires at that point, and as sufficient time had not elapsed after the wires fell, and before the accident occurred, for the defendant to have ascertained the fact by the exercise of the greatest care, no notice can be presumed; and hence it follows that this is not a proper case for the application of the doctrine of "*Res ipsa loquitur*," but that, instead of its being a case of presumed negligence of defendant, it is clearly apparent from plaintiff's testimony that defendant was not negligent, and is in no wise liable for the death of plaintiff's husband. Therefore, in my judgment, the circuit court erred in overruling defendant's demurrer to the evidence at the close of plaintiff's case.

2. Assuming, however, for the purposes of further discussion of the case, that a presumption of negligence arises from the facts and circumstances shown by plaintiff, and that the burden of the evidence was shifted to defendant to exonerate itself by showing that it had taken care commensurate with the danger which men of prudence would have expected under the circumstances, it is practically conceded by the majority opinion, and will be at once conceded by every one who examines the defendant's proofs, that the defendant proved that it was guilty of absolutely no negligence whatever. It showed by the testimony of Keightley, Beyer, Wordsworth, Kell, Miss Josie Kell, Fitzer-

ald, and Foster,—all reputable witnesses,—that they were at the fire before the fire department arrived, and before the alarm was turned on, and that the wires were all properly up on the poles when they reached the fire, and that they saw the wires burn in two, curl up, and fall after it became too hot for the people to remain in close proximity to the fire. It also showed that the wires and circuits before the fire were in first-class condition; that there is no device known to science which will indicate when only one wire is down (there was only one of the two composing the metallic current down in this instance); that the first notice defendant received that the wire was down was at 7 minutes past 12 o'clock, and it sent at once and had it repaired; that it received the alarm of fire which was turned in from the box at Leffingwell avenue and Dickson street; and that defendant had no live wires in that neighborhood, and had no idea that there was any disturbance with the wires until the report aforesaid was received. The plaintiff introduced no evidence in rebuttal. The majority opinion concedes that the defendant proved that it was not negligent. But it is held that the jury, under our constitution and laws, are the sole judges of all questions of fact, and of the credibility of all witnesses, and that they had the right to say, "It fails to convince us. It fails to satisfy our minds. We do not believe it;" and that this is true notwithstanding the witnesses testify positively, are not contradicted, and no attempt is made to impeach them. The majority opinion concedes that this court held otherwise in *Reichenbach v. Ellerbe*, 115 Mo. 588, 22 S. W. 573, but says that the converse of that proposition was held by this court as early as the cases of *Bryan v. Wear*, 4 Mo. 106, and *McAfee v. Ryan*, 11 Mo. 365. It is true that *Bryan v. Wear* and *McAfee v. Ryan* so decide, but the principles so announced have long since been overruled, by implication, at least, in this state; and the rule so clearly and forcibly announced by *Brace, J.*, in rendering the opinion of this court in *Reichenbach v. Ellerbe*, is now the settled law of our state. In speaking of verdicts rendered in such a state of the case, he aptly says: "Such a verdict can be accounted for only on the ground of ignorance, partiality, prejudice, or passion, and, under the repeated rulings of this court, cannot be permitted to stand. *Long v. Moon*, 107 Mo. 334, 17 S. W. 810; *Caruth v. Richeson*, 96 Mo. 186, 9 S. W. 633; *Avery v. Fitzgerald*, 94 Mo. 207, 7 S. W. 6; *Garrett v. Greenwell*, 92 Mo. 120, 4 S. W. 441; *Spohn v. Railway Co.*, 87 Mo. 74; *Whitsett v. Ranson*, 79 Mo. 258. 'When the evidence is of the character that the trial judge would have a plain duty to perform, in setting aside the verdict as unsupported by the evidence, it is his duty and prerogative to interfere before submission to the jury, and direct a verdict for defendant.' *Jackson v. Hardin*, 83 Mo. 175; *Powell v. Railway Co.*,



76 Mo. 80." See, also, *Ackley v. Staehlin*, 56 Mo. 479, and *Hearne v. Keath*, 63 Mo. 84.

In addition to these cases, attention may also be called to the following: In *Hipsley v. Railroad Co.*, 88 Mo. 348, it was held that this court would reverse a judgment where the verdict is so clearly against the weight of evidence as to show passion or prejudice. In *Wilson v. Albert*, 89 Mo. 539, 1 S. W. 209, this court said that, while it would not weigh evidence in law cases, yet it would interfere where there was no evidence to support the verdict. In *Davis v. Fox*, 59 Mo. 125, and in *Cornet v. Bertelsmann*, 61 Mo. 118, this court held it would interfere on questions of fact where the judgment below is clearly erroneous. In *McCartney v. Finnell*, 106 Mo. 445, 17 S. W. 446, it was held that this court would look into the evidence, and would reverse the judgment below where apparent injustice had been done. In *Bruen v. Association*, 40 Mo. App. 425, it was held that where the material facts were undisputed it was the duty of the appellate court to review the action of the trial court, and to render such judgment as the facts warranted. In *Rhodes v. Farish*, 16 Mo. App. 430, it was held that where the defense was the statute of limitations, and the evidence in support thereof was definite, undisputed, and not open to suspicion, the appellate court would direct the proper judgment to be entered by the trial court. In *Hewitt v. Doherty*, 25 Mo. App. 328, it was held that a verdict for one party, where the conceded facts show that the adverse party is entitled to a judgment, will be vacated on appeal as being unsupported by the evidence. The same rule obtains in other jurisdictions. In *Railroad Co. v. Stumps*, 55 Ill., loc. cit. 375, it is said: "The decision of this case, it is true, involves the question of the credibility of witnesses, and the jury are peculiarly the judges of that question. Still they have not an arbitrary discretion in this respect. This court has said a jury cannot willfully, nor from mere caprice, disregard the testimony of an unimpeached witness." In *Read v. Morse*, 34 Wis., loc. cit. 319, it is said: "But we think the court erred in submitting the question to the jury, in any form, as to whether the boat was provided with the necessary means and appliances to prevent escape of fire. After a careful examination, we think the uncontradicted testimony proves that the boat was properly equipped. \* \* \* Such being the case, it was error to submit the case to the jury." In *Wise v. Freshly*, 3 McCord, loc. cit. 548, it is said: "Where evidence is of a doubtful character, or where there is a conflict among the witnesses of the plaintiff and defendant, the juries are proper persons to decide. But they have no such arbitrary and capricious power as to give a citizen one cent for property indisputably proved to be worth five hundred or one thousand dollars." The same rule is laid down in 1 Greenl. Ev. (15th Ed.) § 74, and is supported by the numerous cases and illustra-

tions contained in note "a" to the text. See, also, *Turner v. Haar*, 114 Mo. 335, 21 S. W. 737. In *Selbert v. Railway Co.*, 49 Barb., loc. cit. 586, it is said: "The testimony of these two witnesses is clear, positive, and circumstantial. They could not be mistaken. Their testimony is true, or they both committed willful and corrupt perjury. I think the jury, so far as anything to the contrary appears in the case, were bound to give credit to their testimony. It was not contradicted. It was really no contradiction for the plaintiff to say he did not hear the whistle or bell. They were not impeached or in any way discredited. The positive testimony of an unimpeached, uncontradicted witness cannot be discredited or disregarded arbitrarily or capriciously by court or jury. *Lomer v. Meeker*, 25 N. Y. 363. If juries are permitted to discredit or disregard such testimony, there is no safety in the administration of justice, and parties might just as well let the result of a litigation abide the cast of a die or a game of chance. It belongs to a jury, I admit, in considering the weight of evidence, to pass upon the credit due to the respective witnesses; but this does not imply that they may, without reasonable or justifiable ground, disbelieve any witness. They have no right to discredit an unimpeached, uncontradicted witness, who testifies fairly, and gives clear, rational, consistent, and relevant testimony. For judicial purposes, all witnesses stand upon a par, and must be believed in their testimony, unless discredited by the inconsistency, incredibility, or improbabilities of their statements on cross-examination, or otherwise contradicted by other witnesses, or impeached in respect to their general character for integrity or truth." And, because the jury arbitrarily disregarded the uncontradicted testimony of the unimpeached witnesses in the case, the judgment was reversed and a new trial awarded. In *Crawford v. State*, 44 Ala. 382, it appeared that the lower court, in referring to a portion of the testimony for the defense, said in its charge to the jury: "Yet you are not bound to believe one word of this testimony, unless you are satisfied it is true, and of this you are the judges." And upon appeal the supreme court said: "This clause of the charge must have some meaning. It cannot be construed in support of the veracity of the testimony referred to. It may be construed into an assault upon it, and it would justify the jury in its rejection as unworthy of any influence upon their verdict. In this view of it, it would be erroneous. If the testimony delivered upon the trial is unimpeached, either by the manner of the witness, his knowledge of the facts, his connection with the parties, or by contradictions, or for some legal reason, the jury must treat it as true. They have no legal right causelessly to discredit any portion of the evidence, unless there are legal grounds for such a discrediting. Any other course would imperil the fairness and impartiality of the trial. If the

jury can capriciously and causelessly discredit a portion of the testimony for the defense, they may discredit the whole. If the law exists as intimated by the learned judge on the trial below, it exists without limit, and it may be applied to the testimony of the defense or to the testimony of the prosecution. This would give the jury power to convict or to acquit according to their discretion, and not according to the evidence. This is not a correct statement of their duty. They must try the issue joined according to the evidence." In *People v. Lyons*, 51 Mich. 215, 16 N. W. 380, the case presented the converse of the proposition. The lower court instructed the jury that, "although a witness may be completely impeached, they might still believe him," or, in other words, as the supreme court put it, that they were at liberty to convict the defendant on the testimony of one who was shown by impeaching evidence to be unworthy of belief. The supreme court said of this charge, "Of course, it was not the intention of the circuit judge to convey that idea to the jury, but unfortunately his language was so chosen as to carry that meaning," and granted a new trial to the defendant. In a word, the reason is this: Juries try questions of fact; that is, controversies about the facts. Where there is no controversy (meaning an affirmance of a fact on one side, and a denial on the other), there is no question as to the facts. If the facts are shown by competent evidence on one side, and the evidence is not contradicted on the other, and there is no attempt to impeach the witnesses, there is no question of fact involved in the case, but a simple question of law is presented. To permit a jury to say that it will not believe competent, uncontradicted, and unimpeached testimony, and to return a verdict in the teeth of such evidence, is to give the jury plenary power to take a man's life or property as caprice or willfulness may dictate. If this is the power of a jury in this state, then courts are unnecessary, and the study of the law a waste of time; for what shall it profit us to carefully sift the grain of competent testimony from the bushel of chaff of hearsay testimony, if, after it is all done, the jury can capriciously, arbitrarily, perhaps wantonly, say, "We don't believe it," and find for the litigant who has introduced no testimony, and has not impeached the testimony that has been introduced? Briefly, bluntly, I say this is not the law.

For these reasons I dissent from the second proposition decided by the majority opinion, and think it was the duty of the circuit court to give the instruction asked by defendant at the close of the whole case. It follows that in my opinion the judgment of the circuit court ought to be reversed.

SHERWOOD and BRACE, JJ., concur in all that has been said herein.

SHERWOOD, J. To the foregoing elaborate and exhaustive opinion I desire to add

that outside of this state, "without variation or shadow of turning," the mere conjunction of accident and injury affords no basis for a cause of action; that, if a defect occurs from which an injury results, no cause of action, prima facie or otherwise, arises, unless the party whose duty it was to repair that defect had either actual or imputed notice thereof. In this case the evidence shows no actual notice, and also shows no such lapse of time as to amount to imputed notice. Where, then, is your so-called prima facie case?

### DUNLAP v. GRIFFITH.<sup>1</sup>

(Supreme Court of Missouri, Division No. 2.  
Oct. 17, 1898.)

TENANCY IN COMMON—ADVERSE POSSESSION—  
EJECTMENT—EVIDENCE—APPEAL—REVIEW.

1. A party who requested an instruction tendering an issue which, in substantially the same form, was given at the adversary's request, cannot be heard to say that there was no evidence to warrant a submission of the issues.

2. Plaintiff's intestate negotiated for a farm, saying he wanted to buy it for defendant, his brother. While the conveyancer was drafting the deed intestate said the farm would suit his brother, and, when the deed as drawn named both him and his brother as grantees, he objected that only his brother's name should appear, because the farm was for him, but, the conveyancer having no other blank, he accepted it, saying he would fix it when his brother came. Intestate paid part of the price, but it was not shown who paid the balance. The brother moved on the farm. It was assessed in his name. He paid the taxes, made improvements, and occupied it for 23 years, while intestate resided a mile away, and frequently visited him. *Held* to support a submission to the jury whether the possession was adverse to intestate's paper title to the undivided interest.

3. An actual verbal claim of adverse ownership to a co-tenant personally is not necessary to prove an ouster by one in possession doing overt acts which indicate a hostile claim.

4. In ejectment, declarations of plaintiff's intestate as to ownership, made when he was out of possession, are inadmissible.

5. Declarations of an adverse claimant of lands while in possession are admissible, as tending to characterize his ownership.

Appeal from circuit court, Buchanan county; H. M. Ramey, Judge.

Action by R. C. Dunlap, administrator, against Daniel Griffith. There was a judgment for defendant, and plaintiff appeals. Affirmed.

James W. Coburn and C. A. Mosman, for appellant. W. B. Norris and Benj. Phillip, for respondent.

GANTT, P. J. This is an action of ejectment by the administrator of Henry M. Griffith, deceased, against Daniel Griffith, for the recovery of the undivided one-half of 148 acres of land in Buchanan county. The action was brought in pursuance of an order of

<sup>1</sup> Rehearing denied November 21, 1898.

the probate court under section 129, Rev. St. 1889. The defenses are—First, a gift of the land by Henry M. Griffith to his brother, the defendant, in his lifetime; second, adverse possession for the statutory period. While counsel for the parties draw conclusions radically different, the evidence is practically unquestioned. It appears that Henry M. Griffith, in 1870, resided in Buchanan county. He was a man of considerable means. Daniel Griffith, his brother, lived in Kentucky. At that time the land in controversy belonged to Hurt and Pence. The negotiation for the land was conducted by Henry Griffith. When he went to examine the land he said to Hurt: "I want to buy a place for my brother Dan, who is in Kentucky, if I can find one that I think will suit him." The purchase was agreed upon, and Henry Griffith said he would bring the notary out to the farm to make the deed. Esquire Pettigrew was engaged to prepare the conveyance, and undertook to do so in his office, but when he arrived at the farm found he had made a mistake in the numbers; whereupon he tore it up, and began to draw another. While he was thus employed Henry Griffith and Hurt went out to look at the farm, and Henry then said to Hurt: "If this place don't suit Daniel, I don't know where he will find one in Buchanan county that will suit him." When they came back to the house the justice had finished the deed, and had inserted therein the names of both Henry M. Griffith and Daniel Griffith as grantees. He began reading the deed to the parties in interest, and, when he came to the names of the grantees, Henry remarked: "Captain, my name ought not to be there; the land is for Dan." The scrivener told him that he had no other blank with him, whereupon Henry replied that "that was all right; he would fix it all up when his brother came." With that the deed was executed, and Henry paid a portion of the purchase price. It is not shown who paid the remainder. Shortly afterwards Daniel Griffith moved to Buchanan county, and Henry met him at the station, moved him and his family to the farm, put him in possession of it, and from that day to this Daniel Griffith has been in exclusive possession of all the property. Henry Griffith owned a farm in the immediate neighborhood, only two miles and a half from the land in controversy, upon which he lived from 1870 until he died, in 1893. Shortly after Daniel took possession of the farm he began setting out an orchard and making other improvements. Twenty years ago he planted 70 fruit trees, and from time to time since then has added to the orchard, until it now consists of about 600 trees, all of the present value of about \$2,500. They were paid for entirely by Daniel Griffith. Immediately after the land was purchased, in 1870, it was assessed for taxation in the name of Daniel Griffith, and it has been assessed in that way ever since. It is admitted that Daniel Griffith paid the taxes on all the prop-

erty from the time the land was purchased up to the date of the trial. The evidence shows that from the day Daniel took possession of the property he occupied it exclusively as his home, cleared it, cultivated it, improved it, and managed and controlled it exclusively as he saw fit; that he rented out portions of the land, and received the rents and profits; that he has never paid any rent to Henry Griffith, nor did Henry ever demand any; that he received all of the rents and profits, and never accounted to Henry Griffith for any part of them, and Henry has never claimed any interest in the property; that 14 years before the beginning of this suit Daniel erected a large frame dwelling upon the land at a cost of \$1,200, and a barn at a cost of \$259, and other improvements; that he had cisterns dug and fences built; that all of these improvements were paid for by Daniel; that Henry was never consulted regarding them at any time; that he visited Daniel frequently, and knew the improvements were being made; that he contributed nothing to their cost; that he was never in possession of the property; that he never exercised any act of ownership or control over it, or any part of it, and never claimed the right to do so; that he paid none of the taxes; that Daniel Griffith, from the time he first went into possession of the property until the day of the trial, claimed the land as his own; that Henry Griffith knew that Daniel claimed the property as his own, and whenever he referred to the farm he always called it "Dan's farm." In 1893 Daniel sold an undivided half of the property, and Henry remarked that "it was too bad that Daniel, in his old age, only had eighty acres of land left."

The evidence thus tended to show, not only the adverse holding of the defendant, Daniel Griffith, but also that Henry Griffith disavowed any interest in the land, and up to the day of his death never pretended that he had any interest in it. Indeed, the only evidence in the case that Henry Griffith had any interest in the land at all is the deed conveying the property from Hurt and Pence, and it was proven, without dispute, by Hurt, who owned the land, and by the scrivener, who drew the deed, that Henry's name appeared in the deed as a grantee only on account of a mistake of the scrivener. Upon this evidence the court, at the instance of both plaintiff and defendant, submitted the question of adverse possession for the statutory period, and the question of the gift of the land by Henry to Dan, to the jury. The triors of the fact found for the defendant, and plaintiff brings this case here, insisting that the court erred in giving defendant's instructions 1 and 2, not because they do not correctly state the abstract propositions of law therein contained, but because it is claimed there is no evidence upon which to base them. The remaining errors assigned are that the court erred in giving defendant's instruction No. 3, and erred in

admitting declarations of the defendant while in possession of the property, showing that he claimed the property as his own.

1. Notwithstanding plaintiff directly and explicitly tendered the issue of adverse possession by his instructions, he now insists that the circuit court committed grievous error in submitting that issue to the jury in defendant's instructions Nos. 1 and 2. That we are not in error as to this, we append the following instructions given at the request of plaintiff: "The court instructs the jury that, when one co-tenant makes improvements on land held in common, such improvements are presumed to be for the common benefit of all the co-tenants; and, although you may believe from the evidence that defendant made improvements on the lands mentioned in the petition and evidence, you cannot find for defendant by reason of adverse possession from that fact alone, unless you further believe from the evidence that such improvements were of such a nature that they were of themselves an assertion of the fact to Henry M. Griffith of such adverse possession, and inconsistent with tenancy in common. The court instructs the jury that if they believe from the evidence that the defendant and plaintiff's decedent acquired title to the whole of the tract of land described in plaintiff's petition by deed from Hurt and Pence dated October 31, 1870, introduced in evidence, and subsequently defendant conveyed his undivided interest to said whole tract to Richard C. Bland by deed, and that defendant was in possession of the undivided interest of this suit, viz. December 6, 1895, then you must find for plaintiff for said undivided interest so conveyed to Henry M. Griffith, unless you further believe from the evidence that the defendant is entitled to said undivided interest by reason of adverse possession thereof for the period of ten years prior to the institution of this suit, or by a consummated gift, as hereinafter explained. The court instructs the jury that if they believe from the evidence that defendant and Henry M. Griffith acquired title to the lands in controversy by deed from Hurt and Pence dated 31st October, 1870, and introduced in evidence, and that subsequently said defendant conveyed to R. C. Bland his undivided interest in said lands by deed dated April 15, 1893, introduced in evidence, then you must find for plaintiff, unless you further believe from the evidence that defendant is entitled to your verdict by reason of title acquired by adverse possession, or by gift, as hereinafter explained in these instructions. If the jury believe from the evidence that defendant took possession of the land in controversy as a tenant in common with Henry M. Griffith, then the law is that such possession of defendant was the possession of both him and said Henry M. Griffith; or if you believe from the evidence that defendant took possession with the consent of said Henry M. Griffith, and continued in possession thereof as such co-tenant, or

under the permission of said Henry M. Griffith, the law is that, while said defendant so continued to hold such possession, he cannot claim to hold by adverse possession. If the jury believe from the evidence either that the defendant took possession of the land in controversy as tenant in common with Henry M. Griffith, or that he took possession of the land with the permission of the said Henry M. Griffith, then the law is that such possession is presumed to continue until such possession became adverse; and in such case, before you can find that such possession became adverse to said Henry M. Griffith, you must believe from the evidence that defendant, ten years before the institution of this suit, which was on December 6, 1895, made some positive and distinct assertion of a right to said lands hostile to Henry M. Griffith, and of which said Henry M. Griffith had notice, or that defendant did and performed such acts of possession and ownership as indicated to the world at large and to Henry M. Griffith that defendant claimed the said lands as owner in his own right, and not subordinate to any other person, but inconsistent with the right of ownership in said Henry M. Griffith."

Without incumbering the record with others, these sufficiently indicate that plaintiff himself deemed the evidence of adverse possession of sufficient probative effect to qualify all his propositions of law by the proviso that, if they found that defendant, for 10 or more consecutive years before the institution of this suit, on December 6, 1895, had been in the open, notorious, and exclusive possession of the lands in controversy, claiming during all of said time to own all of said property as his own, and adversely to any claim of ownership or interest on the part of Henry M. Griffith, and that said Henry M. Griffith knew during all said time that defendant was in the exclusive possession of all of said property, and had notice of the fact (if the jury believed it was a fact) that defendant claimed to own all of said lands as his absolute property, adversely to any interest therein on the part of said Henry M. Griffith, for more than 10 years before this action was commenced, then it was immaterial whether said property was purchased, and the deed thereto taken, in the name of both Henry and Daniel Griffith, and the verdict must be for defendant. Having conceded that it was a proper case for instructions on adverse possession, and being unable to point out any error whatever in the instructions themselves, it would seem that plaintiff has little ground to stand on as to this assignment. It would be manifestly unjust to permit plaintiff to have the case submitted upon theories advanced by himself, and thus reverse the judgment, because instructions on the same theory had been given for defendant. *Holmes v. Braidwood*, 82 Mo. 610; *Thorpe v. Railway Co.*, 89 Mo. 650, 2 S. W. 3; *Wilkins v. Railway Co.*, 101 Mo. 105, 13 S. W.

893; *Reardon v. Railway Co.*, 114 Mo. 384, 21 S. W. 731.

But it is not necessary to put the propriety of defendant's instructions on adverse possession upon the ground of plaintiff's estoppel. There was much evidence that Daniel Griffith, with the actual knowledge of his brother, held and asserted the exclusive, continuous possession of this land as his own. His brother Henry lived only a mile or two distant; was very often at his house, and saw Daniel making lasting and permanent improvements on the land out of his own means; was not consulted regarding them; made no objection or protest nor expressed any approval; was never heard, for 20 years, to claim in Daniel's presence any right or interest in the land; never received or claimed a cent of rent or profit from it, but stated that the deed was erroneously drawn when his name was inserted as grantee, and always alluded to the farm as Dan's. These acts of Daniel Griffith were, in the language of this court in *Warfield v. Lindell*, 38 Mo. 562, and recently approved in *Hutson v. Hutson*, 139 Mo. 236, 40 S. W. 886, "overt and notorious, and they were unquestionably of such a character as to impart information and give notice to the co-tenant that [his] rights in the premises were invaded and denied, and that a possession was claimed and a use made of the property which was utterly inconsistent with the presumption that the defendant's possession was their possession also, and consequently that the unity of possession was dissolved. Upon such evidence as this, we think the jury might well be warranted in finding that there had been an actual ouster."

The earnest contention of counsel for plaintiff that the law imposed upon defendant, as a tenant in common with Henry Griffith, the burden of proving a distinct verbal disavowal of Henry's title in said land to Henry himself, and could not be satisfied by proof of acts and conduct which would notify a person of ordinary intelligence of Daniel's claim of adverse possession, is not tenable. While it may be true that, if the adverse claim is altogether verbal, unaccompanied by overt acts, such assertion must be made to, or communicated to, the ousted co-tenant, yet "when the act is of such a nature as the law will presume to be noticed by persons of ordinary diligence in attending to their own interests, and of such an unequivocal character as not to be easily misunderstood, it is not believed to be necessary that any positive notice should be given to the co-tenant, or that it devolve upon the possessor to prove a probable actual knowledge on the part of the co-tenant. It is sufficient that the act itself is overt, notorious; and, if the co-tenant is ignorant of his rights or neglects them, he must bear the consequences." *Warfield v. Lindell*, 38 Mo. 272; *Hutson v. Hutson*, 139 Mo. 236, 40 S. W. 886.

2. As to the admission and exclusion of evidence. The court correctly ruled that Henry

Griffith's declarations were inadmissible because he was not in possession of the land when the proposed declarations were made, and the statements of Daniel Griffith asserting title while in possession were admissible as verbal acts tending to characterize his possession. *Burgert v. Borchert*, 59 Mo. 80; *Railroad Co. v. Clark*, 68 Mo. 371; *Lemmon v. Hartsook*, 80 Mo. 13; *Mississippi Co. v. Vowels*, 101 Mo. 225, 14 S. W. 282. The cause having been submitted to the jury under proper instructions, and there being material and substantial evidence to support the finding, the verdict of the jury must stand. The judgment is affirmed.

SHERWOOD and BURGESS, JJ., concur.

KING, County Clerk, v. TEXAS COUNTY.  
(Supreme Court of Missouri, Division No. 1.  
Nov. 15, 1898.)

CLERK OF COUNTY COURT—DETERMINATION OF  
SALARY—APPEAL—REVIEW.

1. Section 31 of the Acts of 1891, relating to the fees of county clerks and other county officers, classifies the counties according to population, and fixes according to the classification the amount that clerks of the county court shall retain from fees for their compensation, and provides that the population of a county shall be determined by multiplying by five the total number of votes cast in the county at the last presidential election prior to such determination. Section 30 requires the clerk to make quarterly returns to the county court. *Had*, that the salary of a clerk for the year 1896 was fixed at time of his return at the first quarter of each year by the votes cast in his county at the presidential election of 1892, regardless of the presidential election which occurred in November of that year.

2. A ruling by the court below favorable to plaintiff, which did not affect the judgment in favor of defendant, will not be considered on plaintiff's appeal.

Appeal from circuit court, Texas county; L. B. Woodside, Judge.

J. S. King, clerk of the county court of Texas county, presented his accounts to the court for settlement; and he was ordered to pay to the county a balance found to be due. and thereupon he appealed to the circuit court. The judgment was affirmed, and he appeals. Affirmed.

Young & Lyles, for appellant. Edward C. Crow, Atty. Gen., for respondent.

ROBINSON, J. The essential facts presented by the record in this case are as follows: At the general election in November, 1894, the plaintiff was elected clerk of the county court of Texas county for the term of four years, commencing January 1, 1895, and duly qualified as such. At the presidential election held in said county in November, 1892, the number of votes cast for president and other officers voted for thereat was less than 4,000; but at the next succeeding presidential election in November, 1896, the total number of votes

cast in such county was 4,400. The plaintiff duly presented and filed in the county court his quarterly statement and abstract of fees collected for the quarters ending March 31, June 30, September 30, and December 31, 1896. No determination, however, of the fees or salary of the plaintiff, was made by the county court at the May, August, or November terms of said court; but at the ensuing February term, 1897, the plaintiff presented to the county court his annual settlement, showing amounts collected and paid out by him for necessary deputy hire for the year commencing January 1, 1896, and ending December 31, 1896, showing the total amount collected during such period to be \$2,224.83; total amount paid for deputy hire, \$900; amount retained by plaintiff and applied on his salary, \$1,324.83. After examining said statement the county court held that the plaintiff was only entitled to retain \$1,250 on account of his salary, leaving a balance of \$74.83 in his hands, which amount the county court ordered the plaintiff to pay into the county treasury within 15 days thereafter. Thereupon the plaintiff appealed to the circuit court of Texas county. In that court, a jury having been waived, the case was submitted to the court for trial, which again resulted in a judgment against the plaintiff for \$74.83; being the amount in his hands in excess of \$1,250. After an ineffectual motion for a new trial, plaintiff brings the case here by appeal.

Appellant contends that by reason of the increased vote at the presidential election in November, 1896, he was entitled, under the provisions of the Acts of 1891, to an increase of his salary for the year 1896 from \$1,250 to \$1,600, on the theory that the total number of votes of Texas county cast at the presidential election in 1896, multiplied by 5, would show that the population of Texas county for that year was more than 20,000 and less than 25,000, whereas the vote in such county at the presidential election in November, 1892, when ascertained by this method, would show that the population was more than 15,000 and less than 20,000, making a difference of \$350 in the amount of the plaintiff's salary. At the trial the circuit court, of its own motion, gave the following declaration of law: "First. The court declares the law to be that it was intended by section 8 of article 14 of the constitution of the state of Missouri to prevent the passage of laws to increase the salary and fees of officers, and that it was intended by section 12 of article 9 that the legislature, by a law uniform in its operations, might classify the counties in the state by the population, and regulate the fees and salaries of the county officers by classes, and that when any county passes from one class to another the fees and salaries of the officers in said county would be changed by the change of the class of said county, and such change would take effect regardless of the time of the expiration of office of any such officer; and such increase of fees and salaries would

not be in contravention of said section 8 of article 14 of the constitution." No fault is found by the plaintiff with this instruction. The court further instructed: "Second. That section 30, p. 152, Acts 1891, requires clerks of courts to make quarterly returns to the county court of all fees received by them during such quarter, and at each regular session of the county court it is the duty of the court to examine said statements, and to allow all necessary deputy hire, not exceeding the amount allowed by section 31, and to determine whether said clerk had received the full amount of the salary allowed him by section 31, and, if he has received more than the salary allowed him by law, to order him to pay the excess into the county treasury. It was the duty of the county court of Texas county, Missouri, at the May term, 1896, to examine the quarterly statement for the quarter ending March 31, 1896 (January, February, and March), made by the plaintiff, J. S. King, clerk of the county court, and to determine whether he had during such quarter received the full amount of his salary for the year; and in order to do this the court was required at said May term, 1896, to determine the salary of said King for the year of 1896. Under the provision of section 31 the amount of the salary of the county clerk is based upon the population of the county, and for the purpose of fixing the salary of said clerk the population of the county must be determined by multiplying by five the total number of votes cast in such county at the last presidential election prior to the time of such determination; and therefore the salary of said clerk for 1896 was based upon the vote cast at the presidential election for the year 1892, and could not exceed the sum of \$1,250, and \$900 for his assistants." To this the plaintiff excepted. This exception presents the only question for our determination, and it must be determined by sections 30 and 31 of the Acts of 1891, in relation to the fees and emoluments of county clerks and certain other officers,—the law in force at the time the plaintiff was required to make his first quarterly return to the county court of fees, costs, etc.

Section 30 provides: "Every clerk of a court of record in every county in this state shall make a quarterly return to the county court of all fees received to date of return, from whom received and for what services, giving the amount of each fee received, and of the salaries by him actually paid to his deputies or assistants, stating the same in detail and verifying the same by his affidavit. Such statement shall include all fees for all services of whatever character done in his official capacity, giving the name of each deputy or assistant, the length of time each was employed, and the amount of money paid to each. The county court shall at each regular session examine such statement, and may examine any person as to the truth of the same, and allow all necessary clerk or deputy hire, not exceed-

ing the amount allowed in the next succeeding section of this chapter for deputies or assistants, and deduct the same from the aggregate amount received by the clerk, and if there be an amount still in the hands of the clerk exceeding the amount specified in the next section succeeding, the court shall ascertain the amount of such excess over and above the amounts allowed to be retained by the clerk and paid to deputies or assistants, and make an order directing such clerk to pay the amount so ascertained into the county treasury. \* \* \*

Section 31 is as follows: "The aggregate amount of fees that any clerk under this chapter shall be allowed to retain for any one year's services shall not in any case exceed the amount hereinafter set out. In all counties having a population of one hundred thousand persons or over, and less than three hundred thousand, the clerks shall be allowed to retain three thousand dollars for themselves, and shall be allowed to pay for deputies and assistants not exceeding sixteen thousand dollars in such of said counties where courts are held at more than one place, and in all other such counties they shall be allowed to pay for deputies and assistants not exceeding five thousand dollars. In all counties having a population of forty thousand persons and less than one hundred thousand persons, the clerks shall be permitted to retain two thousand dollars for themselves, and be allowed to pay for deputies or assistants three thousand five hundred dollars. In all counties having a population of thirty thousand persons and less than forty thousand, the clerks shall be permitted to retain two thousand dollars for themselves and be allowed to pay for deputies or assistants not exceeding seventeen hundred and fifty dollars; and in all counties having a population of twenty-five thousand and less than thirty thousand persons, the clerks shall be permitted to retain eighteen hundred dollars for themselves, and be allowed to pay for deputies or assistants not exceeding fifteen hundred dollars. In all counties having a population of twenty thousand and less than twenty-five thousand persons, the clerks shall be permitted to retain sixteen hundred dollars for themselves and be allowed to pay for deputies or assistants not exceeding twelve hundred. In all counties having a population of fifteen thousand and less than twenty thousand persons, the clerks shall be permitted to retain twelve hundred dollars for themselves, and be allowed to pay for deputies or assistants not exceeding nine hundred dollars. In all counties having a population of ten thousand and less than fifteen thousand persons, the clerks shall be permitted to retain eleven hundred dollars for themselves and be allowed to pay for deputies or assistants not exceeding seven hundred dollars. In all counties having a population of seven thousand and less than ten thousand persons, the clerks shall be allowed to retain eleven hundred dollars for themselves, and be allowed to pay for deputies and assistants not exceed-

ing six hundred dollars. In all counties having a population of less than seven thousand persons, the clerk shall be permitted to retain all fees earned by them for themselves and deputies. For the purpose of this chapter the population of any county shall be determined by multiplying by five the total number of votes cast in such county, at the last presidential election prior to the time of such determination."

As seen, by section 30 it is made the duty of the county court at each regular session to examine such quarterly statements made by the clerk, and allow all necessary clerk and deputy hire,—not exceeding, however, the amount allowed by section 31. The latter section, it will be observed, classifies the counties according to the population, fixing the amount that the clerks in each class should be permitted to retain for their compensation, and the amount allowed to be paid for deputies and assistants. For the purpose of this appeal it will be presumed that the county court of said county duly determined the population of Texas county after the presidential election of 1892 by multiplying the votes cast in said county at such election by five, as required by the Acts of 1891, and determined the salary of the plaintiff accordingly. Plaintiff having been elected in 1894, it will be seen that there was no presidential election whereby his compensation could possibly be affected until the next succeeding presidential election, which did not occur until November, 1896. It seems to us a proposition as clear as it is reasonable, that the Acts of 1891, above referred to, operated to fix the compensation which the plaintiff might receive out of the fees of his office, and the amount of such fees which he might apply to the payment of deputy hire, and that his salary for the year 1896 must accordingly be determined by the number of votes cast in Texas county at the presidential election of 1892, by multiplying by five the total number of votes cast in such county at the last presidential election prior to 1896, and that the failure of the county court of Texas county to determine at its May and September terms of that year, during the plaintiff's incumbency, his salary, did not in any manner affect the amount of the clerk's compensation after the vote of the presidential election of 1892 had fixed and determined his salary. But little need be said to vindicate the correctness of the court's second instruction against the insistence of the plaintiff that, as the presidential election of 1896 took place before the last two quarterly statements of the year, 1896, it was the duty of such court at its February term, 1897, in fixing plaintiff's salary for the year 1896, to adjust same on the basis of the vote of 1896, regardless of the vote cast at the presidential election in 1892. It suffices to say that his salary was fixed by and on the basis of the vote cast at the presidential election in 1892, being the last presidential election prior to his induction into of-

fee; otherwise there would be no rule fixing the annual compensation of county clerks. If the presidential vote of 1892 was not to be resorted to for the purpose of determining the amount of plaintiff's salary for the year 1896, and the amount to be allowed for that year as expenses for his deputy hire and assistants, the county court at its May and September terms before the presidential election in November of that year would be without data to determine whether the clerk was retaining more of the income of his office than he was entitled to, and as a consequence could make no calculation or order as to any excess over salary and deputy hire that he might have in his hands, as required by section 80. While the compensation of the county clerk is an annual compensation, not quarterly, as contended by appellant, the clerk is required to make his quarterly return to the county court of all fees received to date of return, together with a statement of all salaries by him actually paid to his deputies and assistants; and the court is then required, if there is ascertained to be an amount in the clerk's hands in excess of his salary, and the amount allowed to be expended for deputy hire, to make its order directing such clerk to pay the excess so ascertained into the treasury of the county; and this could not be done if the amount of the clerk's salary was depending upon the unknown result of an election in November following, which might place Texas county in a class where the salary of its clerk would be greater or less than when plaintiff was inducted in office in 1894. The law contemplates no indefinite or undeterminable salary for county clerks during their incumbency in office; yet, according to plaintiff's contention, from January 1, 1896, to November, plaintiff's salary was an unknown quantity. The conclusion, therefore, which we have reached, is that the proposition contained in the second instruction complained of is a correct declaration of law, as applied to this record.

The attorney general, in his brief on behalf of Texas county, questions the correctness of the first instruction above referred to, because the Acts of 1891, classifying counties by population, and allowing increased compensation based on the population, is violative of section 8, art. 14, of the constitution of Missouri, which provides "that the compensation or fees of no state, county or municipal officer, shall be increased during his term of office." It is unnecessary to notice this objection, as no such question is presented by this record. If the decision below erred upon the question as to the constitutionality of the Acts of 1891, as claimed by the attorney general, that error does not affect the judgment in the county's favor. Moreover, the defendant took no appeal, and is not, by the records before us, here complaining of any ruling or decision of the circuit court. For the reasons indicated the judgment of the circuit court must be affirmed. All concur.

## STATE v. TODD.

(Supreme Court of Missouri, Division No. 2.

Nov. 7, 1898.)

## MURDER—JURY—LIST—SEPARATION.

1. A verdict of murder in the second degree is sustained, defendant, who shot her daughter, having threatened her with violence if she did not stop associating with defendant's second husband, the shooting having been during a scramble over a pistol following a dispute, resulting in deceased being shot twice, the evidence being conflicting as to which first had the pistol, deceased having immediately said that defendant did it, and the mother afterwards saying deceased shot herself.

2. Even if delivering the jury list to defendant's attorney were not a delivery to defendant, within Rev. St. 1889, § 4204, the right thereto was waived by not objecting at the time.

3. The rule in capital cases against separation of the jury applies only after they are duly impaneled, sworn, and charged with the case.

Appeal from circuit court, Ralls county; Reuben F. Roy, Judge.

Virginia B. Todd appeals from a conviction of murder in the second degree. Affirmed.

Tapley & Fitzgerald and D. A. Ball, for appellant. Edward C. Crow, Atty. Gen., and Sam B. Jeffries, Asst. Atty. Gen., for the State.

BURGESS, J. At the September term, 1895, of the Hannibal court of common pleas, the defendant was indicted by the grand jury of Marion county for murder in the first degree for having at said county, on the 15th day of June, 1895, killed and murdered her daughter, Hettie Bethel, by shooting her to death with a pistol. Upon defendant's application, a change of the venue of said cause was granted to the circuit court of Ralls county, where there were three mistrials, and one trial at the August term, 1897, at which she was found guilty of murder in the second degree, and her punishment fixed at 25 years in the state penitentiary. She then filed motion for a new trial and in arrest, which being overruled, she appealed.

The defendant was twice married; her first husband, the father of her deceased daughter, Hettie, having died about 10 years previous to the homicide. She afterwards married one Charles E. Todd, from whom she obtained a divorce a short time before the death of Hettie. Hettie seems to have been the cause of the separation and divorce, the defendant claiming that she and Todd had been criminally intimate with each other. At the time of her death deceased was a few months over 22 years of age. She and Todd were very intimate, and were frequently seen in secluded places together. Defendant testified that upon one occasion she caught them in a compromising position, and that she had often tried to persuade her daughter to be a lady, and to break off her relations with Todd. On the day of the homicide defendant was moving her household goods, when de-



ceased entered the house, and demanded of her mother her handkerchief and pictures, which she denied having. In this way they got into a dispute, and finally a scramble over a pistol, both of them having hold of it, which resulted in deceased being shot twice, once in the chest, and once in the abdomen, both balls ranging downward and outward, producing almost instant death.

The evidence was conflicting as to who first had possession of the pistol, defendant or the deceased. When deceased was shot she opened the door, and ran out into the street, exclaiming, "Oh, ma; you have killed me! you have shot me!" About this time one P. H. Rutherford drove along the street in a wagon in front of defendant's house, and saw deceased as she came out of the house, heard her cries, and saw her fall to the ground. The defendant was then standing in the door, and was asked by Rutherford, "What is the matter?" to which she replied, "Nothing; drive on." She was afterwards seen sitting on the door steps crying, and was heard to say, "Hettie shot herself." Defendant had threatened Hettie with violence, if she did not cease associating with Todd. The court instructed for murder in the first and second degrees, and manslaughter in the third and fourth degrees.

1. Defendant challenges the sufficiency of the proof to sustain the verdict of the jury, and we are asked to review the same. The bare statement of the facts connected with the homicide, without again repeating them, were sufficient to authorize an instruction for murder in the second degree, and whether or not the killing was willful, premeditated, and of malice aforethought was for the consideration of the jury, under the evidence and instructions of the court, who found adversely to defendant's contention, and there was, we think, abundant evidence to sustain that finding.

2. Section 4204, Rev. St. 1889, provides that a list of jurors who have been found by the court to be qualified to sit as such in his case shall be delivered to the defendant in the case, when, in the case in hand, it was delivered to one of defendant's attorneys, instead of to her personally, and this is assigned for error. Defendant insists that, as the statute provides that the list shall be delivered to the defendant, it must be strictly complied with, and that it was not waived by defendant; but we cannot concur in this view. She made no objection at the time, but proceeded just as if the list had been delivered to her in person, and her rights could not in any way have been prejudiced by the failure of the delivery of the list to her in person. Besides, it is a mere statutory privilege, which she might and did waive by not objecting at the proper time. *State v. Waters*, 62 Mo. 196; *State v. Gilmore*, 95 Mo. 554, 8 S. W. 359, 912. Moreover, the delivery of the list to her attorney was, in legal contemplation, a delivery to her, and we are

unable to perceive how she could have been injured by the failure to deliver the list to her in person. Whatever benefit there was to be derived by her from the delivery of the list to her in person she got any way, and has no reason, we think, to complain.

3. It appears from the record that, after the state and defendant had made their challenges, the 12 jurors who were found qualified, and selected to try the cause, were called in the jury box by order of the court, and before being sworn to try the case, and without the consent of defendant, discharged for about two hours, during which time they went where they liked, and mixed with the many people who were there in the town of New London, where the case was being tried; that when they were again called in the jury box, for the purpose of being sworn to try the case, defendant objected to their being sworn, and to being tried by them, for the reason that they had been permitted to separate; and, although these jurymen were charged by the court not to talk about the case among themselves, nor permit others to do so in their presence, it is insisted by defendant that, by reason of the provisions of section 4209, Rev. St. 1889, prohibiting the separation of juries in certain cases, and the rulings of this court in *State v. Orrick*, 106 Mo. 111, 17 S. W. 176, 329, and *State v. Steifel*, 106 Mo. 129, 17 S. W. 227, error was committed for which the judgment should be reversed, in the absence of an affirmative showing upon the part of the state that the jurors were not subject to improper influence. No support for this contention can be found in said section, nor in either of the cases cited, all of which have reference to the separation of a jury during the progress of a trial, and not before. In *Wharton on Criminal Law* (3d Ed., 273) it is said: "Until the jury are sworn, it is not necessary that they should be kept together." In *Epes' Case*, 5 Grat. 676, in which several days were occupied in completing the panel in a trial for murder, it was ruled that it was not necessary that the jurors who had been sworn should be committed to the custody of the sheriff until the whole number of the panel was completed. In *State v. Burns*, 33 Mo. 483, the regular panel was exhausted, when only ten who were competent to serve as jurors had been selected, whereupon the court ordered a venire to issue for an additional number, and while the writ was being served the court proceeded with other business, and tried another case on the same day; the ten veniremen who had been selected in the other case forming a part of the jury. Upon the conclusion of the case the writ of venire was returned, and two additional jurors selected, which completed the panel; whereupon the court discharged the jurors until the following morning, with the usual admonition not to talk with any person about the case, nor to permit any person to talk about the case in their presence. As in this

case, they had not been sworn or impaneled, nor was any objection made at the time by the defendant, and it was held that the rule in capital cases forbidding the jury to separate applies only to the jury when duly impaneled, sworn, and charged with the case. Every lawyer knows how inconvenient, if not impracticable, it would be to keep in the charge of the sheriff a panel of jurors in a capital case after their selection, and before 12 of their number are accepted and sworn to try the case, and especially is this so if the defendant should take the time allotted to him by statute in which to pass upon the list of qualified jurors, and, in the absence of statutory enactment, it is not necessary to do so. Finding no reversible error in the record, we affirm the judgment.

GANTT, P. J., and SHERWOOD, J., concur.

### COLLINS et al. v. PEASE et al.

(Supreme Court of Missouri, Division No. 1.  
Nov. 15, 1898.)

**LIMITATIONS—THIRTY YEARS—PLEADING—EQUITABLE TITLES—PERSONS UNDER DISABILITY—MEANING OF "LAWFUL POSSESSION."**

1. The 30-year statute of limitations as to the recovery of real estate, contained in Rev. St. 1889, § 6770, need not be pleaded in ejectment, but may be given in evidence under the general issue.

2. The 30-year statute of limitations (Rev. St. 1889, § 6770) in regard to the recovery of real estate, the equitable title of which shall have emanated from the government more than 10 years before suit brought, also applies to cases where the legal title has emanated from the government.

3. Rev. St. 1889, § 6770, amending Laws 1874, p. 118, providing that 30 years' nonpossession and nonpayment of taxes on land shall be a bar to an action to recover the land, contains no saving clause in favor of persons under disability, and hence a court cannot make any exceptions in favor of such persons.

4. One is in "lawful possession" of property, so as to be able to rely on 30 years' nonpossession and nonpayment of taxes by plaintiff (Rev. St. 1889, § 6770) as a defense to an action to recover the property, where he has entered not as a mere trespasser, but in good faith, claiming to be the owner, notwithstanding he has not a perfect title.

Appeal from circuit court, Douglas county; W. N. Evans, Judge.

Ejectment by Harrison Collins and others against M. M. Pease and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

A. Burkhead and Thos. H. Musick, for appellants. A. H. Livingston, for respondents.

**WILLIAMS, J.** This case was rightly decided for defendants by the circuit court. It is an ejectment. A patent issued in 1860 from the United States to George and Spencer Collins for the land in dispute. George died in 1860 or 1861; and Spencer, in 1864. Defendants are in possession. Plaintiffs are heirs of the patentees. This made for them

a *prima facie* case. The defense relied on is the limitation of 30 years contained in section 6770 of the Revised Statutes of 1889. The testimony tended to prove that Solomon Collins, father of George and Spencer, was in possession of the land in 1860, when it was entered. He assigned to them a land warrant belonging to him, and it was located on this tract. It is said by some of the witnesses that this was done, and the patent issued in their name, because the father was financially embarrassed. He nevertheless remained in possession, and there is evidence showing that he openly asserted his ownership thereof. He went away during the war, and did not return to the land until a year or more after its close. The dates are not very definitely fixed in the record. He continued after he came back to use and claim the land as his own until 1879, when he sold it to C. E. Pease. The latter then went into possession, and held it, undisturbed by any adverse claim, until he sold to the defendants. They have had exclusive possession since their purchase. At the time of the death of Spencer and George Collins, they had two sisters, who were then married women, and have remained under coverture since. These sisters and their husbands in 1894 conveyed their undivided interest to plaintiff Harrison Collins, Jr. There was evidence to show, and the court so found and recited in its judgment, that plaintiffs had never been in possession of any part of the premises, nor had they ever paid any taxes thereon, but, on the contrary, that defendants and their grantors had been in exclusive possession and paid the taxes since 1860. The case was tried by the court without a jury. Plaintiffs asked nine declarations of law. All were refused. Several are based upon the disability of the married women mentioned, and undertake to construe the limitation of 24 years contained in the statute. Others lay down the rule to be applied as to adverse possession between tenants in common. None are predicated upon the act hereinafter referred to, making 30 years a bar, which in our opinion presents the only question in the case. It is plain, therefore, that we do not think error was committed in their refusal. The court, at defendants' instance, declared that if Solomon Collins was in possession of the land when it was entered in 1860, and he and his grantees have ever since remained in the open, exclusive, and notorious possession of the same, and have paid all taxes thereon since 1860, and George Collins died in 1860, and Spencer in 1863 or 1864, then plaintiffs could not prevail in the suit. The judgment, as above stated, was in favor of defendants, and plaintiffs appealed.

The limitation of 30 years set up by defendants as an absolute bar to plaintiffs' suit was first enacted in 1874, and appears in the Laws of that year, on page 118. Several decisions have been rendered by this court construing that act. These propositions have

been settled: It is unnecessary to plead this statute, but the facts showing its applicability may be given in evidence under the general issue. It applies to cases where the legal, as well as to those in which only the equitable, title has emanated from the government. The statute contains no saving clause in favor of persons under disability, and the courts cannot write into it an exception in their behalf. "The act of 1874 was evidently intended to be a statute of absolute repose to those who come within the protection of its provisions." One is in "lawful possession," within the meaning of the act, when he has not entered as a mere intruder or trespasser, but in good faith, claiming to be the owner. It is manifest that he need not have a perfect title, for in that event he would not need the protection of the statute. *Mansfield v. Pollock*, 74 Mo. 185; *Rollins v. McIntire*, 87 Mo. 496; *Fairbanks v. Long*, 91 Mo. 628, 4 S. W. 499. *Brace, P. J.*, in the case last cited, makes a very clear exposition of the act of 1874 in its original form. "The operation of the act depends upon these five concurring conditions: (1) The premises must not have been in the possession of the claimant, nor any person under whom he claims, for thirty consecutive years next preceding the 27th of February, 1874 [the date when the act took effect], and no taxes must have been paid thereon for all that period of time, either by the claimant or those under whom he claims. (2) The claimant must have failed to bring his action within one year after that date. (3) The equitable title must have emanated from the government more than ten years prior to that date. (4) The possessor must have been in lawful possession at that date. (5) His possession must have been continued during the whole of the year immediately succeeding that date." It will be noticed that the act was only operative in cases where the thirty years of non-possession and nonpayment of taxes were those immediately preceding the passage of this statute. The claimant was then given one year from the time the act took effect in which to bring his suit. The law only applied to the condition of affairs then existing. It made no provision for the future. The opinion in *Fairbanks v. Long* called attention to the language of the act of 1874, and at the next session of the legislature the statute was amended so as to read as follows: "Whenever any real estate, the equitable title to which shall have emanated from the government more than ten years, shall thereafter, on any date, be in the lawful possession of any person, and which shall or might be claimed by another, and which shall not at such date have been in the possession of the said person claiming or who might claim the same, or of any one under whom he claims or might claim, for thirty consecutive years, and on which neither the said person claiming or who might claim the same nor those under whom he claims or might claim has paid any

taxes for all that period of time, the said person claiming or who might claim such real estate shall, within one year from said date, bring his action to recover the same, and in default thereof he shall be forever barred, and his right and title shall, ipso facto, vest in such possessor: provided, however, that in all cases such action may be brought at any time within one year from the date at which this article takes effect and goes into force." 2 Rev. St. 1889, § 6770. The change made is that if at the expiration of any period of 30 consecutive years, during which the party asserting title to the land and those under whom he claims have been out of possession and have paid no taxes thereon, another is found in possession, the claimant must bring his suit within one year thereafter; otherwise he will be forever barred. It was intended by the amendment to reach future cases, instead of limiting the statute to conditions existing at its date, as in the first instance. In other particulars the requirements are the same as laid down in *Fairbanks v. Long*, *supra*. An examination of the declaration of law given in behalf of defendants will show that the court must necessarily have found that neither the plaintiffs nor those through whom they claim had been in possession of the land or paid any taxes thereon since 1860. The court, upon the contrary, under this declaration of law, found the facts to be that defendants and those under whom they claim had exclusive possession and paid all the taxes during that period. Hence plaintiffs could have had no part in the matter. There was ample evidence to justify the giving of said declaration. The testimony was undisputed that the title emanated from the government in 1860, and that more than a year before this suit defendants bought the land and entered into possession, and held the same continuously after that time. This clearly brought them within the protection of the statute. The judgment was for the right party, and is accordingly affirmed. All concur.

#### BARRETT v. METSKER.<sup>1</sup>

(Supreme Court of Missouri, Division No. 2.  
June 28, 1898.)

##### CONTRACT TO BUY LAND—CONSTRUCTION.

A contract for the purchase of an interest in lands provided that if the purchase price, interest, taxes, and expenses were not paid out of vendee's proportion of sales made, or otherwise, within three years from the date of the contract, then vendee should forfeit all his interest in the land, and the title should revert to vendor, and thereupon vendee should be released from all obligations of the contract as fully as though the contract had never existed. *Held*, that vendee, not having paid either the purchase price nor interest thereon, and three years having elapsed several days after suit thereon, forfeited whatever rights he had

<sup>1</sup> Rehearing denied November 21, 1898.

obtained under the contract, and hence was exonerated from all obligations thereunder.

Appeal from circuit court, Pettis county; Richard Field, Judge.

Action by T. N. Barrett, administrator of the estate of J. R. Barrett, deceased, against David C. Metsker. From a judgment in favor of plaintiff, defendant appeals. Reversed.

W. M. Williams and W. S. Shirk, for appellant. Geo. P. B. Jackson, for respondent.

SHERWOOD, J. Action on contract made on the 26th of March, 1890, between J. R. Barrett and David C. Metsker. Action brought March 24, 1893. Judgment for plaintiff on February 8, 1895, for \$2,991.28. Barrett was the owner of a tract of land in the suburbs of the city of Sedalia. Becoming desirous of bringing it into market, he, as party of the first part, entered into the contract aforesaid with defendant, Metsker, as party of the second part; said defendant to construct an electric railway at defendant's own expense to said lands. In consideration of the defendant's agreement to build said railway to said land, and to maintain and operate it, the plaintiff contracted to sell him a half interest in said real estate for the sum of \$32,500, which was to bear 6 per cent. interest per annum, payable semiannually, on the 4th of August and 4th of February of each year. The purchase money was to be paid, so the contract provides, in the following manner: "The north forty to forty-five acres of land in section four (4) to be platted into lots and blocks, and sold to the best advantage, and at prices agreed upon by both parties; the proceeds, including all notes, mortgages, deeds of trust, and contracts of such sale, after paying expenses of sale, interest, and taxes, to be retained by the party of the first part at par value, the amount of one-half of sale to be credited as cash by the party of the first part at the time the sales are made on the \$32,500, owing by the party of the second part." Among other stipulations of the contract were the following: "It is further agreed that if there is not enough of lots sold or money received when the party of the second part's interest becomes due to pay the same, the party of the second part is to pay his interest on his purchase money, and his part of the taxes, outside of the contract." "It is further agreed by both parties if the \$32,500, and interest, taxes, and expenses, are not paid out of the party of the second part's proportion of the sales as aforesaid, or otherwise, to the party of the first part, within three years from this date, then the party of the second part forfeits all interest in the above-described land, and the title reverts to the party of the first part; and thereupon, in such case, the party of the second part is released from all obligations of this contract, as fully and completely as though the same never existed." The defendant, in accordance with his contract, built the electric railway at his own expense, and maintained the

same as required by the agreement. The land was platted and laid off into lots and blocks. On the 8th of August, 1891, lots had been sold amounting to \$4,073.50, according to plaintiff's statement, after paying all expenses of sale; and afterwards, on the 13th of February, 1894, three other lots were sold for one-half of net proceeds, amounting to \$187.50. The defendant did not pay out of his own means the interest that became due February 1, 1892, August 1, 1892, and February 1, 1893, claiming that he was not liable therefor under his contract, and that the contract had not been complied with upon plaintiff's part, in that he had not applied the proceeds of the sale of lots to the payment of said mortgage, as stipulated in contract.

Under the last paragraph quoted from the contract in question, it is quite plain that Metsker not having paid either the principal sum of \$32,500 nor the interest thereon, and the three years specified having elapsed two or three days after suit brought, it must follow that he forfeited whatever rights he had obtained under the contract, and was at the same time, and for the same reason, exonerated from all obligation thereunder. The words of the paragraph mentioned mean this or they mean nothing. Suppose, for instance, that defendant had been actor and sued on the contract after the lapse of the three years, and he being in default, can it be doubted that Barrett could successfully plead the paragraph under discussion in bar of the action,—plead that, by reason of his default, Metsker had forfeited all his interest in the contract, and all his rights thereunder, "as fully and completely as though the same never existed"? But one answer, an affirmative, can be returned to this question. The same default and lapse of time which would bar defendant's recovery, if plaintiff, must also bar plaintiff's recovery in the present suit. Therefore judgment reversed. All concur.

### LANGFORD v. FEW.

(Supreme Court of Missouri, Division No. 1.  
Nov. 15, 1898.)

EXECUTION—ISSUANCE—RETURN—PRESUMPTION—  
IRREGULARITY—COLLATERAL ATTACK.

1. Rev. St. 1889, § 6287, provides that no execution shall be sued out of the court where the transcript of a justice's judgment is filed if the defendant is a resident of the county, until an execution shall have been issued by the justice directed to a constable, "and returned that defendant had no goods or chattels whereof to levy the same"; and a constable's return of "Not satisfied" to an execution against a resident defendant is insufficient to authorize the issuance of an execution and the sale of real estate.

2. There is no presumption from the issuance of an execution by a clerk of a circuit court on the transcript of a judgment by a justice as provided by Rev. St. 1889, § 6287, that a return of nulla bona was made to the judgment in justice's court, required by said section before execution on the transcript may issue.

3. A failure to comply with the requirement of Rev. St. 1889, § 6287, that before issuing an execution on a transcript from a judgment in justice court a return of nulla bona shall be made to an execution thereon in justice court, is not a mere irregularity, but the failure is fatal to recovery in ejectment by one claiming title under execution issued on the transcript.

Appeal from circuit court, Ripley county.

Action by James K. Langford against William L. Few. From a judgment for defendant, plaintiff appeals. Affirmed.

Action in ejectment to recover the S.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  of section 8, township 24, range 1 E., in Ripley county. The answer is a general denial and plea of homestead rights. The reply is a general denial. Plaintiff's evidence is: (1) A deed from the sheriff of Ripley county, dated October 18, 1893, recorded March 2, 1894, reciting that on November 7, 1892, William P. Morrison recovered a judgment against defendant before a justice of the peace in said county; that a transcript of the judgment was filed in the circuit clerk's office of the 13th of December, 1892, and upon which an execution was issued on March 18, 1893, directed to the sheriff of Ripley county, and under which he levied on the land in controversy, and sold to plaintiff for \$25. (2) A transcript of the judgment of the justice of the peace in favor of Morrison and against Few. Attached to and forming a part of the transcript is a recital that an execution was issued on the 13th of December, 1892, and a further statement, signed by the justice of the peace, as follows: "March 13th, 1893, execution returned not satisfied, with a schedule of defendant's property, to the amount of two hundred and twenty-three  $\frac{27}{100}$  dollars." It was agreed that the monthly rents and profits is four dollars per month. The defendant's evidence is: (1) A deed from Mrs. M. J. Morrison and seven others, without date, but acknowledged October 2, 1886, and recorded June 24, 1889, conveying an undivided ten-elevenths interest in the N.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$ , and all of the S.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  that lies north of Big Barren creek, in section 28, township 25 N., range 1 E., to defendant, in consideration of \$395 in trade, and \$150.45. (2) The testimony of defendant that he took possession of the land in January, 1888, but did not have the deed recorded until he came to Ripley county; that he stayed on the place two years, made one crop, then moved off, returned in the fall, and the next spring sold it to J. W. Shipp on the 9th of April, 1890; that W. P. Morrison exhibited the sheriff's deed to him, but he did not examine it; that he sold the place for some stock, traded the stock, and with the proceeds, and money he borrowed from the county, he paid for the land. In rebuttal, plaintiff introduced the deed from Few to Shipp. The deed is not set out in the record, but it is there stated to be a warranty deed, recorded; but where or when is not shown. Plaintiff then offered the complete transcript of the justice of the peace in the case of Morrison against Few,

including the execution and return of the constable. The return is the material part, and is as follows: "Executed the within writ in the county of Ripley, state of Missouri, on the 23d day of December, 1892, by reading to W. L. Few, and scheduled the property of defendant. Execution returned not satisfied. P. E. Whitwell, Const.,"—with the following added: "Copy of Oath of Appraisers. F. W. Bell, W. D. Raywinkle, and J. T. Hutson, Sr., appraisers, being duly summoned to appraise the property of W. L. Few, before entering upon their duties make oath and say they will faithfully and impartially appraise the property exhibited to them by the said Few" (signatures and seals and oaths attached); to which is also, unrewritten the following: "Copy of the Schedule. Jan. 21st, 1893. State of Missouri, County of Ripley. To the Justice Court of Kelley Township, of J. W. Hufstедler, J. P.: W. L. Few sets forth upon oath the following described property to the amount of three hundred dollars' worth as scheduled, to wit." (Here follows an itemized list of personal property, with the values set opposite each item, and aggregating \$239.40; but there is no signature or jurat of any one attached to it.) Defendant objected, and the court excluded the transcript. Plaintiff then offered again the transcript on file in the circuit clerk's office, and also the note upon which the judgment of the justice of the peace was based. The plaintiff asked and the court refused to give, the following instructions: "(1) The court declares the law to be that, if the court finds from the evidence and admissions of the parties that the defendant is the common source of title, and that the plaintiff has acquired the title of defendant by a sheriff's deed of and for the said lands, then the court should find for the plaintiff, and assess his damages and value of the monthly rents and profits as shown by the evidence, unless the court should find from the evidence that the land in controversy was the homestead of the defendant at the time of the sale thereof under the execution and judgment shown in evidence. (2) The court further declares the law to be that the sheriff's deed offered in evidence and the transcript of and from the justice upon which the same is based, offered in evidence, cannot be impeached or invalidated in this collateral proceeding of ejectment for any mere irregularity or seeming informality therein contained." The court, of its own motion, gave the following instructions: "(1) The court, sitting as a jury, declares the law to be that, if it appears from the evidence that defendant was, at the time of the institution of the suit before J. W. Hufstедler, the justice of the peace, a citizen and resident of Ripley county, and has been a resident of the county ever since, and was at the time of the filing of the transcript of said justice's docket in the office of the clerk of the circuit court of Ripley county, and at the time of suing out of the said clerk's office the execution under which the sale was made

at which the plaintiff became the purchaser of the land of defendant, and there had not been an execution issued by the justice directed to some constable, and a return by such constable of such execution that the defendant had no goods or chattels whereof to levy the same, then, in that case, the finding and verdict should be for the defendant. (2) The court further declares the law to be that, unless the court find from the evidence that the former homestead claimed by the defendant was acquired by the filing of the deed of conveyance thereto in the clerk's or recorder's office for record and entering into the possession thereof as such homestead by the defendant before he contracted the debt mentioned in the transcript, execution, and deed of plaintiff, although the court may find the land in controversy claimed as a homestead was acquired with the proceeds of the sale of the first-mentioned land claimed as his homestead, and unless the court finds both such facts from the evidence, the court will find for the plaintiff, unless the court should further find from the evidence that plaintiff did not acquire the title under the sheriff's deed." There was judgment for defendant, and plaintiff appealed.

J. L. Fort and C. L. Keaton, for appellant.  
J. C. Sheppard and W. W. Perkins, for respondent.

MARSHALL, J. (after stating the facts). 1. It thus appears very vaguely that defendant owned an undivided ten-elevenths of the N.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$ , and all of the S.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  that lies north of Big Barren creek, in section 28, township 25 N., range 1 E., and that about 1890 he sold something—the record does not clearly show what, but presumably that property—to J. W. Shipp. No explanation is vouchsafed by this record as to what defendant did with the proceeds, but from the instructions it seems to be assumed that he purchased the land in suit with them. It is not shown where or how defendant acquired title to the land here involved. Both parties, however, concede that they claim title through defendant. The defendant, in his answer, claims it as a homestead, but the facts disclosed by the record are so meager that it is impossible for this court to ascertain with any degree of satisfaction whether or not he ever owned this land, or was ever in possession of it. The statement of the case above is a full and fair statement of every material matter contained in the transcript. It nowhere appears whether or not the defendant is a housekeeper, or head of a family, so as to be entitled to claim homestead rights under chapter 80, Rev. St. 1889, or exemptions under section 4908, or whether he was in such favored condition in December, 1892, when the execution from the justice of the peace was issued against him, or in April, 1893, when the sheriff executed the writ of fieri facias. It seems, however, to be assumed by counsel for both parties that defendant was

the head of a family, and we will treat the case in that way. The proposition of law involved is whether a return by a constable on an execution issued by a justice of the peace, which says: "Executed the within writ in the county of Ripley, state of Missouri, on the 23d day of December, 1892, by reading to W. L. Few, and scheduled the property of defendant. Execution returned not satisfied. P. E. Whitwell, Const.,"—with the oath of the three appraisers, and a copy of a schedule, which recites that W. L. Few sets forth upon oath the following described property to the amount of \$300 worth as scheduled (describing it), but which is not signed or sworn to, by any one, is a sufficient return to authorize the issuance of an execution by the clerk of the circuit court, and a sale of real estate, under the provisions of section 6287, Rev. St. Mo. 1889, which provides: "But no execution shall be sued out of the court where the transcript is filed, if the defendant is a resident of the county, until an execution shall have been issued by the justice, directed to the constable of the township, and, if not, to any constable in the county, and returned that the defendant had no goods or chattels whereof to levy the same." This provision has been on our statute books since as early as 1835. It first underwent judicial interpretation in Coonce v. Munday, 3 Mo. 374, and it was insisted that the recital in the execution issued by the circuit clerk that the constable had made a nulla bona return was sufficient, and, at any rate, that the fact might be shown aliunde. But McGirk, C. J., denied that the circuit clerk had the power to make such a recital, and, construing the provision of the statute quoted, said: "The law expressly forbids an execution to issue until one has issued from the justice," and added that "the law-makers had an undoubted right to prescribe the terms on which the execution might or should issue, and, when they have done so, no one can dispense with those terms." It was argued, however, that it was a mere irregularity, which could not be attacked collaterally. But the court said: "In the case before us the law says the execution can have no existence." The question arose there, just as it does here, in an ejectment suit, where the purchaser at the execution sale—a stranger to the original case—was the plaintiff, and the defendant was the same in both cases. The question again came before this court by a bill in equity brought by the purchasers at the execution sale. McGirk, C. J., speaking of filing transcripts of justices' judgments in the office of the circuit clerk, and issuing executions thereon, said: "The act of the general assembly authorizes this to be done, but it requires that, before any execution can issue on the judgment thus filed in the clerk's office, an execution shall have been issued from the justice, and returned 'No goods to be found.' In this case the only evidence of the facts were found on the justice's docket or transcript, which says an execution had is-

sued, and that the constable returned 'Not satisfied' by levying on the property of Burke, and making some \$29. The return does not show that the defendant, Burke, had no more goods, etc. The law is express that no execution can go from the clerk's office till a return of nulla bona is made to an execution issued by the justice." *Burke v. Flournoy*, 4 Mo. 116. In *Wineland v. Coonce*, 5 Mo. 297, it was pointed out that a lien could be obtained by filing the transcript, but that no execution could issue from the circuit court until there had been a return of nulla bona by the constable. In *Illingworth v. Miltenberger*, 11 Mo. 80, it was decided that a nulla bona return was not necessary on a mechanic's lien judgment rendered by a justice, and a transcript filed in the circuit court, because no execution could issue from the justice. In *Linderman v. Edson*, 25 Mo. 105, the constable's return was nulla bona as to one of two defendants, but it was not stated which, and no return as to the other. The question arose in an ejectment suit, brought by the purchaser at the execution sale. Held, that plaintiff acquired no title by the sheriff's sale. In *Burke v. Miller*, 46 Mo. 258, the court again pointed out that the legislature had two objects in view: First, to create a lien, and, second, to enforce the lien; but that the enforcement was stayed until there was a return of nulla bona by the constable, and that the purpose of the stay was to prevent unnecessary seizure and sale of the defendant's real estate. Appellant, however, insists that the return of the constable, above quoted, is a compliance with the statute. The statute expressly prohibits the issuance of an execution by the circuit clerk until an execution has been issued by the justice of the peace, "and returned that the defendant had no goods or chattels whereof to levy the same." The return of the constable in this case is that he executed the writ "by reading it to W. L. Few, and scheduled the property of defendant. Execution returned not satisfied." The oath of the appraisers amounts to only a preliminary. It does not appear that they made any appraisal. The schedule of defendant is not signed or sworn to, and does not, on its face, purport to be all the property he owned, nor is it pretended that the values are those fixed by the appraisers. It rather conveys the idea that defendant was selecting this particular property under section 4907, Rev. St. Mo. 1880, and is not at all inconsistent with the possibility that he had other property which, perhaps, the officer had seized along with that selected. The return of the officer does not exclude the idea that defendant had other property. The return required of the constable by the statute is "that the defendant had no goods or chattels whereof to levy the same." This officer simply says he read the writ to defendant, scheduled his property, and returned the execution not satisfied. The return of nulla bona has a defined meaning in law. It signifies that the officer made strict and diligent search, and

was unable to find any property of the defendant, liable to seizure under the writ, whereof to levy the same. A return of "Not satisfied" conveys only the idea that it has not been paid. In *Dillon v. Rash*, 27 Mo. 243, a return of nulla bona was held necessary. In *Fransé v. Owens*, 25 Mo. 329, a return of "No property found of defendant in said townships whereof to levy" was held to comply with the statute. In *Burke v. Flournoy*, 4 Mo. loc. cit. 117, a return of "Not satisfied by levying on the property of Burke, and making some \$29," was held insufficient, because it did not show that Burke had no more property; the court saying a "nulla bona" return is requisite. See, also, *McDowell v. Clark*, 68 N. C. 118; *Harman v. Childress*, 3 Yerg. 327; *Metcalf v. Gillet*, 5 Conn. 400; *Williams v. Amory*, 14 Mass. 20; *Russ v. Gilman*, 16 Me. 209; *Walsh v. Anderson*, 135 Mass. 65; *Perry v. Inhabitants of Dover*, 12 Pick. loc. cit. 211. *Freeman on Executions* (section 356) says: "The most usual obstacle met by officers is their inability, after due search, to discover property subject to the writ. When this has been the case, and it becomes necessary to return the writ wholly or partly unexecuted, the officer must exonerate himself by stating clearly and unequivocally that the writ is returned unsatisfied,"—citing as authority a great number of cases. *Herman on Executions* (page 389) says: "An officer has no right to make the return [nulla bona] without having made an effort to find any of the property of the defendant. A general report that the defendant has no goods will not excuse such a return. It may be made after one thorough search." "Not satisfied" does not cover the legal requisites of a strict and thorough search, and a failure to find any property belonging to defendant whereof to levy the writ. It is not synonymous with nulla bona, and does not answer the requirements of the statute. The case of *Jordan v. Surghnor*, 107 Mo. 520, 17 S. W. 1009, must be read in the light of the facts in that case, which were that the defendant was not a resident of the county in which the judgment was rendered, and in such cases no execution is required by statute to be issued by the justice, and returned nulla bona by the constable, for the manifest reason that prima facie there would be no personal property on which the constable could levy.

2. Plaintiff, however, contends that it will be presumed that the clerk of the circuit court did his duty, and that he did not issue the execution until there was a proper return of nulla bona by the constable. The answer is plain. As against a positive prohibition of the statute, there can be no presumptions, and there is no room for a presumption in this case, for the plaintiff himself introduced the return made by the constable, which, as we have held herein, was not in compliance with the statute. There is a difference between indulging a presumption in favor of an officer having done a duty which the law casts upon him, and indulging a presumption that a fact

exists which the statute requires to exist in order to give the officer power to act, and without which he is prohibited from acting. A person who buys real estate that is sold under this statute gets no title unless the statute is strictly followed, for, while it gives a remedy to the creditor, it also protects the debtor. It is further contended that this is a mere irregularity in the judgment and execution under which the land was sold, which cannot be attacked in this collateral proceeding. As the references herein contained to the cases decided by this court and in other jurisdictions clearly show, just such contentions were unsuccessfully made under similar conditions of the records. The reason is that it is not merely an irregularity. It goes to the root. It is the corner stone upon which plaintiff's right to recover rests, and without which he has no standing in any court. The sheriff's deed to plaintiff does not even attempt to supply "the missing link," for it only recites the justice's judgment on the 7th of November, 1892, the filing of the transcript in the circuit clerk's office on the 13th of December, 1892, and the issuance by the circuit clerk of the execution by him on the 18th of March, 1893. There is no recital whatever that any execution was ever issued by the justice of the peace, much less a recital of a nulla bona return; and in view of the fact that the judgment was rendered on November 7th, and the transcript was filed on December 13, 1892, there could not have been an execution issued and returned nulla bona by that time. It is evident from these recitals that the plaintiff in that judgment by this action was taking advantage of the first object of the statute,—securing a lien; but this deed furnishes no proof or basis for presumption that the second prerequisite of the statute—an execution and nulla bona return—had been complied with. In this view of the case, it is not necessary to discuss the other assigned errors. The judgment of the circuit court is affirmed. All concur.

will to make absolute disposition of the estate, where they accepted gifts made by her out of the corpus of the estate, but did not at the time know what the will provided, and the tenant had individual property out of which the gifts might have been made on the advice of the party claiming an estoppel, who had taken gifts from the estate from the life tenant without consideration."

3. Administration Law (section 184), providing that "all demands not \* \* \* exhibited and presented to the court for allowance in two years shall be forever barred," does not apply to an action by remainder-men to establish their rights as owners of a fund in the administrator's hands, which was derived from a conversion by decedent, who was the particular tenant, of a part of the estate into money.

4. A final judicial settlement of an executrix's account does not conclude remainder-men from seeking to charge her estate thereafter for a note for which she did not account, which was received by her as particular life tenant of the estate of which she was executrix, on the discharge out of the funds of the estate of a collateral charge on it, because the action seeks to enforce a trust not embraced in the matters passed on by the probate court.

5. Where three cases were tried together, and the same evidence received by consent in all, and a single decree entered, and the pleadings, taken together, make issues to which the decree is responsive, the cases will be treated, on appeal, as if an order of consolidation had been made.

6. Rev. St. 1879, § 3971, providing that, when any estate shall be devised to any child, grandchild, "or other relative" of the testator, and such devisee shall die before the testator, leaving lineal descendants, such descendants shall take the estate as the devisee would have done in case he had survived, does not entitle a grandchild of testator's wife by a former marriage to take under a devise over to her mother, who died before the testator, whereby the devise lapsed.

7. Parties cannot complain of a decree which was unduly favorable to them.

Appeal from circuit court, Johnson county; W. W. Wood, Judge.

Actions severally by Wesley O. Bramell and others against Z. T. Adams, administrator, and others, A. W. Cole and others, and George W. Collins and others. There was a decree for plaintiffs, and defendants appeal. Affirmed.

These cases were tried together in the circuit court, and were submitted on the same evidence. The decree rendered is alike in each case, and was apparently intended to include the issues involved in all. The suits, for all practical purposes, were consolidated and treated as one. The rights of the parties grow out of and depend upon the will of Calvin Atkins, deceased, which was admitted to probate in Moniteau county, in the year 1884. The material parts thereof are as follows: "I will that all my just debts be paid, at as early a date as practicable, and the remainder that is left to go to my beloved wife, Margaret A. Atkins, during her natural lifetime, she to have the entire control of the same, it consisting of the following real estate: The west half of the northeast quarter of section No. (23) twenty-three, in township (44) forty-four, range (2) two west, containing eighty acres, more or less, it being the same we now

BRAMELL et al. v. ADAMS et al. SAME  
v. COLE et al. SAME v.  
COLLINS et al.

(Supreme Court of Missouri, Division No. 1.  
Nov. 15, 1898.)

WILLS—CONSTRUCTION—POWER OF ALIENATION—  
REMAINDER-MEN—LAPSED DEVISES—ESTOPPEL—  
EXECUTORS AND ADMINISTRATORS—STATUTE OF  
NONCLAIM—EFFECT OF FINAL SETTLEMENT—  
APPEAL—REVIEW.

1. A will devising to testator's widow all his property and notes and evidences of indebtedness, to have full control of same as long as she lives, and, after her death, "what is left" to remainder-men, entitles the widow to a life estate, without power to alienate the corpus of the estate, and the remainder-men to whatever is left of the estate, whether diminished by losses in the management thereof or increased by profits.

2. There is no estoppel of the remainder-men to deny the power of the life tenant under a



reside upon, and all other lands that I may have any claim to and upon, and also all moneys, cash, notes, or bonds, and evidence of debt, of every description whatsoever, and effects of all kinds, to go to her, for her to have full control of the same, as long as she lives, and that, after her death, what is left to go to A. W. Cole and Louisa Bramell and her children, legal heirs of her body, share and share alike; that is to say, the said A. W. Cole and Louisa Bramell, wife of Washington Bramell, is to share equal to any of the children of the said Washington and Louisa Bramell and no more; and I further revoke all former wills of every description whatsoever, and publish this as my last will and testament; and my will is that my beloved wife, Margaret A. Atkins, shall act as my executor of my entire estate, both real and personal, of every description whatsoever." The will is dated August 21, 1866. Atkins died in 1884, and his widow, Margaret Atkins, qualified as his executrix. She made final settlement, after publication of the proper notice, on the 10th of May, 1886, showing in her hands \$39,210.39. She also held what is called the "Price note," for \$5,000, which she failed to inventory, and hence it was never charged to her in her administration accounts, and is not included in the above balance. Mr. Atkins deposited this note as collateral security for an indebtedness which he owed, and, when the inventory was made, it was still held by his creditor. Subsequently the debt was paid by the executrix, and the Price note delivered to her. She took credit for the payment in her settlement with the probate court, but did not charge herself with the note. The widow retained possession and control of the money and other property of the estate after her discharge as executrix, and managed and invested it as she deemed proper. Atkins, at the time of his death, held a note for something over \$22,000, secured by a deed of trust upon some land in Henry county, called the "Rule Farm." Mrs. Atkins had the land sold under the deed of trust, and took the title in her own name. She also bought with the funds of the estate several other tracts of land, and had the same conveyed to her personally. In 1891, a short time before her death, she conveyed 80 acres of the Rule land to plaintiff Wesley O. Bramell; a like quantity to Edward G. Bramell; and a third 80 to Louisa and Washington Bramell for life, and after their death to the children of Louisa. She held the title to the remainder of the Rule land in her own name when she died. Mrs. Atkins also conveyed, or caused to be conveyed, to defendant Cole, several tracts of land in Johnson county, aggregating about 400 acres. He, in turn, gave 80 acres of that deeded to him to his son-in-law, defendant Collins. All of the real estate above mentioned was purchased with funds of the Atkins estate. The transfers to Cole and to the Bramells were without consideration, and

merely intended as gifts. The Bramells, in a suit in the circuit court of Henry county, were decreed to hold the title to that part conveyed to them, in trust for the remaindermen provided for in the will of Calvin Atkins, deceased. Mrs. Atkins also made small presents from time to time of money or personal property to some of the plaintiffs, and likewise to defendant Cole. He was the principal beneficiary of these disbursements. She gave him what is spoken of by the witnesses as the "Bowen-Hinkle notes." He collected them, paid \$1,200 out of the proceeds for one of the tracts of land conveyed to him, divided part of the remainder between his two daughters, and used himself what was left after this division. Mrs. Atkins died in 1892. Defendant Adams became her administrator, and took into his possession notes amounting to about \$15,000. These were payable to her, but represented investments which she had made of the funds of the Atkins estate. She left two children surviving her,—plaintiff Louisa Bramell and defendant Dr. A. W. Cole. They are her only heirs, and were born of a marriage prior to that with Atkins. He had no children. Louisa Bramell and seven of her children join as plaintiffs in these suits, making all persons interested parties thereto. Their claim, briefly stated, is that the land, to which reference has been made, was purchased with assets belonging to the estate of Calvin Atkins, deceased, and that the notes in the hands of Adams, administrator of the widow, stand for money which came from the same source. They assert that, upon the death of Margaret Atkins, they, jointly with defendants Cole and Estes, became entitled, as remaindermen under the will of her husband, to the fund held by her for life, and seek to follow it into the property in which it was invested by her. Plaintiffs brought three separate actions. The one in which Adams is a defendant is to reach assets in his hands, which, plaintiffs say, were trust funds held by his intestate, and constitute no part of her estate, but really represent property of the remaindermen; that against Cole seeks a construction of the will, and a decree declaring that the land conveyed to him, as well as that retained by Mrs. Atkins, is held, by the parties having the legal title, in trust for plaintiffs and the others, who were to take at her death; and the one against Collins was for a like purpose as to the land given him by Dr. Cole, his co-defendant. The decree entered in each case is identical. It embraces all the matters litigated in the three suits. The court declared that Mrs. Atkins was a tenant for life; took an account of the notes and effects received by her under the will; decreed to the remaindermen the title to the land, which she held at her death, and credited her with the amount invested therein. This left a balance of the corpus of the estate, which came into her hands, of \$15,076.14, which was declared a lien upon the

money and notes in the hands of her administrator. He was ordered to pay said amount into court for distribution among the remainder-men. An additional lien in their favor was given upon the several tracts of land conveyed to Cole and Collins for so much of the money of the estate as was invested in such tracts, respectively, but the money and notes in the hands of the administrator were made primarily liable. The decree further provided for distribution of the money, when collected, among the parties found to be remainder-men; Dr. Cole, one of them, being charged in the distribution with \$2,500, on account of money received by him belonging to the trust funds, and used, with consent of the life tenant, for his own benefit. The cases come to this court on defendants' appeal.

O. L. Houts and E. A. Nickerson, for appellants. A. B. Logan and James Parks & Son, for respondents.

WILLIAMS, J. (after stating the facts). 1. The first step in the decision of these cases is to determine the proper construction of the will of Calvin Atkins, deceased. The litigants radically differ concerning the interest or estate which the widow took in the property of the testator, and her power to dispose of the same. The claim of the appellants is that the will gave her a life estate, and that the words "what is left," in the gift over, raise an implied power in her of absolute disposition. If this is true, the decree below cannot stand. This will was construed in the case of *Bramell v. Cole*, 136 Mo. 201, 37 S. W. 924, after the trial of the present suits in the circuit court. Macfarlane, J., speaking for the court, said: "I take the rule in this state to be well settled that, in case a life estate is expressly given, a power of absolute disposition will not be implied from the fact that the devise or bequest over is of what remains or what is left of the property at the death of the first taker, wherever it appears also that the property may be diminished in the hands of the life tenant by the uses to which it may properly be applied. The use of such words only contemplates that some of the property may not exist at the death of the first taker. \* \* \* By the will in question the testator not only devised to his wife real estate, but he also bequeathed to her all money, cash, notes, or bonds, and evidences of debt of every description whatsoever, and also all his personal property and effects of all kinds. Personal property and effects, being thus distinguished from money, notes, bonds, etc., must have included such perishable property as one would have in his residence and upon the land upon which he resided, and the words 'what is left,' as used in the will, can apply to such personal property." Again: "In the most careful and judicious management of an estate like this, losses are liable to occur. By a devise over of 'what is left,' the testator evidently had in mind such possible

losses, and did not intend that the legatee for life should be chargeable with them." The court declared, in conclusion: "By the words 'what is left' the testator intended to include, in the bequest over, the entire property which should be in the hands of the life tenant at her death, whether it had been diminished by losses or increased by profits, or whether it consisted of personal property or had been invested in real estate." We have been asked to review that decision. A re-examination of the question has satisfied us that the conclusion reached in that case is correct. We adhere to our previous ruling.

2. The appellants next insist that plaintiffs have estopped themselves by their acts and conduct from questioning the power of Mrs. Atkins under the will to dispose of the property, and from denying that Cole acquired a valid title to that part which she gave him. A careful examination of the evidence fails to disclose any solid basis in the testimony for this claim. It is true that Mrs. Atkins (largely with the advice and assistance of Dr. Cole) managed the trust funds during her lifetime in her own way. She made investments in real estate, and took the title thereto in her own name. She loaned the money upon such security as she deemed proper. Her right to do this was never challenged by plaintiffs, nor were they ever asked to consent thereto. She and defendant Cole simply assumed that the power existed, and acted accordingly. She loaned money to each of the two plaintiffs, Wesley O. and Edward G. Bramell, and took a deed of trust from each upon land in Johnson county to secure the sum loaned him. Later, she released these liens, and the Bramells, at her direction, conveyed the land to defendant Cole. Mrs. Atkins then made a deed to each of them for 80 acres of the Rule farm, in Henry county, and also one to plaintiff Louisa Bramell for a like quantity. It was afterwards decided in *Bramell v. Cole*, supra, that they held the title to this Henry county land in trust for the remainder-men, and so it was that these conveyances amounted to nothing. She made from time to time small gifts of personal property and money to some of the plaintiffs, but it does not appear that they were informed that she claimed to do this by authority of the will. Dr. Cole has no ground of complaint upon this score, as his receipts from this source were much greater than those of any of the others. It also appears that she had some property of her own from which these presents might have been made. The year before she died the parties joined in having an appraisal made of the land, with the view of dividing it, but this partition was never consummated. Defendant Cole also testified that he refused to receive a deed for any of the land until provision was likewise made for his sister, which was done. If we give the full force and effect contended for by appellants to every fact and circumstance tending to show that plaintiffs recognized the

power of Mrs. Atkins to make disposition of the property, and overlook the fact that some of the parties were minors, and refuse to consider the testimony that most of plaintiffs were ignorant of the contents of the will until after her death, we still have two essential elements of an estoppel entirely lacking. To constitute an estoppel by conduct, there must be: "First, an admission inconsistent with the evidence proposed to be given or the claim offered to be set up; second, an action by the other party upon such admission; third, an injury to him by allowing the admission to be disproved." *Taylor v. Zepp*, 14 Mo. 482; *Acton v. Dooley*, 74 Mo. 63; *Blodgett v. Perry*, 97 Mo. 263, 10 S. W. 891. It is necessary for one relying upon an estoppel to show that he was induced, by acts and conduct of the other party, to do something which, but for such conduct, he would not have done. He must have been induced to take a certain course by something said or done by his adversary. Dr. Cole stands in no such attitude towards these plaintiffs. He knew far better than they what the will of Calvin Atkins contained. He was familiar with its terms and provisions. He was the moving spirit in his mother's transactions with the property of the estate. Plaintiffs simply acquiesced in what he did or advised. They may be said to have been influenced by his conduct, not he by theirs. *Acton v. Dooley*, 74 Mo. 63. Neither is it perceived how he is injured by granting the relief sought. He paid no consideration for the property of the estate transferred to him. Nothing that he invested in it is taken from him. He was the recipient of gifts, which the donor was not empowered to make. He is only required to return that to which he was never entitled, and which was a mere gratuity to him. He parted with nothing to obtain it, and it is no hardship when he is required to give it up. The decree, however, does not require him to surrender, by any means, all that he received. We cannot see that he will be in any worse position, after returning that which cost him nothing, than he was before receiving it. We find nothing akin to an estoppel in the facts of this case.

3. Defendant Adams, administrator of the estate of Margaret Atkins, deceased, pleads the special limitation of two years contained in section 184 of the administration law. The statute, after providing for the exhibition, allowance, and classification of demands against estates, declares that "all demands not thus exhibited and presented to the court for allowance in two years shall be forever barred," with a saving clause in behalf of persons under certain disabilities. Plaintiffs' suit was not commenced within two years. This statute is invoked as a bar. It is clear that if the result of this litigation is to be a general money judgment against the administrator, to be classified and paid out of the assets of the estate, plaintiffs' suit comes too late. The fact that it was begun in the circuit court, and that the claim grew out

of a trust fund, could not save it from the operation of the statute. This is not, however, a proceeding for a money judgment, in the ordinary form, against the estate. Plaintiffs are not trying to enforce a personal liability of the intestate, or to establish a demand which existed against the deceased. They do not ask a judgment to be paid out of the assets of the estate in order of classification. They proceed upon an entirely different theory. Mrs. Atkins had in her possession property to which plaintiffs and the other remainder-men became entitled at her death. The moment she died, it became theirs. She held it in trust. It constituted no part of her estate. While she had changed the investments and form of the securities, they still remained trust property. There was no transformation of the character in which she held them. Her administrator acquired no rightful title as against the remainder-men. He could not compel plaintiffs to come in as general creditors and share with others in the same class in the distribution of their own property. It was clearly shown that the assets in the hands of the administrator were derived from the trust funds. This is a suit in equity to reach the property itself, not to establish a personal liability or debt incurred by the deceased. If an administrator should assume to hold personal property of another, it could not be claimed that the two-years limitation would be an answer to a replevin suit therefor. A similar question to the one under consideration here was before the supreme court of California in *Gunter v. Jones*, 9 Cal. 643. The court said: "Another point argued by the counsel of the defendant is that Gunter did not present his account to the administrator for approval or rejection, as the probate act requires. But to this it is a sufficient answer that the scope and purpose of the bill of Gunter was not the recovery of a debt against the estate, but to enforce his right to trust funds that had found their way into the hands of the administrator. He was compelled from the complex nature of the case, and the kind of relief sought, to go into a court of equity. The trust funds properly constituted no part of the assets of the estate. Where the executor or administrator has property which belongs to another, the owner is not required to present his account, as if he were a creditor. The claimant of specific property, and not a debt, cannot properly be called a creditor, within the meaning of the probate law." *Ang. Lim. (6th Ed.)* § 170, lays down this rule: "The limitation is strictly applicable to demands of creditors of deceased, and does not reach claims on specific property which was held in trust by the deceased for other persons, and which has come into the hands of an executor or administrator." See, also, *Trecothick v. Austin*, 4 Mason, 16, Fed. Cas. No. 14,164; 2 Woerner, Prob. Law, p. 848, § 402; *Fallon v. Butler*, 21 Cal. 24; *Bank v.*

Hummel (Colo. Sup.) 23 Pac. 986; Snorgrass v. Moore, 30 Mo. App. 232. Justice Story in *Trecothick v. Austin* said: "The cestui que trust is not, in such case, strictly and merely a creditor of the testator, and the statute bars only claims of a pecuniary nature against the testator, not such as become personal trusts in the hands of the executor." Some of the language used by Judge Adams in *Smith v. Ricordi*, 52 Mo. 581, gives countenance to plaintiffs' contention. The discussion of this question was not necessary to the decision of that case. When it came back to this court, upon a second appeal, the affirmance of the judgment below was placed by Judge Wagner upon the sole ground that the action was barred by the general statute of limitations. The special statute in favor of administrators was not mentioned or considered. *Ricordi v. Watkins*, 56 Mo. 553. We do not think the special statute of two years in favor of administrators applies in this case. A very different question would be presented if the fund could not be traced, and plaintiffs had to come in as general creditors of the estate. *Attorney General v. Brigham* (Mass.) 7 N. E. 851.

4. The circuit court included, as part of the trust funds held by Mrs. Atkins, the Price note for \$5,000, hereinbefore referred to. This was not charged to her as executrix of her husband's estate in her settlements with the probate court. Appellants, in a supplement to their brief, assign as error this action of the trial court, contending that the final settlement is conclusive, and only the balance shown thereby can be considered in determining the amount received by the life tenant. If this was an attempt to charge her as executrix with amounts omitted from her settlements, the point might be well taken. It is not a suit upon her bond; neither is it based upon any dereliction of duty upon her part in the administration of the estate. Her final settlement is not called in question. The correctness of her accounts is not in issue. The present proceeding could be as well maintained if another had been the executor or administrator. No personal liability against her growing out of the administration is sought to be established. The suit is to reach certain assets into which she converted the trust funds. She held the note mentioned in this paragraph as part of the property which under the will she was to control during her life. It did not lose its character as trust property, nor were plaintiffs deprived of their title to it, because it did not pass through the settlements of the executrix. Their title to the note or its proceeds was not determined adversely to the plaintiffs in the final settlement. *Sherwood, J., in Nelson v. Barnett*, 123 Mo. 564, 27 S. W. 520, said: "But a judgment of the probate court on a final settlement of an administrator is, of course, conclusive only as to matters therein embraced. In order that any matter can be said to have passed in rem judi-

catum, it must have been tried and adjudicated by the court." *Snorgrass v. Moore*, 30 Mo. App. 232.

5. Appellants say that the entire subject-matter in litigation should have been embraced in one bill in equity, and complain that what should have been a single suit has been improperly split into three parts. The point is also made that the decree is rendered "as if the subject-matter and the rights of all the parties were involved in one suit," and, "when applied to the cases separately, it does not respond to the issues of either." There was but one trial in the lower court. The same evidence was, by consent, received in all the cases. They were, in effect, treated as one suit. They were, for all practical purposes, consolidated, although no formal order was made for that purpose. They have been argued together here. Appellants have enjoyed every right that could have arisen from the union of all the matters in one bill. The pleadings, taken together, present all the issues settled by the decree. We will treat the suits, in passing upon this objection, as one case, as the parties have done for all other purposes, and as if an order of consolidation had been made. We cannot see that appellants have been injured in any manner by the form of procedure, and, in the absence of material error, we are powerless, under the statute, to reverse, even though there may have been a departure from technical precision in the matter complained of by appellants.

6. The court held that defendant Tressie Fisher was not entitled to any part of the fund, and this ruling is before us for review. Her mother, who was given by the will an equal share with the other remainder-men, died during the life of the testator. The legacy to her lapsed, unless it was preserved in favor of her only child, the defendant named above, by section 3971 of the Revised Statutes of 1879, which is as follows: "When any estate shall be devised to any child, grandchild or other relative of the testator, and such devisee shall die before the testator, leaving lineal descendants, such descendants shall take the estate, real or personal, as such devisee would have done in case he had survived the testator." Margaret Atkins was a widow, with one son and one daughter, when she married Atkins. Mrs. Fisher, the legatee, was the child of this daughter. She was not related to the testator by consanguinity. We do not think she comes within the statute. The use of the words "child" and "grandchild" excludes the idea that one only connected by marriage was meant by "other relative." Several of the states have like provisions. "It is held, under these statutes, that the term 'relative' applies only to relations by consanguinity." 2 Woerner, *Adm'n*, p. 939, and authorities cited in note; 20 Am. & Eng. Enc. Law (1st Ed.) 738. "It has long been settled that a bequest to 'relatives' applies only to those who, by virtue of

the statute of distributions, would take property as next of kin." And. Law Dict. p. 870. We think the word is used in the same sense in this statute.

7. The decree gives evidence of careful preparation and full consideration of all the matters at issue. It is more favorable to appellants than they could ask, under the construction placed upon the will by this court in *Cole v. Bramell*, *supra*. Mrs. Atkins was regarded by the circuit court as a life tenant, having the right to dispose of the income, and only the corpus of the fund was taken into the accounting. Upon the other hand, this court held: "By the words 'what is left' the testator intended to include in the bequest over the entire property which should be in the hands of the life tenant at her death, whether it had been diminished by losses or increased by profits, or whether it consisted of personal property or had been invested in real estate." The plaintiffs are not complaining, and the defendants have no ground to do so. A judgment of affirmance will accordingly be rendered.

BRACE, P. J., and ROBINSON and MARSHALL, JJ., concur.

#### OSBORN et al. v. WELDON et al.<sup>1</sup>

(Supreme Court of Missouri, Division No. 2.  
July 6, 1898.)

DOWER—ADVERSE POSSESSION—EJECTMENT—EVIDENCE—LOST RECORDS—PRESUMPTIONS—DEEDS.

1. Where land is in the possession of one holding under a widow's dower right therein, which has never been set off to her, limitations do not run in favor of the occupant as against the widow until dower is assigned or the widow dies.

2. A judgment awarding dower, rendered in 1852, recited that, as the widow had become the purchaser of the real estate since her husband's death, no commissioners were required to admeasure her dower. Defendants' evidence tended to show that she had bought the land at an administrator's sale to pay debts prior to the rendering of said judgment. However, all the papers of the probate court were destroyed by fire in 1890, and the original grantee of the widow and the administrator are both dead. *Held*, that it will be presumed that the wife received a deed from the administrator at the time of her purchase.

3. A deed will be construed to convey whatever interest or estate the grantor may have in the land, unless it shows his intention to convey a less estate.

Appeal from circuit court, Daviess county; E. J. Broadbush, Judge.

Ejectment by Elijah Osborn and others against James H. Weldon and others. From a judgment for plaintiffs against defendant James H. Weldon, but in favor of the other defendants, James H. Weldon appeals. Reversed.

This is an action of ejectment for the possession of a tract of land in Daviess county,

Mo. Both parties claim title under Joseph Osborn, deceased; the plaintiffs as his only heirs at law, and the defendants by mesne conveyances. Defendants also rely upon the statute of limitations. The case was tried to the court, a jury being waived. The issues were found for plaintiffs as against defendant James H. Weldon, and for the other defendants, and judgment rendered accordingly. Defendant James H. Weldon appealed.

Alexander & Richardson and Gillihan & Brosins, for appellant. W. D. Hamilton and Boyd Dudley, for respondents.

BURGESS, J. Joseph Osborn died in June, 1850, the owner in fee of the land involved in this litigation, upon which his wife, Mary Osborn, and children, the plaintiffs, then resided. Some time between the month of June and the 25th day of December of that year, Mrs. Osborn rented the land, and moved elsewhere. One Manuel Martin was appointed administrator of Joseph Osborn, deceased, on the 2d day of December, 1850. On the 2d day of September, 1852, Mrs. Osborn filed her petition in the circuit court of said county against Manuel Martin, the administrator of the estate of her deceased husband, and John W. Blakely, his tenant in possession of the land, for the admeasurement of her dower therein, and for damages in the way of rents, etc. At the October term, 1852, of said circuit court, judgment was rendered in her favor against the administrator and his tenant, in which was adjudged to her as her dower one-third interest in said land for and during her natural life, and eight dollars damages,—that being her third of the rents and profits. The amount of the judgment was afterwards paid to her by the administrator. There was evidence tending to show that before this final judgment the land had been sold by the administrator for the payment of debts against the estate, and that Mrs. Osborn had become the purchaser of it at such sale, and therefore no commissioners were appointed by the court to admeasure her dower interest; the judgment reciting that, as Mrs. Osborn "had become the purchaser, since her husband's death, of said real estate, no commissioners are required to assign and admeasure her dower." On the 18th day of June, 1855, Mary Osborn conveyed said land to Benedict Weldon by general warranty deed, which was acknowledged before Manuel Martin, a justice of the peace, and duly recorded. The defendants claim title through mesne conveyances from Benedict Weldon. Mrs. Osborn died in March, 1896, and this suit was begun on the 26th day of July, 1895. The evidence tended to show that the land had been assessed to said Benedict Weldon and his grantees, successively, and that they had paid all taxes levied against it up to the time of bringing this suit, since the purchase of it by him, and that they had claimed to own it in fee sim-

<sup>1</sup> Rehearing denied November 21, 1898.

ple during all that time; that they were in the actual, open, notorious, and adverse possession of said land from the time said Benedict Weldon took possession of said land up to the present time; that Ebenezer E. Weldon, one of the grantees, planted an orchard on said land, and that O. Ramsbottom, one of the grantees, who became purchaser of same about 1870, built a dwelling and barn and made other lasting and valuable improvements thereon, worth from four to five thousand dollars, soon after said purchase, and continued to reside thereon for more than 20 years, and that defendant James H. Weldon is now in possession under title derived from the heirs of said O. Ramsbottom, the latter having died in the year 1895. All of the papers of the probate court of Daviess county were destroyed by fire in January, 1890. Benedict Weldon and Manuel Martin died many years before the commencement of this suit, and John W. Blakely and David Enyart were also dead at that time, or their places of residence unknown. The youngest of the plaintiffs became of age in the year 1866. At the instance of plaintiffs, the court, over the objection and exception of defendants, declared the law to be as follows: "The court, sitting as a jury in the above-entitled cause, declares the law to be that, if the court finds from the evidence that Joseph Osborn died seised and possessed of the lands in controversy in the year 1849, leaving his three minor children, the plaintiffs herein, and his widow, Mary Osborn, living upon and in possession of the same; and that said widow deeded the same to Benedict Weldon after her husband's death; and that the defendants are in possession of said land, and claiming the same, as the grantees of said widow through Benedict Weldon, and that said widow died within ten years next before the filing of the petition in this case; and that there has never been any legal assignment, or admeasurement, or setting off of her dower interest in said land,—then the finding must be for the plaintiffs, unless the court further finds that said land was legally sold, by Manuel Martin, administrator of the estate of said Joseph Osborn, deceased, and that said sale was duly approved by the probate court, and that the purchase money was paid, and all the terms of such sale were complied with according to law, and that said administrator duly executed and delivered a deed to said Mary Osborn for said land under said sale. The court further declares the law to be that under the evidence in this case there never was any legal assignment, or admeasurement, or setting off of the widow's dower in said land shown." Defendants prayed the court to declare the law to be as follows: "(1) The court declares the law to be that under the pleadings and the evidence the findings should be for defendants. (2) The court declares the law to be that Mary Osborn was estopped by the proceedings in the circuit court, on her petition, from there-

after claiming quarantine or dower in the premises sued for, and that the statute of limitations began to run in favor of defendants and their grantees from the date of the decree therein,"—which declarations of law the court refused, and the defendants duly excepted.

Where land is in the possession and occupancy of one holding under a widow's dower right therein, which has never been admeasured and set off to her, the statute of limitations does not begin to run in favor of the occupant as against the owner until dower is assigned, or the death of the widow. *Melton v. Fitch*, 125 Mo. 281, 28 S. W. 612; *Fischer v. Siekmann*, 125 Mo. 165, 28 S. W. 435; *Carey v. West*, 139 Mo. 146, 40 S. W. 661; *Shumate v. Snyder*, 140 Mo. 77, 41 S. W. 781. If, then, defendants were holding the possession of the land under the dower right of the widow only, the statute of limitations did not begin to run in their favor until the death of Mrs. Osborn, in March, 1886, and, as 10 years had not elapsed from that time up to the commencement of this suit on the 26th day of July, 1895, plaintiffs' cause of action was not barred. But there were facts and circumstances in proof which tended strongly to show, and from which it may be presumed, after the lapse of so many years, that Mrs. Osborn acquired title to the land at administrator's sale before she sold and conveyed it by warranty deed to Benedict Weldon, on the 18th day of June, 1855, and that he went into possession of it under this deed as the owner in fee, and not merely of the dower interest. "A deed will be construed to convey whatever interest or estate the grantor may have in the land, unless it shows his intention to convey a less estate." *Bray v. Conrad*, 101 Mo. 331, 13 S. W. 957. As there was nothing in the deed from Mrs. Osborn to Weldon indicative of an intention to convey a less estate, it must be construed to convey all of her interest in the land, including that of her dower interest. *Moore v. Harris*, 91 Mo. 616, 4 S. W. 439. The verbal evidence tending to show that Mrs. Osborn bought the land at administrator's sale finds strong support in the recital in the judgment of the court fixing her dower in the land, in which it is recited that, as she "had become the purchaser, since her husband's death, of said real estate, no commissioners are required to assign and admeasure her dower"; and now after the lapse of nearly half a century since the execution by her of the warranty deed to Weldon, the death of all persons who are to be presumed to know anything about the transaction, the destruction by fire of the records of the probate court in 1890, and the occupation and improvement of the land by defendants and those under whom they claim title, it will be presumed that Mrs. Osborn received, at the time of the purchase of the land by her at the administrator's sale, his deed conveying to her the legal title thereto. Moreover,

this view seems to have been acquiesced in by plaintiffs, from the fact that nine years and four months elapsed from the time of the death of their mother, at which time, if at all, they were entitled to the possession of the land, before the institution of this suit, while ten years would have been a complete bar to their action; and they were, during that time, laboring under no disability to sue. In speaking of presumptions of this character, Greenleaf says: "Juries are also often instructed or advised, in more or less forcible terms, to presume conveyances between private individuals in favor of the party who has proved a right to the beneficial enjoyment of the property, and where possession is consistent with the existence of such conveyance, as is to be presumed; especially if the possession, without such conveyance, would have been unlawful, or cannot be satisfactorily explained. This is done in order to prevent an apparently just title from being defeated by matter of mere form. \* \* \*

It is sufficient that the party who asks for the aid of this presumption has proved a title to the beneficial ownership, and a long possession, not inconsistent therewith; and has made it not unreasonable to believe that the deed of conveyance, or other act essential to the title, was duly executed." 1 Greenl. Ev. (14th Ed.) § 46. So, in *Richards v. Elwell*, 48 Pa. St. 364, in speaking of the same subject, it was said: "If the rule which requires the proof to bring the parties face to face, and to hear them make the bargain, or repeat it, and to state all its terms with precision and satisfaction, is not to be relaxed after the lapse of forty years, when shall it be? \* \* \*

There is a time when the rules of evidence must be relaxed. We cannot summon witnesses from the grave, rake memory from its ashes, or give freshness and vigor to the dull and torpid brain." See, also, *Williams v. Mitchell*, 112 Mo. 300, 20 S. W. 647. With the indulgence of the presumption that the administrator executed to Mrs. Osborn a deed to the land in accordance with her purchase, it follows that by her deed to Benedict Weldon the title was vested in fee in him, and, as defendants hold under him, that plaintiffs were not entitled to recover. Our conclusion is that the declarations of law given on the part of plaintiffs should have been refused, and the first one asked by defendants given. The judgment is reversed.

GANTT, P. J., and SHERWOOD, J., concur.

#### STATE v. MILLS.

(Supreme Court of Missouri, Division No. 2.  
Nov. 7, 1898.)

#### FORGERY—FOURTH DEGREE—INDICTMENTS—UTTERING—CONVICTION.

1. Rev. St. 1889, § 3644, defining the offense of forgery in the fourth degree as having in one's possession, buying, or receiving a forged

instrument, knowing the same to be forged, with intent to injure and defraud by uttering the same as true, does not include the offense of uttering the instrument.

2. An indictment for forgery, charging defendant with "selling and delivering," with intent to defraud, a forged deed of trust, with intent to have the same uttered and passed, knowing the deed to be forged, is good, under Rev. St. 1889, § 3646, prohibiting the "passing, uttering or publishing," of forged paper.

3. The fact that accused might have been convicted under a statute defining forgery in the fourth degree does not necessarily prevent his conviction under the statute defining forgery in the first degree.

Appeal from St. Louis criminal court; William Zachritz, Judge.

Herbert Mills, alias John Bauer, was convicted of forgery in the first degree, and he appeals. Affirmed.

Chas. T. Noland, for appellant. Edward C. Crow, Atty. Gen., and Sam B. Jeffries, Asst. Atty. Gen., for the State.

GANTT, P. J. The defendant, having been convicted of forgery, and sentenced to 10 years' imprisonment in the penitentiary, appeals to this court for a reversal of his sentence. He assigns only one ground of error. He insists that the second count of the indictment, under which he was convicted, does not charge him with forgery in the first degree, and the circuit court erred in instructing the jury as to the minimum punishment. He maintains that the pleader evidently intended to charge an offense under sections 3644 and 3645, which sections defined forgery in the fourth degree. The controverted count is in these words:

"And the grand jurors aforesaid, upon their oath aforesaid, do further present that Herbert Mills, alias John Bauer, on the 7th day of April, A. D. 1897, at the city of St. Louis aforesaid, unlawfully and feloniously had in his custody and possession a certain false and counterfeit instrument in writing and printing, to wit, a deed of trust, purporting to be made by John Bauer, which said false, forged, and counterfeit written and printed instrument, to wit, a deed of trust, is as follows: that is to say:

"This deed of trust, made and entered into this fifth day of April, eighteen hundred and ninety-seven, by and between John Bauer, a widower of the city of St. Louis and state of Missouri, party of the first part, and John McMenary, of the city of St. Louis and state of Missouri, party of the second part, and Alphonso J. Walsh, of the city of St. Louis and state aforesaid, party of the third part, witnesseth: That the said party of the first part, in consideration of the debt and trust hereinafter mentioned and created, and of the sum of one dollar to him paid by the said party of the second part, the receipt of which is hereby acknowledged, do by these presents grant, bargain, and sell, convey, and confirm unto the said party of the second part, forever, all the following described real estate, situated in the city of St. Louis and state of

Missouri, and known and described as follows, to wit: Being lot (11) eleven, and the western seventeen (17) feet of lot ten (10), in block nine (9) of Peter Lindell's First addition, and being in block 1952 of the city of St. Louis, fronting together forty-two (42) on the north lines of Laclede avenue, by a depth, northwardly, between parallel lines, of one hundred and twenty-eight (128) feet six inches, to an alley, and bounded north by said alley, east by the eastern eight (8) feet of lot (10) ten, south by Laclede avenue, and west by lot No. 12 of said block and addition. To have and to hold the same, with the appurtenances, to the said party of the second part, and to his successors hereinafter designated, and to the assigns of him and his successors, forever. In trust, however, for the following purpose: Whereas, the said John Bauer, for value received, and borrowed money, has executed and delivered to the party of the third part his seven negotiable promissory notes, of even date herewith, drawn to the order of Alphonso J. Walsh, party herein of the third part, and payable as follows, to wit: One principal note for the sum of thirty-five hundred (\$3,500) dollars, payable in three years after date, and six interest notes for the sum of one hundred and five (\$105) dollars each, payable respectively in 6, 12, 18, 24, 30, and 36 months after date, all of said notes bearing eight per cent. interest per annum from maturity; it having been agreed between the parties hereto that when one of said notes, whether of interest or principal, after having become due and payable, should remain unpaid, then all of said notes should become due and payable at once, whether due on their face or not; to secure the payment of which said notes the party of the first part has executed this deed of trust; and he also agreed with said party, his indorsers and assignees, to cause all taxes and assessments, general and special, to be paid whenever imposed upon said property, and within the times required by law, and also to keep the improvements upon said property constantly and satisfactorily insured, until said notes are paid for the sum of thirty-five hundred (\$3,500) dollars, and the policy or policies therefor to keep constantly assigned unto the said party of the second part for further securing the payment of said notes, and the same apply towards the payment of said notes, unless otherwise paid, when they respectively become due as aforesaid. And the said party of the first part hereby guaranties to the said party of the third part that said property herein described is free and clear of mechanics' liens; and said party of the first part further agrees that, in case any lien should hereafter be filed against said property after the execution of this trust, then and in that case said liens so filed shall have the same force and effect as if any of said notes hereinbefore described shall become due and payable, and all the covenants and agreements herein provided shall be in full force and effect and carried

out as if said notes were actually due and payable. And in the event the said party of the third part, or his assigns or legal representatives, or the party of the second part, or his successors in trust, shall expend any money to protect the title or possession of said premises, then all such money so expended shall be a new and additional principal sum of money secured by this instrument, and shall be payable, and may be collected, with interest thereon at the rate of ten per centum per annum from the time of so expending the same: Now, therefore, if the said John Bauer, representatives or assigns, shall well and truly pay, or cause to be paid, unto the holder or holders thereof, respectively, all and singular the said promissory notes above mentioned, at maturity thereof, respectively, according to the tenor of the same, and shall well and truly keep and perform all and singular the several covenants and agreements hereinbefore set forth, then this trust shall cease and be void, and the property hereinbefore conveyed shall be released at the cost of said party of the first part; but if either one of said notes, or any part thereof, be not so paid at maturity according to the tenor of the same, or if default be made in due fulfillment of said covenants or agreements, or either of them, then this conveyance shall remain in force, and said party of the second part (whether acting in person or by attorney in fact hereunto authorized under seal), or, in case of his death, his successor in this trust, may proceed to sell the property hereinbefore conveyed, or any part thereof, at public vendue or outcry, at the east front door of the court house in the city of St. Louis and state of Missouri, to the highest bidder, for cash, first giving twenty days' notice of the time, terms, and place of said sale, and of the property to be sold, by advertisement published in some newspaper printed in the city of St. Louis, state of Missouri, and upon such sale shall execute a deed in fee simple of the property sold to the purchaser or purchasers thereof (and any deed made by the trustee or his successor in pursuance of the powers herein granted, and all recitals therein contained, shall be everywhere received as prima facie evidence of such facts), and shall receive the proceeds of such sale, out of which he shall pay first the cost and expenses of executing this trust, including lawful compensation to said trustee; and next he shall repay to any person or persons who may or shall, under the covenants hereinbefore set forth, have advanced or paid any money for taxes, mechanics' liens, or insurance, as above provided, all sums so by him or them advanced and not already repaid, together with interest thereon at the rate of 10 per centum per annum from date of such advance till day of payment; and next said principal note, whether it be due then or not, together with all interest notes and interest then due and unpaid, with 8 per cent. per annum interest thereon from maturity to the day of sale; and the re-



mainder, if any, shall be paid to the said party of the first part, or his legal representatives: provided, however, that nothing in this deed shall be so construed as to prevent the legal holder of said notes, or either of them, to have and to take every legal step and means to enforce payment of said notes without having first executed this deed of trust. And the said party of the second part covenants faithfully to perform and fulfill the trust herein created. In witness whereof the said party of the first part has hereunto set his hand and seal on the day and in the year first above written. John Bauer. [Seal.]

"State of Missouri, City of St. Louis—sa.: On this seventh day of April, 1897, before me personally appeared John Bauer and his wife, to me known to be the person described in, and who executed, the foregoing instrument, and acknowledged that he executed the same as his free act and deed; and the said Bauer further declares himself to be single and unmarried. In testimony whereof I have hereunto set my hand and affixed my official seal at my office in city of St. Louis, Mo., the day and year first above written. My term expires March 1, 1899. Charles Williams, Notary Public, City of St. Louis."

"And the said Herbert Mills, alias John Bauer, did afterwards, to wit, on the day and year aforesaid, at the city of St. Louis aforesaid, state aforesaid, unlawfully and feloniously, with intent to injure and defraud, sell and deliver the said falsely made, forged, and counterfeit written and printed instrument, to wit, a deed of trust, to one John McMenary and Alphonso J. Walsh, for the consideration and sum of three thousand five hundred dollars, with intent to have the same uttered and passed; he, the said Herbert Mills, alias John Bauer, then and there well knowing the said printed and written instrument, to wit, a deed of trust, to be falsely made, forged, and counterfeited,—against the peace and dignity of the state."

The statutory provisions invoked in the argument are sections 3644-3646, Rev. St. 1889, and are as follows:

"Sec. 3644. Uttering Forged Instrument, Fourth Degree. Every person who shall have in his possession, buy or receive any falsely made, altered, forged or counterfeited instrument or writing, the forgery of which is hereinbefore declared to be an offense, except such as are enumerated in section 3633, knowing the same to be forged, counterfeited or falsely made or altered, with intent to injure or defraud, by uttering the same as true or false, or causing the same to be uttered, shall, upon conviction, be adjudged guilty of forgery in the fourth degree.

"Sec. 3645. Selling Forged Instrument to Have the Same Passed, Fourth Degree. Every person who shall sell, exchange or deliver, for any consideration, any falsely altered, forged or counterfeited instrument or writing, the forgery of which is declared punishable, except as in the last section is excepted, know-

ing the same to be forged, counterfeited or falsely altered, with the intention to have the same uttered or passed, shall, upon conviction, be adjudged guilty of forgery in the fourth degree.

"Sec. 3646. Uttering Forged Instrument. Every person who, with intent to defraud, shall pass, utter or publish, or offer, or attempt to pass, utter or publish, as true, any forged, counterfeited or falsely altered instrument or writing, or any counterfeit or any imitation of any gold or silver coin, the altering, forging or counterfeiting of which is hereinbefore declared to be an offense, knowing such instrument, writing or coin to be altered, forged or counterfeited, shall, upon conviction, be adjudged guilty of forgery in the same degree as hereinbefore declared for the forging, altering or counterfeiting the instrument, writing or coin so passed, uttered or published, or offered or attempted to be passed, uttered or published."

In addition to these, it may be remarked that, by section 3626, forging, counterfeiting, or falsely altering any deed or other instrument being or purporting to be the act of another, by which any right or interest in real property shall be or purport to be transferred or in any way changed or affected, is declared forgery in the first degree. We are required to determine which of these sections, if either, the defendant is charged to have violated. No trouble is experienced in holding that this indictment does not charge an offense under section 3644. The crime denounced in that section is the having in possession, buying, or receiving a forged or counterfeited instrument or writing, the forgery of which had been declared a forgery in some previous section, except such as are enumerated in section 3633, with intent to injure and defraud by uttering, etc. That section does not cover the case of uttering the said instrument. The offense denounced by section 3646 is passing or offering to pass as true counterfeit coin or forged instruments, with intent to defraud, knowing such coin or instrument to be counterfeited or forged; and this offense is declared to be forgery in the same degree as had in preceding sections been fixed for forging the instrument so altered or passed. In other words, the offense is the felonious uttering or passing as true of a forged instrument with intent to defraud. The recognized formula for charging this offense is, "did unlawfully, knowingly, and feloniously utter, pass, and publish as true a certain falsely made, forged, and counterfeit," etc., "knowing the same to be forged," etc. *State v. Horner*, 48 Mo. 520; *State v. Watson*, 65 Mo. 115. The point to be determined in the light of authority is whether the words used in this indictment, to wit, "with intent to injure and defraud, did sell and deliver the said falsely made and forged and counterfeit instrument to one John McMenary," etc., "knowing the same to be forged and counterfeited," charge an offense under section 3646. The principle in-

involved in this appeal was considered in *State v. Watson*, 65 Mo. 115. In that case, as in this, it was urged with much force that it was essential to a conviction under section 21, p. 471, Wag. St. (the same as section 3646, Rev. St. 1889), that the indictment charge that the defendant did "pass, utter, or publish as true" the forged paper; but in that case, as in this, the indictment charged that the defendant "did falsely, fraudulently, and feloniously sell, exchange, and deliver" the forged draft, etc. Said this court: "It will be observed that it contains every material allegation required by that section, but, instead of the words 'pass,' 'utter,' and 'publish,' substitutes the words 'sell,' 'exchange,' and 'deliver.' Do these words, in connection with the acts charged, sufficiently describe the offense, or is the pleader confined to the words in this section?" "Selling, exchanging, or delivering a bank bill or piece of money is, in common parlance, passing the bill or money." And they were held sufficient. In *U. S. v. Nelson*, 1 Abb. (U. S.) 135, Fed. Cas. No. 15,361, the defendant was indicted for passing, uttering, and publishing a counterfeit United States fractional note, with intent to defraud the United States. The proof was that the defendant sold to a detective \$410 of spurious United States notes, for which he received \$133 in good and lawful money. The court held the proof sustained the indictment. It was urged in *State v. Watson* that the words "sell, exchange, or deliver" defined a transaction in which both the seller and the buyer were equally guilty, and that "utter, pass, or publish" only applied to a case where the vendor was guilty and the vendee was defrauded. We do not think the words of section 3644 carry any implication whatever that the vendee or transferee is guilty. Its denunciations are leveled entirely against the guilty vendor. Authorities are numerous that while ordinarily, in charging a statutory offense, the words of the statute should be used, it is not indispensably necessary to do so. It is sufficient if the offense be set forth with substantial accuracy and reasonable certainty. *U. S. v. Bachelder*, 2 Gall. 15, Fed. Cas. No. 14,490; *State v. Pennington*, 8 Head, 119; *State v. Little*, 1 Vt. 331; *State v. Bullock*, 13 Ala. 413; *State v. Watson*, 65 Mo. 115. We are cited by counsel to *Vanvalkenburg v. State*, 11 Ohio, 404, and *Hutchins v. State*, 13 Ohio, 198; but each of those cases was considered in *State v. Watson*, and this court, as then constituted, declined to follow them. The court fully and correctly charged the jury as to the constituent elements of uttering and passing the forged instrument knowing it to be forged, and the jury responded to that count in the indictment by finding defendant guilty as in said count charged.

It does not necessarily follow that, because defendant might have been convicted under section 3644, he is not also guilty under section 3646. The evidence clearly sustains the charge of uttering and passing as true a

forged instrument, within the meaning of that section. It is strange that a contention like this, so easily avoided by using the language of the statute, should have been invited. The words "utter, pass, and publish" are so well understood that it would seem the prosecuting officers would employ them, notwithstanding the court may have sustained other words of the same significance when used in connection with acts which clearly constitute an "uttering or passing" within the meaning of the statute. It follows that the judgment must be, and is, affirmed.

SHERWOOD and BURGESS, JJ., concur.

### CHRISMAN v. HOUGH et al.<sup>1</sup>

(Supreme Court of Missouri, Division No. 1.  
July 6, 1898.)

TAX DEEDS—VALIDITY—CERTIFICATES OF PURCHASE—INDORSEMENTS—TAX TITLE PROCURED BY JUNIOR INCUMBRANCER—EFFECT ON SENIOR LIENS.

1. The Kansas City charter of 1875 authorized the city treasurer, who was ex officio city collector, to execute a tax deed as collector after a specified time from the tax sale. A sale was made, and a tax certificate duly issued by the treasurer as collector. Afterwards the charter of 1889 went into effect, which changed the procedure only in that the treasurer was to execute the tax deed as treasurer. *Held*, that the tax deed afterwards issued by the treasurer as such was valid.

2. Where a purchaser at a tax sale transfers the certificate of purchase to another by a mere indorsement, the latter is authorized in afterwards writing a formal assignment above the indorsement.

3. A junior trust deed contained a covenant by the grantors to pay all taxes, and authorized the grantee, on their failure so to do, to pay them, for which he was entitled to a lien. *Held*, that where the grantors failed to pay the taxes, and such mortgagee purchased the property at tax sale, he thereby acquired no title, as against the senior incumbrancer, but only the right to be reimbursed.

Appeal from circuit court, Jackson county; E. L. Scarritt, Judge.

Action by William Chrisman against Samuel B. Hough and others to foreclose defendants' equity of redemption in certain property. From a decree for plaintiff, defendants Hough and another appeal. Reversed.

On the 17th of October, 1885, Charles W. Chase, who was the owner of lot 17, block 2, E. L. Brown's subdivision, Kansas City, by deed of that date, in which his wife joined, conveyed said lot to W. H. Whiteside, trustee, to secure the payment of a promissory note of the said Chase, of the same date, payable to H. L. Jamison six months after date, for the sum of \$500, with interest from date at the rate of 10 per cent. per annum. Afterwards this promissory note was assigned by indorsement to the plaintiff, who brings this action to foreclose said deed of trust. This deed of trust was duly acknowledged,

<sup>1</sup> Rehearing denied November 15, 1898.

and recorded on the 22d day of October, 1885. Afterwards, on the 6th day of February, 1886, the said Chase and wife by their deed of that date conveyed the premises to S. F. Scott to secure the payment of a promissory note dated the 15th of December, 1885, payable to George Pasfield two years after the date thereof, for the sum of \$2,500, with 9 per cent. interest, payable semiannually. This deed of trust was duly acknowledged, and recorded on the 15th of February, 1886. Afterwards, on the 20th of November, 1890, Theodore S. Case, city treasurer of Kansas City, by deed of that date, duly acknowledged, and recorded on the 8th of December, 1890, in pursuance of a sale made on the 4th of February, 1889, which sale was begun on the first Monday in November, 1888, by the city collector, for delinquent taxes for the year 1888, conveyed the premises to Leonil Moise. Afterwards, on the 25th of January, 1892, the said Moise, by quitclaim deed of that date, duly acknowledged, and recorded on the 26th of January, 1892, conveyed the premises to S. B. Hough; and on the same day Chase and wife, by their quitclaim deed of that date, recorded also on the 26th of January, 1892, released all their interest in the premises to the said Hough. The suit was instituted on the 17th of February, 1894. Hough, Pasfield, and Whiteside are made co-defendants with Chase and wife in the action. Hough and Pasfield alone answered; setting up title under the tax deed aforesaid, and averring that the title of Hough is held for the use and benefit of Pasfield. Issue was joined by reply. The issues were found for the plaintiff, and decree rendered in his favor against all the defendants, foreclosing their equity of redemption, from which the defendants Hough and Pasfield appeal.

New & Palmer for appellants. Milton Campbell, for respondent.

BRACE, P. J. (after stating the facts). 1. It is contended for respondents that the decree should be sustained on the ground that the tax deed is a nullity, for the reason that Case, the city treasurer, had no authority to execute it. Under the charter of Kansas City of 1875, the city treasurer was ex officio city collector (Sess. Acts 1875, p. 212, § 20), whose duty it was to make sale of real estate for delinquent taxes, and upon such sale to give the purchaser a certificate of purchase, which was assignable by indorsement (Id. p. 234, § 53). Real estate sold under the provisions of this act was redeemable "at any time within two years from the first day on which such real property was advertised for sale." Id. p. 235, § 55. If not redeemed within that time, it became the duty of the city collector, on presentation to him of the certificate of purchase, to execute a deed to the purchaser, his heirs or assigns, in the form therein prescribed, under the seal of the city, and attested by him as city collector. Id. §§ 63, 64. The sale was

made and the certificate of purchase issued under the provisions of this law by Benjamin Holmes, who was then city treasurer, and ex officio city collector. Afterwards, on the 9th of May, 1889, the freeholders' charter went into effect, whereby the charter of 1875 was superseded. In the new charter the provisions of the old charter in regard to the sale of lands for delinquent taxes, and the execution of deeds therefor to the purchasers, were substantially re-enacted; the city treasurer remaining, as before, the collector of the taxes, without any official designation as such; and as such treasurer he was required to perform the same duties as before, and, among them, to execute tax deeds to purchasers, in like form, under the seal of the city, attested by him as city treasurer. Charter 1889, §§ 57, 58. And so the deed in question was executed, under the seal of the city, by Case, then city treasurer, as such, when, under the former law, had it been in force, it would have been executed by him as city collector; and from this it is argued that the tax deed is void, for want of authority in Case, as treasurer, to execute the same. There is nothing in this contention. When Kansas City passed from its old organization under the charter of 1875 to its new organization under the charter of 1889, there was a valid and subsisting contract between the municipality and the purchaser at this tax sale to execute to him or his assignee a deed for this real estate, in case it should not be redeemed as provided in the charter. It was not redeemed, and the duty of the city to make such deed became absolute, and specific performance of that duty could have been compelled by the purchaser or his assignee. *Eyerman v. Blakesley*, 13 Mo. App. 407; *Dillon, Mun. Corp.* (4th Ed.) §§ 85, 171, 172. This imperative duty was by the new charter devolved upon the treasurer of the city, ex nomine, whose functions as such include all those performed by the same officer as city treasurer and ex officio city collector under the old charter; and there can be no question but that the deed was duly executed in manner and form as required by the charter, and by the proper officer duly authorized to execute the same.

2. It is also contended that the certificate of purchase was assigned in blank by the purchaser, Harrison, and for this reason the treasurer had no right to issue a deed thereon to Moise. The evidence tends to prove that Harrison indorsed the certificate of purchase, and that the formal assignment over his name was written by Moise, but whether at the time it was indorsed, or afterwards, does not appear; but, conceding that it was afterwards, that could make no difference in its effect to transfer the assignor's interest in the certificate to the assignee, or in the authority of the treasurer to act thereon. The purchaser, by writing his name on the back of the certificate and delivering it to Moise, authorized him to write above it a

formal assignment, if one had been necessary; but such formal assignment was not necessary,—the certificate being, by the terms of the charter, made assignable by indorsement simply.

3. The deed was in the form required by the charter, and valid upon its face. It had been of record for more than three years before this suit was instituted, and was impervious to attack for such irregularities in the mode of sale as are urged against it. Charter 1889, §§ 58-60. It is but justice to the officers who conducted the sale, however, to say that, upon comparison of the evidence with the charter, we find that the sale was conducted substantially in accordance with the requirements thereof. The decree cannot be sustained on the ground that the tax deed was invalid.

4. The deed of trust from Chase and wife to Scott to secure the payment of the promissory note aforesaid to Pasfield contained a covenant on the part of the grantors, with Pasfield, to pay all taxes that might thereafter be assessed and levied on the land; and, in case of failure to do so, Pasfield was authorized to pay such taxes, and for the repayment thereof, with interest, a lien was given upon the land. Hence it is argued that it was Pasfield's duty to pay the taxes for which the land was sold, and he cannot set up the tax title purchased by him as aforesaid against plaintiff's right of action under his prior mortgage. It was the duty of Chase, the mortgagor in possession, to pay the taxes. His personal covenant with Pasfield to pay them, and, in case of his failure, his authorization of Pasfield to pay and add the amount to his security, imposed no additional duty upon Pasfield to pay the tax in question. Without any such provision, Pasfield had the right to pay the taxes, as did the plaintiff, the prior mortgagee, each for his own protection. *Jones, Mortg.* § 358. And this covenant in no way affected the duties of either mortgagee to the other, or their relations inter sese to the property. Those relations, and the rights and duties growing out of them, may well be stated in the language of *Cooley, J., in Insurance Co. v. Bulte*, 45 Mich. 113, loc. cit. 121, 122, 7 N. W. 707: "It certainly cannot be said that the second mortgagee owes any duty to the first mortgagee to protect his lien as against tax sales. Neither, on the other hand, does the first mortgagee owe any such duty to the second mortgagee or the owner. To the state each one of the three may be said to owe the duty to pay the taxes, and the state will sell the interest of all, if none of the three shall pay. As between themselves, the primary duty is upon the mortgagor, but, if he makes default, either of the mortgagees may pay; and one of the two must do so, or the land will be sold, and his lien extinguished. But in such case, when each has the same right, payment by one is allowed to increase the

amount of his incumbrance; for in no other way could he have security for its repayment by the mortgagor, who ought to protect the security he has given. When, therefore, each mortgagee has the same interest in making payment of the tax, and the same right to do so, and the same means of compelling repayment, it may well be held that a purchase by one shall not cut off the right of the other, because it is based as much upon his own default as upon that of the party whose lien he seeks to extinguish. It is as just and as politic here as it is in the case of tenants in common to hold that the purchase is only a payment of the tax." While there is some conflict in the decisions upon this question, the weight of authority is in favor of such holding. 1 *Jones, Mortg.* (4th Ed.) § 680; *Black, Tax Titles* (2d Ed.) 278, 279; *Cooley, Tax'n* (2d Ed.) 504; *Woodbury v. Swan*, 59 N. H. 22; *Hall v. Westcott*, 15 R. I. 373, 5 Atl. 629; *Bank v. Backarach*, 46 Conn. 513; *Fair v. Brown*, 40 Iowa, 209; *Garrattson v. Scofield*, 44 Iowa, 35. As was said by *Bingham, J., in Woodbury v. Swan*, supra: "It is a general rule, founded on the requirements of good faith, that any one interested in land with others, all deriving their titles from a common source, cannot acquire an absolute title to the land by a tax deed, to the injury of others. The payment of taxes by a mortgagee protects his interest, and for the protection of his interest he may acquire a tax title, but he cannot set up that title to defeat a prior mortgage." A title thus acquired by a second mortgagee "inures to the protection, not the destruction, of the general title"; and no distinction on principle can be made between the case where such title is procured at first hand by purchaser at the tax sale, and the case where the title is afterwards acquired by the second mortgagee from such purchaser. *Frank v. Caruthers*, 108 Mo. 569, 18 S. W. 927, and authorities supra. All that the second mortgagee can in equity and good conscience demand of the prior mortgagee is that he be reimbursed from the general estate for the sum thus expended in procuring a title which protects the interests of each, and restores that estate to its original standing, so far as their interest therein is concerned.

Applying these principles to the case in hand, the decree of the circuit court is reversed, and the cause remanded, with directions to enter a decree foreclosing the mortgages and ordering a sale of the premises, and that out of the proceeds of such sale, after payment of costs, there be paid—First, to the defendant Pasfield, the sum of \$350, the amount paid by his agent, Hough, to Maise for the tax title on the 25th of January, 1892, with interest thereon from that date at the rate of 6 per cent. per annum; next, to the plaintiff, the amount of the indebtedness secured by his mortgage; and the remainder to the defendant Pasfield. All concur.

# MOUNTAIN GROVE BANK v. DOUGLAS COUNTY.

(Supreme Court of Missouri, Division No. 1.  
Nov. 15, 1898.)

COUNTIES—LIMIT OF INDEBTEDNESS—ACCRUAL OF  
DEBT—BURDEN OF PROOF—STARE DECISIS  
—OBLIGATION OF CONTRACTS.

1. Services and supplies for paupers and insane, salaries and fees of county officers, of jurors and witnesses, repairs on roads, printing books and blanks, insurance and repairs on court house and rent of a jail, and fuel, cannot be presumed to have been furnished or rendered on the faith of a decision that Const. art. 10, § 12, inhibiting counties from exceeding a fixed limit of indebtedness, did not extend to contingent and unascertained liabilities or those imposed by statute, and hence the overruling of that decision was not an impairment of contract as to warrants issued for such services in excess of the limit.

2. A county which issued warrants exceeding the constitutional limit of indebtedness is liable for the items thereof that were furnished before the funds were exhausted, notwithstanding all the funds have been paid out on subsequently issued warrants, since the debt was created when the services or goods were furnished.

3. In an action on county warrants, where a referee reported a sum as being due if the rendering of the services which the warrants represented created the debt, but, in case the debt was not created until the warrants were issued, then that only a certain smaller sum was due, the former sum included the latter.

4. A general denial, with a special defense to an action on county warrants that the constitutional limit of indebtedness had been exceeded, imposes the burden on plaintiff to prove that the warrants were for debts created before the funds were exhausted, in order to make his prima facie case, and then the burden shifts to defendant to prove its affirmative defense.

Appeal from circuit court, Douglas county;  
W. N. Evans, Judge.

Action by the Mountain Grove Bank against Douglas county. There was a judgment for defendant, from which plaintiff appealed. Reversed.

Thos. H. Musick, A. H. Livingston, and James R. Vaughan, for appellant. E. H. Farnsworth, for respondent.

**MARSHALL, J.** This is an action against the defendant, a political subdivision of this state, to recover upon several hundred warrants and jury scrips. Each warrant is made the basis of a separate count. The counts allege that on a specified date the defendant was indebted to a person named (for what is not stated) in a specified sum, and that on the date named, after the county court ascertained the fact, it ordered its clerk to draw a warrant therefor on the county treasurer, which the clerk did, commanding the treasurer to pay it out of the contingent fund; that by divers assignments plaintiff became the owner of the warrant; that the warrant was presented to the treasurer, who refused to pay it, indorsing on it the fact of presentation, and that there was no money in the treasury appropriated for that purpose. The answer denied the indebtedness,

and set up seven defenses, as follows: (1) That the warrant is void because it was issued after the county court had issued warrants in excess of the county's revenue for the current year, and in excess of the appropriation for contingent purposes for that year. (2) That it is void because at the time it was issued the county court had issued warrants in excess of the total revenue for the year raised by a levy of 50 cents on the \$100 valuation, the sum limited by law, exclusive of warrants issued during the year for the support of paupers, roads, and bridges. (3) Because, at the commencement of this action, the authorized revenues of the county for the year had been entirely consumed by the legitimate annual expenses of the county government. (4) Because neither the payment of the warrant nor the creation of the debt had ever been authorized by a vote of the people of the county. (5) Because at the time the warrant was issued there was not, and is not now, any money in defendant's treasury for its payment. (6) Because the total assessment of taxable property of the county for the year 1890 (the warrant was issued in February, 1890) was \$1,191,349, and the amount of revenue derived therefrom was \$6,369.24, appropriated and set apart as follows: For paupers, \$350; for road fund, \$950; for county officers, \$3,250; for contingent fund, \$300; for jury fund, \$1,000; and that the debt was contracted, and the warrant issued, after the contingent fund was exhausted. (7) Because the assessed value of the taxable property in the county for the year 1889 was \$1,155,553, and the total revenue derived therefrom was \$5,777.50, appropriated as follows: Pauper fund, \$500; road fund, \$950; county officers' fund, \$3,250; jury fund, \$1,000; contingent fund, \$300; and that the debt was contracted, and the warrant issued, after the contingent fund was exhausted; and that the assessed value of the taxable property of the county for the year 1888 was \$963,974, and the total revenue derived therefrom was \$4,819.87, and the same was not appropriated or set apart, but was exhausted May 12, 1888, and that the debt was contracted and the warrant issued after the internal revenue was exhausted.

The case was sent to a referee, who reported upon two different theories: (1) Upon the theory that the fiscal year begins on the 1st of January, and that the auditing and allowing of a claim, and ordering a warrant to issue, constitute the creation of the debt; and (2) upon the theory that the fiscal year begins on January 1st, and that the debt is created at the time the services are performed or the goods sold and delivered, and that the fund for one year is not exhausted until warrants are issued for services rendered or goods sold and delivered during such fiscal year to the full amount of the whole revenue for such fiscal year. Upon the first theory, he reports that two warrants in suit, amounting to \$3.50, were issued prior to the

time the revenue for 1888 was exhausted; that three warrants in suit, amounting to \$22.30, were issued before the revenue for 1889 was exhausted; and that two warrants in suit, amounting to \$23.05, were issued before the revenue for 1890 was exhausted. These amounts aggregate \$48.85. Upon the second theory the referee found: "The total amount of warrants issued during the years 1888, 1889, and 1890, issued for services performed and goods sold and delivered between January 1st of each year and the date and warrant when fund for each respective year was exhausted, where dates have been found, \$808.77." The referee also reports that, as to \$493.88, he is unable to discover the dates when the services were rendered or the goods were sold and delivered.

The plaintiff filed exceptions to the referee's report, which the court overruled, and thereupon the cause was submitted to the court upon the following agreed statement of facts: "It is agreed by the parties, plaintiff and defendant in the cause above entitled, as follows: That the warrants mentioned in the different counts of plaintiff's petition were ordered drawn by the county court of Douglas county on the county treasurer of said county at the respective dates mentioned in the different counts, and that the county clerk of the county court drew said warrants pursuant to said orders, and for the sums named in them, directing and commanding said treasurer to pay the sums of money named in the different warrants to the payees therein for the purposes recited by the warrants. That the said jurors and witnesses referred to in the different counts of said petition were chosen, selected, summoned, and qualified, and recognized to attend said circuit court, as in said counts set forth, and that they traveled the number of miles and attended the number of days as stated, and that the same were entered in a book kept for that purpose, as in manner and by law required, on said jurors' and witnesses' application, as in said scrip stated, the same was duly verified by said jurors' and witnesses' oaths, and that said scrip and warrants were signed and given by the said circuit clerk as in the said counts stated, and verified by said circuit clerk's official signature. That said scrip and warrants issued to said witnesses before said grand jury were duly countersigned by the foremen of the respective grand juries before which they attended, as in said counts stated. That said warrants and scrip were assigned, in the manner required by law, to the assignees named in the several counts, and finally to the present plaintiff, which is now the legal holder and owner of said warrants and scrip. That the said warrants and scrip were presented to the county treasurer of said county for payment, and payment demanded, at the time mentioned in the several counts, but the treasurer refused to pay the said warrants and scrip, because there was no money in the treasury for that purpose, and indorsed them

in these words: 'The within warrant presented for payment, and no money in the treasury for that purpose, this ——— day of ———, 18—, ———, County Treasurer.'—the blank spaces in said indorsements being filled with the date of presentment, and signed by the county treasurer on whom demand was made, as on the backs of said scrip and warrants stated. That plaintiff is a corporation duly organized. That all said warrants remain due and unpaid. That this suit involves the legality and payment of 286 warrants and jury and witness scrip issued in the years 1888, 1889, and 1890, in the aggregate amount of \$3,570, exclusive of interest, of which amount there are on account of:

Criminal costs .....	\$1.271	02
Stationery books and blanks.....	785	47
Roads .....	53	60
Faupers and insane.....	255	10
Insurance on court house.....	51	00
Salary of judges of county court.....	133	58
Salary of sheriff and jailer.....	261	40
Repairs on court house.....	12	23
Rent of building for jail.....	25	00
Fuel .....	15	55
Jury and witnesses.....	314	95
Salary and fees of county clerk.....	282	54
Printing .....	89	40
Sundries and unknown.....	29	57
	<b>\$3,570</b>	<b>00</b>

"That the cause was referred by the court, by consent of parties, to Hon. A. Burkhead, as referee, to ascertain and report: (1) When the several debts were incurred for which said warrants were issued. (2) When the revenues of the county were exhausted in each of the years 1888, 1889, and 1890 by indebtedness incurred in each of these years, respectively. (3) For what amount of these warrants the county is legally liable. (4) That said referee heard evidence, and there was evidence tending to support his finding, which was filed in the case on 25th of March, 1895, and exceptions filed thereto on 27th of March, 1895, by plaintiff."

Plaintiff then asked, and the court refused to give, the following instructions:

"(1) That upon the evidence and the referee's report the plaintiff is entitled to recover upon all the warrants and scrip sued on.

"(2) That upon the evidence and said finding, and the facts as agreed on in this case, the plaintiff is entitled to recover on all the warrants and scrip issued for services rendered and materials sold, attendance of witnesses, and jurors' services, salaries, etc., accruing after the decision of the supreme court of the state in *Potter v. Douglas Co.*, 87 Mo. 239; that said decision, and its acceptance and following throughout this state, constitute a rule of property, and created a vested right, which could not be divested by any subsequent decision overruling the same.

"(3) That it is a violation of the obligation of the contract between the original holders of said warrants and scrip, as well as their assignees, to hold that the validity of the said scrip and warrants is affected by any deci-

sion of the supreme court contrary to the construction maintained at the time said warrants and scrip were issued.

"(4) That the decision in *Potter v. Douglas Co.*, 87 Mo. 239, constituted a rule of property as to the warrants issued for county officers' salaries, books and stationery for such officers, jurors' and witnesses' fees, and, in so far as the decision in *Barnard & Co. v. Knox Co.*, 105 Mo. 382, 16 S. W. 917, may appear to reach and affect the validity of such scrip and warrants, the same is in violation of the obligation of contracts, and hence said decision cannot be held to apply to such warrants and scrip, after the decision in said *Potter Case*, for services, etc., rendered and received thereafter.

"(5) That the opinion of the supreme court of this state in construing section 12 of article 10 of the constitution of the state in the case of *Potter v. Douglas Co.*, reported in 87 Mo. 239, is based upon two propositions of construction: First, that the inhibition in said section contained did not apply to county debts of a contingent character, the amount of which could not be foreseen or anticipated by the county court; and, second, that it did not apply to indebtedness which accrued by reason of statutory provisions over which county courts had no other control than that of auditing boards; and that from the rendering of said opinion, in 1885, until the reversal thereof by the opinion rendered by the same court in the case of *Barnard & Co. v. Knox Co.*, in 1891, reported in 105 Mo. 382, 16 S. W. 917, such construction became and was the settled and fixed construction of said section 12 in this state, and the law of this state on the subject, and a rule of property governing the legality of county indebtedness, and, if it appears that all the warrants in suit were issued between said dates and for services rendered and for materials furnished to defendant county between said dates, then the judgment should be for plaintiff for the whole of said warrants and scrip."

"(7) That plaintiff is entitled to recover upon all warrants and scrip which were issued for services rendered or materials furnished for and to defendant before the exhaustion of the revenue of the year in which they were respectively issued by indebtedness already incurred in such year for services rendered and materials furnished in such year.

"(8) That plaintiff is entitled to judgment upon all warrants and scrip which do not affirmatively appear to have been issued for indebtedness incurred in any year after the exhaustion of the revenues of the county for that year in which they were respectively issued by prior indebtedness incurred for services rendered and materials furnished for and to defendant county."

Plaintiff's contentions are: First, that the decision of this court in *Potter v. Douglas Co.*, 87 Mo. 239, constituted a rule of property, and that any warrants that were issued

upon the faith of that decision are not affected or invalidated by the overruling of that case by the decision in *Barnard & Co. v. Knox Co.*, 105 Mo. 382, 16 S. W. 917; second, that, under the rule laid down in the *Barnard Case*, it is entitled to a judgment for \$808.77 and \$48.85 upon the referee's report; and, third, that it is entitled to a judgment for \$493.88 on the referee's report.

In support of its first contention, plaintiff asserts the proposition: "After a statute or constitution has been settled by judicial construction, the construction becomes, so far as rights acquired under it are concerned, as much a part of the statute or constitution as the text itself, and a change in the decision of the courts is, to all intents and purposes, the same, in effect on contracts, as if made by legislative enactment or a constitutional convention." Without the interpolated words about the constitution and a constitutional convention, this statement is substantially, and almost literally, the language of Chief Justice Waite in *Douglas v. County of Pike*, 101 U. S. 687. The doctrine thus stated is almost universally accepted as applied to decisions construing statutes, especially where there has been a long line of decisions on the question; but even then the doctrine of stare decisis has not been followed where a palpable wrong or injustice would be done, or where the mischiefs to be cured far outweigh any injury that might be done in the particular case by overruling prior decisions. A distinction has also been drawn where only one decision is relied on as establishing the doctrine. *Butler v. Van Wyck*, 1 Hill (N. Y.) 462; *Leavitt v. Blatchford*, 17 N. Y. 533; *Pratt v. Brown*, 3 Wis. 609; *Callender's Adm'r v. Insurance Co.*, 23 Pa. St. 474; *State v. Silvers* (Iowa) 47 N. W. 772. Whether the doctrine applies to the construction of the constitution is a question that has been differently decided in different jurisdictions. The supreme court of the United States enforces the principle. *Taylor v. Ypsilanti*, 105 U. S. loc. cit. 71, 72; *Green Co. v. Conness*, 109 U. S. 104, 3 Sup. Ct. 69. Some of the text writers also lay down the rule that there is no difference in the application of the doctrine to decisions upon the constitution and upon statutes. *Endl. Interp. St.* § 529; *Suth. St. Const.* § 317. The last-named author says: "The two grounds of justification in departing from even a single decision, which has become a general rule of property within a certain line of dealing, are (1) the necessity of preventing further injustice; (2) the necessity of vindicating clear and obvious principles of law." On the other hand, in *Boyd v. State*, 53 Ala., loc. cit. 608, and *Willis v. Owen*, 43 Tex., loc. cit. 48, 49, it was held that this doctrine did not apply to cases construing the constitution. And in *Osage Val. & S. K. R. Co. v. Morgan Co. Ct.*, 53 Mo., loc. cit. 158, while the court refused to overrule its prior decisions, it said: "It is true that constitutional questions are always open to

examination." It may not be amiss to remark that, in most of the jurisdictions where the doctrine has been applied to decisions interpreting constitutional provisions as strictly as it has to those construing statutes, their reports are not without instances where the rule announced has not been observed, but that prior decisions have been overruled, from such considerations as Sutherland says justify such a course, or upon the broader ground that a further adherence to such prior cases would do more mischief to the public generally than it would harm to a few people.

There is another reason for a distinction between decisions construing statutes and those construing the constitution. If the people are dissatisfied with the construction of a statute, the frequently recurring sessions of the legislature afford easy opportunity to repeal, alter, or modify the statute, while the constitution is organic, intended to be enduring until changed conditions of society demand more stringent or less restrictive regulations, and, if a decision construes the constitution in a manner not acceptable to the people, the opportunity of changing the organic law is remote. Moreover, no set of judges ought to have the right to tie the hands of their successors on constitutional questions, any more than one general assembly should those of its successors on legislative matters.

But the case at bar cannot fairly be said to entitle plaintiff to invoke the doctrine contended for by it. None of the items for which the warrants here involved were issued can be tortured into a contract between Douglas county and the persons in whose favor they were issued, based upon the faith of the rule announced in *Potter v. Douglas Co.* Those items are set out in the agreed statement of facts. One of them relates to matters belonging to the first class of expenses, for which sections 7663, 7664, Rev. St. 1880, require the county revenues to be appropriated, and to which it is solemnly pledged, one belongs to the second class, two belong to the third class, two to the fourth class, and seven to the fifth class. The first class, required by those sections of the statutes, relates to necessary expenses for the care of paupers and insane persons; the second, to building bridges and repairing roads, including the pay of road overseers; the third, to the salary of county officers; the fourth, to fees of grand and petit jurors, judges, and clerks of election, and fees of witnesses for the grand jury. Of the \$3,570 covered by the claim in this case, \$2,263.49 represents criminal costs, salary of judges of the county court, jury and witness fees, and salary and fees of county clerk, and salary of the sheriff and jailer. It cannot be successfully claimed that the jurors and witnesses attended the court, when subpoenaed or attached, on the assurance of the decision in *Potter v. Douglas Co.*, and that without this they would have refused to attend when ordered, or that the judges or clerk of the coun-

ty court or the sheriff and jailer took public office on the confident reliance that their salaries and fees would be paid whether the revenues of the county were enough to pay them or not. They each and all knew that the limit of taxation allowed by the constitution for county purposes was 50 cents on the \$100 valuation, and that, if the sum realized in this way was not sufficient to pay all the expenses in the order of payment required by the provisions of section 7663, they would not get all they otherwise would. The persons who rendered the services and sold and delivered the goods embraced in the other items covered by the warrants were likewise informed. As to none of these claims, therefore, did the decision in *Potter v. Douglas Co.* hold out an inducement, afford a shield of protection, or become a rule of property. So that the decision in *Barnard & Co. v. Knox Co.* cannot be considered as impairing the obligation of any contract they thus had with the county. The first contention of plaintiff is therefore untenable.

As to the second contention, it appears from the report of the referee that, upon the theory that the issuing of the warrant creates the debt, there were warrants for 1888, 1889, and 1890, amounting to \$48.85, which were issued before the revenues belonging to the respective classes to which they properly belonged were exhausted; and that, upon the theory that the debts were created when the services were rendered, there were warrants for said years, amounting to \$808.77, issued before the revenues belonging to the respective classes to which they belonged were exhausted. There is no countervailing showing made by the defendant. Under these circumstances, we are not able to see upon what theory the court below refused the seventh instruction asked by plaintiff, to the effect that it was entitled to recover on these warrants. The fact that the money had been paid out upon warrants issued after these does not affect these warrants. It rendered those issued in excess of the sums, respectively, appropriated for the several classes, and in excess of the revenues for that year, void, but it affords no excuse for refusing to pay those that were legal and properly issued. The second theory upon which the referee stated the account, that the debt was created when the services were rendered or the goods sold and delivered, is the correct statement of the law, and upon this the plaintiff was entitled to a judgment for \$808.77, but not for the \$48.85, for that is included in the \$808.77, and the circuit court erred in not so finding.

As to the third contention, the referee found that warrants amounting to \$493.88 were issued, but he was unable to ascertain the dates when the services were rendered or the goods sold and delivered. Plaintiff bases its claim to a judgment for this amount upon the contention that the burden of proof is upon the defendant to show that the revenues for the respective years were exhaust-



ed when these debts were created, and that the evidence regarding the services for which these warrants were issued is in the defendant's possession, and hence it was its duty to prove the time. This is a misconception of the pleadings. The answer is—First, a general denial of indebtedness to the person to whom the warrant was issued; and, second, special constitutional defenses. Under the first, the burden of proof was upon plaintiff to prove a valid indebtedness, which includes dates as well as items and amounts. Then, if the plaintiff made out a *prima facie* case, the burden of the evidence shifted to defendant to rebut the *prima facie* case, and to establish, in the first instance, its affirmative defenses. This also establishes that the rule of evidence that, where a fact or evidence of a fact is peculiarly within the knowledge or control of one party to a suit, the burden is on him in the first instance, has no application to this case; for the party who renders services or sells and delivers goods knows the dates as well as the party to whom the services were rendered or the goods were sold and delivered. It follows, therefore, that there was no error in the judgment of the circuit court in respect to this \$493.88. For the error of the circuit court in not entering judgment for the plaintiff for the \$806.77, aforesaid, the judgment is reversed, and the cause remanded, to be proceeded with in accordance herewith. All concur.

**LOGAN v. FIDELITY & CASUALTY CO.  
OF NEW YORK.<sup>1</sup>**

(Supreme Court of Missouri, Division No. 1.  
July 6, 1898.)

**LIFE INSURANCE—SUICIDE AS A DEFENSE—ACCIDENT POLICY.**

1. Rev. St. 1889, § 5855, providing that, "in all suits upon policies of insurance on life hereafter issued by any company doing business in this state, it shall be no defense that the insured committed suicide," unless it shall be shown that the insured contemplated suicide when making his application, "and any stipulation in the policy to the contrary shall be void," applies to policies which cover loss of life from external, violent, and accidental means alone, as well as those governing loss of life from usual or natural causes.

2. The fact that a policy of insurance covering loss of life from external, violent, or accidental means also contains a provision for indemnity in case of disability not resulting in death does not make it other than a policy of insurance on life.

Appeal from circuit court, Jackson county; E. L. Scarritt, Judge.

Action by Mary A. Logan against the Fidelity & Casualty Company of New York. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Warner, Dean, Gibson & McLeod, for appellant. Fyke, Yates & Fyke and Reed & Reed, for respondent.

<sup>1</sup> Rehearing denied November 15, 1898.

ROBINSON, J. This is an appeal from a judgment in favor of a beneficiary in a policy issued by the defendant insurance company containing, among others, the following provisions: "If death shall result, within ninety days, from such injuries, independently of all other causes, the company will pay the principal sum of this policy to Mrs. Mary A. Logan, his mother, if surviving, or, in event of her prior death, to the legal representatives of the assured; (a) or if the loss by actual separation, at or above the wrist or ankle, of both hands or both feet, or of one hand and one foot, or the irrecoverable loss of the sight of both eyes, shall so result within ninety days, the company will pay the assured the principal sum before named, which payment shall terminate the policy; (b) or if the loss by actual separation, at or above the wrist or ankle, of one hand or of one foot, shall so result within ninety days, the company will pay the assured one-half the principal sum before named, which payment shall terminate the policy; or if such injuries, independently of all other causes, shall immediately, continuously, and wholly disable and prevent the assured from performing any and every kind of duty pertaining to his occupation, the company will pay the assured the weekly indemnity before specified during the continuance of such disability, and for a period not exceeding fifty-two consecutive weeks. If the assured is injured, fatally or otherwise, in any occupation or exposure classed by this company as more hazardous than that before stated, the company's liability shall be for such principal sum or weekly indemnity as the premium paid by him will purchase at the rate fixed for such increased hazard. In case of injuries, fatal or otherwise, wantonly inflicted upon himself by the assured, or inflicted upon himself, or received by him while insane, the measure of this company's liability shall be a sum equal to the premium paid, the same being agreed upon as in full liquidation of all claims under this policy."

The petition in the case set out that on the 18th day of December, 1893, the assured, William E. Logan, received, through external, violent, and accidental means, bodily injuries, which were the direct and immediate cause of, and which, independent of all other causes, resulted in, the immediate death of said William E. Logan, and that said injuries consisted of a gun or pistol shot wound in and upon the head of him, the said Logan. Defendant set up in its answer that the assured died by reason of a pistol-shot wound intentionally and wantonly inflicted upon himself and by his own hand, and that the death of said assured was caused while either sane or insane, in either of which events defendant was not liable except for the amount of the premiums paid. Defendant further pleaded the stipulations and covenants contained in the policy, that, in the event of fatal injuries to said assured resulting from injuries wantonly inflicted upon himself, or inflicted upon

himself while insane, the defendant's liability under its policy should be a sum equal to the premiums paid, said sum being agreed upon in said policy as in full liquidation of all claims thereunder, which sum, with interest amounting to \$20, defendant in its answer tendered to plaintiff, together with all costs to date of tender, and avers its willingness to pay said sum into court, with costs, for plaintiff. Plaintiff then filed her reply, denying each and every allegation of defendant's answer.

During the progress of the introduction of defendant's testimony in the court below, the trial was abruptly terminated by this announcement on part of the counsel for defendant: "We want this case to go up on the question as to whether or not the suicide statute makes suicide a defense in a case of this kind, and applies to a policy such as this, and, if so, then the jury should be instructed to find for plaintiff, and that there may not be any question upon that point, and for the purpose and in order to have the matter clear, we withdraw all objections as to proof of death, and admit, for the purposes of this trial, that the proofs of death were furnished, and that notice of death was furnished; it is a question we are all interested in, and it is a question that ought to be decided, both for the company and for the assured,"—to which announcement the trial court then replied: "Your position is that, if section 5855 of the Revised Statutes of 1889 applies to this kind of a policy, then, under the testimony in this case, the plaintiff is entitled to recover; otherwise not."—to which Mr. Warner, of counsel for defendant, responded: "That is it, precisely. That narrows it down so that the case will be stripped of all technicalities as to evidence." Accepting the issue of law tendered by the defendant's counsel, the court instructed the jury to return a verdict for the plaintiff for the full amount of the policy, with interest. From the judgment rendered upon the verdict returned in obedience to the court's instruction, after the usual motions and preliminaries, defendant has prosecuted its appeal to this court, presenting and discussing here but the one question, is suicide in this state a valid defense to an action upon a policy of insurance issued by an accident insurance company, containing provisions such as the one in controversy, where it is not shown that the insured contemplated suicide at the time he made his application for the policy (and it being admitted that the assured afterwards came to his death from external, violent, and accidental means)?

Section 5855, Rev. St. 1889, reads as follows: "In all suits upon policies of insurance on life hereafter issued by any company doing business in this state, it shall be no defense that the insured committed suicide unless it shall have been shown to the satisfaction of the court or judge trying the cause that the insured contemplated suicide at the time of making his application for the policy, and any

stipulation in the policy to the contrary shall be void." Appellant's contention is that, when section 5855 was enacted, it related to life insurance in its usual and ordinary significance, and referred to those life policies issued by life insurance companies furnishing indemnity to the insured from death from any and every cause, and not otherwise; and in aid of its contention has given, in his brief filed herein, a detailed history of the legislation of this state bearing upon the subject of life and accident insurance, and argues that, as the legislature has made a class distinction between life and accident insurance, and the policies relating to such insurance, under separate articles, appropriately entitled "Life Insurance" and "Insurance Other than Life," up to 1889, when the legislature authorized life insurance companies, thereafter to be organized in this state, to engage, not only in life insurance, but also in accident insurance, and that as each department was provided for by provisions and requirements peculiar to itself, as a separate and distinct corporate creation and business venture, and that as section 5855 first appeared in the statute under article 2, Rev. St. 1879, entitled "Life Insurance," that the provisions of that section related only to policies issued by life insurance companies as were treated of, provided for, and designated in said article.

From our consideration of section 5855, the history of the legislation in this state on life and accident insurance, or life and accident insurance companies, furnishes no particular assistance in the matter of interpreting its meaning. Certain it must be that if the provisions of section 5855, as contended for by appellant, expressly and exclusively applied to policies of insurance on life issued by life insurance companies as such, by name, prior to 1889, there is nothing to be found in the act of 1889, widening the range of policies issued by accident companies, to cause those issued since that time to be influenced by its provisions. If, prior to 1889, it was an availing defense, against a policy of insurance issued on the life of the assured by an accident insurance company, that the insured had died from suicide, nothing can be found in the act of 1889 to make the provisions of section 5855 now apply to a policy issued by an accident insurance company. Nor does the fact that section 5855 now finds itself carried forward into, and as one of, the provisions of the statute, under the head of "Life and Accident Insurance," make the section apply to a policy to which it would not have applied when found as one of the provisions under article 2 of the statute entitled "Life Insurance." It is the language of the section, and not its arrangement in the statute, under one title or another, that must first be looked to to determine its meaning.

The error into which respondent has fallen is in assuming that section 5855 was intended to affect a particular line, class, or department of insurance, as the same has been

classified for legislation. The real object of the section, as the clear terms of its language express, is to affect all policies of insurance on life, from whatever class, department, or line of insurance the policy may be issued, or by whatever name or designation the company may be known. It is policies of a given kind, and not companies of a class, that are to be affected by the provisions of section 5855. The section was enacted clearly to protect all policy holders of insurance on life against the defense that the insured committed suicide, all provisions in the policies to the contrary notwithstanding, unless, as provided in the section, it can be shown that the insured contemplated suicide at the time he made application for the policy. That the company issuing the policy sued upon called itself a "life" or an "accident" insurance company, that it had one or more departments of business, or that the state required the different classes of insurance undertaken by one company be made a separate department of its business, or that section 5855 was found, from its first adoption up to the Revision of 1889, in the statute under the chapter entitled "Life Insurance," are matters of no concern, and serve to throw no light upon the meaning to be given the words of section 5855, as likewise, it may be said, they in no way serve to obscure its purpose. This section was not designed to limit the powers of a particular class of companies, as such by name, but its terms established a general rule, applicable to any company whose contracts insure against death, and who attempts to avoid liability in case of suicide, except those companies doing business on the assessment plan, that were expressly exempted by reason of the provisions (section 5869, Rev. St. 1889) of the act authorizing such companies to be organized and prosecute business in this state; and the force of that provision in favor of the assessment companies has been stricken down by an act of the legislature in 1897, so that the defense of suicide now is alike unavailing to all companies issuing policies upon the life of a citizen in this state, whether they be called "life," "accident," or "assessment" insurance companies. When a policy covers loss of life from external, violent, and accidental means alone, why is it not insurance on life? Such a provision incorporated in a general life insurance policy admittedly would be insurance on life. Then, why less insurance on life because not coupled with provisions covering loss of life from usual or natural causes as well? If one holds a general life policy and an accident policy, and is killed by lightning or commits suicide, so that he may be said to have died by accidental means, both the companies should pay, and the stipulation against liability in the event of suicide in the policies should be no more a defense against the suit upon the accident policy, providing against death from accidental cause, than against the policy which goes

further, and covers death from other causes as well. No such exception or exemption is found in the plain and comprehensive language of section 5855.

Neither the enlarged provisions, covering death from the usual as well as the unusual or accidental causes, as in the ordinary life policy, nor the restricted provisions, as in some accident policies, covering liability for death alone from accidental causes, nor the insertion of an indemnity clause, in case of disability, in an accident policy covering death from external, violent, or accidental means, in any wise affect the nature or construction of the provisions which are common to all the policies; and no good reason can be given why in one instance the provision of the policy covering death should be said to be one of insurance on life, and in the others deny the same provision the same construction, so as to avoid the force of a statute that provides that in all suits upon policies of insurance on life hereafter, insured by any company doing business in this state, it shall be no defense that the insured committed suicide. An examination of the various schemes of accident and life insurance must convince any one that, although there are differences in the results sought of accomplishment in some particulars, there are many requirements and provisions in common to both, and that the only substantial difference between the two plans of insurance on life is that, in the accident contract, death must result from a more limited number of causes than is covered by the other and broader contract of insurance on life, called "life insurance contracts." No rule of construction, short of one applied for distortion and destruction, can relieve accident insurance companies, issuing policies of insurance on life in this state, from the operation and influences of section 5855, which, in plain and unambiguous terms, declares that, in all suits upon policies of insurance on life thereafter issued, it shall be no defense that the assured committed suicide, unless it shall have been shown to the satisfaction of the court or judge, trying the cause that the insured contemplated suicide at the time of making his application for the policy, all stipulations in the policy to the contrary being void. The mere addition of one or more features or elements in a contract of insurance on life, that may serve to give the contract or policy a particular designation in the business or insurance world, will not in the least devalue the contract or policy of its chief character of insurance on life, or make the contract other than life insurance. The promise to pay a weekly indemnity by an insurance company in the event the insured receives an injury from an accident not resulting in death does not change the character of the agreement of the policy to pay a certain other sum when the accident results fatally, which is life insurance from accidental causes, as the prom-

ise to pay a certain stipulated sum to the insured (now contained in many of the policies issued by what is known as "old-line" life insurance companies), when the insured attains a given age, or in a definite specified time, and if before the insured arrives at the age designated, or before the time fixed for its certain payment, he shall die from any cause, accidental or otherwise, to pay his legal representatives or some one named in the policy as beneficiary the amount stipulated, is none the less life insurance because coupled with an investment or bond feature, not found in what is commonly known as a "straight" life insurance policy. The calling of a contract of insurance an "accident," "tontine," or "regular" life policy, or, for that matter, by any other appellation that may be adopted for business or conventional uses or classification, cannot make a policy containing an agreement to pay to another a sum of money designated upon the happening of an unknown or contingent event, depending upon the existence of life, less a policy of insurance on life. Insurance on life includes all policies of insurance in which the payment of the insurance money is contingent upon the loss of life. The policy in controversy certainly corresponds to that definition, and must be held to be subject to the provisions of section 5855. The judgment of the circuit court will be affirmed. All concur.

**EXTER et al. v. SAWYER et al.<sup>1</sup>**

(Supreme Court of Missouri, Division No. 2.  
Oct. 17, 1898.)

**CORPORATIONS—PROMOTER'S LIABILITY—FRAUDULENT SALE—RIGHT OF ACTION.**

1. Where one formed a company for the purpose of purchasing land on which he had previously procured a personal option and acted for it in making the purchase, concealing from the subscribers and directors that he had purchased the land at a much less sum than that at which he sold it to the company, he is liable to the company for the profits of the sale thus made to it.

2. Where a corporation, on being informed by a stockholder of a fraudulent sale of land to it by a promoter, fails to sue him at the stockholder's request, the stockholder may sue him in his own behalf, and in behalf of all other stockholders.

3. Where a promoter made a fraudulent sale of land to a corporation, the fact that the sale was not fraudulent as to some of the stockholders is not a bar to an action by the corporation.

Appeal from St. Louis circuit court; P. R. Hiltcraft, Judge.

Suit by Fred C. Exter and other stock owners of the Edgfield Land & Improvement Company against Charles H. Sawyer and others to cancel certain deeds of trust and notes of the company given to the defendant Saw-

yer, and to recover moneys paid him by the company, and wrongfully appropriated by him. From a judgment for plaintiffs, defendant Charles H. Sawyer appeals. Affirmed.

About the middle of March, 1890, the defendant Charles H. Sawyer having conceived the idea of forming a company for the purpose of buying a certain tract of land of about 100 acres in St. Louis county, he submitted the following instrument of writing, and another, to be hereafter mentioned, to certain parties, and induced the plaintiff and the individual defendants and the Farmers' Co-operative Club to become subscribers thereto for the amounts set opposite their respective names:

"Whereas, C. H. Sawyer is about to form a company for the purpose of buying a certain tract of land, of about 100 acres, in St. Louis county, lying on and south of the Wabash Railroad, opposite Woodland station, and being about 400 yards west of Jennings station, as shown by plat attached hereto; said land to be bought at the price of \$500 per acre, or \$50,000: Now, therefore, the undersigned hereby agree to bind ourselves to take stock in said company for the number of shares and amount set opposite our respective names; one-fifth of amount subscribed to be paid at the time of signing, or when called upon to pay by C. H. Sawyer; the other four-fifths to be paid in monthly installments equal to ten per cent. of the amount subscribed. Said company shall be incorporated and known as the Edgfield Land and Improvement Company, or some other suitable name."

Sawyer began procuring subscriptions to this list about the middle of March, 1890. It took a week or 10 days to get the necessary amount to buy the land subscribed. The subscriptions were all paid to Sawyer. As soon as a sufficient amount was subscribed to pay for this tract of land, Sawyer conceived the idea of enlarging the proposed company, increasing its capital, and selling to it a certain tract of land, known in this litigation as the "Ramona Tract," for which purpose he issued a second subscription list, which was in words and figures as follows:

"Whereas, C. H. Sawyer has secured subscriptions to the amount of \$50,000 for the purpose of organizing and incorporating a stock company to be known as the Edgfield Land and Improvement Company, or some other suitable name, to purchase a tract of land, of one hundred (more or less) acres, situated on the Wabash Railroad, at or near Woodland station; the subscription to said stock to be paid as follows: One-fifth at time of signing, or when called for by C. H. Sawyer; the balance, four-fifths, to be paid in monthly installments (commencing thirty days from March 13), equal to ten per cent. of the amount subscribed. And, whereas, it is desired by a majority of the stockholders to increase the capital stock of said company to \$100,000, for the purpose of purchasing an additional tract of land of 142 acres (more or

<sup>1</sup> Rehearing denied November 21, 1898.

less) at the sum of \$350 per acre; said land situated on or near Narrow-Gauge Railroad, Carsonville, Mo., as shown by plat accompanying this instrument. Said subscribers to the original \$50,000 of stock to be allowed to subscribe to the new stock an equal amount of their first subscription, and pay five per cent. on said new stock at time of signing, or when called for by C. H. Sawyer, and ten per cent. of amount subscribed every thirty days from date thereof until the remaining ninety-five per cent. shall have been paid. The new subscribers, or those not subscribers to the original stock, or original subscribers subscribing to more stock than their original shares, are to pay one-fourth ( $\frac{1}{4}$ ) of the amount subscribed in cash at the time of signing, or when called for by C. H. Sawyer, and the remaining three-fourths ( $\frac{3}{4}$ ) to be paid in monthly installments equal to ten per cent. of the amount subscribed: Now, therefore, we, the undersigned, hereby agree and bind ourselves to take stock in said company for the number of shares and amounts set opposite our respective names, subject to all the terms and conditions hereinbefore mentioned."

All of the payments for stock called for by the subscription lists were made to Sawyer, and by him deposited to his personal account, and used by him in the acquisition of the two tracts of land for the acquirement of which he secured the organization of the Edgefield Land & Improvement Company. Sawyer first contemplated purchasing the Jennings tract in January or February, 1890, and about the same time procured an option upon it in writing from Jennings at \$300 an arpent. On March 15, 1890, Sawyer and Jennings entered into a further agreement in regard to the same tract, at which time Sawyer paid him the sum of \$1,000 earnest money. This contract is as follows:

"McLaren Real-Estate and Investment Co., Rooms 224 and 225 Commercial Building. St. Louis, March 15, 1890. Received of McLaren Real-Estate and Investment Company the sum of \$1,000 on account of the purchase of a certain parcel of unimproved property lying in St. Louis county, and being a part of the Jennings survey by Solomon and Schultz, and bounded on the east by the land of Mrs. Duryea, on the west by estate of D. A. January, on the north by Woodland station, and on the south by Mary E. McCleny, containing 100 arpents or more, known as the northern part of lot fourteen, being the same conveyed by Robert Jennings to the Connecticut Mutual Life Insurance Company to secure the incumbrance of \$10,000 herein mentioned, on which is situated tenant houses, which property is this day sold to Mr. C. H. Sawyer for the total sum of \$300 per arpent, payable on terms of \$20,000 in cash, and the balance to be assumed, \$10,000 now standing against the property, and due May 17, 1891, with six per cent. interest; possession given when deeds are passed, and said Sawyer is hereby authorized to collect rents for 1890 now due." The title

of said property to be perfect, and to be conveyed by warranty deed, free from liens and incumbrances, except as to the taxes for the year 1890, which the undersigned purchaser agrees to pay. If, upon examination, the title proves to be defective, and cannot be made good within a reasonable time, the sale shall be off, and the earnest money returned, as also a reasonable fee for the investigation of title. The said C. H. Sawyer is accorded thirty days' time from this date to close the above purchase and have the title investigated. I agree to the above terms and conditions. [Signed] C. H. Sawyer. [Seal.] Robert M. Jennings. [Seal.] McLaren Real-Estate and Investment Company, Theodore De Forest, President. Witness: T. W. Copening."

On April 14, 1890, Jennings and wife conveyed the Jennings tract to C. H. Sawyer: the nominal consideration in the deal being \$50,000, and the real consideration being \$35,100. The nominal consideration was inserted at Sawyer's request. On April 28, 1890, Sawyer and wife conveyed to the Edgefield Land & Improvement Company the Jennings tract reciting in the deed a consideration of \$80,283. Sawyer says he took the first steps towards acquiring the title to the Ramona tract in December, 1889. His efforts to acquire the Ramona tract at that time resulted in the execution of the following agreement between Sawyer and the owners of said Ramona tract:

"St. Louis, December 31, 1889. M. M. Fitzgerald, Esq., No. 9 North Eighth Street, City—Dear Sir: I hereby propose to trade for the 142<sup>ss</sup>/<sub>100</sub> acres located at Carsonville, on the Narrow-Gauge Railroad, and running along the Natural Bridge road, in St. Louis county, Mo., as shown by plat now in my possession, on the following terms, to wit: I will give my 1,200-acre place, located in Ellis county, Texas, and known as the 'Brown Farm' (of which you have plat), with an incumbrance of eighty-five hundred (\$8,500) dollars, with \$850 interest due the 18th day of March, 1890, balance due in one and two years from 18th of March, 1890, and turn over to you or your party rent notes amounting to \$1,023, due 15th day of September, 1890, with twelve per cent. interest after maturity, and hay contract, also all implements now on the place belonging to me, and represented in description I gave Mr. Sass, and will take the 142<sup>ss</sup>/<sub>100</sub> acres above mentioned, subject to incumbrance of \$14,000, due in three years, at six per cent. interest, and also give an additional incumbrance on said 142<sup>ss</sup>/<sub>100</sub> acres of \$8,500, one-half with ten per cent. interest, due 18th of March, 1890, balance due in one and two years from 18th of March, 1890, with ten per cent. interest from date. Title of both properties to be good, with the exception of the incumbrances herein named. You to furnish certificate of title by Sterling and Webster Abstract Co. and Aug. Gehner & Co., of this city. I will furnish same by reliable abstractor in Ellis county, Texas. And agree further to give you twenty days from this

date in which to examine my property. And if you find, on such examination, it be as represented, agree to close trade on such basis. The representations made are as follows, viz.: The deed will call for 1,145 acres, but is considered by many that it will overrun this largely. That the land is located in Ellis county, Texas, about eight miles from Ennis, and about two miles from Faulkne station, on branch of the Houston & Texas Central R. R. That the soil is a black, waxy, and sandy loam. There is now 212 $\frac{1}{4}$  acres, more or less, under cultivation, or to be put in cultivation, as shown in contracts; also, 150 acres, more or less, under hay contract. The contracts and notes above mentioned hereto attached. Said contracts and notes to be transferred without recourse on me. It is further understood that I do not claim that the school house, church, and store are my property, but are located on my land, according to survey made by George H. Hogan, surveyor of Ellis county, Texas. C. H. Sawyer.

"Accepted, to date January 3, 1890. M. M. Fitzgerald, Agent. Wm. E. Berkeley, Agent."

This agreement was changed by another in writing, which is as follows:

"McLaren Real-Estate and Investment Company, Rooms 224-225 Commercial Building. St. Louis, April 4, 1890. Received of C. H. Sawyer the sum of ten dollars as earnest money on account of the purchase money of a certain tract or parcel of land located, lying, and being in the county of St. Louis and state of Missouri, and described as follows: One hundred and forty-two acres of land situated in St. Louis county, Mo., known as the 'Clement Woodward Farm,' being and lying in section 22, township 48 north, range 6 east, which lays south of the Natural Bridge road, and east of the Hanley road, where said road crosses said Natural Bridge road at Carsonville, and being at the southwest corner of said crossing, which property is this day sold to C. H. Sawyer for the total sum of \$50,000, payable as follows: \$5,000 in cash, and a warranty deed to 1,145 acres in Ellis county, Texas, now owned by said Sawyer, subject to \$8,500 incumbrance, bearing ten per cent. interest. Title to said 142 $\frac{1}{100}$  acres to be perfect, and to be conveyed by warranty deed, and to be clear of liens and incumbrances, except an incumbrance of \$14,000, bearing six per cent. interest, which the undersigned purchaser agrees to assume. If, upon examination, the title proves to be defective, and cannot be made good within a reasonable time, the sale shall be off, and the earnest money returned, as also a reasonable fee for investigation of title, not to exceed \$50. The said parties hereto are accorded thirty days' time from this date to close the above purchase and have the title investigated. I agree to the above terms and conditions. Signed in duplicate. Wm. E. Berkeley. [Seal.] C. H. Sawyer. [Seal.] Farmers' Co-operative Club, by M. M. Fitzgerald, Mgr.

"This receipt to be returned to the McLaren

Real-Estate and Insurance Company on closing purchase."

Under this agreement, Sawyer paid \$10 earnest money to bind the contemplated trade, and on April 24, 1890, received a deed for the Ramona tract. On April 26, 1890, Sawyer conveyed to the Edgefield Land & Improvement Company the Ramona tract, by a deed in which the consideration was stated to be \$80,000. Sawyer testified that with the exception of De Forest, who knew what the real consideration was for the Jennings tract, and possibly Ewing, Cheney, and Babcock, he never disclosed to any of the subscribers to the stock of the Edgefield Land & Improvement Company the real price at which he bought either the Jennings tract or the Ramona tract. He also testified that by express agreement between himself, Fitzgerald, and Chew, his Texas equity was to be taken in the Ramona deal at a valuation of \$31,000. To a committee of the stockholders appointed to ascertain the amount of claims asserted by Sawyer against the Edgefield Company he gave the following statement: "Ramona tract cost me: Option, \$22,500; equity, \$16,500; total, \$39,000. Option, December 31, 1889, closed April 4, 1889. Berkeley's deed, April 24, 1890. Woodward deed to Berkeley, April 11, 1890, deeded by Sawyer & Company April 26, 1890. Total cost to C. H. Sawyer of the two properties, \$74,100. Total profit to Sawyer, \$26,983. Price paid Sawyer as agreed, \$101,083." This statement was furnished about May, 1892. He further stated that Ewing and De Forest knew that he had traded his Ellis county property in Texas for the Ramona tract, but that he told no one else that he had traded said property; that in all this matter, from first to last, no one ever asked him the question as to whether he owned the land, or had an option on it, or was selling it at a profit, or ever intimated a desire to know who owned it, or what his relation to it was, except Mr. Bannantine; that on the 15th of March, 1890, when he signed the contract for the purchase of the land, he was worth, in real estate, bank stocks, and other stocks, the sum of \$200,000; that he could not tell what sums of money he had deposited in any bank about the time when the Jennings tract and Ramona tract were purchased. After having his attention called to his notice of March 17, 1890, to Capt. Bull, informing him that the subscriptions for the first \$50,000 had been completed, Sawyer was asked: "Q. What do you say now as to your efforts to organize this company prior to March 15, 1890, when you closed your option with Dr. Jennings?" and answered: "A. I stated I didn't know how many days— It is possible it was a few days before that. I am not positive as to dates. I cannot remember. I am inclined to think from this document that I commenced to organize this company a few days before I closed the option with Dr. Jennings, if it was closed at that date. I know of no reason why I waited till March 15th to close the op-

tion with Dr. Jennings, unless it might have been a matter of convenience to me. I don't remember whether it was or not," etc. To Capt. William Bull, Sawyer, in substance, stated that he had an option on the Jennings tract at \$500 per acre; that the option would run out soon, and it was necessary to get sufficient money to take it in; that he did not have enough himself, and wanted a few of his friends to go in with him and put up the money and secure the property; that there was a party waiting to take the property at \$550 an acre, and that the price that he was to pay for it (\$500) was considerably less than the actual value; that there were certain facts, that were known only to himself and a few others, that would increase the value of the property very much; that he had raised quite a sum of money to induce the Wabash Railroad to put on additional trains, and as soon as that would become known the property would be worth a great deal more money; that he was a subscriber, and was putting in all the money he could afford, and had converted some securities in order to get some money to put into the investment; and thought it a good thing; that he never at any time intimated to Capt. Bull that he was the owner of the property, but in every conversation with Capt. Bull spoke of buying the property for the Edgefield Company. He further stated to Capt. Bull that he was getting up the scheme, and would act for the syndicate in the acquisition of the property, and that as soon as the company was organized he was to be its secretary, and until its organization he was to act for the subscribers; that all moneys were by the subscribers to be paid to him; that he never told Capt. Bull that he was acquiring either of the tracts of land for a less sum than appeared on the face of the two subscription lists, but that all parties were going in together on the ground floor, and would share any profit that was made. Capt. Bull's subscription to the capital stock of the Edgefield Company was made not later than March 10, 1890. To Fred C. Exter, Sawyer stated that the option on the Jennings tract would expire about the middle of April, 1890, and that they would have to fill the subscription list and get enough money on or before that time, because Mr. Jennings would not wait longer than that time. To George A. Bannantine, Sawyer stated that he represented a syndicate which was organized to buy the Jennings tract for the sum of \$500 per acre, under an option, and that he was one of the syndicate. To R. S. Logan, a subscriber to both lists, Sawyer stated that he was organizing a syndicate for the purpose of purchasing the Jennings tract and the Ramona tract; that he was one of the syndicate, and would manage the business of the company; that he did not state who owned the Jennings tract, nor did he state anything as to the cost of said tract, except what was shown on the subscription paper. R. S. Logan subscribed for his stock

about the 12th or 13th of March, 1890. To John J. Broderick, a subscriber to said Edgefield stock, Sawyer stated that he had an option on the land that had to be closed at a certain time, and that all subscribers to the stock would "stand on the same basis" in the purchase of the two tracts of land, and that he was acting for the stock subscribers and the contemplated company in purchasing the two pieces of land. Sawyer never told Mr. Broderick that he was the owner of the two tracts of land, and proposed to sell them to the company he was then forming to buy lands. He never told Broderick that he would make a profit out of the sale of the lands to the proposed company. Broderick testified that he "never heard of such a preposterous proceeding until this suit was begun." To Benjamin Lynds, a subscriber to the stock of the Edgefield Company, Sawyer stated: "You see my name on the subscription list for \$5,000 of the stock. You can see how much faith I have in it. I am going to take more, if I can get the money to pay for it." Sawyer stated to him that he was one of the syndicate. Mr. Ewing, in Sawyer's presence, stated that Sawyer was to manage the company for the subscribers. Sawyer did not tell Mr. Lynds that he owned the two pieces of property for the acquisition of which the Edgefield Company was formed, and intended to sell the lands to such company; nor did Sawyer say anything about the costs of the properties to him. The subscription list indicated what the lands would cost. Lynds testified that he first knew that Sawyer had made a profit out of the lands after this suit was brought. To William H. Mayo, a subscriber to the Edgefield stock, Sawyer stated that he had an option on the Jennings tract at \$350 or \$500 an acre or arpent; that they were to form a syndicate with a number of other gentlemen, whose names were given, and who were said to be friendly to the project; that they could make some money out of it by dividing it up and selling it out in lots; that he (Sawyer) was one of the subscribers to the stock; that the price was too big for him to handle alone, or that he would gladly handle it alone; "that he had subscribed as much as he could afford to, and desired to have other parties subscribe, and form a syndicate, and subdivide and improve it, and sell it for whatever we could." He further stated to Mayo that he was to represent the parties and manage the business, and that all business was to be negotiated through him or the McLaren Real-Estate Company. Mayo testified that Sawyer never informed him that he owned the lands, but that he had an option. Theodore De Forest, a witness for defendants, testified that Mr. Broderick correctly summarized the transaction when he stated that "all parties were to stand on the same floor." James F. Ewing, a witness for defendants, testified that the first time he heard that Sawyer had acquired the Jennings tract at \$300 an arpent, and sold it to the Edge-

field Company for \$500 an arpent, was after this suit was begun, and that he was as much surprised by such a disclosure as anyone.

There was evidence introduced by plaintiffs tending to show that at the time Sawyer exchanged his Texas farm for the Ramona tract the entire value of the Texas farm was \$10,000 or \$12,000,—about the amount of the incumbrance thereon. Defendants introduced evidence tending to show that at the time stated the equity in the Texas farm was worth \$10,000 to \$25,000. The court found the equity in said farm to be of the value of \$5,000. The evidence on the part of plaintiffs tended to show that, at the date of the purchase of the Ramona tract by Sawyer, its full value was from \$19,000 to \$20,000, while upon the part of defendants it tended to show that the value of the Ramona tract at that time was from \$25,000 to \$50,000. After the two tracts of land were conveyed by Sawyer to the Edgefield Land & Improvement Company, the Edgefield Company executed a deed of trust on the Jennings tract for \$20,000 to the Connecticut Mutual Life Insurance Company, out of which the \$10,000 deed of trust existing on said tract was paid, and the remaining \$10,000 was paid to Sawyer. The Edgefield Company also executed to Sawyer a second deed of trust on the Jennings tract for the sum of \$30,000. This second deed of trust for \$30,000 has been paid off, until but \$5,200 remain unpaid; the note being held by Sawyer. The Edgefield Company at the same time executed to Sawyer its deed of trust on the Ramona tract to secure the sum of \$30,000,—a portion of the profits made by him through the sale of the two tracts of land to the Edgefield Company. Fred C. Exter, one of the subscribers to the Edgefield stock, afterwards became satisfied that Sawyer had abused the confidence reposed in him, and, in violation of the duty due from him to the proposed Edgefield Company, had wrongfully and fraudulently appropriated a large portion of the values of said Edgefield Company. After having come to this conclusion, said Exter made upon the directors of the Edgefield Company a demand, in writing, requesting them to institute against said Sawyer a suit for the cancellation of the deeds of trust and notes wrongfully and illegally given to said Sawyer, and for the recovery from said Sawyer of all moneys of the Edgefield Company that had been wrongfully appropriated by him. In response to this demand of Exter, the Edgefield Company refused to institute such suit. He thereupon instituted it himself. After the suit was filed a committee of the stockholders of the Edgefield Company was appointed to investigate the truth of the charges made in Exter's petition against Sawyer. An investigation of the charges was made by the committee. The committee made its report, with the result that the amended petition in this case was filed, and the numerous parties plaintiff therein were joined with said Exter. A trial of the

cause resulted in the rendition of a judgment and decree in favor of plaintiffs, in trust for the use of the Edgefield Land & Improvement Company, and against the said Charles H. Sawyer, for the sum of \$15,052.31, as being the profit made by the said Sawyer upon the Jennings tract, and for the sum of \$33,923.40, as being the profit made by the said Sawyer upon the Ramona tract, making the total judgment of \$40,975.71, as being the amount due from said Sawyer to the said Edgefield Land & Improvement Company, arising out of the matters set forth in the petition, and further ordered and decreed that the case be dismissed as to Theodore De Forest, James F. Ewing, T. J. Cheney, and the Third National Bank, and that the defendant Sawyer pay the costs of the suit. Afterwards and in due time a motion for new trial was filed by the defendant Charles H. Sawyer, which was overruled, and an appeal to this court was duly taken by the said Sawyer. The court made a finding of facts substantially as hereinbefore stated.

J. M. Holmes, for appellant. Sim. T. Price and D. D. Fassett, for respondents.

BURGESS, J. (after stating the facts). It is insisted by defendant Sawyer that he occupied no fiduciary relation to the company, was not accountable to them for his profits (not having done or said anything to create any such right upon their part), and therefore he was under no obligation to disclose the nature or extent of his interest in the lands to the company. Upon the other hand, it is contended by plaintiffs that Sawyer, having promoted the organization of the Edgefield Company for the express purpose of buying the two tracts of land, and having acted for the company as its agent for the purchase of the two tracts of land, occupied a fiduciary relation to the subscribers for stock and to the proposed company, and could make no profit out of the sale of the lands without making full disclosure of the fact that he was the owner of the lands and was the proposed seller of them to the company to be organized. It is indisputable that Sawyer was the promoter of the Edgefield Land & Improvement Company, and that he had an option, only, on the land in question at the time of the organization of the company; and if, with respect to such land, he occupied no fiduciary relation to the corporation, this action cannot be maintained. It was in January or the early part of February, 1890, that Sawyer secured an option on the Jennings tract, and about the 9th or 10th of March next thereafter he determined to organize a corporation for the purpose of selling to the same said land. He did not then, at the time of acquiring the option, occupy a fiduciary relation to the corporation with respect thereto. In such circumstances it was said in *Oil Co. v. Densmore*, 64 Pa. St. 43: "There are two principles applicable to all partnerships or as-



sociations for a common purpose of trade or business, which appear to be well settled on reason and authority. The first is that any man or number of men, who are the owners of any kind of property, real or personal, may form a partnership or association with others, and sell that property to the association at any price which may be agreed upon between them, no matter what it may have originally cost, provided there be no fraudulent misrepresentation made by the vendors to their associates. They are not bound to disclose the profits which they may realize by the transaction. They were in no sense agents or trustees in the original purchase, and it follows that there is no confidential relation between the parties which affects them with any trust. It is like any other case of vendor and vendee. They deal at arm's length. Their partners are in no better position than strangers. They must exercise their own judgment as to the value of what they buy." But where the promoter is not the owner at the time of the organization of the company, and only has an option on the property, which he subsequently sells at a profit to the company or corporation which he causes to be formed, he is liable in damages to the subscribers for the stock. And if after he begins promoting he purchases property, and then sells it to the company, he must inform the directors that the property belongs to him; otherwise the sale will be invalid. 2 Cook, Stock, Stockh. & Corp. Law, (3d Ed.) § 651. There are authorities, however, which go further, and hold that a promoter occupies the same position towards the company or corporation which he promotes as a trustee, steward, or agent. Thus, in *Phosphate Co. v. Erlanger*, 5 Ch. Div. 73-119, it was said: "A promoter is, according to my view of the case, in a fiduciary relation to the company which he promotes, or causes to come into existence. If that promoter has a property to sell to the company, it is quite open to him to do so; but upon him, as upon any other person in a fiduciary position, it is incumbent to make full and fair disclosure of his interest and position with respect to the property. I can see no difference in this respect between a promoter and a trustee, steward, or agent." So, in *Land Co. v. Case*, 104 Mo. 572, 16 S. W. 390, it was said that persons who "project and form a corporation, by soliciting and procuring others to subscribe for and take shares of stock, for the purpose of selling or turning over to the company property which they own or have a right to acquire by executory contract, do occupy a double position. On the one hand, they represent their own interest in respect of the disposition of the property; on the other, they represent the proposed corporation." The court said further: "A vendor is a promoter, and is bound to protect the interests of those who ultimately constitute the company, if he assumes to act for them, or if he induces them to trust him or to trust persons who are un-

der his control, and who are practically himself in disguise. He also assumes such duty if he calls the company into existence in order that it may buy what he has to sell; but he does not assume such duty in negotiating with persons who have themselves assumed that duty, and who are in no way under his influence." See, also, *Quinlan v. Keiser*, 66 Mo. 603. According to the rule thus announced, Sawyer was agent for the Edgefield Company in acquiring the two tracts of land. This was not only shown by the verbal evidence, but it is shown by the recitals in the subscription lists, in the first of which it is said that "Sawyer is about to form a company for the purpose of buying a certain tract of land, of about one hundred acres" (the Jennings tract), for \$500 per acre, or \$50,000; that "all subscriptions for stock are to be paid to him"; and that "he is a subscriber for \$5,000 of the stock of the Edgefield Company, which is being organized by him for the express purpose of buying the Jennings tract." In the second subscription list it is stated "that Sawyer has secured subscriptions to the amount of \$50,000 for the purpose of organizing and incorporating a stock company, to be known as the Edgefield Land and Improvement Company, to purchase a tract of land; \* \* \* that it is desired by a majority of the stockholders to increase the capital stock of said company to \$100,000, for the purpose of purchasing an additional tract of land \* \* \* [the Ramona tract]; that all stock subscriptions shall be paid to C. H. Sawyer," who also subscribed for \$5,000 of this increased stock. Sawyer acted for the company in organizing it and in securing its incorporation, and in purchasing the two tracts of land. He concealed from the subscribers of stock and the directors of the company the fact that he had purchased each tract of land at a much less sum than that at which he sold it to the company, when it was his duty, owing to his relations with the company and its stockholders, to speak out and fully advise them with respect thereto; and in his failure to so do he violated his obligation of good faith which he owed to his associate stockholders, for which he must be held to respond in damages.

Another insistence is that error was committed by the trial court in proceeding upon the theory that if a wrong had been committed by a promoter against subscribers or stockholders, in procuring their subscriptions, which wrong was not common to all stockholders, the remedy lies with the corporation, and consists in an action by it. This action is not bottomed upon the ground of fraud practiced by Sawyer upon individual stockholders, but upon the ground of fraud practiced upon the company, to whom the lands were sold by Sawyer at a greatly advanced price over what he paid for them, when, by the rules of honesty and fair dealing, it was entitled to them at the same price that he paid, in the absence of knowledge of that

fact, and an agreement to take them at a fixed sum. The corporation, after being informed by Exter of the fraud practiced upon the stockholders in the sale of the land to it by Sawyer, refused to take action in the matter and to bring suit against him for the fraud; and in such circumstances the plaintiff Exter, being a stockholder, had the right to sue in equity in his own behalf, and in behalf of all other stockholders who might wish to come in, making the corporation and the guilty parties the defendants. 2 Cook, Stock, Stockh. & Corp. Law (3d Ed.) § 701. As Sawyer was the agent of the company in the purchase of the lands, and transferring them to it for a much larger sum than he paid for them, without disclosing to the company the amount paid for them by him, he was guilty of fraud, upon which a cause of action accrued to the company, regardless of the fact that he may never have stated to the company at any time the amount paid by him for the land. An agent must act fairly with his principal. He cannot speculate off of him with respect to matters in which he is agent. In 1 Mor. Priv. Corp. (2d Ed.) § 272, it is said: "It is true that an act committed by a portion of the members of a corporation cannot, in the nature of things, be a wrong against the whole company. It can be a wrong only against those shareholders who were not parties to the act. Yet it is impossible, under these circumstances, to work out the exact rights of the individual shareholders, except by regarding the corporation as a separate entity, and by treating the wrong as a wrong against the whole corporation. Each shareholder has an interest in the corporate concern as an entirety, and his rights must be protected accordingly. A recovery by the corporation as an entirety against a portion of its members would inure to the benefit of each shareholder in proportion to his interest. These shareholders who were charged with liability irrespective of their membership in the corporation would be recouped to the extent of their interests, through the enhancement of the value of their shares, and exact justice would thus be meted out to all the parties. The argument that it would be unfair to allow those shareholders who were not wronged to benefit by a recovery in the name of the corporation is best answered by Sir George Jessel in *Phosphate Co. v. Erlanger*, supra, as follows: "If the argument were once allowed to prevail, it would only be necessary to corrupt one single shareholder, to prevent a company from ever setting the contract aside. It may be said, 'You give to the shareholder who was a party to the fraud a profit, because he will take it in respect of his shares, and since, as between the conspirators, there is no contribution, therefore his brother conspirators, who are made liable for the fraud, cannot make him repay his proportion.' But the doctrine of this court has never been to hold its hand, and avoid

doing justice in favor of the innocent, because it cannot apportion the punishment fully amongst the guilty." 1 Mor. Priv. Corp. (2d Ed.) § 294. It seems that De Forest was the only stockholder and director of the company who was aware that Sawyer had made a profit out of his sale of the lands to the company. He testified himself that he did not disclose to many of the stockholders, excepting Babcock and Cheney, nor to any of the directors of the company, the price which he paid for the lands; and, while the considerations expressed in the deeds to him for the two tracts of land were \$50,000 each, the actual price paid was much less. This would also seem to indicate a purpose upon the part of Sawyer to keep from the stockholders and directors of the corporation the actual price paid by him for the lands. With respect to the Ramona tract, Sawyer at the time of its purchase by him was the agent of the Edgfield Land & Improvement Company, and must be held to have purchased that tract for it; and it is as much entitled to the benefit of such purchase as if it had purchased it direct, and Sawyer is only entitled to recover the actual value of what it cost him. If he suffered loss by reason of his misconduct in failing to disclose to the company what he gave in exchange for the land, and the total amount that it cost him, there is no one to blame but himself. The court seems to have adjusted this transaction upon an equitable basis, and we are disposed to defer to its findings. "If an agent undertakes to act for himself, and at the same time for his principal, and reaps an advantage by his dealing, the law will take it from him, unless the principal, knowing all the facts, has allowed the agent to so change his condition that he cannot be put in statu quo, and thus make it inequitable to rescind the contract." *Kuneau v. Rieger*, 105 Mo. 675, 16 S. W. 864. The conclusion reached by the trial court was well warranted by the evidence, and, finding no reversible error in the record, we affirm the judgment.

GANTT, P. J., and SHERWOOD, J., concur.

# MCGREGOR-NOE HARDWARE CO. v. HORN et al.

(Supreme Court of Missouri, Division No. 1.  
Nov. 15, 1898.)

SUPREME COURT — APPELLATE JURISDICTION —  
FRAUDULENT CONVEYANCES—HUSBAND AND  
WIFE—SEPARATE ESTATES—TRUSTS.

1. An action to impeach the title of defendant to real estate, and change his apparent fee-simple title into an equitable one in trust for plaintiff, is within the appellate jurisdiction of the supreme court, since the title to real estate is involved.

2. In an action by a judgment creditor to subject to the payment of his debt real estate of his debtor fraudulently conveyed to the latter's wife, it appeared that the real estate was purchased with the separate means of both

husband and wife, but the deed was taken in the name of the wife. *Held*, that as the wife took the title in trust for her husband, to the extent that he paid for it, his interest would be subject to the payment of his debt.

Appeal from circuit court, Wright county; Argus Cox, Judge.

Action by the McGregor-Noe Hardware Company against Malissa J. Horn and others to subject certain property to the payment of a debt. From a judgment for defendants, plaintiff appealed to the St. Louis court of appeals, which transferred the cause to the supreme court. Reversed.

G. M. Sebrée, for appellant. F. M. Mansfield, L. F. Parker, and Pope & Belch, for respondents.

BRACE, P. J. On the 5th day of July, 1892, James J. Prophet and wife, by general warranty deed of that date, duly executed, acknowledged, and recorded, conveyed to the defendant Malissa J. Horn, wife of the defendant Thomas B. Horn, a lot of ground described in the petition, situate in the town of Mountain Grove, in Wright county, Mo. On the 22d day of October, 1889, the defendant Thomas B. Horn became indebted to the plaintiff in the sum of \$170.79, on his promissory note of that date, payable one day after date, with 10 per cent. interest. Afterwards, on the 10th day of July, 1890, the plaintiff obtained judgment against Thomas B. Horn for such indebtedness, in the sum of \$243.45 and costs, before a justice of the peace in said county, execution upon which was issued on the 26th of July, 1893, and a transcript thereof duly filed and recorded in the office of the clerk of the circuit court for said county on the 9th day of August, 1893; and thereafter, on the 26th day of December, 1893, the execution on said judgment was returned nulla bona. Afterwards, on the 4th day of March, 1895, this suit was instituted. Plaintiff avers in the petition, in substance, that the said Thomas B. Horn purchased said real estate of the said Prophet, and paid for the same with his own means, but, with the fraudulent intent of hindering and delaying the plaintiff in the collection of its said debt, had the same deeded to his wife, the said Malissa Horn; that the said Thomas B. Horn is insolvent, and has no other property, real or personal, subject to execution,—and prays that the said Malissa may be declared a trustee of the title of said real estate for its benefit, and that the same be subjected to the payment of its debt. Issue was joined on these allegations by general denial of each of the defendants; the defendant Malissa, in addition, affirmatively alleging that she purchased said property in her own right, and paid for the same with her own separate means. The issues were found for the defendants in the circuit court, and from the judgment rendered in their favor the plaintiff appealed to the St. Louis court of appeals, by which court the cause was transferred to this court, on the ground that

title to real estate is involved, under the ruling of this court in *Patton v. Bragg*, 113 Mo. 595, 20 S. W. 1059, and *Miller v. Leeper*, 120 Mo. 466, 25 S. W. 378. Afterwards, and before the case was submitted here, a motion to remand the cause was overruled. In connection with that ruling, it may be as well to say here that, while the question of jurisdiction was not discussed in those cases, as the purpose and effect of this proceeding are to impeach the title of the defendant Malissa to the real estate in question, and change her apparent fee-simple absolute into an equitable fee in trust for the plaintiff, title to real estate is involved in the action, within the meaning of the constitutional provision (*Morris v. Clare*, 132 Mo. 232, 33 S. W. 1123), and the case was properly certified here for determination.

Upon the facts stated in the petition, the plaintiff is entitled to the relief sought. *Zoll v. Soper*, 75 Mo. 460; *Lionberger v. Baker*, 88 Mo. 447. And the only question before us for determination is whether the facts proven sustain those allegations. It appears from the evidence that on the 13th of May, 1889, R. M. Simmons and wife, by warranty deed of that date, conveyed a lot in the city of Springfield to the said Thomas B. Horn, for the expressed consideration of \$2,000. The evidence tended to prove that the actual consideration paid for this property was \$1,500, \$750 of which was paid in money and notes by Thomas B. Horn, and \$750 in hotel furniture. This deed was duly acknowledged and filed for record on the 31st of May, 1889; and on the same day the said Horn and wife, by warranty deed of that date, duly executed, acknowledged, and recorded, conveyed the said Springfield lot to C. R. Hughes for the expressed consideration of \$2,000, subject to a deed of trust for \$600 filed for record the same day. In fact, no consideration whatever was paid for this conveyance. Hughes is a brother-in-law of Mrs. Horn, and testifies that he paid nothing for the conveyance; that about that time her husband was in failing circumstances, and unable to pay his debts; and that his (Hughes') understanding was that the property was conveyed to him to protect it from Horn's creditors. Afterwards, on the 1st day of November, 1892, Hughes and wife, by warranty deed of that date, duly executed, acknowledged, and recorded, conveyed the said Springfield lot to the said James J. Prophet for the expressed consideration of \$2,000, subject to the incumbrances aforesaid. Hughes in fact received no consideration for this deed. It was executed at the request of Horn and wife, the actual consideration therefor being the conveyance first aforesaid made by the said Prophet and wife of the Mountain Grove lot to the defendant Malissa J. Horn. The evidence tends to prove that the \$600 raised by the mortgages on the Springfield lot was received by Thomas B. Horn. He testifies that he applied this money to the payment of his debts. Simmons testifies that the \$500 in

cash which he received on the Springfield lot came out of this fund. However that may be, it is evident that the actual consideration paid for the Mountain Grove lot in controversy was \$900,—being the amount actually paid Simmons for the Springfield lot, less the amount of the mortgages,—and that, of this amount, \$750 was the value of the hotel furniture as aforesaid, and \$150 was money and notes, confessedly the property of Thomas B. Horn. The evidence tends to prove that in the year 1889, and for many years prior thereto, the said Thomas B. Horn had been engaged in the mercantile business, and his wife, the said Malissa, in the boarding-house and hotel business, in her own name, with his consent; that the businesses of the two concerns were kept separate; and that the furniture in question was purchased with the means of Mrs. Horn, earned by her in her said business, and was always regarded and treated by her and her husband as her separate property. Such being the case, the same will, in the absence of fraud, be so regarded and treated in equity. *Coughlin v. Ryan*, 43 Mo. 99; *Tuttle v. Hoag*, 46 Mo. 38; *Welch v. Welch*, 63 Mo. 57; *Bartlett v. Umfried*, 94 Mo. 78, 7 S. W. 581. And the property in question having been purchased with \$750 of the separate estate of Mrs. Horn, and with \$150 of the means of Mr. Horn, and the deed taken in her own name, upon well-settled principles of equity she took that title in trust for her husband, to the extent that he in fact paid for it. *Payne v. Twyman*, 68 Mo. 399; *Broughton v. Brand*, 94 Mo. 169, 7 S. W. 119; *Jones v. Elkins*, 143 Mo. 647, 45 S. W. 261; *Richardson v. Champion*, 143 Mo. 538, 45 S. W. 280. And it follows that she holds the legal title to three-eighths of the property in question in trust for her husband, which interest ought to be subjected to the plaintiff's debt; and, that it may be so subjected by an appropriate decree, the judgment of the circuit court is reversed, and the cause remanded, with directions to enter a decree declaring such trust as to the undivided three-eighths of said real estate, and directing a sale thereof, and the appropriation of the proceeds of the sale of such interest to the payment of plaintiff's judgment. All concur.

STATE ex rel. CROW, Atty. Gen., v. WEST SIDE ST. RY. CO.

(Supreme Court of Missouri. Nov. 16, 1898.)

FRANCHISES—PUBLIC SALE—CONSTRUCTION OF STATUTE—VAAGUENESS—IMPOSSIBILITY TO DETERMINE MEANING.

1. Act April 9, 1895, provides that the municipal authorities to whom application may be made for consent to the construction, extension, maintenance, occupation, or use of, inter alia, any street railway or railroad for the transportation of freight, passengers, or mails, must provide, as a condition precedent to the granting of such consent, that the franchise

shall be sold at public auction to the responsible bidder who will give the largest percentage yearly of the gross receipts derived from such occupation and use, with adequate security for the payment thereof, and for the prompt construction and completion of the proposed plant, provided that such payment shall in no case be less than 2 per cent. of the gross earnings during the first five years of said occupation and use, and thereafter for each period of five years such percentage shall be increased to correspond with the increase in value of the land thus occupied and used. *Held*, that the act is void, in that its meaning cannot be determined by any known rules of construction, because, if it means that the company must pay at least 2 per cent. of its gross earnings for the first five years to each municipality over whose streets it may build, and to each county whose highways it may cross, the railway company may in many cases be compelled to pay more than its total receipts.

2. It is also void if it means that the percentage should be computed only on the gross receipts of that part of the road located on the streets of the city or across the highways, as the case may be, because there is no method provided by which the actual gross receipts of that particular part of the road can be ascertained.

3. A continued line of railroad cannot be subdivided so as to permit competition for the privilege of constructing and operating separately the portions thereof lying within the municipalities and across the highways on its route.

4. The act cannot be practically enforced, since, in the case of street railroads, there is nothing to show on what gross earnings the percentage is to be computed, the act evidently contemplating that the bid shall be a percentage only of the receipts derived from the use and occupation of the "public" property, and a portion of the earnings being attributable to the capital invested in power stations, machinery, etc.

5. The percentage is to be increased in "each period of five years to correspond with the increase in the value of the land thus occupied and used," but the act gives no intimation by whom or in what manner this increase is to be settled and determined.

6. If the provision for increased payment for the franchise after five years is meaningless, in the case of street railroads, the proviso is practically eliminated, so that it is highly improbable that the legislature would have passed the act with the clause increasing the percentage in each term of five years omitted.

In banc.

Original proceeding by information in the nature of a quo warranto by the state, on the relation of Edward O. Crow, attorney general, against the West Side Street-Railway Company. Judgment for respondent.

Edw. C. Crow, Atty. Gen., F. N. Judson, Sam B. Jeffries, Asst. Atty. Gen., and H. S. Julian, for information. Karnes, Holmes & Krauthoff, Frank Hagerman, John H. Overall, G. A. Finkelnburg, Henry Hitchcock, R. B. Middlebrook, S. S. Winn, and Clarence Palmer, for respondent.

WILLIAMS, J. The attorney general has presented to this court an information charging that the respondent is unlawfully usurping the franchises of being a body corporate and politic, under the name of the "West Side Street-Railway Company," and, without legal

warrant therefor, is operating and conducting an electric street railway over and along certain streets in Kansas City, and carrying passengers thereon for hire. A judgment of ouster is prayed.

The respondent, being called upon to show by what authority it is claiming, using, and exercising the rights and privileges above recited, filed an answer, setting out in detail the various steps leading up to its incorporation, under article 8 of chapter 42 of the Revised Statutes of this state, and, as its warrant for constructing and operating said street railway, pleading an ordinance of Kansas City, adopted October 5, 1896, granting it authority so to do. The attorney general demurs to this answer, on the ground that it does not allege that the ordinance relied upon by respondent was enacted in conformity with the act of the general assembly approved April 9, 1895, entitled "An act to secure to each county, city, village and other municipal or public corporation adequate compensation for the occupation or use of its streets or other public lands by private companies, co-partnerships, corporations, or individuals," and because it does not appear from said answer that said franchise was granted in the manner required by the above-mentioned act.

The first section of the act referred to is as follows:

"Section 1. The public authorities of every county, city, village, or other municipal or public corporation, to whom application may be made by any private company, co-partnership, corporation, individual or individuals for consent to the construction, extension, maintenance, occupation or use of any electric lighting plant, or plant for generating, transmission, sale, or use of electricity, gas lighting plant, street railway, or railroad for the transportation of either freight, passenger, or mails, telephone or telegraph plant, or plant for supplying water, above, across, along, beneath or through any highway, road, avenue, alley, park, square, street or other public lands, must provide, as a condition precedent to the granting of such consent, that the franchise, privilege and right-of-way for such occupation and use of any such public places for any such private purposes, shall be sold at public auction to the responsible bidder who will give the largest percentage yearly of the gross receipts derived from such occupation and use, with adequate security, as hereinafter provided, for the payment thereof and for the prompt construction and completion of the proposed plant: provided, that such payment shall in no case be less than two per cent. of the gross earnings during the first five years of said occupation and use and thereafter, for each period of five years, such percentage shall be increased to correspond with the increase in value of the land thus occupied and used."

The respondent makes no claim that the

procedure pointed out in the section just quoted was pursued by the city authorities, or that the franchise conferred upon it was offered at public auction to the bidder who would pay the largest percentage of the gross receipts, as therein required. Upon the contrary, it is confidently asserted that this act of the legislature is of no force or effect, and that the city was not deprived by it of the power to grant, upon terms satisfactory to itself, the right to construct and operate street railways within its boundaries.

It is not, nor can it be, disputed that Kansas City, under its charter, had full power, unless restrained by the act above copied, to pass the ordinance relied upon in the answer, and to authorize the use of its streets for respondent's electric street railway, and to fix the terms upon which the city would give its consent for this to be done. The ordinance, in the absence of a valid and controlling statute to the contrary, is an all-sufficient warrant for the exercise by respondent of the franchise referred to in the information, so far, at least, as the use of the streets is concerned. In other words, the city had the power, under its charter, to pass the ordinance empowering respondent to construct and operate its railway in the streets of said city, upon the terms fixed by said ordinance, without first offering that privilege to bidders at public auction, unless such right was taken from it by the legislature through the act of 1895, *supra*.

Several reasons have been given why this act cannot have that effect. It is argued that it is too vague, indefinite, and uncertain in its provisions to be capable of practical construction and enforcement, and hence is an abortive and ineffectual attempt to express the legislative will. It is also claimed that section 20 of article 12 of the constitution, which prohibits the general assembly from passing any law granting the right to construct and operate a street railroad within any city, without first acquiring the consent of the local authorities thereof, so far withdraws from the legislature the power of the state to deal with street-railway franchises, and vests the same in the cities concerned, as they desire, as conditions of granting such consent, and that the act of 1895 impairs this constitutional right. The further contention is that the people of the state, by constitutional provision, conferred upon Kansas City the power to frame and adopt, by popular vote, a charter for the government of said city in matters pertaining exclusively to its municipal affairs, and that the construction and operation of street railways within the limits of said city are, under said constitutional grant, properly regulated by the charter and ordinances made pursuant to it, and not by the legislative act in question. These propositions have been ably argued orally at the bar by counsel for the respective parties, and elaborately discussed in numerous briefs

filed herein. If any one of the objections raised to the act is well taken, it cannot stand, and the demurrer of the attorney general must be overruled.

Recurring to the point first suggested, this question is presented: Does the act sufficiently express the legislative will to enable the courts and officers charged with its execution to ascertain and enforce it? A statute cannot be held void for uncertainty, if any reasonable and practical construction can be given to its language. Mere difficulty in ascertaining its meaning, or the fact that it is susceptible of different interpretations, will not render it nugatory. Doubts as to its construction will not justify us in disregarding it. It is the bounden duty of the courts to endeavor, by every rule of construction, to ascertain the meaning of, and to give full force and effect to, every enactment of the general assembly not obnoxious to constitutional prohibitions. It is equally true that a mere collection of words cannot constitute a law; otherwise the dictionary can be transformed into a statute by the proper legislative formula. An act of the legislature, to be enforceable as a law, must prescribe a rule of action, and such rule must be intelligibly expressed. "It is plainly the duty of the court to construe a statute ambiguous in its meaning so as to give effect to the legislative intent, if this be practicable. \* \* \* But a statute must be capable of construction and interpretation; otherwise it will be inoperative and void. The court must use every authorized means to ascertain and give it an intelligible meaning; but if, after such effort, it is found to be impossible to solve the doubt and dissolve the obscurity, if no judicial certainty can be settled upon as to the meaning, the court is not at liberty to supply or make one. The court may not allow conjectural interpretation to usurp the place of judicial exposition. There must be a competent and efficient expression of the legislative will." *State v. Partlow*, 91 N. C. 550. In *Drake v. Drake*, 15 N. C. 110, Chief Justice Ruffin said: "Whether a statute be a public or private one, if the terms in which it is concluded be so vague as to convey no definite meaning to those whose duty it is to execute it, either ministerially or judicially, it is necessarily inoperative. The law must remain as it was, unless that which professes to change it be itself intelligible." In *Ward v. Ward*, 37 Tex. 389, the court declared: "We hesitate, to consider well any judgment of ours which declares unconstitutional or void an act of the legislature, paying due deference to the learning and wisdom of that branch of the government. But when we find ourselves totally unable to administer a law by reason of its uncertainty or ambiguity, or believe it to be unconstitutional, we shall not hesitate to discharge the duty which the law devolves upon us. We do not mean to say, by any means, that the act of November 1, 1871, is unconstitutional, but we do say that it is nugatory

and void for want of some adequate provision in the law to carry out its execution." See, also, *Com. v. Bank of Pennsylvania*, 3 Watts & S. 173; *Suth. St. Const.* §§ 261, 431. It is needless to cite authorities to show that which is self-evident. It is manifest that an act of the legislative department cannot be enforced when its meaning cannot be determined by any known rules of construction. The courts cannot venture upon the dangerous path of judicial legislation to supply omissions or remedy defects in matters committed to a co-ordinate branch of the government. It is far better to wait for necessary corrections by those authorized to make them, or, in fact, for them to remain unmade, however desirable they may be, than for judicial tribunals to transcend the just limits of their constitutional powers.

Turning, then, to the act of April 9, 1895, upon which the attorney general bases his case, it will be observed that an attempt is made to regulate, by one general provision, the method of granting franchises of many different kinds. The privilege of constructing railroads, street railways, electric light plants, gasworks, waterworks, telegraph and telephone lines and extensions thereof, "above, across, along, beneath or through any highway, road, avenue, alley, park, square, street or other public land," the act declares, must be "sold at public auction to the responsible bidder who will give the largest percentage yearly of the gross receipts derived from such use and occupation." *Acts 1895*, p. 53. The provision is made equally applicable to each privilege or franchise mentioned. They are all placed upon the same footing, and, under the act, must be disposed of in the same way. The legislature evidently intended to make no discrimination. It will be seen, at a glance, that it is utterly impossible to give this act any reasonable or sensible construction as applied to railroads. If it means that the company must pay at least 2 per cent. of its entire gross earnings for the first five years (to be subsequently increased) to each municipality over whose streets it may be built, and to each county whose highways it may cross, the railway company, in many instances, will be compelled to pay more than its total receipts for the right to build its road over the highways and through the cities along its way. If, as some of the counsel suggest, the percentage should be computed only upon the gross receipts of that part of the road located upon the streets of the city, or across the highways, as the case may be, then we are met by the fact that there is no method provided (if it is possible to suggest one) by which the actual gross receipts of that particular part of the road can be ascertained. Such receipts will not necessarily be in the same proportion to the entire earnings as the length of the road upon the highways or streets may be to the entire length of such railroad. Travel may be greater or less upon one part of the road than upon another. Such a

rule would be an arbitrary one, which the act has not prescribed, and which will not comply with its terms.

Aside from these considerations, a continuous line of railroad cannot be subdivided so as to permit competition for the privilege of constructing and operating separately the portions thereof lying within the municipalities and across the highways upon its route. It cannot have been intended that, when a railroad is built to the boundaries of a city or to the limits of a public highway on its line, the right to construct such railroad through the city, or across the highway over which it must pass, must be "let at public auction to the responsible bidder who will give the largest percentage yearly of the gross receipts derived from the use and occupation" of such streets and highways. There cannot be any competition, in the very nature of the case, for the privilege of constructing and operating that part of a continuous line of railroad located within the limits of the highways or streets, as distinct from the entire road, which may extend over many miles.

Much that has been said applies with equal force to "extensions" of street railways, telegraph and telephone lines, gasworks, waterworks, etc., referred to in said act. An "extension" becomes part of the existing plant, and forms a continuation thereof. The pipes in an extension of a system of waterworks must connect with the reservoir, gas pipes with the gas holder, and the wires of a continuous telephone line with the central station. The privilege of making such an "extension" can only be conferred upon the owner of that which is to be extended. If granted to any one else, it must necessarily be an independent enterprise. A city may exact conditions for its benefit before it will consent to the use of its streets for such "extensions," or it may withhold its consent altogether. It may also authorize the building of an independent line or the construction of a new plant. An "extension," however, to be operated in physical connection with the original and as an integral part of one system, can only be made by the owner thereof. Then, too, an extension of a street railway gives an increased distance over which people may be carried for a single fare, and the act, as in case of railroads, gives no rule by which to determine the amount of the gross receipts to be credited to the new portion of the line.

It is argued that, notwithstanding the act must be held nugatory as to many of the franchises which it attempts to regulate, yet it can be applied to, and enforced against, this defendant, which obtained the city's consent to operate therein a new street railway. Without stopping to inquire whether the legislature intended to discriminate in favor of existing companies by permitting "extensions," for which, in the very nature of the case, there can be no competitive bidding, and, at the same time, requiring like privi-

leges, if applied for by others, to be let at public auction to the bidder offering the largest percentage of the gross receipts, we find insuperable obstacles in the way of any attempt to practically enforce the act. It provides that the right to use the public highways for street railroads "shall be sold at public auction to the responsible bidder who will give the largest percentage yearly of the gross receipts derived from such use and occupation, \* \* \* provided, that such payment shall in no case be less than two per cent. of the gross earnings during the first five years of such occupation and use, and thereafter, for each period of five years, such percentage shall be increased to correspond with the increase in value of the land thus occupied and used." Upon what gross earnings is the percentage to be computed? A large capital must be invested in the machinery and appliances for conducting a street railway, aside from the tracks laid in the streets. The act seems to contemplate that the bid shall be a percentage only of the receipts derived from the use and occupation of the public property. How is the proper proportion of the gross earnings that should be attributed to the capital invested in the power stations, machinery, etc., to be ascertained? Shall it be by valuing the entire plant, and deducting therefrom the proper valuation of the machinery, and apportioning the gross earnings according to these amounts? If so, how shall this value be fixed and by whom? The act furnishes no answer.

Again, the percentage is to be increased in "each period of five years" "to correspond with the increase in the value of the land thus occupied and used." But the act gives no intimation by whom or in what manner this increase is to be settled and determined. There is painful obscurity, too, as to what is meant by the "increase in the value of the land thus occupied and used." Some of the counsel for the state say that the proviso should be rejected in toto, as inapplicable to street railways, where the streets only are so occupied. The act, however, declares that the same rule shall govern the disposition of all the franchises mentioned therein. It was certainly designed to increase the percentage "as the years go by," where street railways are concerned, fully as much as in other cases. There is nothing to indicate that any special favors are to be accorded them. Then the act has to do almost entirely with franchises which involve the use of the streets only, and in which simply that privilege will be asked. If the requirement for an increased payment for the franchise, after five years, is meaningless in those cases, the proviso is practically eliminated. No one can say that the legislature would have passed the act with the feature increasing the percentage in each term of five years omitted. It forms a most material and important part of the plan contained therein. Counsel say that instances

may arise wherein a street-railway company, in addition to the occupation of the streets with its tracks, may also desire for some of its purposes the possession of land belonging to the municipality, and there the proviso can be made effective. This construction would bring up an additional difficulty. There is no possible method by which the gross receipts derived from the use and occupation of the lot of ground can be ascertained, and the act makes no provision for doing so. Other counsel for the state contend that "land," as here used, refers to the franchise granted, and that the per cent. of gross earnings to be paid for the same, under this proviso, must be increased every five years, in proportion to the increase in the value of said franchise, as shown by the gross receipts derived therefrom. It is argued, upon the other hand, that this cannot have been the intention, for the city at the original per cent. will receive its due share of any increase in the earnings. Counsel upon the same side of the controversy have been unable to agree as to the proper construction to be adopted. It will be thus seen that it cannot be stated with any degree of certainty what meaning should be ascribed to this part of the act. No bidder can know what he will have to pay under it. No municipal officer, when called upon to accept or reject a bid, can say what the city will receive by virtue of it.

It will be also noticed that the increase in the percentage is to be made for each period of five years in proportion to the increase in the value of the land. Between what years shall the comparison be made? Must it be the last year of the first period with the first year of the next, or the first year of the first term with the last year of that which follows? Or shall no rent be paid until the average valuation of one period of five years can be compared with the average of another, and in that way the ratio of increase be reached? Who shall say what years shall be selected for the purpose of comparison? The act gives us no data upon which to predicate a reply to these questions. These are matters which are not provided for therein, and without which the act cannot be carried into practical effect. The courts cannot aid the "defective phrasing of an act; we cannot add and mend, and by construction make up deficiencies which are left there." This attempt at legislation is so indefinite and uncertain, by reason of the effort to regulate the disposition of a great number of franchises by one general rule, that we must hold it incapable of practical operation and enforcement. Its provisions are so obscure that it is impossible to ascertain and declare their proper meaning. "If the terms in which a statute is couched be so vague as to convey no definite meaning to those whose duty it is to execute it ministerially or judicially, it is necessarily inoperative." Entertaining these views, we find it unnecessary to consider the other questions discussed by counsel. The return is adjudged

sufficient in law, and judgment entered for respondent.

GANTT, C. J., and SHERWOOD, BURGESS, ROBINSON, and BRACE, JJ., concur. MARSHALL, J., having, while city counselor of St. Louis, given an opinion concerning the validity of the act under consideration, declined to sit in the case, and takes no part in the decision.

#### COBB v. BARBER et al.

(Supreme Court of Texas. Nov. 28, 1898.)

CHATTEL MORTGAGES — CONVERSION — PARTIES — VENUE—JOINT DEFENDANTS.

1. A chattel mortgage may join the mortgagor with persons who had converted the mortgaged property to their own use, in an action to recover the amount of the mortgage.

2. An action to recover for conversion of property may be brought in any county in which any one of the defendants reside.

Certified questions from court of civil appeals of Fifth supreme judicial district.

Action by W. E. Cobb against A. W. Barber and others to recover the amount of a chattel mortgage executed by defendant Barber on certain property which his co-defendants had converted to their own use. The court of civil appeals certifies certain questions to the supreme court.

J. H. Barwise, Jr., for appellant. J. I. Campbell and J. M. Cooper, for appellees.

GAINES, C. J. In this case the court of civil appeals for the Fifth supreme judicial district has certified the following statement:

"The petition of the plaintiff, W. E. Cobb, alleged that A. W. Barber made, executed, and delivered his certain promissory note for \$950, on which plaintiff became liable as surety; that upon maturity of the note he, as surety, paid it off, and the note was transferred to him. Plaintiff further alleged that at the time of the execution of said note A. W. Barber made, executed, and delivered to H. M. Pollard, as trustee, a chattel mortgage, whereby he conveyed to said Pollard, as security for the payment of said note, certain cattle, a description of which is particularly set out in the petition, said cattle being in Potter county, Texas. It alleges the recording of the deed of trust, and that upon the maturity of the note all the cattle but 50 head were sold to pay off a prior lien thereon; and that the proceeds of the same were only sufficient to pay off the prior lien, leaving the 50 head of cattle undisposed of as the only security for plaintiff's note. The petition contains the following allegations relating to the defendants J. I. Campbell and J. M. Cooper, to wit: 'Plaintiff further shows that afterwards, on or about the 18th day of May, 1895, the defendants J. I. Campbell and J. M. Cooper, in total disregard of plaintiff's lien upon said 50 head of cattle, seized and



converted the same to their own use and benefit; that said cattle were at said time of the value of \$30 per head, and of the aggregate value of \$1,500, whereby plaintiff was damaged in the sum of \$1,500.' The petition alleged that the residence of Campbell and Cooper was in Randall county, Texas, and that the cattle were in Potter county, Texas. This suit was instituted in Dallas county, Texas, against A. W. Barber, J. I. Campbell, and J. M. Cooper. The defendant Barber, the maker of the note, is alleged to be a citizen of Dallas county, Texas. The plaintiff, W. E. Cobb, is a citizen of Wichita county, Texas. The petition does not allege that Campbell and Cooper, or either of them, are liable upon the note, nor that Barber acted with them in the alleged conversion, and does not pray for a joint judgment against all the defendants on either of the causes of action, but prays for judgment against Barber for the amount of the note, principal, interest, attorneys' fees, and costs, and against the defendants Campbell and Cooper for damages for the conversion of the cattle, and costs of suit. No foreclosure was sought in the suit. The defendants Campbell and Cooper filed a special exception to the petition to the effect that under the facts as set out in the petition there was a misjoinder of parties and causes of action, and that the district court of Dallas county had no jurisdiction as to them, and asked that they be dismissed from the suit."

Upon the statement so made the court have predicated the following questions:

"Question 1. There being no allegation of joint liability of Campbell and Cooper with Barber upon the note sued upon, and no allegation that Barber acted with Campbell and Cooper in the conversion of the cattle, and no prayer for a foreclosure of a lien upon the cattle, was there a misjoinder of causes of action or parties?"

"Question 2. It not being alleged that Campbell and Cooper were liable for the debt alleged against Barber, nor that Barber acted with them in the conversion, and foreclosure not being sought in the suit, did the fact that Barber resided in Dallas county give jurisdiction to this court in Dallas county over Campbell and Cooper, who resided in Randall county, and pleaded their privilege to be sued in the county of their residence?"

1. If the cattle which were mortgaged were still in existence, and were in possession of Campbell and Cooper, and if they were asserting some claim to them, and if this were a suit to foreclose the mortgage, it is clear that they would be proper parties to the action. On the other hand, if the mortgagor had sold the mortgaged property to the defendants named above, and they had converted it, the suit for the conversion, being a tort, could not, at common law, be joined with the action to recover of the mortgagor the debt secured by the mortgage. Whether, in such a case, the joinder of the two causes

of action would be permitted under the practice which prevails in our courts, may be doubted. But that is not precisely the question certified, and it need not be determined. Here the allegation is that the defendants have converted the property to their own use. It is not alleged that the mortgagor had in any manner parted with his title or equity of redemption in the cattle. Under the facts as pleaded, he has an interest in the damages resulting from the conversion to the full extent of the value of the cattle; for, although he had not paid the debt, it is to his interest that the damages should go to its extinguishment. If the damages should exceed that debt (a fact which he might assert as defendant in the action), he would be entitled to recover the excess. Had he brought a suit to recover damages for the conversion of the property, the plaintiff in this case would have been a proper, and probably a necessary, party; for the latter would have been entitled to so much of the recovery as was necessary to discharge the debt owed him by the mortgagor. If the plaintiff had sued Campbell and Cooper without joining Barber, under our practice the defendants in that suit would have been entitled, under proper averments, to have the latter made a party, to the end that they might be protected from the hazard of a double recovery. If such be the law, clearly the plaintiff was not required to pursue that course, and to subject himself to the delay that might have resulted from bringing in a new party. Our system does not favor the bringing of a multiplicity of suits, and therefore permits all causes of action growing out of the same transaction to be joined, and all interests in the same property or fund to be litigated, and the equities of the parties adjusted, in the same suit. We answer the first question in the negative.

2. It follows, as a corollary from what has been said, that all the defendants in this suit are proper parties to it. It is not the duty of a plaintiff to sue those who are proper, but not necessary, parties to it; but it is his right to do so. If rightfully defendants, the suit in a case of this character may be brought in any county in which either of the defendants resides. We answer the second question in the affirmative.

#### MAULDIN v. SOUTHERN PAC. CO.

(Supreme Court of Texas. Nov. 17, 1898.)

##### APPEAL AND ERROR—BOND—DISMISSAL.

Where a bond for costs, required as a condition to the granting of a writ of error, is not given within the time prescribed, the grant has no effect, and hence the application for the writ must be dismissed.

Application for writ of error to court of civil appeals of First supreme judicial district.

Action by Joseph C. Mauldin against the Southern Pacific Company. There was a judgment of the court of civil appeals (46 S.

W. 650) reversing a judgment for plaintiff, and he applies for a writ of error. Dismissed.

George H. Breaker, for applicant.

GAINES, C. J. The applicant for the writ of error in this case obtained a judgment against the defendant in the application in the trial court. The court of civil appeals reversed that judgment, and remanded the cause for a new trial. The applicant, in his petition for the writ of error, in order to give the court jurisdiction, alleged that the decision of the court of civil appeals "practically settled the case." We were of opinion that the ruling of the appellate court was decisive of the case, and therefore exercised jurisdiction and granted the writ. The applicant (being the appellee in the court of civil appeals) had given no bond, and under the statute and rules of this court he was required, in order to make the grant of the writ effective, to file a bond for costs within 10 days. The order granting the writ was entered on the 13th day of last October, and on the 24th day of the same month, upon his application therefor, the time was extended for an additional 10 days. That time has now expired, and no bond has been filed. The grant of the writ of error in such a case is upon condition that the bond must be given within the time prescribed by the rules or order of the court. The condition not having been complied with, the grant of the writ has become of no effect, and the application for the writ of error must be dismissed. It is accordingly so ordered.

#### GLASSCOCK v. PRICE et al.

(Supreme Court of Texas. Nov. 21, 1898.)

PARTNERSHIPS—ACTIONS—DISMISSAL AS TO PARTIES NOT SERVED—EFFECT ON JUDGMENT—JUDGMENT.

1. A judgment reciting that plaintiff was entitled to recover against two firms, "both of which firms are composed of" certain persons, including L., and, after dismissing against L., for nonservice, decreeing that plaintiff recover from the firms, "and the individual members of said firms, to wit," said certain persons, but not including L., shows on its face that L. is a member of the firm.

2. Where an action against a firm is dismissed as to one member for lack of personal service on him, judgment cannot be rendered against the firm, but only against the individual members served.

Error to court of civil appeals of Third supreme judicial district.

Action by Annie E. Price against M. P. Kelley and others to foreclose a vendor's lien. From a judgment of the court of civil appeals (45 S. W. 415) affirming a judgment of the district court for plaintiff, and holding the lien of the defendants Allen & Craig superior to that of defendant George W. Glasscock, the latter brings error. Judgment reformed so as to make the judgment lien of plaintiff in error superior to that of Allen & Craig, and otherwise affirmed.

West & Cochran, for plaintiff in error.

DENMAN, J. Plaintiff in error, G. W. Glasscock, on the 12th day of February, 1896, recovered in the district court of Williamson county a judgment in the following words: "G. W. Glasscock v. M. P. Kelley & Co. No. 3,210. The above numbered and entitled cause this day coming on to be heard by the court, came the plaintiff in person and by attorney, and the defendants in person and by attorney appeared, except the defendant R. Lyles, when the judgment herein rendered was agreed upon, to wit: That plaintiff, G. W. Glasscock, on his cause of action as pleaded, was entitled to recover the sum of 2,469 &  $\frac{86}{100}$  dollars from each of the defendants, to wit, the firm of M. P. Kelley & Co. and the firm of M. P. Kelley and Associates, both of which firms were composed of the following persons, viz.: M. P. Kelley, D. H. Snyder, J. W. Snyder, estate of Emzy Taylor, Lee M. Taylor as executor of said estate, Lee M. Taylor individually, R. Lyles, and the Georgetown & Granger Railroad Company, and the Trinity, Cameron & Western Railroad Company; and it further appearing that each of said defendants had filed an answer herein and agreed thereto, except the defendant R. Lyles and the defendant Frank Hamilton, plaintiff dismisses as to the defendants Frank Hamilton and R. Lyles individually. It is therefore considered, adjudged, and decreed by the court that the plaintiff G. W. Glasscock do have and recover of and from the defendants M. P. Kelley & Co. and M. P. Kelley & Associates, and the individual members of said firm, to wit, M. P. Kelley, D. H. Snyder, J. W. Snyder, estate of Emzy Taylor, through and against Lee M. Taylor as executor of said estate, and Lee M. Taylor individually, and of the Georgetown & Granger Railroad Company, and the Trinity, Cameron & Western Railroad Company, the sum of twenty-four hundred sixty-nine &  $\frac{86}{100}$  (\$2,469.86) dollars, and all costs in this behalf expended, and that this judgment bear ten per centum interest from date hereof, for all of which let execution issue after six months from this date." He had an abstract of this judgment properly recorded and indexed in the records of said county as required by the statutes in relation to judgment liens, as to all the parties mentioned therein, except R. Lyles, whose name was not given in any part of the index. The district court and court of civil appeals held that Glasscock did not thereby acquire a lien upon the land of M. P. Kelley situated in said county, and therefore refused in this cause to fix said judgment as a lien upon certain lands of said Kelley. If said ruling of the courts below was correct, the judgment must be affirmed; otherwise it must be reformed, foreclosing in favor of Glasscock said judgment, as a lien upon the land.

We are of opinion that the court of civil appeals were correct in holding that the judgment shows on its face that R. Lyles was one

of the partners in each of said firms. We are also of opinion that they were in error in treating the attempted judgment against "M. P. Kelley & Co. and M. P. Kelley and Associates" as having any force or effect in law. If we are correct in this, it follows that it could not possibly have bound Lyles, either as a partner or as an individual, and therefore it should not have been indexed as to him. At common law, independently of statute, a partnership had no legal entity, like a natural or artificial person. It was merely a status, "the result of a contract" (Smith, Merc. Law, 42), as is marriage. Therefore it could neither sue nor be sued. Suits affecting partnership matters must have been by or against the members of the firm. In some states statutes have been enacted authorizing suits to be brought by or against partnerships in their firm names, thus recognizing them as persons, in a qualified sense, but our statutes do not go so far. They merely provide that, when the partners are sued, service upon one of them will authorize a judgment against the one served and against the firm, but that no personal judgment or execution shall be awarded against those not served. Rev. St. 1895, §§ 1224, 1347. Under these articles partners not served are before the court through service upon one partner, their agent as to partnership affairs, in so far as the court may render a judgment by which their interest in the firm property may be reached (Alexander v. Stern, 41 Tex. 197), but no further. Thus, it was held in Burnett v. Sullivan, 58 Tex. 537, that where both partners were sued as partners, and only one was served, a judgment against the partner served, and against both as partners, providing that execution could only issue against the partnership property and the individual property of the partner served, disposed of all the parties to the suit, though the cause was not dismissed as to the partner not served; and in answer to the contention of appellants that the judgment was either a judgment against a defendant not served, or not a final judgment against him, the court say: "If a discontinuance as to the partner not served were entered, it is questionable whether or not the judgment could be rendered against the partnership property. That part of the judgment affects the interest of the partner not served as much as it does that of his co-partner. It is but proper that, for the purpose of having such interests reached by the proceedings, he should be brought into court in some way. The statute prescribes that this may be done through service on his co-partner, and that such service shall be good to bind his interest in the firm property, though to reach his separate estate he must have legal notice in person." In Frank v. Tatum, 87 Tex. 207, 25 S. W. 409, it was held that the dismissal as to some of the members of the firm of Goldfrank, Frank & Co. had the legal effect of dismissing the firm, and left the court without authority to render a judgment against the

partnership or its property; the court saying: "When the suit was dismissed as to all the members of that firm except A. B. Frank, the court had no further authority to enter judgment against the partnership or its property, and there remained no issue between plaintiff and that firm which the court could adjudicate under the pleadings. In so far as the partnership was a party by reason of joining all of its members, it ceased to be a party when that joinder was destroyed by dismissing as to some of them, and it left A. B. Frank individually to answer, instead of answering as a member of the firm of Goldfrank, Frank & Co." It was necessary to reach that conclusion in order to hold the judgment of the trial court, which did not in express terms make any disposition as to the firm of Goldfrank, Frank & Co., final. Since in that case the dismissal as to all the partners except A. B. Frank left him as a party only in his individual capacity, and deprived the court of all jurisdiction and power to render a judgment affecting the firm property, it follows as a logical necessity that in the case before us the dismissal as to R. Lyles left the court without jurisdiction to render a judgment against either of the firms of which he was a member, and that the judgment above set out must be held to be effective only as a personal judgment against the individuals. Since the judgment does not affect Lyles either as a partner or as an individual, the courts below erred in holding that it did not become effective as a lien upon the property of M. P. Kelley by reason of the omission of the name of Lyles from the index.

In disposing of the case upon the ground stated above, we do not wish it understood that we would have held that the judgment, being properly indexed as to M. P. Kelley, was not a lien upon his individual property, had we thought the judgment against the partnerships valid. We express no opinion upon that question. The judgments of the trial court and court of civil appeals affirming same will be reformed so as to fix said judgment as a lien prior to that of the attachment of Allen & Craig, and to award to Glasscock his costs against Allen & Craig, and in all other respects they will be affirmed.

#### MIXON v. MILES et al.

(Supreme Court of Texas. Nov. 28, 1898.)

#### APPEAL—REVIEW.

1. An instruction can be reviewed only as to the particulars in respect to which error is assigned.

2. In an action for damages for the wrongful sale of land by a trustee, the measure of damages is the value of the land at the time of the trial, or the price it sold for, with interest, and not "the market value of the lands at the date" defendant sold them.

Application for writ of error to the court of civil appeals of Third supreme judicial district.

Action by Cora Miles and others against D. C. Mixon to recover damages for the wrongful sale of lands held by defendant as trustee. Judgment for plaintiffs was affirmed in the court of civil appeals (46 S. W. 105), and defendant applies for a writ of error. Application refused.

Dyer & Dyer, for applicant.

GAINES, C. J. *Boothe v. Fiest*, 80 Tex. 141, 15 S. W. 799, was a case very like the case now under consideration. There the claim of the plaintiffs was that they had made to the defendant a deed to a tract of land, which, although purporting to convey the title, was intended merely to secure a loan of money, and that the defendant, in violation of the agreement, had sold the land to an innocent purchaser. It was held that the measure of damages was either the purchase money for which the land was sold and interest, or the value of the land at the time of the trial, at the option of the plaintiffs, less, of course, in either case, the amount of the mortgage debt. The general rule there announced applies in this case, though in this there was no mortgage debt to be deducted. The court, however, in the present case, charged the jury, in the event they found for the plaintiffs, to find, as the measure of their damages, the value of the land at the time the suit was instituted. But there is no assignment in the petition for the writ of error filed in this court which questions the correctness of the charge in that particular. The applicant does assign that the court of civil appeals erred in not holding that the trial court should have given a special charge requested by him "to the effect that, if the jury found in favor of the plaintiffs, the measure of damages would be the market value of the land at the date appellant sold the lands." Under the ruling in the case cited, it would have been manifest error to have given this charge. We have examined the other assignments made in the petition for the writ, and have reached the conclusion that no error is shown by any of them. The application is therefore refused.

#### CRARY v. PORT ARTHUR CHANNEL & DOCK CO.

(Supreme Court of Texas. Nov. 21, 1898.)

EMINENT DOMAIN—CHANNEL AND DOCK COMPANIES—POWERS.

1. Under Rev. St. arts. 721, 722, authorizing corporations organized to construct channels from the waters of a gulf along and across any of the bays of the coast to condemn land and construct channels along the waters of the bays and so far inland as to reach places of safety for their docks, such a company may construct its channel on the land adjacent to a bay, as well as through the bay itself; and this though the channel starts at a point on the bay within tide water, and not from the gulf, since the term "waters of the gulf" embraces tide-water inlets.

2. Under Rev. St. arts. 721, 722, authorizing channel companies to construct channels from the gulf inland, and condemn land therefor, such a company need not show permission of the secretary of war for such construction before condemning land, since the secretary's consent does not concern the landowner.

3. Under Rev. St. art. 722, authorizing channel companies to construct channels from the gulf so far inland as to reach places of safety from storms and tidal waves for their docks, and to condemn land therefor, such a company need not show, to entitle it to condemn, that such condemnation is necessary for it to reach a place of safety.

Certified questions from court of civil appeals of First supreme judicial district.

Condemnation proceedings by the Port Arthur Channel & Dock Company against Charles T. Crary. Judgment for plaintiff. Appeal to the court of civil appeals, and questions certified.

Votaw, Martin & Chester, A. H. Willie & Sons, and Coke & Coke, for appellant. Greer & Greer, for appellee.

GAINES, C. J. The court of civil appeals for the First supreme judicial district has certified for our determination the following questions: "The Port Arthur Channel & Dock Company was organized as a private corporation under the general laws of this state for the purpose expressed in the second article of its charter, as follows: 'Second. The purposes for which this corporation is formed are to construct, own and operate a deep water channel from the waters of the Gulf of Mexico at Sabine Pass, along and across Sabine Lake on the coast of Texas, to a point on the mainland at or near the town of Port Arthur, in the county of Jefferson and state of Texas, for the purposes of navigation and transportation, and to construct, own and operate docks along the coast of the state of Texas, at or near said channel, for the protection and accommodation of ships, boats and all kinds of vessels for navigation and their cargoes, with full authority to exercise all of the rights and privileges described by chapter fourteen of said title 21 of said Revised Statutes [of 1895] of Texas, and all acts amendatory thereof and supplemental thereto.' It seeks to condemn land belonging to the appellant, through which to cut its proposed channel, and this appeal is from a judgment of the county court of Jefferson county by which the land was condemned. Sabine Pass connects Sabine Lake with the Gulf of Mexico. It is about nine miles long, is of an average width of four-fifths of a mile, and has an average depth of thirty feet. Sabine Lake is a much larger body of water. From Mesquite point, at its exit into the pass, the Texas shore of the lake runs for some distance almost due west, and then trends in a northwesterly direction, and finally in a northeasterly direction, until Port Arthur is reached, which is situated near the shore of the lake. Appellee proposes to cut its chan-

nel from a point on Sabine Pass about four miles from its entrance into the Gulf of Mexico, and thence inland to Port Arthur. The proposed route running from Sabine Pass enters the mainland immediately, and runs thence in a northwesterly direction, departing from the course of the pass and approaching the shore of the lake, which it reaches at about the distance of three miles from the beginning. It runs along the shallow edge of the lake the distance of about one-half of a mile, the right of way extending into the water, but the channel proper being on the shore, and then gradually diverges from the shore line until it reaches Taylor's Bayou, which it crosses about 2,000 feet from its mouth, and continues thence in a northeasterly direction to the town of Port Arthur. The land sought to be condemned lies from the beginning point at Sabine Pass to the place where the line strikes the lake, and from this place to its northern end the channel is wholly upon the land of appellee, and appellee's projected docks at Port Arthur will be upon its own land. Taylor's Bayou empties into Sabine Lake, and is wholly within the state of Texas. It is a navigable stream for about 25 or 30 miles from its mouth. It is about 300 feet wide and 25 feet deep, but at its mouth in the lake the water is only three and a half feet deep, and vessels drawing a greater depth cannot enter it. The channel is inland entirely within the state of Texas. Its general course is that of the shore of the lake along and near which it runs. It will be about nine miles long, twenty-four feet deep, and one hundred and eighty-three feet wide, except at its mouth at Sabine Pass, where it will be two hundred and fifty feet wide. The topography of the country over which the route lies is low and level. Destructive storms of more or less violence have visited Sabine Pass. Shipping in the stream and houses in the town have been destroyed by storms, with great loss of life to the people. Bodies of persons drowned and debris have been thrown upon the northern shore of the lake as far north as the place where Port Arthur now is. Appellant in its answer pleaded that, in order to give appellee the right to construct its channel, it was necessary for it to first obtain the permission of the secretary of war, as provided by act of congress, which had not been done. To this the court below sustained a demurrer by the appellee, and no proof of such consent was made. The disposition of the case involves the determination of the following questions, which are certified to the supreme court for their decision: (1) Has the appellee authority, under the law providing for the creation of channel and dock corporations, to cut its channel inland along the proposed route, or must the channel be confined to the waters of the lake? (2) In order to authorize the appellee to maintain its suit to condemn the land of appellant for the construction of its

channel, is it necessary for it first to obtain the permission of the secretary of war, as prescribed by act of congress? Or can appellant raise the question in this proceeding? (3) In order to give the appellee the right to condemn the land of appellant for the construction of its channel, must it show that such condemnation is necessary to enable the appellee to reach a place of safety for its docks?"

In 1874 our legislature enacted a general law authorizing the creation of private corporations for certain specified purposes. Laws 1874, p. 120. In this act authority was given for the organization of corporations for "the construction of canals for the purpose of irrigation or manufacturing purposes." No authority was given for creating a corporation for the construction of deep-water channels for the purposes of navigation, unless it was conferred by the last subdivision of section 5 of the act. That section specifies, in 27 subdivisions, the several purposes for which corporations may be created, the last of which reads as follows: "(27) For any other purpose intended for mutual profit or benefit not otherwise especially provided for, and not inconsistent with the constitution and laws of this state." The constitution of 1876 provided that private corporations should only be established by general laws, and in the Revised Statutes of 1879 the act was embodied as title 20, with some omissions made necessary by other limitations in the organic law. In that title section 5 was incorporated as article 566. It seems that the subject of deep-water channels received neither the attention of the legislature which passed the original act, nor of that which enacted the Revised Statutes of 1879. Article 566 was amended in 1885, but not only was there no express authority given by the amended article for incorporating companies for the purpose of making deep-water channels or canals for navigation, but subdivision 27, quoted above, was wholly omitted. Under that subdivision only was any authority conferred for creating corporations for the purpose of constructing canals or deep-water channels for navigation, and no authority whatever was given for condemning land for such purposes. But at the session of the legislature which was held in 1887 a change of legislative policy was manifested, for which it is not difficult to account. A few months previous to that session a disastrous storm had visited our coast, and had destroyed much property and many lives. Not many years before, a disaster probably still more serious had occurred. Not only was much property destroyed, and many lives lost, but one of our most flourishing seaport towns was completely swept out of existence. In the interval between the two there were, as we recollect, one or more similar disasters, which were not so great, but which were sufficient to admonish our legislators of the danger of building up towns upon our

low-lying and storm-swept coast, and to suggest the policy of encouraging by appropriate laws the deepening of our water ways, and the digging of canals through which the shipping of the gulf could pass and reach more elevated ground, where the danger would be materially lessened, if not altogether avoided. The twentieth legislature, which met in 1887, passed two acts relating to the subject under consideration, both as amendments or additions to title 20 of the Revised Statutes, which was the then existing general law which authorized the creation of private corporations, and defined their powers and duties. The first was passed March 23, 1887, and amended article 506, which, as we have seen, enumerated the purposes for which such corporations could be created. Where the previous law read, "The construction of and maintenance of canals for the purpose of irrigation or for manufacturing purposes," the amendment read, "The construction and maintenance of canals for the purpose of irrigation, navigation or manufacturing." Laws 1887, p. 41. Again, in the amendment another subdivision was inserted, which is as follows: "(25) The construction of harbors and canals on the coast of the Gulf of Mexico." A few days after the passage of this amendment the second law last referred to was enacted. This statute defined the special powers and liabilities conferred upon "deep water channel" and "dock companies" on the coast of the Gulf of Mexico. This last act was amended in 1895, but the amendment only affected the question of the width of the strip of land which "deep-channel" corporations were permitted to condemn for their rights of way. As so amended it was incorporated in our present Revised Statutes as articles 721 and 722. Article 722 was again amended by an act which took effect in the month of March, 1897. It is now the existing law upon the subject, and the law which we are called upon to construe. Articles 721 and 722, as amended, in so far as the latter bears upon the questions certified, are as follows:

"Art. 721. This title shall embrace and include the creation of private corporations for the purpose of constructing, owning and operating deep water channels from the waters of the Gulf of Mexico along and across any of the bays on the coast of this state to the mainland, for the purposes of navigation and transportation, and for the construction, owning and operating docks on the coast of this state for the protection and accommodation of ships, boats, and all kinds of vessels for navigation and their cargoes.

"Art. 722. Every such channel corporation shall, in addition to the powers herein conferred, have power: (1) To cause such examination and survey for its proposed channel to be made as may be necessary to the selection of the most advantageous route for such purpose by its officers, agents or servants to enter upon any of the waters of such bays

and upon any of the lands of this state, or of any person. (2) To take and hold such voluntary grant of real estate and other property as shall be made to it to aid in the construction and maintenance of its deep water channel and works pertinent thereto. (3) To construct its channel across, along, through or upon, any of the waters of the bays within the jurisdiction of this state, and so far into the mainland as may be necessary to reach a place for its docks that will afford security from cyclones, storms, swells, and tidal waves, with such depth as may suit its convenience and the wants of navigation, not less than five feet, and a width of not less than forty feet. \* \* \* (6) To enter upon and condemn and appropriate any lands of any persons or corporation that may be necessary for the uses and purposes of such channel corporation, the damages for any property thus appropriated to be assessed and paid for in the same manner as provided by law in the case of railroads; provided, that no damages shall be assessed against or paid by it for any portion of the route of the channel embraced within and covered by the waters of any bay or lake on the coast of this state, nor for any portion of any island belonging to the state that may be requisite and necessary to the construction and successful operation of its channel; and provided, further, that its right of way shall not be less than the actual width of its channel, and not more than seven hundred feet in width on each side of its channel; provided, that when the land sought to be condemned under this chapter is arable land, such right of way shall not extend further than six hundred feet on each side of the channel from the edge or boundary of said channel. (7) To construct, own and operate its channel so far into the waters of the Gulf of Mexico as may be necessary to obtain an adequate depth of water at its gulf entrance to facilitate the ingress and egress of such vessels as may navigate the same in so far as this state may have the power to grant such right, which shall be in subordination to that of the government of the United States in so far as that government has the constitutional power to control the same."

1. The first question is, in substance, whether or not the Port Arthur Channel & Dock Company has authority to construct its channel along its proposed route, and we are of opinion that it must be answered in the affirmative. It is urged in argument that the word "along," as used in article 721 and subdivision 3 of article 722, means along and upon the waters of the bay; and it is claimed that in construing the word the other prepositions used in the disjunctive in the subdivision mentioned should be looked to, and the rule "*noscitur a sociis*" should be applied. On the contrary, we think that the canon of construction which requires a distinct meaning to be given to every word is more properly applicable to

the phrase in question. It is true that "through the waters" and "upon the waters" mean practically the same thing. A channel through the water must be upon the water, and one upon the water must be through the water, in any ordinary meaning which can be attached to these terms. So, also, it is quite clear that the word "across" might have been omitted without changing the meaning of the language employed. It is not so, however, with the word "along." "Along a bay" may mean along the waters of the bay. If such was the meaning of the word, it might have been dropped out of the statute in question without in any manner affecting its sense. But it does not follow that, because one word in a statute or other writing may be omitted without changing the sense, another should be omitted, which in one of its meanings adds nothing to the construction, while in another it enlarges the scope of the language. A statute which authorizes the construction of a railroad along a river means that the road is to be constructed on the land near to, and in the general direction of, the river. A statute giving a right to construct a channel for navigation along a body of water may mean either that it is to be dug under the water lengthwise of the lake, bay, or stream, as the case may be, or upon the land alongside of it. The meaning must be determined in every case by the context and the general purpose of the enactment. Unless we give the word "along" the latter construction in the statute in question, we must say that the legislature has employed a term which is mere sound, and signifies nothing. Again, as may be seen from what has already been said, we are of the opinion that the history of the country and that of the legislation upon this subject tends to show that in the enactment of the laws in question the legislature was impelled by an earnest desire to encourage the opening of waterways to the gulf, and thereby to promote the commerce of the state. Such being the case, it is not reasonable to conclude that it was the purpose to hamper enterprises of the character of that in question by throwing around them restrictions for which no necessity exists. There may be points upon our coast at which it is feasible to dig and maintain a channel upon land, and not practicable to open and maintain one wholly through the water. If it be to the public interest to permit corporations to be created to open channels through the water, why not upon the land? The only difference we can see is that in the one case it may be necessary to condemn private property, and in the other it may not. But why should there be hesitation on this account? Property in this state cannot be taken for a public use without making full compensation to the owner for its value, and, to him and all others who suffer any special damage by the construction or operation of the

work, payment in full for such damage. But, again, if the words, "across, along, through or upon any of the waters of the bays," etc., standing alone, would not confer the right to cut a channel upon the land by the side of the bay, we are of the opinion that the authority given by the subdivision under consideration to construct "so far into the mainland as may be necessary to reach a place for its docks that will afford security from cyclones," etc., are sufficient to confer the power to cut the channel in question. The statute prescribes no length of the channel through the water, and permits it to be constructed sufficiently far into the mainland to reach a place of safety, without prescribing any direction which it shall take. Any channel through the mainland connecting with the waters of the gulf must, upon a flat coast, of necessity enter the waters for some distance so as to reach the open sea. It follows, in our opinion, that a channel which commences at the waters of Sabine Pass and penetrates the mainland to the point of safety is a compliance with the law, whether it run wholly on the mainland, or partly on the land and partly through the waters of the lake. That the channel was not to be confined to the waters is also shown by that provision in subdivision 6 of article 722 which confers the right to take land upon any island belonging to the state without making compensation therefor. But it is also insisted that the channel in question is not authorized by the statute, for the reason that it does not start "from the waters of the Gulf of Mexico," as prescribed in article 721. The contention seems to be that by "the waters of the gulf" is meant the gulf itself. But we think the language in question is far more comprehensive than it would have been had the statute read, "from the Gulf of Mexico." We are clearly of the opinion that the terms are sufficiently broad to embrace at least all bays, inlets, and streams upon the gulf coast, to the extent to which they are subject to the ebb and flow of the tide. We are also of the opinion that we should take judicial notice that the tide ebbs and flows through Sabine Pass. *Peyroux v. Howard*, 7 Pet. 324. From these conclusions it follows, as we think, that a channel which proceeds from Sabine Pass proceeds from "the waters of the gulf," within the meaning of the provision under consideration.

2. We are also of the opinion that the second question propounded by the court of civil appeals should be answered in the negative. It occurs to us that if the appellant has the right to say that, since the appellee has not yet obtained the consent of the secretary of war for the construction of its proposed works, it has no authority to condemn his land, the secretary may with equal propriety withhold his consent until the land is condemned. So, again, one proprietor whose land is sought to be condemned for

the construction of a canal, railroad, or other like public improvement, might with as much reason urge that his property ought not to be taken because the right to use other land necessary to the completion of the work had not been acquired. It is evident that under that rule no enterprise of the character of that in question could be prosecuted to a successful end where two proprietors whose lands were necessary to the work would seek to obstruct it. Besides, if the consent of the secretary of war be not obtained, it does not follow that the United States would see proper to interfere with the construction or use of the channel. Should the government, after appellant's property has been taken, see proper to obstruct the enterprise and prevent either the completion of the work or the use of the channel, the land would be discharged of its burden, and he would enjoy it in full property, without restoring the compensation which had been paid him. The legislature has authorized the company, upon the filing of its charter and the completion of its organization, to condemn lands for the purposes of its incorporation, and in our opinion the consent of the secretary of war to the construction of the works upon the navigable waters of the pass and lake is a matter with which the appellant has no legal concern.

3. In providing in the third subdivision of article 722 that a channel corporation shall have the right to construct its channel "so far into the mainland as may be necessary to reach a place for its docks that will afford security from cyclones, storms, swells and tidal waves," the legislature, as we think, intended to confer a privilege, and not to place a restriction, upon such corporations. To have required that a place of absolute safety should be reached would in most instances have required the impossible, and would have rendered the whole legislation nugatory. The corporation, of all persons, natural or artificial, is most interested in the safety of its docks, and its interest would in every case lead it to select a locality as safe as practicable. The meaning of the language, in our opinion, is the same as if the statute had read, "and so far into the mainland as the corporation may deem necessary;" etc. We therefore answer the third question in the negative.

In the case of *Davis v. This Appellee*, 31 C. C. A. 99, 87 Fed. 512, the United States circuit court of appeals for the Fifth circuit held in accordance with our views upon the first question. We infer from the briefs in that case that the question of the consent of the secretary of war was before the court, but it seems that evidence was introduced to show that his consent had been obtained. Whether the court held that consent was shown, or that it was not necessary, we are unable to determine, since the question is not treated in the opinion.

## HOUSTON, E. & W. T. RY. CO. v. RUNNELS.

(Supreme Court of Texas. Nov. 28, 1896.)

TRIAL — INSTRUCTIONS — WEIGHT OF EVIDENCE — HARMLESS ERROR.

1. In an action against a railroad company for personal injury, plaintiff relied solely on his own testimony. As to the main facts, there was a positive conflict between his testimony and that of the conductor and brakeman, who were charged with negligence. The court commented on the weight of the testimony by charging that, "in determining what weight you will give the testimony of any witness, you are authorized to consider \* \* \* their apparent prejudice, if any." *Held* reversible error.

2. An instruction that, in determining the weight of the testimony, the jury may consider the apparent prejudice of the witnesses, comments on the weight of the testimony, notwithstanding it further allows a consideration of "all other facts and circumstances in the case."

Error to court of civil appeals of First supreme judicial district.

Action by R. R. Runnels against the Houston, East & West Texas Railway Company. From a judgment in favor of plaintiff in the district court, defendant appealed to the court of civil appeals, where the judgment was affirmed. 46 S. W. 394. Defendant brings error. Reversed.

Baker, Botts, Baker & Lovett, J. C. Feagin, and O. S. Parker, for plaintiff in error. Branch, Garrison & Blount, for defendant in error.

BROWN, J. We copy the following facts found by the court of civil appeals: "Appellee, who was a wood chopper in the employment of the appellant, and as such was accustomed to traveling upon passes upon freight trains over its road, on the 11th day of July, 1896, at Houston, procured a pass entitling him to travel from that place to Humble. He resided near the railroad, at a point about three miles beyond Humble from Houston. There was a wood yard near his home, at which such trains sometimes stopped to take on wood. He entered a freight train, and traveled upon it to and beyond Humble, at which place no stop was made. The trains did not always stop there, and appellee did not insist upon having this train stop there. When the train reached the neighborhood of appellee's house, the conductor ordered the brakeman to flag the engineer to stop, which was done; and the speed of the train was reduced to a rate slow enough to have enabled appellee to get off safely, and the conductor directed appellee to get ready and get off. Appellee went out of the caboose, in obedience to this direction, and stood upon the step, which was wet and slippery, waiting to get off, when there came a sudden jerk, which caused him to slip and fall from the step, still holding the handrail. He was thus pulled some distance, until his foot or clothing was caught by a spike, and he was then jerked to the ground, suffering severe injuries. The evidence conflicts as to the circumstances un-



der which he left the caboose; the conductor and brakeman stating that he did so, not only without any direction, but against the orders of both of them. This conflict was submitted by the charge, and we find the above facts in support of the verdict. We also conclude that appellant's servants were guilty of negligence in thus acting and operating the train, and that appellee was not guilty of negligence. The sufficiency of the evidence to sustain the verdict is not questioned by the assignments. The appellant introduced evidence tending to show that appellee had made statements concerning the transaction in conflict with his testimony, and tending to show that his general character for truthfulness was bad. Appellee undertook to explain the one and to rebut the other by evidence as to his good character for veracity. Appellant, in cross-examination of appellee, showed that he had been convicted of theft, a misdemeanor; and appellee was then allowed, over objection, to testify to facts showing that he was not guilty, but had been wrongfully convicted. The conviction took place six or seven years before this trial."

The plaintiff relied solely upon his own testimony for a recovery. As to the main facts attending the injury, there was, between the plaintiff and two of the defendant's employees who testified, as positive a conflict as can be produced by opposing affirmative and negative statements. The conductor and the brakeman bore such a relation to the facts of the case as made them guilty of negligence, if the statements of the plaintiff were true, and they might "apparently" be prejudiced against the plaintiff. The judge of the trial court instructed the jury as follows: "If you should find there to be a conflict in the evidence, it will be your duty to reconcile such conflict, if you can, so as to give credit to the whole of the testimony. If you should be unable to reconcile such testimony, then you must decide for yourselves as to which testimony you will believe; and, in determining what weight you will give the testimony of any witness testifying in the case, you are authorized to consider age, intelligence, their manner of testifying, their apparent prejudice, if any, and all other facts and circumstances in the case, and you can give to such witness testifying in the case such weight and credit as you see fit." The law does not impose upon a jury the duty of reconciling a conflict in the testimony of witnesses. It is impossible to reconcile positive and unequivocal affirmative and negative evidence. Seeming conflicts may be shown not to exist, but a real conflict between witnesses can only be disposed of by discarding the testimony on one side of the issue. It is the province of the jury to pass upon the credibility of the witnesses, and they may disregard the testimony of a witness who has neither been impeached nor contradicted, if they believe his statements to be untrue from his manner of testifying, prejudice exhibited towards the oppo-

site party, or his interest in the result of the litigation, or other things indicating that the evidence is not reliable. *Cheatham v. Riddle*, 12 Tex. 112; *Coats v. Elliott*, 23 Tex. 613. The law has not, however, prescribed as tests of credibility the demeanor of a witness, his prejudice, etc., but courts have refused to set aside verdicts rendered upon conflicting testimony, when the apparent weight was against the finding of the jury, and in support of their rulings have generally assigned the reason that the witnesses were before the jury, who had the opportunity to see their manner of testifying, to observe whether they disclosed prejudice in the case, and other matters which would indicate the want of truth in their statement, either from intentional misstatement or from other causes, and might have discredited some of them, making the weight of the credible evidence to differ from that which appears of record. This is a rule by which courts are governed, and not to control juries in passing upon the credibility of witnesses. While a jury may consider everything named in the charge, it is not proper for a judge who presides at a trial to prescribe them as tests to be applied by the jury, because in so doing he comments upon the weight of the testimony. *Dwyer v. Bassett*, 63 Tex. 277; *Willis v. Whitsitt*, 67 Tex. 677, 4 S. W. 253; *Davidson v. Wallingford*, 88 Tex. 624, 32 S. W. 1033. In the case last cited, Chief Justice Gaines said: "The court should simply have charged that the jury were the judges of the credibility of the witnesses and the weight of the evidence. The effect of the instruction was to lead the jury to believe that there was more question as to the credibility of the witness who was named than as to that of the other witnesses. Whether such was the fact or not is a matter solely for the determination of the jury, without any intimation, either direct or indirect, as to the opinion of the judge." Chief Justice Willie, in commenting upon a very similar charge, in the case of *Willis v. Whitsitt*, cited above, said: "The appellee was the only witness examined who had any real pecuniary interest in the suit. By giving the charge the court would have said, in effect, that the jury should take into consideration the appellant's interest, in determining whether or not they should believe his testimony. Such a charge is virtually upon the weight of the evidence, tending to make the jury believe that in the opinion of the judge the testimony of a particular witness was not entitled to much weight in making up their verdict. Such a charge is inconsistent with the freedom allowed to the jury in passing upon the weight of testimony and the credibility of witnesses." The charge before us virtually called the attention of the jury to the fact that some of the defendant's witnesses might be prejudiced, and invoked their attention to it in determining the conflict between them and plaintiff. *Dwyer v. Bassett*, cited above. In that case the court said: "The mere fact that

such a charge was given was calculated to influence the jury to believe that, in the opinion of the court, there were 'attendant circumstances' which would authorize them to disregard his testimony; for, unless there be evidence to authorize the giving of the charge, it should not be given." If the judge did not believe there was "apparent prejudice," why mention it?

It is claimed by counsel for the defendant in error that the charge complained of in the present case was not objectionable, because it did not confine the jury to the things particularly specified, but authorized them to consider "all other facts and circumstances in the case." The error consisted in specifying the particular things which the jury might consider, which things, in the state of the facts before the court, pointed with more or less force to particular witnesses who had testified in the case, and was not cured by referring to all other facts. The court erred in giving this charge to the jury, for which the judgment must be reversed.

We have examined the other grounds of error assigned in the application, but find that the most of them relate merely to the manner in which the case was presented, and will not probably arise upon another trial. The fourth ground of error complains of the refusal of the court to give special instructions asked by the defendant. We think that the instructions were not in such form as to require the court to give them. Besides, in our opinion, the charge of the court fully presented the propositions indicated by the special charge, so far as they were justified by the law. For the error indicated, the judgments of the district court and court of civil appeals are reversed, and the cause is remanded.

#### GRIFFIS v. PAYNE.

(Supreme Court of Texas. Nov. 28, 1898.)

APPEAL—REVIEW—DEEDS—DELIVERY TO THIRD PERSON—TRIAL—MOTION TO STRIKE EVIDENCE—HARMLESS ERROR.

1. Where, on an issue of fact, the testimony is such that the supreme court cannot say that the finding of the jury is unsupported by evidence, an affirmance by the court of appeals is conclusive.

2. Where a grantor parts with all control over his deed when he delivers it to a third person for delivery to his grantee on the grantor's death, the conveyance takes immediate effect, and vests in the grantee title to commence after the grantor's death, but otherwise it does not.

3. Where a witness was asked if he saw a certain person on a certain day, and, if so, to state the circumstances of the meeting, and replied that he did not, but saw him the day following, and stated the circumstances, a motion to strike from the answer the circumstances recited, as not responsive, was properly overruled, where the date was not material.

4. Where incompetent evidence has been allowed, in favor of the prevailing party, as to a material point not clearly established by competent evidence, it is ground for reversal.

Error to court of civil appeals of Fifth supreme judicial district.

Trespass to try title by Zege Payne against T. E. Griffis. From an affirmance of a judgment for plaintiff in the court of civil appeals, defendant appeals. Reversed.

Lightfoot, Denton & Long and Allen, Hathaway & Allen, for plaintiff in error. Hale & Hale and E. W. Fagan, for defendant in error.

BROWN, J. J. A. W. Burris was a single man, living in Lamar county upon a farm, who some years before his death made a will by which he devised the land in controversy to T. E. Griffis. The will was duly probated after the death of Burris, and Griffis claimed the land under that will. A short time before his death, Burris made a deed by the terms of which he conveyed the land to Zege Payne, his nephew, and delivered the deed to one Wagoner, to be held by him until the death of Burris, after which it was to be delivered to the grantee. Defendant in error, who was plaintiff below, claimed the land under that deed. The only contested issues in the case were (1) the genuineness of the deed, it being claimed by Griffis that it was a forgery; and (2) the effect of the deed, the claim being made that it was never delivered to Zege Payne, nor to any one for him, but was delivered by Burris to Wagoner, to be held subject to Burris' order and right of repossession until his death. Upon these issues the court of civil appeals found the facts as follows: "(1) The deed from Burris to Payne was not a forgery, but was genuine; (2) the deed was delivered to Wagoner by Burris with the direction that it should be delivered to Zege Payne, or to his father for him, upon the death of Burris; and it was the intention of Burris to surrender all power and control over it." The district court entered judgment for Zege Payne against Griffis for the land, which judgment was affirmed by the court of civil appeals.

The plaintiff in error assigned in this court the following objections to the judgment of the district court and the court of civil appeals: (1) That the undisputed evidence shows that Burris, the grantor, never lost control in his lifetime of the deed in question, and that the court of civil appeals erred in finding that he had intended to surrender his control of it; (2) the court of civil appeals erred in refusing to sustain the assignment which called in question the correctness of the trial court's charge; (3) that the trial court erred in overruling appellant's motion to strike out a portion of Dr. Black's answer to the fourth interrogatory; (4) the court erred in admitting the testimony of G. T. Tarrant as to the contents of letters written to him by Burris which were lost.

Upon the issue, did Burris relinquish all control over the deed to Zege Payne when he

placed it in the possession of Wagoner, the testimony of the latter was so indefinite and uncertain that, if the jury had decided the question in favor of either party, this court could not have said that the verdict was without evidence to support it. In such state of case, the finding of the court of civil appeals upon that question of fact is binding upon this court. The trial judge with much clearness correctly submitted to the jury the rules of law by which they would determine the issue of fact. In substance, the court charged the jury that, if they believed from the evidence Burris parted with all control over the deed when he delivered it to Wagoner, then the conveyance took effect at that time, and vested in the grantee a fee-simple title, to commence after the death of the grantor, which would entitle the plaintiff to recover. The charge correctly stated the reverse of this proposition, in favor of defendant. There was no error in the charge of the court. In our opinion, article 632 of the Revised Statutes of 1895 does not relate to this character of transactions, but the statement of the contrary view of that article by the court of civil appeals did not affect the decision of this case, and need not be reviewed by this court.

Plaintiff in error complains that the trial court refused to strike out the answer of Dr. Black to the fourth interrogatory, which is as follows: "State whether you saw said Burris on the 28th day of November, 1896; and, if yea, where did you see him, where was he going, and where had he been, and where did he say he had been, if he said anything about it?" To this the witness answered: "I did not see said Burris on the 28th day of November, 1896, but did see him on the 29th day of November, 1896, at my office at Milton. At that time he said he was going home; that he had been to Frank Wagoner's to attend to business." The motion was to strike out all of the answer after "the 28th day of November, 1896," because it was not responsive to the question. The deed purported to have been made on November 28, 1896, at the house where Frank Wagoner lived. The material part of the question was that which sought to elicit from the witness what the deceased said, where he had been, and where he was going at the time, and not the particular day on which he saw him. Whether this testimony supported the contention that the deed was executed by Burris was a matter of argument, to be addressed to the jury, but the discrepancy between the date inquired of and the date stated in the answer did not render the evidence inadmissible. There was no error in overruling this motion.

It is not denied by counsel for Payne that it was error to admit the statement of G. T. Tarrant that the contents of letters written to him by Burris, some of which were not produced in court, "indicated that Burris was unfriendly to the whole family of T. E. Grif-

fis, except Mrs. Tarrant and Joe Griffs"; but counsel insist earnestly that the fact of ill will on the part of Burris towards Griffs was so thoroughly established by the letters introduced, and other evidence in the case, that the error of admitting this testimony was harmless, and should not cause a reversal of the judgment. To sustain this position, it must satisfactorily appear that the evidence improperly submitted to the jury had no effect upon the verdict prejudicial to the rights of Griffs; otherwise the judgment of the district court must be reversed. *Railway Co. v. Greathouse*, 82 Tex. 108, 17 S. W. 834; *Eborn v. Zimpelman*, 47 Tex. 522; *Dewees v. Bluntzer*, 70 Tex. 408, 7 S. W. 820. In our opinion, the fact of ill will on the part of Burris towards T. E. Griffs was not undisputed, nor was it established so conclusively that, without the testimony objected to, the jury must have found the same verdict. The expression of ill will deliberately made in writing from time to time, covering several months, would evince greater intensity of feeling than would the sudden ebullition of passion which might occur in casual conversation; and, without discussing the weight of the evidence upon this issue, we will say that in our opinion the verdict of the jury upon this point may have been influenced by the testimony admitted over the objection of the defendant. For the error committed by the trial court in admitting the testimony of G. T. Tarrant over the objection of the defendant, the judgments of the district court and of the court of civil appeals are reversed, and the cause remanded.

#### BRANCH v. INTERNATIONAL & G. N. R. CO.

(Supreme Court of Texas. Nov. 28, 1898.)

##### MASTER'S LIABILITY — UNAUTHORIZED ACT OF SERVANT—ESTOPPEL—DANGEROUS MACHINERY.

1. Where a hand car was intrusted by a railroad company to the foreman of a telegraph repair gang for use in their work, and, contrary to his instructions, he used it on a private errand, and while doing so negligently ran it against a vehicle at a public crossing, the company is not liable.

2. Where one operates a car on the tracks of a railroad company for his private benefit, and without the company's consent, the company is not estopped to deny that it was a part of the operation of the road because he was a servant in charge of the car, and required to use it in his ordinary duties.

3. A railroad hand car does not come within the rule imposing on the master the duty of "consummate care" in the custody of things dangerous in themselves.

Certified questions from court of civil appeals of Third supreme judicial district.

Action by John Branch against the International & Great Northern Railroad Company. From a judgment for defendant, plaintiff appealed to the court of civil appeals, which certifies certain questions to the supreme court.

F. J. Maler, for appellant. S. R. Fisher, for appellee.

**DENMAN, J.** The court of civil appeals has certified to this court statement and questions as follows:

"This is an action by the appellant, John Branch, against the railway company to recover damages on account of injuries sustained by his wife in a collision with a hand car operated upon appellant's road at a public crossing in the town of New Braunfels, Comal county, Texas. It is averred that the railway company intrusted the use and possession of the hand car to a foreman who was careless and untrustworthy, which fact was known to the defendant, and that it was a part of the duty of the foreman to carefully keep control and possession of said hand car, and that he negligently permitted the same to go upon the track in the nighttime, and that he carelessly and negligently, in the operation of said hand car, caused it to collide with the plaintiff's buggy, in which he and his wife were crossing the track at a public crossing. The facts in the record show that the hand car in question was intrusted to the possession, care, and use of one John Maloney, who used the hand car for the benefit of the company. He at the time was the foreman of a telegraph repair gang for the defendant company. At the time of the accident, which occurred at night at a public street crossing of the railway in the town of New Braunfels, Maloney was propelling and operating the hand car on the railway track under circumstances from which a jury might infer negligence upon his part in running down the buggy in which the plaintiff and his wife were crossing the track, and under circumstances under which a jury might also infer that the plaintiff and his wife were not guilty of contributory negligence. The weight of the evidence tends to show that at the time of the accident, when Maloney was so using the hand car, he was doing so contrary to the instructions of the railway company, and for his own private use and benefit; not at the time being engaged in the performance of any duty imposed upon him by the company. There are also facts in the record which have a tendency to show that Maloney was a negligent and untrustworthy servant, and that the railway company had knowledge of this fact, or could have obtained knowledge by the exercise of reasonable diligence, and retained Maloney in its employ. The court below, in the trial of the case, instructed the jury to return a verdict in favor of the defendant. This case has once been before this court, in which the trial court also instructed a verdict for the defendant, which upon appeal was reversed. 40 S. W. 208. In view of this fact, and the importance of the questions raised in the case, we certify the questions propounded to the supreme court; and in this connection we desire to state that, owing to the fact that

the supreme court has previously dismissed certificates because questions involving the entire case were certified to that court, we take occasion to say that there is one important question reserved by this court which we do not certify, and upon which we have concluded the court below erred, and for which reason we have concluded to reverse the judgment of the court below. With this preliminary statement, we certify that the above styled and numbered cause is now pending in the court of civil appeals for the Third supreme judicial district; and that there arises from the record the following questions, which we certify to the supreme court of the state of Texas for answer:

"Question 1. In view of a rule of public policy, if there is any applicable, or in view of the duty that a railway company owes to the public in exercising caution in operating its cars over and across public crossings, are such companies relieved from responsibility for the negligent conduct of its servants in the operation of its cars, which may result in injury to one who is without fault in crossing a railway track at a public crossing at a time when the servant has the control and management of the car, and is in possession thereof by the consent of the company, but at the time of the accident the servant is using and propelling the car on the railway track for his own private use and benefit, and was not at the time performing a service for his master, and so used the car against the instructions of the master?

"Question 2. When a car is intrusted to the management and control of a servant of the company, who is required to use the car on the tracks when performing his duty to the company, the use of which may be attended with danger at public crossings, and the servant operates the car on the track in his own private use and benefit, and against the instructions of his master, is not this conduct, in part, the operation of the road, for which the master would be responsible, if the servant was guilty of negligence to the injury of one at a public crossing?

"Question 3. Does the fact that the car was in the possession of the servant, who was charged, as a part of his duty, with the management and control of the same, make the company responsible for the negligence of the servant in operating the car upon the track at a time when the servant was not performing some duty for the master?"

We understand the first question, when read in the light of the preceding statement, to be, in effect: The car being intrusted to Maloney by the company, to be kept and used by him in the performance of his duties as foreman of the telegraph repair gang, and he having on the occasion in question, contrary to the instructions of the company, taken the car out on the road, not in the performance of any of such duties, but upon a private errand of his own, and negligently

injured plaintiff's wife, is the company liable? Since the question assumes that Maloney was not at the time using the car in the discharge of his duties to the company, and did not have its consent to operate it on the track, it would seem that, upon principle and authority, the nonliability of the company is so well settled that it would serve no useful purpose to attempt to restate the principles upon which the decisions in similar cases have been based; and therefore, in answering the first question in the negative, we content ourselves with referring to some of them: *Railway Co. v. Cooper*, 88 Tex. 607, 32 S. W. 517; *Railway Co. v. Dawkins*, 77 Tex. 229, 13 S. W. 982; *Stephenson v. Railway Co.*, 93 Cal. 559, 29 Pac. 234; *Cousins v. Railway Co.*, 66 Mo. 572; *Robinson v. McNeill* (Wash.) 51 Pac. 355.

We are of opinion that the second question must be answered in the negative. While the law imposes upon a railroad company the duty of operating its road, and requires it to exercise a certain degree of care in such operation, to prevent injuring persons at public crossings, it does not estop it from showing that a particular act, not done in its service or by its consent, was not in fact a part of its operation of the road. Whether such act be done by one who in other matters is the servant of the company, or by a mere stranger, is wholly immaterial. Whether the company is permitted by law to authorize the operation of its road in whole or in part by another, and, if not, whether it would not be estopped, upon principles of public policy, from denying that the running of the car by Maloney upon the occasion in question was a part of its operation of the road, in case the pleadings and evidence show, as contended by appellant, that Maloney was accustomed to run the car over the track upon private errands, and that the company knew, or by the use of reasonable diligence could have known, thereof, are questions upon which we express no opinion, as they are not included in those certified. For the same reason we express no opinion as to the effect upon defendant's liability of the fact of Maloney's untrustworthiness.

We are of opinion that the third question must be answered in the negative. The rule laid down in *Railway Co. v. Shields*, 47 Ohio St. 389, 24 N. E. 658, so much relied upon in argument, to the effect that the law imposes upon the master the duty of "consummate care" in the custody of things which are dangerous within themselves, such as torpedoes, and that such duty cannot be shifted to another, was not intended by that court, as appears upon the face of its opinion, to have any application to such a machine as a hand car, which is only dangerous by reason of improper use. By reference to the brief of counsel for defendant in error in *Railroad Co. v. Cooper*, 88 Tex. 608, 32 S. W. 517, it will be seen that it was there urged that the fact that the company had intrusted

the engine to its servant made it responsible, though the latter's act of scalding plaintiff was not done in the performance of his duties, and that said Ohio case was relied upon as authority. We were then of the same opinion as above expressed in reference to that case.

### SPARKS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 30, 1898.)

#### CRIMINAL LAW—FILING BRIEFS—DISMISSAL OF APPEAL.

Briefs will be stricken, and the case on appeal dismissed, where the briefs were not filed in the trial court, and no reason is shown for the failure to so file them.

Appeal from district court, Harris county; E. D. Cavin, Judge.

Action by the state against I. W. Sparks. From a judgment for plaintiff, defendant appeals. Dismissed.

Robson & Duncan, for appellant. Mann Trice, for the State.

DAVIDSON, J. This is an appeal from a judgment final on a forfeited bond. The assistant attorney general moves to strike out the briefs and dismiss the case because the briefs were not filed in the trial court, and no reason is shown for the failure to so file said briefs. An inspection of the briefs shows the facts to be as stated. We believe the motion is well taken. *Lewis v. State* (Tex. Cr. App.) 38 S. W. 205. The appeal is dismissed.

HURT, P. J., absent.

### RANALD v. STATE.

(Court of Criminal Appeals of Texas. Nov. 30, 1898.)

#### PHYSICIANS AND SURGEONS—PRACTICING WITHOUT CERTIFICATE—EVIDENCE.

R. testified that accused had given him medicine 29 or 30 years before; that at the suggestion of one H. witness had gone to accused, who was practicing medicine in a tent. H. testified that he knew accused about 30 years ago, when the latter was practicing medicine in a house, and not a tent, and that he did not recommend accused to R., and contradicted testimony of R. in many particulars. Accused testified that he practiced on R., and had for 5 years practiced continuously, after coming to the state 30 years ago, in certain counties. Witnesses who had known accused well for 10 or 12 years stated that accused was employed at farming and as a laborer, and that they never knew of his practicing medicine. *Held* to warrant the jury in discrediting the testimony that accused had practiced for 5 consecutive years prior to 1875, within Pen. Code 1895, art. 441, authorizing him in that case to practice without a certificate or diploma.

Appeal from Houston county court; E. Winfree, Judge.

A. R. Ranald was convicted of practicing medicine without having obtained a certificate, and appeals. Affirmed.

John I. Moore, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of practicing medicine without having obtained a certificate of professional qualifications from the board of medical examiners, and fined \$50; hence this appeal.

The statement of facts discloses that appellant was practicing medicine in Houston county. To meet this state of case, appellant introduced evidence to the effect that he had been practicing medicine for 29 to 31 years in this state, and by this evidence to meet the terms of the statute, which authorized him to practice without a certificate or diploma if he had so practiced medicine for 5 consecutive years prior to the year 1875. Burrell Richardson stated that defendant had given him some medicine for "bleeding at the lungs" about 29 or 30 years ago, in Dallas; that he had sought appellant at the suggestion of one John Hanks, whom he had met two or three miles from Dallas. He stated that appellant was practicing in a tent, and was called the "Indian Doctor." Hanks testified that he knew defendant about 30 years ago; that he was then practicing medicine, and was called the "Indian Doctor"; and he met him in Dallas. He states he met Burrell Richardson in Dallas, and also saw him in Henderson county; that he did not meet him outside of Dallas, as stated by Richardson, nor did he recommend the Indian doctor to Richardson, as stated by Richardson; that he saw Richardson at a house where the defendant was, and did not know, until he met him there, that Richardson was in Dallas. He further stated that defendant was practicing in a house, and not in a tent. Appellant himself testified that he had practiced medicine in Texas for 31 years, and says that he practiced on Burrell Richardson 29 or 30 years ago, and that he had been engaged in continued practice for 5 years after he came to Texas 31 years ago; that he had "practiced medicine in the Panhandle, Tom Green county, and other counties." In rebuttal the state proved, by witnesses who had known appellant for 10 or 12 years, two of whom had lived near him 5 or 6 years, that during that time he did not practice medicine; that he was "engaged in farming and as common workhand; never heard him or any one else represent that defendant was a doctor; if he ever practiced medicine, I never heard of it, and he lived during these years from one to five miles of me." Another witness for the state testified that defendant gathered cotton for him in the fall of 1894, and made a crop on his place in 1895, and also worked at his (witness') sawmill. Never heard him claim to be a doctor. It is claimed that this evidence is not sufficient to justify the conviction, in that it shows that he had practiced medicine for five consecutive years before 1875, which would authorize him to practice now without a certificate or diploma. Pen.

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Code 1895, art. 441. The credibility of the witnesses and the weight to be attached to their testimony are left with the jury under our laws. While the evidence does not directly contradict appellant as to the fact that he had practiced medicine 5 years prior to 1875, yet it does show that for 12 years past, wherever he has been known, or wherever they could reach his whereabouts during that time, he was contradicted as to his practicing during said years. He had stated that he had practiced for 31 years in Texas, placing himself during that time "in the Panhandle, Tom Green county, and other counties." There is no evidence, save his own, as to his practice in any of those counties. As to the Dallas transaction, the witnesses only show that he gave one bottle of medicine to Richardson, and the testimony of these witnesses is contradictory, one of the other, as to the attendant circumstances and environments. We believe that under this state of case the jury were authorized to discredit his testimony as to the five consecutive years of practicing medicine prior to 1875. If the jury believed that he had testified erroneously as to the 12 years during which he was located, they were authorized to discredit the remainder of his testimony as being untrue. The judgment is affirmed.

HURT, P. J., absent.

#### POYNER v. STATE.

(Court of Criminal Appeals of Texas. Nov. 16, 1898.)

CRIMINAL LAW—LEADING QUESTIONS — PREJUDICIAL ERROR—EVIDENCE—INCEST—DEFENDANT'S REPUTATION.

1. It cannot be said on appeal that permitting the state to ask the prosecutrix leading questions was material error, where the bill of exceptions does not show the surrounding circumstances.

2. In a prosecution for incest, the action of the court in limiting the evidence as to defendant's reputation to his reputation for virtue and chastity cannot be said to have been prejudicial error, in the absence of a statement of facts, since the evidence of guilt may have been so overwhelming that any reputation on defendant's part would not have affected the verdict.

Appeal from district court, Nacogdoches county; Tom C. Davis, Judge.

V. E. Poyner was convicted of incest, and he appeals. Affirmed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of incest, and his punishment assessed at confinement in the penitentiary for a term of five years; hence this appeal.

What purports to be a statement of facts was filed on the 18th of October, 1898. Court adjourned on the 11th of October, 1898. There is no 10-day order in the record; consequently we cannot consider the purported statement of facts. When the witness Nan-

nie Turner was on the stand, the state asked her the following question: "Did he [Verner Poyner] have intercourse with you?" to which the defendant then and there objected on the ground that said question was leading. The objection was overruled, and the witness answered, "Yes, sir." And also he asked said witness the following question: "How did he accomplish it,—by force?" to which question the defendant objected on the ground that it was leading. Which objection was overruled, and she answered "that he did it by force." And again, the state asked her the following question: "Did you say anything to him at the time he was doing it?" to which defendant objected, and the witness answered, "I told him not to do it." And again, he asked her the following question: "You told him not to do it, and he went on?" to which she answered, "Yes, sir." And again: "Did you, at any time during the progress of the intercourse with you, give your consent?" Defendant objected, the court overruled the objection, and the witness answered, "I refused." And again, the state asked her the following question: "Did Verner Poyner at any time tell you whether he believed you were pregnant or not?" to which question the defendant objected on the ground that it was leading, and the court overruled the same; and the witness answered, "He said he did not believe I was that way." The bills of exception do not show the surrounding circumstances, so as to authorize us to say that the questions should not have been asked in the form they were. As presented, we cannot say that the court committed material error in allowing the questions to be asked and answered as was done.

The court did not err in refusing to permit the defendant to ask the question stated in the bill of exceptions to D. C. Turner. What the defendant's father may have told Turner was not legal evidence; but, if defendant had been permitted to prove by Turner that Poyner's father told him that defendant was guilty, this would not have authorized defendant to introduce another witness to contradict Turner as to this evidence.

Appellant reserved a bill of exceptions to the action of the court in refusing to permit him to prove that the defendant had a good reputation for gentlemanly deportment and moral character in the community in which he lived. The court refused to permit appellant to ask this question, but limited the investigation to defendant's reputation for virtue and chastity. The charge here was incest, and if it be conceded that appellant had the right to have the question propounded by him answered by the witness, and so have proved the reputation of defendant as being a man of gentlemanly deportment and good moral character, still, in the absence of a statement of facts, we cannot say what effect said testimony may have had with the jury. The testimony of his guilt may have

been of such an overwhelming character that any reputation on his part would not have affected the testimony of guilt.

The court did not err in refusing to permit appellant to examine D. C. Turner in regard to a conversation between him and old man Poyner in regard to the condition of Nannie Turner. It does not occur to us that said testimony was material.

As to the newly-discovered evidence, in the absence of a statement of facts, we are not in a condition to discuss its materiality. No error appearing, the judgment is affirmed.

HURT, P. J., absent.

#### DAVIS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 30, 1898.)

CRIMINAL LAW—STATEMENT OF FACTS—DELAY IN FILING—DILIGENCE OF COUNSEL—ASSAULTS—FORMER CONVICTION—PREJUDICIAL ERROR.

1. The court adjourned on July 2d, and a statement of facts was filed on the 14th. Appellant's affidavit to excuse his laches in not filing the statement within the 10 days allowed after the adjournment showed that the motion for new trial was overruled on June 28th, and that his attorney was a candidate for office, so that he had some difficulty in getting an interview with him, but that the attorney had a statement of facts ready on July 7th; that he was unable to find the district attorney, though the latter was in the city, until July 11th, and he did not succeed in getting a statement from him. Appellant's statement as prepared was forwarded by mail to the judge on July 11th, and received on the 12th. The statement was made out by the judge, and returned by mail on the 13th, but was not received and filed in the appellate court until the 14th. The transcript only covered three pages. *Held* insufficient to excuse the delay.

2. In a prosecution for assault with intent to murder, where the evidence shows that, if defendant committed any offense, it was of a higher grade than a simple assault, he cannot plead a former conviction before a justice, based on a complaint for a simple assault, since Code Cr. Proc. 1895, art. 590, provides that a former judgment of acquittal or conviction in a court of competent jurisdiction shall not bar a prosecution for any higher grade of offense over which said court had no jurisdiction, unless the trial and judgment was on indictment or information.

3. In the absence of a statement of facts, where it cannot be said by the appellate tribunal what effect certain newly-discovered evidence would have, it is proper to refuse to grant a new trial.

Appeal from district court, Harris county: E. D. Cavin, Judge.

Thirsty Davis was convicted of an assault with intent to murder, and he appeals. Affirmed.

J. B. Brockman, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of an assault with intent to murder, and his punishment assessed at confinement in the penitentiary for a term of four years; hence this appeal.

What purports to be a statement of facts was filed on the 14th of July,—court having adjourned on the preceding 2d of July,—being more than 10 days after the adjournment of court. Appellant, by an affidavit, seeks to excuse his laches in filing the same before the expiration of the 10 days. We have examined said affidavit carefully, and do not think that same excuses the delay. The motion for new trial was overruled on the 28th of June, and Attorney Brockman was his attorney at that time, although others may have been representing him previous to that. He says the attorney who tried the case was a candidate for county judge, and he had some difficulty in getting an interview with him as to the facts, but that he had a statement of facts ready on the 7th of July. It seems from his statement that he was unable to find the district attorney, although he says he was in Houston, until the 11th of July. But he did not succeed in getting a statement from him. His own statement, as prepared, was forwarded by mail to the judge at Galveston on the 11th. According to the judge's certificate, it was not received by him until the 12th of July, the last day in which it was authorized to be filed in the court at Houston. A statement was made out by the judge, and returned to Houston by mail on the 13th of July, but was not received and filed by the district clerk of Harris county until the 14th. The statement of facts in this case is by no means lengthy, covering only three pages of the transcript. Only four witnesses were examined, and their testimony is short; and it does occur to us that ordinary diligence would have secured the statement of facts, and had it filed within the 10 days allowed by law. At least the statement here made does not excuse the delay in a satisfactory manner. If we hold this statement of facts should be considered, although filed after the time, hereafter the precedent would have to be followed; and the rule requiring statement of facts to be filed within 10 days would have no efficacy. Almost any excuse would authorize it being set aside. We hold that the purported statement of facts cannot be considered. *Bryant v. State*, 35 Tex. Cr. R. 394, 33 S. W. 978, and 36 S. W. 79.

Appellant filed a plea of former conviction, setting up that he had been previously convicted of the same transaction before the justice of the peace on a complaint, which charged him with a simple assault. The plea was accompanied by exhibits, and is regular in form. The court refused to instruct the jury with reference to his plea, and ignored it entirely. The judge's explanation to the bill of exceptions shows that the court maintained, if defendant was guilty of any offense, it was of an assault with intent to murder, and certainly not less than aggravated assault, and that, therefore, his plea of former conviction on a complaint for a simple assault was not good. In this action of the court we do not believe there was any error. As certified by

the court in the bill of exceptions, the testimony showed that, if this was an offense at all, it was of a higher grade than simple assault. Article 590, Code Cr. Proc. 1895, provides: "The former judgment of acquittal or conviction in a court of competent jurisdiction, shall be a bar to a prosecution for the same offense, but shall not bar a prosecution for any higher grade of offense over which said court had no jurisdiction; unless such trial and judgment were had upon indictment and information, in such case the prosecution shall be barred for all grades of offense." The prosecution before the justice being under a complaint, this statute applied, and rendered the plea nugatory; and the court did not err in treating it as of no effect.

What we have said above applies to appellant's second bill of exceptions, which relates to the offer of appellant to prove the allegations of his plea by the witness Dellery, and the refusal of the court to permit such proof.

There is nothing in appellant's application for a new trial on the ground that he was under 16 years of age at the time, and did not know that the law provided that he could be sent to the reformatory. His counsel should have informed him of his legal rights in this respect.

As to the ground of the application for a new trial, based on the newly-discovered evidence of one Dixon, which he alleges will show that the prosecutor, Dellery, first attacked him, we have this to say: In the absence of a statement of facts, we are unable to tell what effect said newly-discovered evidence may have. The testimony in the case may have rendered the evidence of said absent witness absolutely immaterial and unimportant.

Appellant complains of the charge of the court, because, he says, it did not sufficiently inform the jury of appellant's right not to be put off the car while in motion by the prosecutor, Dellery. In the absence of a statement of facts, we cannot tell what occurred at that time, or whether a special charge on that subject requested by appellant was necessary. The court gave a charge which would appear to cover that phase of the case. This was the court's charge on self-defense. We find no error in the record, and the judgment is affirmed.

HURT, P. J., absent.

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#### CARTER v. STATE.

(Court of Criminal Appeals of Texas. Nov. 16, 1898.)

#### CRIMINAL LAW—APPEAL—ESCAPE OF DEFENDANT.

Code Cr. Proc. art. 880, which provides that the escape of defendant pending an appeal to the court of criminal appeals ousts the court of jurisdiction to determine the appeal, applies only after jurisdiction has attached by service of notice of appeal.



Appeal from district court, Bell county; John M. Furman, Judge.

Joe Carter was convicted of murder, and he appeals. On motion to dismiss appeal. Overruled.

Mann Trice, for the State.

DAVIDSON, J. Appellant prosecutes this appeal from a conviction of murder. The conviction occurred on the 24th of August, 1898. A motion for a new trial was filed on the 25th. An amended motion for new trial was filed on the 29th of August, and on that day the defendant escaped from custody, and was recaptured on the 4th of September following, and returned to custody. On the 7th of September the motion for new trial was overruled, sentence pronounced, and notice of appeal given. On account of the escape, the assistant attorney general moves a dismissal of the appeal. Article 880, Code Cr. Proc., provides that, pending an appeal to this court in this character of case, the escape of the defendant ousts this court of jurisdiction to hear and determine said appeal. But it only applies when the jurisdiction of this court has attached after the notice of appeal has been legally given. The conviction in this case was imprisonment in the penitentiary. Therefore it was necessary that sentence should be pronounced and notice of appeal given before the jurisdiction of this court would attach. By recurring to the facts, we discover that the appellant's motion for new trial had not been acted upon, nor was sentence pronounced; nor was notice of appeal given at the time of his escape, nor for some days after his recapture. There was nothing therefore entered in the record which attached the jurisdiction of this court, and the appeal therefore was not pending in this court. The motion to dismiss said appeal is not well taken, and it is therefore overruled.

HURT, P. J., absent.

#### JONES v. STATE.

(Court of Criminal Appeals of Texas. Nov. 16, 1898.)

On rehearing. Judgment dismissing prosecution set aside, and judgment of trial court affirmed.

For former opinion, see 45 S. W. 596, 907.

DAVIDSON, J. At the Austin term, 1898, of this court, the judgment herein was affirmed, and the questions then raised were reviewed. Subsequently, and during said term, appellant made a motion for rehearing, upon the ground that the transcript in this court disclosed the fact that there was no complaint as a predicate for the information, and filed affidavits to the effect that in fact there was no complaint in the court below. For the first time that question was suggest-

ed in said motion for rehearing. The state submitted the motion for rehearing in that condition, and this court of course granted it, and reversed the judgment and dismissed the prosecution. Thereupon the state filed a motion for rehearing, alleging that there had been a complaint in the trial court, which was used upon the trial in said court, and that subsequent to said trial said complaint had been lost or destroyed, and asked a continuance of the cause in this court, in order that said complaint might be substituted in the trial court, under the provisions of article 884, Code Cr. Proc. This not having been accomplished prior to the time court adjourned at Austin, the case was transferred to the present term. We have now before us, in proper form, the substitution of said complaint. So we now have the case on a complete record. We have carefully reviewed the case again, and find no error in the record, and the judgment reversing and dismissing the prosecution is set aside, and, for the reasons indicated in the original opinion, we affirm the judgment. The judgment is accordingly affirmed.

HURT, P. J., absent.

#### BARKER v. STATE.

(Court of Criminal Appeals of Texas. Nov. 16, 1898.)

LOCAL OPTION — PROSECUTIONS — ORDER OF COMMISSIONERS' COURT — EVIDENCE — INTOXICATING LIQUORS.

1. In a prosecution for violating the local option law, an objection to evidence of the order of the commissioners' court declaring the result of the local option election, as immaterial, is too general.

2. An order of the commissioners' court declaring the result of a county election under the local option law, showing that an election was held for the entire county, need not also show that there was an election held in each of the various election precincts of the county.

3. An order of the commissioners' court declaring the result of a county election under the local option law is not vitiated by an erroneous reference therein to the year in which the local option law was passed, since such matter may be treated as surplusage.

4. A printed notice of the order of a county judge declaring the result of a local option election is not inadmissible in a prosecution for a violation of such law because the order published is not a verbatim copy of that entered by the commissioners' court, where the copy published is a substantial copy.

5. An order of the commissioners' court declaring the result of a county election under the local option law need not set out the vote by precincts, since it is sufficient if the order declares the total number of votes as cast in the county.

6. Evidence that "grape cider" sold to boys caused two of them to become so intoxicated that they knew nothing of what was done with them by their friends during their intoxicated condition is sufficient to show that the liquor was intoxicating.

Appeal from Delta county court; G. C. Dunagan, Judge.

P. J. Barker was convicted of violating the local option law, and he appeals. Affirmed.

L. L. Wood and James Patteson, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted for violating the local option law, and his punishment assessed at a fine of \$25, and 20 days' confinement in the county jail; hence this appeal.

During the trial the state was permitted to introduce in evidence the order of the commissioners' court declaring the result of said election. Appellant excepted to this evidence: (1) "Because it was immaterial." This ground is too general. (2) "Said order does not show that there was an election held in the various election precincts." This is not necessary in the order declaring the result in a county election. It does show that the election was held for the entire county of Delta, and orders the prohibition of the sale of liquor within said county in accordance with the result of said election. The third ground is "that said order prohibits absolutely the sale of intoxicating liquors, except as is provided and recited in 'title 69, art. 3385, of the Revised Statutes of 1893 of the State of Texas.'" It is contended that, because there is no such title as 69 in the Acts of 1893, therefore this order declaring the result is invalid. By reference to the Acts of 1893, it will be seen, on page 48 of said Acts, that title 63, then in existence, was amended, and, by reference to the Revised Statutes of 1895, that title 69 thereof is now the title which embodies within its terms the provisions in regard to local option elections; and the mistake in the commissioners' court, in stating 1893 instead of 1895, seems to be the discrepancy. This is wholly immaterial. This matter may be treated as surplusage, and whether the exceptions were embodied in the order or not makes no difference. The law makes the exceptions, and a mistake of the commissioners' court in referring to the wrong year of the act or the wrong title of the law would not vitiate the election or the order. *Gilbert v. State*, 32 Tex. Cr. R. 596, 25 S. W. 632; *Ex parte Perkins*, 34 Tex. Cr. R. 429, 31 S. W. 175; *Bruce v. State*, 36 Tex. Cr. R. 53, 39 S. W. 683.

The second bill of exceptions reserved by appellant was to the action of the court permitting the printed notice of the order of the county judge, as published in the "People's Cause," a newspaper in said county, to be introduced in evidence. The first and second grounds of objection are the same as those stated in the former bill. The third ground is based upon the assertion that the notice taken from the paper is not a correct copy of the order of the commissioners' court declaring the result. It is true that the order published is not a verbatim copy of that entered by the commissioners' court declaring the result, but the differences are too slight to be noticed. The copy published is in all respects a sub-

stantial copy. Nor was it necessary for the order of the commissioners' court declaring the result to set out the vote by voting precincts or justice precincts, this being an election for the whole county. It is sufficient if the order declaring said result specify the number of votes for and against prohibition as cast by the people.

It is contended that the statement of facts does not show that the venue was proven on the trial. The recent act of the legislature was passed to cover this character of omission. Gen. Laws 1897, p. 11. This act provides that "the court shall presume that venue was proven in the court below, \* \* \* unless such matter was made an issue in the court below; and it affirmatively appears to the contrary by bill of exceptions properly signed and allowed by the judge of the court below or proven up by by-standers as is now provided by law and incorporated in the transcript as required by law." There was no issue on this question in the court below. There was no bill of exceptions reserved in regard to the matter, and this court must presume, under the statute quoted, that venue was proven on the trial.

It is contended that the evidence is insufficient to support the judgment of conviction, and the main ground of this contention seems to be predicated upon the idea that the liquor sold was not intoxicating. The liquor bought seems to have been what is termed "grape cider," and there was testimony pro and con as to whether or not grape cider was intoxicating. It was shown without contradiction that at least two of the boys who drank the liquor became so intoxicated that they were carried some distance in that condition without knowledge on their part that they were so transported; in other words, they were so drunk they knew nothing of what was done with them by their friends during their intoxicated condition. We do not understand how there could be any question, under this state of case. A substance that will intoxicate must evidently be intoxicating. The judgment is affirmed.

HURT, P. J., absent.

#### ARMSTRONG v. STATE.

(Court of Criminal Appeals of Texas. Nov. 16, 1898.)

CRIMINAL LAW—EVIDENCE—GENERAL OBJECTIONS—INTOXICATING LIQUORS—LOCAL OPTION—PROSECUTIONS—PUBLICATION OF RESULT OF ELECTION—BURDEN OF PROOF—INSTRUCTIONS—QUESTIONS OF LAW—SUFFICIENCY OF EVIDENCE.

1. An objection to evidence as irrelevant and inadmissible will not be considered on appeal, unless the evidence is clearly inadmissible for any purpose.

2. In a prosecution for violating the local option law, evidence that defendant had followed the occupation of saloon keeper prior to the time of the local option law going into effect in the county is not objectionable as tending to mislead the jury.

3. Under Rev. St. 1895, art. 3391, providing for the publication of an order of court announcing the result of a local option election, and prohibiting the sale of intoxicating liquors, and also providing that the fact of publication shall be entered by the county judge on the minutes of the commissioners' court, and that such entry, or a certified copy thereof, shall be prima facie evidence of publication, evidence other than such entry is inadmissible to prove the publication, where it is not shown whether the entry has been made.

4. In a prosecution for violating the local option law, the burden is on the state to show that the order of the commissioners' court announcing the result of the local option election was legally published.

5. Where defendant procured whisky for the prosecuting witness, at the request of the latter, and paid for it with money furnished by the witness, he is not guilty of a violation of the local option law.

6. It is not error to refuse to instruct the jury to acquit on the ground that the indictment had not been transferred from the district to the county court, since such question is one of law.

7. Prosecutor went to defendant's place of business to buy some whisky. Defendant, not having it, told him he would order it for him from another town, and wrote out and had prosecutor sign an order for a gallon, the quantity desired. Prosecutor gave defendant no money at the time. On the same or the following day, prosecutor returned to defendant's place of business, and purchased and paid for a pint of whisky, and afterwards made several purchases, paying each time for the quantity obtained. Defendant bought the whisky at wholesale price, and sold it at retail price. Held to warrant a conviction of violating the local option law.

Appeal from Delta county court; C. O. Dunagan, Judge.

A. J. Armstrong was convicted of violating the local option law, and he appeals. Reversed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25, and 20 days' confinement in the county jail; hence this appeal.

While Akard, the alleged purchaser of the intoxicants, was upon the witness stand, the state was permitted to prove by him that defendant had followed the occupation of saloon keeper on the south side of the square in Cooper prior to the time of the local option law going into effect in Delta county. This was objected to on the ground that same was irrelevant and inadmissible, and was calculated to mislead the jury. The ground of objection that the testimony is irrelevant and inadmissible is too general, and fails to point out any specific objection; and such general grounds will not be considered, unless the testimony is clearly inadmissible for any purpose. Nor do we think it was calculated to mislead the jury.

There is also a bill of exceptions reserved to the testimony of the witness Pickens, who in the fall of 1897 was deputy sheriff, and who, on being handed a copy of the order of the commissioners' court declaring the re-

sult of the election, stated that he had the copies of said order, and gave them to the editors of the "People's Cause," a paper published in Delta county, for publication, and that he saw one publication of said order, but does not recollect that he saw the other three publications. It is further stated, as matters of fact, that it was not shown that the county judge had selected said newspaper in which to publish said order, nor that the county judge had ordered said deputy sheriff to make publication of said order, and it was not shown that there was a record made by the county judge, upon the minutes of the court, showing said publication, if in fact it was made. Nor was it shown that such order had been made by said county judge. The statute requires that the fact of publication in one of the modes required by the statute should be entered by the county judge upon the minutes of the commissioners' court, and that the entry thus made, or a copy thereof, certified under the hand and seal of the clerk of the county court, shall be held sufficient prima facie evidence of such fact of publication. The introduction in evidence of such entry, or a certified copy, as required by the statute, would be sufficient prima facie evidence of the fact that the publication was made. As was said in *Jones v. State* (Tex. Cr. App.) 43 S. W. 981: "It is clear from this provision that, until the order has been published the length of time required, the publication cannot take effect in the county, precinct, etc. It is absolutely necessary, therefore, that the publication of this order in one of the modes prescribed by this article should be proved upon the trial of any person accused of violating the local option law. Rev. St. 1895, art. 3391." In this case, however, the state did not undertake to prove that the county judge had made the proper entry upon the docket, or that he had failed to do so. If he had made the order, then the minutes of that entry, or a certified copy thereof, under the seal of the clerk of the court, would have been legitimate evidence to constitute a prima facie case, on this phase of it. But the state did not undertake to show this, but relied upon the statement of Pickens that he had an order, and had given it to said paper for publication, and had seen one issue of said paper containing said order. Upon the objections of appellant, this testimony should have been excluded, unless it had been shown that such entry had not been made. If it had been shown that the county judge had failed or refused to make such entry, then the state could prove the fact of publication by other legitimate evidence. In the absence of proof that the entry had been made, it would devolve upon the state to prove the fact of the necessary publication by other and the best evidence attainable. But this was not shown in this case, and the objections should have been sustained. *Ezzell v. State*, 29 Tex. App. 521, 18 S. W. 782; *Jones*

v. State, supra. The burden is upon the state to establish the fact that the order had been legally published, and thus must be done as stated above.

Appellant also objected to the evidence of the witness Sharp to the effect that on the 22d of February, 1898, he got a bottle of whisky from W. F. Finley. This was objected to because it was irrelevant and inadmissible, and did not tend to prove any fact alleged by the state, and was misleading. This is all that is stated in the bill. This bill does not show the connection of W. F. Finley with the defendant in the transaction. Of course, the bare fact that Sharp bought whisky from Finley is no evidence of the fact that appellant sold whisky to Akard.

The court charged the jury as follows: "If you believe from the evidence that the defendant was acting for Henry Akard, and at the instance and request of Akard procured said whisky for Akard, and further believe defendant procured said whisky for Akard, and paid for same with money furnished by Akard, he would not be guilty." This was objected to by appellant because the same was misleading and did not fairly submit the law applicable to the facts. To say the least of it, this charge, under the facts of this case, was favorable to appellant.

It is not necessary to discuss the first special charge asked by appellant. That has been discussed under the bill of exceptions with reference to the testimony of Pickens, the deputy sheriff.

The second charge asked by appellant instructed the jury that there was no proof before them that the indictment in this case had been transferred from the district to the county court, and, there being no such evidence, the jury should acquit. There was no warrant for such a charge. The jury has nothing to do with the transfer of the cause from the district to the county court.

It is contended that the evidence does not support the conviction. Substantially, the testimony disclosed that Akard went to appellant's place of business, and wanted to buy some whisky. Appellant, not having it, told him he would order it for him from L. C. Clark, at Paris, and wrote out, and had Akard sign, an order for a gallon of whisky,—the quantity desired by Akard. Subsequently, perhaps the same day or the day following, Akard returned to the appellant's place of business and purchased a pint of whisky, paying for it, and afterwards made several other trips and purchases along at intervals, paying each time for the quantity he obtained. At the time of executing the order, Akard gave appellant no money; in fact, gave him no money except in payment for the particular quantity of whisky obtained at each purchase. Appellant bought the whisky at wholesale price, and sold it to Akard at retail price. Under this state of case, this was a clear, intended evasion of the law.

This transaction occurred in about the usual way that retail liquor dealers sell their intoxicants, the only difference being that appellant undertook to cover up the transaction with an order. Because of the admission of the testimony of Pickens, the deputy sheriff, the judgment is reversed and the cause remanded.

HURT, P. J., absent.

#### GARZA v. STATE.

(Court of Criminal Appeals of Texas. Nov. 16, 1898.)

#### PERJURY—INSTRUCTION — HARMLESS ERROR—VERDICT.

1. Where, in a prosecution for perjury, the charge covered all the elements of the crime, and was that the statement must be willfully and deliberately made, and not through inadvertence, mistake, or during agitation, to which no objection was taken until on motion for new trial, error in not defining the word "willfully" was harmless.

2. An objection that in a verdict the word "guilty" was misspelled is without merit.

Appeal from district court, Bee county; James C. Wilson, Judge.

Jose Garza was convicted of perjury, and he appeals. Affirmed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of perjury, and his punishment assessed at confinement in the penitentiary for two years; hence this appeal.

What purports to be a statement of facts was filed after the adjournment of court, and there is no 10-day order. Consequently we cannot consider the same.

In a motion in arrest of judgment, appellant contends that the indictment is defective, because it fails to allege that the statements testified to by appellant were willfully and deliberately made. We have examined the indictment, and find that the same does contain said allegation.

It is also urged that the trial court committed an error, for a failure to define the word "willfully." An exception to this failure of the court to define this word was not reserved at the time the charge was given, but is brought forward in the motion for a new trial. "Willfully," in this connection, is tantamount to "knowingly," and is distinguished from a statement made through inadvertence or mistake or under agitation. The charges on perjury, so far as we are advised, do not contain a definition of the term "willfully," further than is contained in the definition of the offense; that is, the jury are told that the statement must be willfully and deliberately made, and must be under oath in a judicial proceeding, and must be material to the issue joined, and that the falsity of such statement must be shown, and that appellant knew it was false when he made it,

and that such statement must be shown to have been made not through inadvertence or under mistake or during agitation. These allegations contain the distinctive elements of the offense, and, when shown, carry with them the idea that the statement was made willfully; that is, knowingly and with evil intent. The view here stated is borne out in *Hill v. State*, 22 Tex. App. 579, 3 S. W. 764. In that case the court say: "The charge of the court is complained of because it does not define the word 'willful.' No objection was taken to the charge when given, nor were any special instructions requested; the correctness of the charge being called in question for the first time in the motion for a new trial. We are cited to several cases holding that it is necessary to define 'willful.' These decisions are correct, when considered with reference to the offenses discussed, and the peculiar facts of the cases cited. When, however, considered with reference to this offense, and when the charge is taken as a whole, we do not think the omission contributed in the least to injure the appellant. Perjury is a false statement deliberately and willfully made. A false statement made through inadvertence or under agitation or by mistake is not perjury. The court in its charge gave to the jury the above definition and restrictions in a very clear manner. We cannot see how a party can deliberately, without agitation, coolly, without mistake or inadvertence, make a false statement, without such statement be 'willfully' made. The omission, if error, not being objected to at the time, we must look to the entire record to ascertain if it was prejudicial to defendant; and, thus viewing the record, we perceive no injury."

The other assignment of appellant is without merit, to wit, that the verdict is spelled "guilty" or "gulty." See *Price v. State*, 36 Tex. Cr. R. 403, 37 S. W. 743, and *McGee v. State* (Tex. Cr. App.) 45 S. W. 709. The judgment is affirmed.

HURT, P. J., absent.

#### LITTLE v. STATE.

(Court of Criminal Appeals of Texas. Nov. 16, 1898.)

HOMICIDE—SELF-DEFENSE—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE—CONDUCT OF ACCUSED—CONTINUANCE—CORPUS DELICTI.

1. On a trial for murder, it was not improper for the state's counsel to use the iron bar, in evidence (with which the killing was done), in demonstrating to the jury that the killing could not have been done with one hand, as testified by accused; and this though there was no evidence as to its weight.

2. The state is not precluded by a confession of accused that he killed deceased in self-defense, and, where there are circumstances supporting its theory of murder in perpetration of robbery, a charge on murder is justified.

3. The subsequent possession of goods and money of deceased by one accused of killing him tends to show that the killing was in perpetration of robbery, and not in self-defense.

4. Evidence of the conduct of accused after a homicide is competent to show the purpose for which the killing was done.

5. Where the evidence shows that the killing was either in self-defense or in perpetration of robbery, a charge on manslaughter is properly refused.

6. A charge that, if the jury have a reasonable doubt of accused's guilt, to acquit him, applies to all degrees of murder, and hence the court need not charge specifically as to a reasonable doubt between the degrees.

7. One accused of murder cannot complain of a charge on circumstantial evidence, and this though the evidence takes the case out of the rules applicable thereto, since he is not injured thereby.

8. The court's action in having a witness reiterate his testimony to the jury is not improper, no new testimony being given.

9. The refusal of a continuance is not improper, where the evidence of the absent witnesses would have served no useful purpose.

10. Deceased was last seen alive in the evening, with accused. The next morning a charred body, with the skull crushed, was found in a burned building, with which accused was familiar. On the trial he admitted killing deceased on the gallery of the building, but claimed it was in self-defense, and denied burning the building. An officer testified he had confessed to him the killing in self-defense, and that he burned the building to prevent detection. Another testified he had confessed to him the killing of deceased for his money; that he got from deceased \$108.50, and burned the house to cover the crime. Witness stated that, at the time of the confession, accused had a \$20 bill which had blood on it. Deceased was shown to have possessed about the sum stated. Accused, though having but little before the killing, was immediately after rather prodigal of money, stating he had plenty, and was shown to have possessed a considerable amount. He also had deceased's watch, and a peculiar shell button belonging to him. There were circumstances indicating that the bludgeon with which the killing was done was taken from a plow in the yard, and was not picked up on the gallery by accused in his haste to defend himself, as claimed by him, and also that the body was placed in one of the rooms of the house, and not left outside, as asserted by accused. Held to establish the corpus delicti, and to show beyond reasonable doubt that the motive of the killing was robbery.

Appeal from district court, Hunt county; Howard Templeton, Judge.

Charley Little was convicted of murder in the first degree, and he appeals. Affirmed.

Daniel Upthegrove, Thos. F. Ragsdale, and J. G. Matthews, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of murder in the first degree, and his punishment assessed at death; hence this appeal.

The statement of facts shows substantially that appellant and deceased had been hired to pick cotton for one Josh Merrill, and lived together at his house for about a month. They left Merrill's on Friday, November 12th, about 1 o'clock, to go to Whitewright, where deceased expected to take the train for Denison. Deceased was not coming back, but defendant was coming back with his horse and buggy, and on Sunday was to take the deceased's trunk to Wolfe City, and forward it to him at Galveston. Deceased (Stonecypher) and defendant were seen together at

Wolfe City on that Friday evening; and later on the same evening, about 6 o'clock, they were seen at Celeste, a little place in Hunt county, several miles from Wolfe City. They put up their horse, and had him fed, and also got supper themselves. About 7 o'clock they left Celeste, stating they were going to Valley Creek. Stonecypher was not afterwards seen alive by any witness. The defendant returned to Wolfe City in the buggy alone about 4:20 the next morning. The horse appeared to be very tired. He remained in Wolfe City until late that evening. The state showed that appellant returned to Merrill's late on Saturday evening, and on Sunday or Monday took the trunk of Stonecypher from Merrill's, and carried it to Wolfe City and expressed it to Galveston. Some time after this, and before November 20th, appellant and one Woodard were seen at Honey Grove; appellant stating that he was going to Tennessee. A few days subsequently they were at Detroit, to which point they had shipped appellant's trunk from Honey Grove. A few days after this, defendant and Woodard, while going across the country in appellant's buggy, were arrested in the edge of Lamar county, and brought back to Hunt county. On Saturday morning, November 13th, some time after midnight,—about 4 o'clock,—an outhouse belonging to one Roach, several miles from Celeste, was discovered to be on fire. It was shown that, about a year before this, appellant had worked on the premises adjoining this outhouse, and was familiar with it. Later in the day, on Saturday morning, the charred body of a man was found among the debris of the burned house. Its location was fixed as within the walls of the north room. On an examination of the body, the back of the skull was found to be crushed, evidently with some heavy bludgeon or blunt instrument. There was no evidence, outside of the circumstances herein related, and the confessions and testimony of appellant, identifying the charred remains which were discovered as the body of the deceased, Stonecypher. The criminative facts making out the corpus delicti, and connecting appellant with the murder, in addition to what has been stated, were as follows: Deceased was shown to have been possessed of a considerable amount of money—about \$160—prior to his leaving Merrill's. After the parties left there, and at Wolfe City, they were shown to be drinking. When they left Celeste, it was for the purpose of going to a house where some lewd women were believed to reside. Near the burned house, where the charred remains were found, in an old cistern, a piece of iron belonging to a plow near by was discovered. Evidently this was the instrument with which the homicide was committed, for blood and hair were found on it. The fresh tracks of a buggy drawn by a horse were followed from the burned house in the direction of Wolfe City for some distance. Appellant, though not having much money

before the homicide, was shown to have immediately thereafter been possessed of a considerable amount,—some \$20 bills and a \$20 gold piece; and he appeared to be rather prodigal of his means, stating on one or two occasions that he had plenty of money. Appellant was also shown, shortly after the homicide, to have been found in possession of the deceased's watch, and also of a peculiar shell button belonging to deceased. The trunk of deceased, which was shown to have been shipped to Galveston, was found there, and identified and brought back after the arrest of appellant. Two confessions of appellant were introduced: One made to Woodard, his traveling companion, before his arrest, and the other to Jeff Mason, an officer, after his arrest. In the first he admitted that he had killed Stonecypher for his money, and that he got from him \$108.50; that he afterwards burned the house in which his remains were, to cover up the crime. He also stated that appellant at that time had a \$20 bill which had blood on it. The confession to the officer was as follows: "He said that they had left Josh Merrill's with a view of going up near Leonard to see some women; that they went to Wolfe City, and then went from there to Klondike to get some whisky, and then back to Wolfe City, and from there to Celeste; that after they got to Celeste they took supper, and had their horse fed, and after supper started to see the women in to the left of Leonard, and after they got in above Leonard they learned that the women were gone; that they turned around then, and in coming back to Celeste, and when they got to where the roads fork at John Stone's residence, at the northwest corner of his field, instead of turning square to the left, as they had gone, they kept straight forward, coming south, which turned them to the right of his premises, and around by Lane's store; that he, being familiar with the premises, and knowing that it did not make much difference as to the distance, continued the route around by Lane's store to Celeste; that when they came to this old house on their route, which was close to the road, Stonecypher spoke to him about stopping and playing a game of cards; that they stopped first at the old barn, and lit a candle, but the wind was blowing so that they could not keep the candle lighted; that they saw, from the plunder and rubbish and cotton on the front porch, that no one lived in the old house, and went up there and went to playing; that they had played a few games, and defendant caught Stonecypher stealing cards; that he told him about it, and said that he had some cards under his knee; they were sitting, playing on the front porch; that there was considerable old plow gears, rubbish, and plow implements stacked up on the porch, which was to the defendant's back as they played cards; that defendant and Stonecypher carried the former's gun with them that evening when they left, and that, when they got

out of the buggy, Stonecypher carried defendant's gun; that the gallery fronts the north, and fronts on the big road; that, while they were playing, Stonecypher's back was to the east, and he had defendant's gun lying down on his right side; defendant's back was to the west; that, when he caught Stonecypher stealing cards, that he accused him of stealing cards, and that they got into a row over it, and that Stonecypher raised the gun on him, and he reached back behind him and found the iron bar, and hit Stonecypher in the head and killed him; that he did it to keep Stonecypher from killing him; that he had to do it; that they were playing cards there by the candlelight, Stonecypher having bought a couple of candles in Celeste; that he was very nervous just at the time of and just after the killing, and excited; that he got off of the gallery and walked around the house, and there was an old well there, and that he threw the old bar of iron in the well, and then returned to Stonecypher, and saw that he was dead; and that he picked up his gun, that was clenched in Stonecypher's hands, and set the house on fire to prevent detection; then he left and came back to Wolfe City, and stayed around there a day or two, and then went and got Stonecypher's trunk and shipped it to Stonecypher, at Galveston, from Wolfe City." Appellant's testimony as to the homicide was substantially the same as his confession to Mason, the officer. His testimony tending to show self-defense is stronger and more in detail than in his confession. There is also this difference between his confession to Mason and his testimony on the trial: In his confession to Mason he stated that he burned the house to prevent detection of the crime. On the trial he stated that he did not know the house was destroyed by fire, and did not know how it caught fire, unless it was from candles they used while they were gambling. The state combated this theory of self-defense by showing that the homicide did not occur on the gallery at all, as stated by appellant, but the remains, with the skull crushed in, were found at a spot inside one of the rooms of the house; further, that the implement or bludgeon with which the blow was given was not on the gallery, but had evidently been taken by appellant from the plow which was outside in the yard; and, further, that the fruits of the robbery were shown to have been in the possession of appellant after the homicide.

On the impanelment of the jury, appellant excepted to the action of the court allowing the state to question the jurors as to whether or not they had conscientious scruples in inflicting the death penalty in a case depending on circumstantial evidence; and he further objected to the court sustaining a challenge to one of the jurors (Tucker), who, in reply to said question, stated that he had conscientious scruples in such case. This question has heretofore been settled by

the decisions of this court, and we think properly. See *Shafer v. State*, 7 Tex. App. 239; *Clanton v. State*, 13 Tex. App. 139, and authorities there cited.

There is nothing in appellant's second bill of exceptions, in regard to the impanelment of the jury.

Appellant reserved an exception to the use by the district attorney in his argument of the bar of iron which had been introduced in evidence, and identified as the weapon with which the homicide was committed; the grounds of his objection being that there was no evidence before the jury of the weight of said bar of iron, and that its exhibition and use in such manner by the district attorney were calculated to inflame the minds of the jury. It was not necessary, in order to illustrate with the bar of iron, that it should have been weighed. It had been introduced in evidence, had been seen by the jury, and its use by the district attorney in the way of illustration, and his insistence that the homicide could not have been committed with one hand, in the manner testified by appellant, was, we think, permissible. It was as much allowable for the state to so use it as it would have been for the defendant's counsel to have used it in argument in order to show that it was entirely practicable to have committed the homicide with it as testified by appellant. So far as the desire of the jury to have the bar of iron sent to the jury room is concerned, this was not permitted by the court, and we do not understand counsel to urge an objection on the ground that the court refused to allow the jury to have said bar of iron.

The court instructed the jury that all murder committed with express malice, and all murder committed in the perpetration or in an attempt to perpetrate the crime of robbery, is murder in the first degree, and then instructed the jury what constituted robbery, and told them that, if a homicide was committed in the perpetration or attempt to perpetrate robbery upon another, the homicide is murder, per se, of the first degree, and further instructed them, if they believed that appellant killed deceased in perpetrating robbery, to find him guilty of murder in the first degree. This charge was objected to on the ground that there was no evidence to authorize such a charge; that the testimony showed that the row occurred over a game of cards, and not for the purpose of robbery; that, if the evidence showed that appellant was afterwards found in possession of any of the goods and money of deceased, this was after the homicide, and did not serve to characterize it as a homicide in the perpetration of robbery. We understand from this that appellant insisted that, inasmuch as his is the only positive testimony regarding the circumstances attending the homicide, the state is constrained by this testimony, and the court was author-

zed to present only the phase of the case arising under his evidence in the charge to the jury. If this be true, then the court would have discharged his full duty if he had instructed the jury to find the defendant not guilty, for his testimony singled out shows a case of homicide in self-defense. We do not understand this to be the rule. On the contrary, the state's whole fight in this case was to show by circumstances that the homicide was committed in the perpetration of robbery, and a great many circumstances are adduced in evidence tending to establish this view of the case, and the court, in our opinion, was authorized to instruct the jury as it did. See *Roach v. State*, 8 Tex. App. 478; *Sharpe v. State*, 17 Tex. App. 486; *May v. State*, 33 Tex. Cr. R. 74, 24 S. W. 910.

The court instructed the jury that in determining the grade of the homicide, and in order to determine whether the killing was murder in the first degree, they could consider all the facts and circumstances in the case at the time of the killing, and before and after that time, having connection with or relation to it, etc. This charge was objected to because it instructed the jury that they might take into consideration facts and circumstances after the death of Stonecypher to show whether or not he had before that time been unlawfully killed with express malice. Under all the authorities, evidence of the conduct of the defendant after the killing is admissible to show the animus that actuated him at the time, and it would be a strange doctrine that would limit the testimony to what occurred before and at the very time of the killing. If testimony is admissible subsequent to the killing to show the state of mind, it is proper for the jury to look to such subsequent testimony in order to aid them in ascertaining the state of mind and the purpose for which the homicide was committed. As illustrative of this, take the case in hand. If the homicide was committed for the purpose of robbery, as contended by the state, we would expect to find the actual taking of the money and goods from the body of the deceased after the homicide, and not before. Such is the general experience where murder is committed for the purpose of robbery.

We fail to find in the record any evidence that suggests a killing on manslaughter, and the court did not err in failing to charge this view of the case to the jury. Appellant objected to the refusal of the court to instruct the jury that they were the exclusive judges of the weight of the evidence and the credibility of the witnesses, and also because he failed to instruct the jury as to a reasonable doubt between the degrees of murder. As to the first objection, a reference to the charge shows that the court did instruct the jury that they were the exclusive judges of the weight of the evidence and the credibility of the witnesses.

The court furthermore instructed the jury, if they had a reasonable doubt as to the guilt of the defendant, to acquit him. This applied to all the degrees, and it was not necessary for the court to give a specific charge as to a reasonable doubt between the degrees. The charge in question, as given, authorized the jury to acquit of any degree, if they had a reasonable doubt of the guilt of defendant of that particular degree.

Appellant also objected to the court's charge on circumstantial evidence. A number of grounds of objection are assigned to this charge of the court. Among others, it is insisted that appellant himself having testified, and the state having also proved his confessions, this took the case out of the rule applicable to circumstantial evidence. Concede this, and yet we fail to see how appellant was injured by the charge of the court. Indeed, the court required a stricter rule, before the jury would be authorized to convict the defendant, than that insisted upon by appellant himself.

There is nothing in appellant's exception to the action of the court with reference to having the witness Patton reiterate his testimony before the jury. If he had stated some new testimony, it might have been improper, but it appears that he stated nothing new. Nor is there anything in appellant's motion for a continuance. The testimony of the absent witnesses was not material. If they had been present, their evidence would have served no useful purpose, even if it had been admissible.

We have examined the statement of facts carefully, and in our opinion the evidence supports the finding of the jury. The circumstances in connection with the confessions and testimony of appellant sufficiently identified the body found in the burned building as that of the deceased, and established the corpus delicti, to wit, that he came to his death by violence at the hands of appellant. *Anderson v. State*, 34 Tex. Cr. R. 546, 31 S. W. 673; *Kugadt v. State* (Tex. Cr. App.) 44 S. W. 989. Furthermore, the testimony establishes beyond any reasonable doubt that the motive for the homicide was robbery. There being no error in the record, the judgment is affirmed.

HURT, P. J., absent.

#### RIOS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 23, 1898.)

#### CRIMINAL LAW—WITNESSES—HUSBAND AND WIFE—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

1. Where two men are indicted for the same offense, and there is an agreement between the district attorney and one of them that his case is to be dismissed, the wife of the latter is competent to testify for the state in the prosecution of the other.



2. Where the evidence against accused is positive, although the testimony is that of an accomplice, an instruction on circumstantial evidence need not be given.

Appeal from district court, Atascosa county; M. F. Lowe, Judge.

Miguel Rios was convicted of cattle theft, and appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of cattle theft, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

On the trial Mrs. Hettie Miller was introduced as a witness by the state. Her husband, Charley Miller, was separately indicted for the same offense of which the defendant was then on trial. Because of the pending indictment against her husband, it was urged that Mrs. Miller was not a competent witness against the defendant. Her testimony was to some extent material in making out the case against appellant; and it may be stated here, also, that it exonerated her husband. It is provided by statute that the husband and wife cannot testify against each other, but may be witnesses for each other. This case differs from the Bluman Case, 38 Tex. Cr. R. 43, 21 S. W. 1027, and 26 S. W. 75, in this: In that case the husband testified, and the wife was then used as a witness, and the conclusion reached under this state of case was that, because the husband was used as a witness in the case, therefore the wife should be used. Here the husband did not testify and the wife did. However, there was an agreement in this case made between the district attorney and the husband, by which his case was to be dismissed from the docket, and the reasons are stated in the bill of exceptions, but are not necessary to be noticed. As presented by the bill of exceptions and the record, the wife could not be used against her husband, either directly or indirectly, because there was no possibility of his being tried under the pending indictment. Under this agreement made between the husband and the district attorney, the pending case against said husband would have to be dismissed. While this is not exactly the same state of case as that of *Camron v. State*, 32 Tex. Cr. R. 180, 22 S. W. 682, yet, as we understand it, the principle is the same. Here, while there was no agreement that the husband should turn state's evidence, yet there was an agreement to dismiss this case, evidently for the purpose of obtaining the testimony of the wife in the trial of this appellant. If the decision of *Camron v. State*, supra, is correct, then the agreement could be enforced in this case. There was no error in admitting this testimony.

Appellant reserved an exception to the failure of the court to submit the law of circumstantial evidence. In this there was no error. The testimony as to the taking was positive. It is true that the witness who tes-

tified to the taking was an accomplice, but that fact does not make it a case of circumstantial evidence. The evidence was direct and positive as to the taking, driving up, and butchering the animal. This relieved the court of the necessity of giving a charge on circumstantial evidence.

Appellant contends that the evidence is not sufficient to support the conviction. The testimony is overwhelming and conclusive, and the verdict of the jury is fully supported by the evidence. The judgment is affirmed.

HURT, P. J., absent.

#### LEWIS et al. v. STATE.

(Court of Criminal Appeals of Texas. Nov. 23, 1898.)

#### INTOXICATING LIQUORS—STATUTES—BAIL BOND—VALIDITY.

Laws 1881, p. 21, § 1, imposing a license on any person "engaged or engaging in the business of selling \* \* \* liquors," is tantamount to Laws 1893, p. 177, § 1, providing that "any person \* \* \* who shall engage in the sale of spirituous, vinous, or malt liquors," shall pay a license; and hence a criminal bond reciting as the offense that accused "unlawfully engaged in pursuing and following the occupation of selling spirituous, vinous, and malt liquors, and medicated bitters, in quantities of one gallon and less than one gallon, without first obtaining a license therefor," is a valid bond, under the latter act.

On rehearing. Affirmed.

For former opinions, see 38 S. W. 205, and 39 S. W. 570.

HENDERSON, J. This case is submitted to us on a motion for rehearing. Appellant insists in his motion that the court was in error in the original opinion in holding the bond a valid one, and the *scire facias* sufficient. His contention is that the bond was framed under the act of 1881, instead of the act of 1893; and he insists that the law of 1881, under which the bond was drawn, made it penal for pursuing the occupation of a liquor dealer, while the act of 1893, in existence when this offense was committed, made the selling of liquor an offense. And he urges that these are distinct and different offenses, and that sale of liquor as provided in the act of 1893 superseded and repealed the former law, making the pursuing of an occupation an offense. In reply to this, we would state that the object of the two laws is exactly the same, to wit, to levy and collect a tax on the occupation or business of selling liquor. It is not necessary to here enter into the details of the two acts in question, but a reference thereto will amply sustain what we have said. It is true, the language of the act of 1881 differs from that of 1893. The act of 1881 (page 21, § 1) provides that "there shall be levied and collected from any person, firm or association of persons engaged or engaging in the business of selling

\* \* \* liquors, an annual tax," etc. The act of 1893 (page 177, § 1) provides that "any person or association of persons who shall engage in the sale of spirituous, vinous or malt liquors," etc. Both acts provide for a license, but the punishment as provided in the act of 1893 is somewhat different from that contained in the former act. By reference to the above, it will be seen that the language of the former act contains the expression "engaged in the business of selling," while in the latter the expression is "engaged in the sale." Now, we hold that the above expressions are tantamount to the same thing, and were intended to cover the occupation of liquor dealing. And we further hold that a bond, as in this case, which recites the offense as "unlawfully engaged in, pursuing and following the occupation of selling spirituous, vinous, and malt liquors, and medicated bitters in quantities of one gallon, and less than one gallon, without first obtaining a license therefor," is a good bond under the law of 1893, which makes it penal to engage in selling spirituous, vinous, or malt liquors, etc., without first obtaining a license therefor. The motion for rehearing is overruled.

HURT, P. J., absent.

#### MORSE v. STATE.

(Court of Criminal Appeals of Texas. Nov. 23, 1898.)

#### CRIMINAL LAW—CONTINUANCE — DISORDERLY HOUSE—EVIDENCE.

1. It is not reversible error to refuse a continuance of a criminal case on the ground that defendant's son was sick, and needed her care, and to proceed at once with its trial, where the case was called at her instance, out of its regular order, to pass on the application for the continuance, and there were no absent witnesses and no injury was shown.

2. Evidence showed that defendant, charged with keeping a disorderly house, purchased the house, and went into possession, accompanied by two girls; that two days after she left, and was not again on the premises. The girls remained, and the house subsequently acquired a bad reputation, but defendant was not shown to have been connected with it, or to have known its reputation, and subsequent to her arrest she transferred the property to one of the inmates of the house. *Held* not sufficient to overcome the presumption of innocence or sustain a conviction.

Appeal from Houston county court; E. Winfree, Judge.

Mrs. E. Morse was convicted of keeping a disorderly house, and appeals. Reversed.

John I. Moore, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of keeping a disorderly house, and appeals.

There was no error in overruling the application for a continuance. It was sought because of the alleged fact that her son was sick with pneumonia, and she was needed at

his bedside. It was also urged that the court forced her into trial when the application for a continuance was overruled. She states that the case was called upon her suggestion, only for the purpose of having the continuance passed upon, and that when the application was overruled the case was called for trial over her protest. It seems to have been next to the last criminal case on the docket. This is all that is alleged. We see no reason for reversing the judgment on this account. The case was called on her suggestion, and there were no absent witnesses. No injury is shown to have occurred, and but for her act the case doubtless would not have been called until reached in its regular order.

A conversation which occurred between one of the boys visiting the house and one of the girls who lived there was introduced. The witness was permitted to testify "that the girls told him that he must go away; that he was too young to come there." This was objected to, on the ground that the defendant was not present when this conversation occurred. If this testimony had any effect upon the trial, it was calculated or tended to prove the character of the house or its inmates. As shown, it was a matter of small import one way or the other; but perhaps, in view of another trial, it would be better to exclude it.

It is contended that the evidence is not sufficient to support the judgment. We are of opinion that this contention is correct. Appellant purchased the house in question, and, in company with two girls, went into it upon Thursday morning. The parties came on the train, but from where is not shown. Appellant remained until some time during the following Saturday, when she left, and went away to some unknown place, and was not again on the premises. The girls remained, and the evidence shows the house acquired a reputation as being one of prostitution. But this character grew up after appellant left, and she is not shown to have had any connection with it in any way, nor to have known the reputation, either of the house or of the girls. Her residence is not disclosed, but she did not live in the town where the house is situate, nor is it shown where she was arrested. It is true that subsequent to her arrest, and a day or so previous to the trial, she transferred the property to one of the inmates of the house. But this would not be sufficient, in our judgment, to show that she was permitting the use of her house for the purpose of prostitution, and, in fact, it would seem that as soon as she was arrested she immediately disposed of the property. If it had been shown that she knew the character of the girls as being that of prostitutes before placing them in the house, or that she placed them there for that purpose, we would have a different case. But the bare fact that she owned the house, and accompanied these girls there, we think is hardly sufficient to justify a conviction for permitting her house to be used as a house of prostitution. If there are

other facts that are true, to the effect that she knew the girls to be prostitutes and then placed them in the house, this might be a strong circumstance to show that she placed them there for the purpose of plying their vocation. That being true, she would be guilty of permitting her house to be used for the purpose of prostitution. We do not believe this is a stronger case than that of *Ramey v. State* (Tex. Cr. App.) 45 S. W. 489. A suspicion that a party may be guilty will not warrant a conviction. The evidence must be strong enough to overcome the presumption of innocence and the reasonable doubt. We do not believe the evidence is of that character. Wherefore the judgment is reversed, and the cause remanded.

HURT, P. J., absent.

### McCULLOUGH v. STATE.

(Court of Criminal Appeals of Texas. Nov. 30, 1898.)

#### ASSAULT WITH INTENT TO RAPE—FORCE—INSTRUCTIONS—AGGRAVATED ASSAULT.

1. Pen. Code 1895, art. 634, defining force as applied to the crime of rape as such "as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case," does not limit the rule that, in order to convict for assault with intent to commit rape, the evidence must show, not only an assault, but that defendant intended to have carnal knowledge of the woman, and "to use all his power," notwithstanding any resistance on her part.

2. Prosecutrix testified that defendant requested her to have sexual intercourse with him, but she refused, and that he then threw her on the floor several times, and tried to tear her clothes. No marks of violence were shown to have been made on her, and she testified that she screamed only once or twice during the half an hour tussle, though several people lived near by. *Held*, that it was error to refuse to charge as to aggravated assault, where defendant denied any assault, since defendant may not have entertained the intent at the time to accomplish his purpose at all hazards.

Appeal from district court, Rusk county; W. J. Graham, Judge.

James McCullough was convicted of an assault with intent to rape, and he appeals. Reversed.

W. C. Buford, for appellant. John B. Carter and Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of an assault with intent to rape, and his punishment assessed at confinement in the penitentiary for a term of three years; hence this appeal.

Appellant assigns a number of errors, but there is only one which requires notice. The court failed to charge on aggravated assault, and to this action of the court appellant excepted. An examination of the record strongly suggests that this charge should have been given. The general rule on this subject is as follows: "In order to convict a defendant

on a charge of assault with intent to commit rape, the evidence should show, not only an assault, but that the defendant intended to gratify his passion on the person of the woman, and that he intended to do so at all events, and notwithstanding any resistance on her part." Our statute defines force as follows: "The definition of force as applicable to an assault and battery applies also to the crime of rape, and it must have been such as might reasonably be supposed sufficient to overcome resistance taking into consideration the relative strength of the parties and other circumstances of the case." Pen. Code 1895, art. 634. We do not understand our statute to limit the amount of force prescribed in the rule as above set out,—that is, that the evidence must show beyond a reasonable doubt (1) an assault on the prosecutrix; (2) that he had at the time the specific intent to have carnal knowledge of her; (3) that he intended to use all his power to overcome any resistance that the prosecutrix might put forth, to have carnal knowledge of her without her consent. Applying the above rule to the facts in this case, in our opinion the court should have charged on aggravated assault from the state's standpoint, for appellant denies any assault whatever. The testimony of the prosecutrix required such a charge. She testified, in effect, that, appellant and herself being alone together at her mother's house, he requested her to copulate with him, and offered her money to gain her consent; that she refused, and then he laid hands on her, and threw her down on the floor a great number of times (she says eight or ten times); that when he would throw her down he would endeavor to tear her drawers, which she describes as "box drawers, opening on the sides"; that then she would jump up, he would get up, and throw her down again, and that he threw her down on the bed several times; that she screamed several times; that she finally ran out of the room, and went to her sister's, some 150 yards, and there told her sister all about it. Her sister also states that she heard some screaming, but did not know what it was. The testimony shows that the prosecutrix's dress was torn in two places where the sleeve joined the waist, and also at the belt. No marks of violence apparent on the prosecutrix are testified to, nor does she state that he hurt her at any time. She does state, however, that she was sick some time afterwards. Other facts in connection with this matter, unnecessary to be stated, tend to show that appellant may not, at the time, have entertained the intent to accomplish his purpose at all hazards, but merely that the assault was for the purpose of persuading the prosecutrix to have carnal intercourse with him. The summary above given, however, aside from the other facts suggested, it appears to us, required the court to give a charge on aggravated assault. It seems that this affair between the parties lasted, according to prose-

cutrix's testimony, for half an hour. No effort was made to prevent her from screaming, and she screamed, according to her own account only once or twice,—evidently not very loud, for, besides her sister, who barely seems to have heard her, others lived in close proximity to the place, and they did not hear her screams. Appellant was a man, and prosecutrix a woman; and if he was using sufficient force to accomplish his purpose, we would expect to find some bruises on prosecutrix as the effect of his assault, but none are here shown. It is not necessary here to pass on the question whether or not on the testimony an assault with intent to rape would not be sustained by us, but we do hold that under the facts of this case appellant should have had the full benefit of a charge on aggravated assault. For the error of the court in failing to give such a charge, the judgment is reversed, and the cause remanded.

HURT, P. J., absent.

### BEASLEY v. STATE.

(Court of Criminal Appeals of Texas. Nov. 30, 1898.)

#### FORGERY—INDICTMENT—ISSUES AND PROOF.

An indictment for forging a bill of lading, which charges that defendant made a false instrument, purporting to be "the act of one P., Agt., the said false instrument being made in such way that the same, if it were true, would have created a pecuniary obligation on the part of" a railroad company, but which does not allege that said P. was the agent of said company, is insufficient to admit proof of such agency.

Appeal from district court, Harris court; E. D. Cavin, Judge.

C. W. Beasley was convicted of forgery, and appeals. Reversed, and prosecution dismissed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of forgery, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

There is no statement of facts in the record, and appellant relies exclusively on questions of law saved by bills of exception. The first bill of exception is as follows: "J. C. Pray, a witness for the state, over objections by defendant, was permitted to testify that on the 12th day of February, A. D. 1898 [the date of the alleged forged instrument], said witness was the agent and officer of the International & Great Northern Railroad Company, and as such agent and officer of said railroad company had authority to issue, sign, and put forth bills of lading for cotton received at Austin, Texas, for shipment on said railroad, in such manner as to bind said railroad company; that said witness was then, and has since been, the only person or officer authorized to issue, sign, or put forth

such bills of lading. Before said evidence was admitted, defendant duly urged the following objections thereto: (1) That there was no proof that the International & Great Northern Railroad Company was a person or corporation capable of having an agent or officer; (2) that the indictment nowhere alleges that Pray was such agent or officer; and (3) that the evidence was irrelevant and immaterial to the allegations in the indictment. All of said objections were by the court overruled, and the evidence admitted, along with the further evidence that said Pray did not sign nor issue, nor put forth, the bill of lading alleged to be forged, nor authorize defendant, nor any one else, to sign, issue, or put forth the same,—to which action of the court defendant then and there excepted, and here tenders his bill of exceptions, which is signed, and ordered filed," etc. This brings in review the allegations in the indictment, and we will quote so much thereof as is necessary to a disposition of the questions here raised. The indictment charged that appellant, without lawful authority, with intent to defraud, "did make a certain false instrument in writing upon paper, purporting to be the act of another, to wit, the act of one J. C. Pray, Agt., the said false instrument being then and there made by the said C. W. Beasley in such manner and in such way that the same, if it were true, would have created a pecuniary obligation on the part of the International & Great Northern Railroad Company, a corporation, by and under the laws of the state of Texas, and is in words and figures as follows, to wit." Here follows, copied into the indictment, a bill of lading, regular in form, of the International & Great Northern Railroad Company, signed by "J. C. Pray, Agt." No question is made here but that the instrument set out is such an instrument as is the subject of forgery, without any extrinsic explanatory averments. It is in the form of a bill of lading, such as is issued by the International & Great Northern Railroad Company. It contains the name of the place and date of the shipment; an acknowledgment of receipt by the carrier of certain goods (to wit, 100 bales of cotton); the name of the shipper or consignor; the carrier and consignee; the name of the place of destination; and the terms upon which the transportation is to be made. It is such bill of lading as is used by shippers in this state, and such as our statute requires shall be given by common carriers. Rev. St. 1893, art. 322. It is an instrument which is negotiable or quasi negotiable. As stated above, no extrinsic explanatory averments were necessary in order to predicate a charge of forgery of said instrument, as on its face it imports an obligation affecting property. It is not such an instrument as was discussed in Cagle's Case (Tex. Cr. App.) 44 S. W. 1097, which we held required explanatory averments. The difficulty, however, is whether

or not the indictment should have alleged the connection between Pray and the International & Great Northern Railroad Company; in other words, whether or not it should have charged his agency for said company, so as to show by averment the connection between said company and Pray, so as to create an obligation as against the said railroad company. The indictment here charges the forgery to be of the name "J. C. Pray, Agt." Of course, we understand, in ordinary parlance, what "Agt." means. We think the pleader should, by an innuendo, have explained this abbreviation. But this is not the main point. The indictment further goes on, and alleges that the false instrument was made by said Beasley in such manner and in such way that, if the same were true, it would have created a pecuniary obligation on the part of the said railroad company, etc. No doubt the pleader felt the necessity of showing the connection between said Pray and the railroad company; otherwise he would not have used this language. But this is not tantamount to the allegation of agency for the said railroad company on the part of the said J. C. Pray. This, in our opinion, should have been distinctly alleged, and not left to inference. This matter was incidentally touched on in *Millsaps v. State* (Tex. Cr. App.) 43 S. W. 1015; and see *Daud v. State*, 84 Tex. Cr. R. 460, 81 S. W. 376. We there suggested the proper course of pleading. It is a rule of almost universal application, and is a requirement under our statute, that everything that is necessary to be proved must be averred. The proof of agency was offered in this case, and objected to because there was no allegation in the indictment to sustain this proof, and it was admitted over the objections of appellant. We think in this action of the court there was error. 2 Bish. Cr. Proc. § 418a, subd. 2; 2 Bish. Cr. Law, § 545, subd. 2; *State v. Thorn*, 66 N. C. 644. We deem it unnecessary to discuss other assignments. The judgment is reversed, and the cause ordered dismissed.

HURT, P. J., absent.

#### BLACK v. STATE.

(Court of Criminal Appeals of Texas. Nov. 30, 1898.)

ASSAULT AND BATTERY — DUTY TO GIVE INSTRUCTIONS—APPEAL—ERRORS—HOW PRESENTED.

1. A refusal of a continuance cannot be reviewed unless the ruling is presented by a bill of exceptions.

2. Under the statute providing that the court need not charge the jury in misdemeanor prosecutions except on request of counsel, a failure to charge the jury, in a prosecution for aggravated assault, without request, was not error.

3. Objections to a verdict as excessive and contrary to law cannot be heard unless the evidence adduced on trial is brought into the record.

Appeal from district court, Harris county; E. D. Cavin, Judge.

J. T. Black was convicted of aggravated assault, and appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of aggravated assault, and his punishment assessed at confinement in the county jail for the period of 18 months; hence this appeal.

The indictment only charged aggravated assault; hence this is a misdemeanor. The record does not contain an assignment of errors. The first ground of the motion for a new trial is based upon the refusal of the court to grant a continuance. A bill of exceptions was not reserved to this ruling of the court. The matter, therefore, is not presented so that it can be revised.

The second ground of the motion is based upon the action of the court in failing to give a charge to the jury. The statute provides that, in misdemeanors, the court is not required to charge the jury, except upon the request of counsel upon either side. When this request is made, the charge must be in writing. No request was made of the court to give a charge in the case.

A new trial was also sought because the verdict was excessive, and because the verdict is contrary to the law. A sufficient answer to both grounds is found in the fact that the record does not contain the evidence adduced on the trial. The judgment is affirmed.

HURT, P. J., absent.

#### HANKINS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 30, 1898.)

CRIMINAL LAW—ACCOMPLICE—QUESTION FOR JURY—THEFT—EVIDENCE.

1. The question whether a witness is an accomplice is one of fact for the jury, even though the evidence showing him to be such is overwhelming.

2. In a prosecution for theft, an instruction that, to convict accused, he must have been concerned in the original taking, accompanied by a definition of a principal, is sufficient.

3. On the day of a theft of cattle, accused and an accomplice were seen riding towards where the cattle were stolen; and on the day of their sale by the accomplice they together went to the town where the cattle were sold, and were seen there together immediately before and after the sale. After being indicted, accused approached a witness who had seen him riding towards where the cattle were stolen, and told him, if he would swear for him in this case, accused would do as much for him, if he ever got into trouble. Held to connect accused with the theft, and sufficient as a corroboration of an accomplice.

Appeal from district court, Bosque county; J. M. Hall, Judge.

Roe Hankins was convicted of theft, and he appeals. Affirmed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of theft, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

Appellant asked a special charge on accomplice testimony. He complains of the court's charge on the subject of accomplice testimony, because said charge, he insists, was too general; that it merely defined who were accomplices, and left it to the jury to say whether any of the witnesses who testified were accomplices, and then gave the rule with reference to the corroboration of accomplice testimony. He insists that the court should have directly told the jury that Horn was an accomplice, and that his special charge cured this failure in the court's charge. We think the court's charge on this subject decidedly preferable to that requested. The question as to whether or not a witness is an accomplice is always a question of fact, and it is always proper for the court to leave this matter to the jury, even though the evidence should be overwhelming to the effect that a witness or witnesses are accomplices.

Appellant also complains because the court refused to give his second special requested instruction. This charge in effect told the jury that although they might believe appellant was present at the time the cattle were sold, and knew the unlawful intent of the party who committed the theft, that would not make him guilty as a principal in the offense, and, before they could convict, they must believe that appellant was present at the time of the commission of the offense, and participated therein, and that they could not find this fact from the evidence of the witness Horn alone, because he was an accomplice. The court instructed the jury what it took to constitute one a principal in the offense, and that they must believe appellant acted as a principal in the taking, before they could convict him. The court further told the jury that, if they did not believe appellant was present and engaged in the original taking of the cattle, any subsequent connection he may have had with said cattle would not make him guilty of theft. We think this charge sufficiently directed the attention of the jury to this issue, and covered the very phase of the case presented in appellant's requested charge.

Appellant urges that this case should be reversed, because the verdict of the jury is contrary to the law and the evidence, in this: that there is no evidence, except that of the accomplice, Charley Horn, tending in any degree to connect the defendant with the act of taking the cattle alleged to have been stolen by said defendant. We have examined the record carefully in this respect, and we believe that the record does disclose testimony, aside from that of the accomplice, Horn, tending to corroborate him, and to connect appellant with the offense charged. The testimony shows without controversy that ap-

pellant, by a singular coincidence, remained at home with Horn on the day of the theft of said cattle, while the family left and were gone all day, attending a picnic. It is also shown that appellant and Horn left the house on the morning of that day on horseback, and remained together during the day. They were seen together about 11 o'clock a. m. going in the direction of the range of said cattle. The cattle were stolen that day, as testified by the owner. Horn testified that he and appellant stole them and put them in the pasture. The fact that they were seen together on that day, going towards the range where the cattle were running, by another state's witness, is testimony tending to corroborate the accomplice, and to connect appellant with the taking of said animals. Moreover, on the day when the cattle were driven to market and sold to Massie, at Walnut, appellant himself admitted that he went to town with Horn. No one saw Horn with appellant when the cattle were sold, but he was with appellant both before and after the sale, in the town of Walnut. They came together, they ate dinner together before the sale and delivery of the cattle, and they were seen together after the sale, and went home together. Massie says the defendant and his brother and Horn came to his butcher shop between 11 and 12 o'clock on that day; the defendant and his brother referred Horn to witness to make the trade for the yearlings; and that he bought the yearlings from Horn. And, in addition to all this, after defendant was indicted he approached the witness Alexander, who had seen him with Horn on July 24, 1895, going in the direction of the range of the stolen cattle, and told him, if he would swear for him in this case, he would do as much for him, if he ever got in trouble. In our opinion, these facts, in connection with the other circumstances in the case, do corroborate the accomplice, Horn, and tend to connect appellant with the taking of said cattle. The judgment is affirmed.

HURT, P. J., absent.

#### REDDICK v. STATE.

(Court of Criminal Appeals of Texas. Nov. 23, 1898.)

HOMICIDE — MANSLAUGHTER — EVIDENCE — RES GESTÆ — WITNESSES — BRIEF INSTRUCTIONS.

1. An indictment for murder charging an instantaneous killing will admit of proof that a mortal wound was inflicted, which resulted in death two or three months later.

2. A statement made by deceased two hours after receiving a mortal wound, as to the circumstances of the shooting, on request of the accused to the attending physician, is not part of the res gestæ.

3. After a witness for the state had testified to having on one occasion only, when angry, expressed a belief that accused was guilty of murder, and a desire to see him hung, it was admissible, in proof of bias against accused, to show by other witnesses that that witness had

on other occasions, at the same place, made similar statements.

4. Accused had shot his son during an altercation in which the son rushed at his father with an ax, and the latter ran into his house and immediately returned with a pistol, and fired the fatal shot, which he claimed was done to scare the son, with no intention of hitting him, and to deter his advance, and prevent bodily harm to accused. *Held* that, if the shooting was done as claimed, it was not manslaughter.

5. One who fired a pistol towards another, with whom he had just had an altercation, not intending to shoot him, but merely to scare him, and when the person shooting was in no danger of life or person, was guilty, under Pen. Code, art. 592, subd. 3, of negligent homicide in the second degree.

6. Accused and his son had had an altercation, and accused struck his son with an iron rod. The latter got an ax, and accused went into his house, and immediately came out again with a pistol, and fatally shot his son, who had then come near the place where his father was standing. Defendant's evidence was that the son was advancing with the ax, and that he shot to scare him, and prevent him from doing bodily harm, but with no intention of hitting him; and the state's evidence was that the son had put the ax down, and was not advancing. *Held* not to warrant a charge on negligent homicide in the first degree.

7. A charge on manslaughter was warranted, since it might be found that the killing was prompted by a sudden passion aroused by the quarrel.

Appeal from district court, Falls county, S. R. Scott, Judge.

Henry Reddick was convicted of murder in the second degree, and appeals. Reversed.

N. J. Lewellyn and Rice & Bartlett, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 10 years; hence this appeal.

The testimony shows that an altercation occurred between the defendant, Henry Reddick, and his son, Jerry Reddick, who was about 18 years of age, at the house of the former, in regard to the treatment of a horse in charge of the deceased. After some words between the parties, the defendant picked up an iron rod, and struck deceased, who stepped to the woodpile, a short distance, and got an ax. The defendant, who was standing on or near the gallery, immediately went into his house and procured a pistol, and returned to the gallery, and shot the deceased, who at the time was on the ground near the gallery; the shot taking effect in his forehead between his eyes, ranging backward and through the brain, but not making an exit. After the death of the deceased, which occurred some two or three months later, his head was cut open, and it was discovered that the ball had struck the rear portion of the skull, and had then rebounded or fallen down. When found, the ball was about an inch below where it struck the skull, near the base of the brain. Appellant claimed that when he shot the deceased he then had the ax, and

was advancing towards him on the gallery, and that he shot him in self-defense. The testimony for the state, however, showed that deceased had then put the ax down, and was not advancing on defendant. A good deal of testimony was adduced, showing the condition of the wound, and the treatment of the deceased, who lived several months after he was shot. The physicians concurred in stating that a wound of that character was necessarily fatal, and that no treatment would have avoided his death, except the removal of the ball; that this, under the circumstances of this case, could not be done, because the ball could not be located. The physician who attended the deceased immediately after the wound was inflicted states that he probed for same, but could not find the ball. On the post mortem examination it was found about an inch or an inch and a half below where it must have struck the back of the skull, imbedded in a portion of the brain; and that the brain around the ball was decayed; and both he and another physician, who assisted in making the post mortem examination, concur in stating that this caused his death. Appellant made a motion in arrest of judgment on the ground that the indictment alleged that the death of the deceased was contemporaneous with the shooting, and that the proof showed that deceased lived two or three months after he was shot; in other words, that the indictment charged an instantaneous killing, and that only proof of such a killing was authorized under the indictment; and that, where the death was shown to have occurred several weeks or months after the fatal shooting, the conviction could not be sustained. This is not in accordance with the authorities. See *Cudd v. State*, 28 Tex. App. 124, 12 S. W. 1010, and authorities there cited. And see, also, 1 Bish. Cr. Law, § 392; 2 Bish. Cr. Law, §§ 531-533.

On the trial, the court, over the objections of the defendant, admitted the testimony of the witness Dr. Naylor, as shown by the following bill of exceptions: "Dr. Naylor, for the state, was recalled by the state, and he testified: 'I had a conversation with defendant, or, rather, he did with me. He first told me how the thing occurred, and then he requested me to go in, and have the deceased to make a statement. Defendant told me at first that he did not aim to hit the deceased when he shot, but to bluff him; that the deceased was a very unruly boy, and he wanted to bluff him. We went in, and defendant told Jerry [the deceased] to make a statement about how it happened.' Defendant at this point objected to any statement made by the deceased, because he was not living, and defendant had no opportunity to examine him, and because the statements did not come within the rule of the law applicable to dying declarations. Here Mr. Harlan, of counsel for the state, stated that he would withdraw the question asking for the statement of the deceased, but the court remarked that he

would admit the question anyway; that it was settled that statements made in the presence of the defendant to the physician at the request of the defendant himself were admissible. Here counsel for defendant again objected, because said statement was not preserved as the law required, and no opportunity allowed to examine the deceased. But the court remarked, 'I think it a part of the *res gestæ*, and therefore admissible;' to which counsel for the defendant again objected on the ground that this did not occur until nine o'clock in the morning, while the tragedy occurred at seven o'clock that morning, which fact was testified to by Dr. Naylor; but the court overruled said objection, and said witness testified as follows: 'I talked with the deceased and the defendant, and the deceased said his father had treated him bad, and that he [deceased] threw down the ax before his father got out the pistol. I will not be positive, but I believe defendant asked the deceased the questions himself.' As shown by the bill of exceptions, this testimony was ultimately admitted by the court as a part of the *res gestæ*. We do not believe it was a part of the *res gestæ*. This was at least two hours after the shot was fired. It was, therefore, remote in point of time, and it does not appear to have been the spontaneous remarks of the deceased, springing out of the transaction itself, but after a considerable lapse of time. It was the result of a conversation brought about, it seems, between the deceased, the defendant, and the physician. If, however, the statements of the deceased were brought about at the instance of the defendant himself, and were made in the conversation between him and deceased, at which Dr. Naylor was present, at the request of defendant, the testimony may have been admissible.

On the examination of the state's witness Dr. Naylor, the defendant, on cross-examination, in order to prove his animus, asked him if he did not say in the town of Bell Falls, "and in the store of one Halpin, on various occasions during the fall of 1895, and also during the year 1896, in the presence of said Halpin, Williamson, and others, that he believed the defendant was guilty, and the God damned son of a bitch ought to be hung; that he would be glad to see him hung." Witness replied that he had made such statements in the presence of the persons named on one occasion, but that this occurred immediately after the difficulty between witness and defendant, in which his (witness') feelings were considerably aroused. Defendant's counsel then asked him if it was not true that he had frequently made such statements in the town of Bell Falls, during 1895 and 1896, to the said Williamson and Halpin and other persons; to which witness replied that he may have said so, though he could not recall any other statement than the one stated. Defendant then proposed to show by said Williamson and

Halpin, who were then in court, that they had frequently heard said Naylor, during 1895 and 1896, in the store named, use the same or similar remarks as that stated above. On objection by the state, appellant was not allowed to make this proof. Under the circumstances of this case, we think the proof was competent. The witness Naylor was a material witness for the state, and had testified to a number of facts that were important, and in answering the question propounded to him by the state qualified the same by reciting that he was at the time angry with appellant. We think it was competent to show that he made similar statements, showing his ill will towards appellant, at other times, and when he was not enraged against him.

The court instructed the jury on murder in the first and second degrees, manslaughter, and self-defense. Appellant excepted to the court's charge on manslaughter, which is as follows: "You are further charged that if you find that the defendant did, at the time charged, shoot the said Jerry Reddick, from which shot the said Jerry Reddick died within one year from the time the wound was inflicted, and you further find that at the time defendant fired the shot he did so with no intention of hitting the said Jerry Reddick, but only intended to frighten and scare said Jerry Reddick, then, if you so find, defendant would be guilty of manslaughter," etc. On this same subject appellant asked the court to give the following instruction: "If you believe from the evidence that the defendant, Henry Reddick, shot and killed deceased, but did the shooting with no intent to hit the deceased, and only shot for the purpose of scaring the deceased, and to prevent his coming onto and doing serious bodily injury to defendant with the ax, then you are instructed that the defendant would not be guilty, and so say by your verdict." It will be noted that the court's charge instructed the jury, without any limitation or qualification as to the circumstances or conditions under which appellant may have fired the shot to frighten deceased, to find him guilty of manslaughter. Under our view, this phase of the case does not present manslaughter. If appellant shot at deceased not intending to hit him, but for the purpose of frightening him, and at the time deceased was coming at him with the ax, as suggested by appellant's own evidence, then the charge asked by appellant on this subject was a correct one, and should have been given. If deceased was not endangering appellant's life or person, at the time he was shot, by any act he was then doing, and appellant shot with no intention of hitting him, but merely to frighten him, this would not be manslaughter, but would be negligent homicide of the second degree. See Pen. Code, art. 592, subd. 3; *Pearce v. State* (Tex. Cr. App.) 40 S. W. 806.

Appellant asked a charge on negligent homicide of the first degree. We find no facts



In the case authorizing this instruction, but we believe that the instruction on negligent homicide of the second degree should have been given. For instance, if this was a casual difficulty between father and son,—as the testimony would seem to indicate,—and he threatened his father and procured an ax, and defendant shot deceased when he was in danger of his life or great bodily injury from an attack then being made or about to be made on him by his son with an ax, this would have been self-defense; but if, when defendant returned to the gallery with the pistol, the son had already thrown down the ax, and was then not menacing his father, but his father, laboring under a sudden passion aroused by the conduct of his son, intentionally shot and slew him, this might be manslaughter. At least, under the facts of the case as here presented, the court might well have given a charge on manslaughter to the jury. We would suggest, in view of another trial of this case, that the court instruct the jury as shown by the requested charge in bill of exceptions No. 8, to the effect that if the jury believe that said wound was not necessarily and inevitably fatal, but that the deceased died from gross neglect or manifestly improper treatment, etc., to acquit defendant. For the errors discussed, the judgment is reversed, and the cause remanded.

HURT, P. J., absent.

#### Ex parte WILSON.

(Court of Criminal Appeals of Texas. Nov. 18, 1898.)

#### WITNESS BEFORE GRAND JURY—CRIMINATING EVIDENCE.

1. Under Code Cr. Proc. art. 426, providing that, when a witness before a grand jury refuses to testify, the court may compel him to answer the question by imposing a fine or committing him to jail, it is the duty of the court, when such witness is brought before it, and shows that his answer would incriminate him, to entertain the witness' objection, notwithstanding he had stated to the grand jury that his answer would not incriminate him.

2. A bill of sale under which witness had claimed to hold certain property, with the theft of which property he and others are charged, is obviously material; and therefore, where witness shows that such bill of sale would tend to connect him with the crimes of forgery and theft, he cannot be required to produce it.

3. The constitutional provision that "in all criminal prosecutions the accused shall not be required to give evidence against himself" applies to the giving of testimony before a grand jury as well as in court.

4. The protection against being required to give oral testimony incriminating the witness applies equally when it is sought to require him to produce any private books or papers.

Appeal from district court, Milam county; M. J. Moore, Special Judge.

Ex parte Robert Wilson. From an order refusing to discharge the applicant on a writ of habeas corpus, he appeals. Reversed.

Henderson, Streetman & Freeman, for relator. J. C. Scott, Dist. Atty., and Mann Trice, for the State.

HENDERSON, J. This is an appeal from a proceeding in the court below on writ of habeas corpus, in which the court refused to discharge the applicant, but held him in custody, to collect a fine of \$100, which had been imposed on him by the court, and to require him to answer a certain question before the grand jury. From the application and statement of facts it appears that the grand jury of Milam county were investigating a charge of theft of cattle, alleged to have been committed by C. J. Wells, Allen Isaacs, and applicant, Robert Wilson. Appellant was served with a subpoena duces tecum to appear before said grand jury, and produce a certain bill of sale alleged to have been executed by one Dock Simmons to applicant for three head of cattle, charged to have been stolen, and which were alleged to be in his possession. On the first occasion when appellant was before the grand jury, he declined to produce the bill of sale, and the matter was reported to the court, and he assessed a punishment against appellant, but, no commitment having been issued, said proceedings were subsequently set aside, and appellant was brought before the grand jury the second time. For the purposes of this case it is only necessary to state the proceedings had on the last occasion. On the last occasion appellant was brought before the grand jury under said subpoena duces tecum to produce said bill of sale, and was asked the following question by the district attorney: "Have you got the bill of sale purported to have been executed by one Dock Simmons to three head of cattle, and witnessed by Allen Isaacs?" He answered, "I haven't it on me or about me." Question: "Where is that bill of sale?" The witness refused to answer the question as to what he had done with the bill of sale, stating that he did not refuse to answer the question because said answer would incriminate him. Witness further stated his answer would not incriminate him; at least, this was the report made by the grand jury to the court. When said witness was brought before the judge in open court, he adjudged a fine against said witness of \$100; and also that he should be committed to the Milam county jail until he was willing to testify before said grand jury, and give answer to the question propounded to him by said grand jury. The following is the order of the court: "On this day, in open court, was presented the person of one Robert Wilson, and at the same time appeared his attorneys, Henderson, Streetman & Freeman, and appeared also for and on behalf of the grand jury in and for Milam county, then in session, the attorney representing the state, to wit, J. C. Scott, and it being then and there made known to the court

that the said Robert Willson was duly brought before the grand jury of Milam county on this day, and while duly in session and sitting as a grand jury, such witness refused to testify, and refused to answer certain questions asked him by said grand jury, as shown as follows: "To the Honorable Monte J. Moore, District Judge of the 20th Judicial District of Texas: The witness Robert Willson, who has been legally subpoenaed to appear before the grand jury of Milam county, now in session, with a subpoena duces tecum to produce a certain bill of sale purporting to have been executed by one Dock Simmons to 3 head of cattle, and witnessed by Allen Isaacs, said subpoena being hereto attached, and the witness being asked: Question. Have you got the bill of sale purporting to have been executed by one Dock Simmons to 3 head of cattle, and witnessed by Allen Isaacs? Answer. I haven't it on me or about me. Question. Where is that bill of sale? Witness refuses to answer the question as to what he has done with the bill of sale, and he does not refuse to answer the question because said question would incriminate him, and witness further said his answer would not incriminate him. J. C. Scott, Atty. for State.' And it appearing to the court that the question propounded to said witness by said grand jury is a proper one: It is therefore considered, ordered, adjudged, and decreed by the court that said Robert Willson be fined in the sum of \$100.00, and that he be committed to the Milam county jail, until he is willing to testify before said grand jury, and give answer, under oath, to such question so propounded to him by said grand jury; and that the state of Texas do have and recover of and from the said Robert Willson the sum of \$100.00, and all costs of this behalf; and execution may issue against the property of said defendant, and said defendant, being now present in court, be committed to the custody of the sheriff, who shall forthwith confine him in the county jail of this, Milam county, and there keep him until he is willing to testify before said grand jury of Milam county, and answer the question herein mentioned." On this order the commitment was issued.

On the 26th of October, relator applied for a writ of habeas corpus, which was granted; the application therefor being as follows: "Your applicant, Robert J. Willson, respectfully represents and shows: That on the — day of October, 1898, he was duly summoned to appear before the honorable grand jury of Milam county, Texas, then in session in the city of Cameron, in said county and state, and that in obedience to said subpoena he made his appearance before said grand jury on the 25th day of October, 1898, and that while there he was asked, besides various other questions, the following, to wit: 'Have you got the bill of sale purporting to have been executed by one Dock Simmons

to 3 head of cattle, and witnessed by Allen Isaacs?' to which question this applicant answered as follows: 'I haven't it on me or about me.' The grand jury then asked this applicant the following question: 'Where is that bill of sale?' which question the applicant refused to answer, because his answer to said question would tend to incriminate him, and connect him with penal and criminal offenses against the laws of the state of Texas, to wit, with the offense of the theft of said three head of cattle described in said bill of sale, and with the offense of forging the name of the said Dock Simmons to said bill of sale, by reason of the following facts and circumstances, viz.: On or about the — day of —, 1898, the three head of cattle described in said bill of sale were seen and known to be within certain inclosed premises jointly owned and controlled by this applicant, Green Willson, and C. J. Wells, who were then partners in the butcher business in said city of Rockdale, and said premises were then being used by this applicant and said Wells and Willson as a pasture and place to keep cattle to be used for slaughtering purposes, said premises being situated near the city of Rockdale, in said county of Milam. That after said cattle were seen in said inclosure, to wit, on or about the — day of —, 1898, complaint was filed against this applicant and said C. J. Wells and Allen Isaacs in the justice court of precinct No. 4, Milam county, Texas, charging each of them with the theft of said three head of cattle from the possession of M. Cummings. He (applicant) is informed and believes, and upon such information and belief states to the court as a fact, that the state, by her officers, have made certain investigations concerning the execution of said bill of sale, and are now continuing to make an investigation concerning the same, for the purpose of proving, and will attempt to prove, that said bill of sale is false and forged. That the defendant is informed and believes, and charges the fact to be, that when this applicant and the said Wells and Isaacs were arrested upon said charge of theft that it was reported to said state's officers that the cattle had been purchased by this applicant from said Dock Simmons, and that he had executed said bill of sale conveying said cattle, and delivered it to some one of said parties. That this applicant cannot make any further explanation or statement to the court concerning said bill of sale without being exposed to self-incrimination. That afterwards, on the said 25th day of October, 1898, the said grand jury filed a report, signed by the said J. C. Scott, attorney for the state in this court, charging this applicant with refusing 'to answer the question as to what he has done with the bill of sale.' A true copy of said report is hereto attached, marked 'Exhibit A,' and made a part hereof. That this applicant was brought before this court on said charge on the 25th day of October, 1898. That this applicant is and was un-

learned in the law, and unacquainted with the procedure and trial of criminal causes in the courts of this state, and for that reason was unable, without the aid of counsel, to bring before and explain to the court the true facts and circumstances concerning his failure to answer said question, and was unable to make said defense to said charge. That this applicant had a valid and legal defense to said charge, to wit, because his answer to said question would tend to incriminate him, and connect him with the commission of said penal offenses against the laws of this state, as before stated. That this applicant did not intend any disrespect or contempt to said grand jury nor to this court by refusing to answer said question. That when this applicant was brought before this court he requested the court to permit him to have his attorneys called to present to this court his defense against said charges, and the court refused said request, and refused to permit this applicant to be defended by counsel against said charge. That afterwards, while this applicant was still before this court, and while said charges were being investigated by the court, this applicant's attorneys, Sam Streetman and J. K. Freeman, appeared in said court, and requested the court to permit them to present to the court the true facts and circumstances concerning the failure of this applicant to answer said question; and the court refused said request, and refused to permit said applicant's said attorneys to make any defense for him against said charges; and the court then and there, upon said charge, made his order fining this applicant \$100.00, and committing him to the jail of Milam county until said fine should be paid, and until this applicant should be willing to answer said question. A true copy of said order is hereto attached, marked 'Exhibit B,' and made a part hereof. That this applicant was immediately thereafter taken to and confined in the Milam county jail. That afterwards, on the same day, the court made some investigation, and permitted this applicant's attorneys and the state's attorney to make some character of statement to him concerning said charge and fine against this applicant, which said investigation was made during the absence of this applicant, and while he was confined in said jail. That during the said investigation the state's attorney, J. C. Scott, stated to the court that he had made certain investigations before the grand jury concerning said bill of sale, and that, if the same was produced and proven, it might be a circumstance against this applicant, tending to convict him of a criminal offense against the laws of this state, and that the said attorney desired said bill of sale for the purpose of being used in the prosecution against some parties other than this applicant. That on the 26th day of October, 1898, at 1:30 o'clock p. m., the court made its order setting aside the former order fining and imprisoning this applicant, and ordered him to be discharged

from custody. A true copy of said order is hereto attached, and marked 'Exhibit C,' and made a part hereof. And afterwards, and before said order was executed, and before this applicant was liberated, the state, by her district attorney, filed in this court an amended report against the applicant, charging him with refusing to answer said question before said grand jury. A true copy of said amended report is hereto attached, marked 'Exhibit D,' and made a part hereof. And this applicant was again brought before this court, and filed his answer to said amended report and charge against him. A true copy of said report is hereto attached, marked 'Exhibit E,' and made a part hereof. That the state appeared by her district attorney, and defendant appeared in person and by his attorneys, and the court proceeded to investigate said charge. That, after hearing the statement of said district attorney and his amended report read, defendant, by his counsel, presented his said answer concerning his failure to answer said question before said grand jury, and, the court having heard the evidence introduced by both parties, again made his order fining this applicant the sum of \$100.00, and imprisoning him in the said jail of Milam county until this applicant should be willing to answer said question before said grand jury. A true copy of said order is hereto attached, marked 'Exhibit F,' and made a part hereof. That in obedience and pursuance to said order of the court the clerk of said court issued a writ of commitment, commanding the sheriff of said county to take into his custody and commit to jail of said county this applicant until he should pay said fine, and until he should have answered said question so propounded by said grand jury. A true copy of said writ of commitment is hereto attached, marked 'Exhibit C,' and made a part hereof. The said writ of commitment was duly delivered to R. Todd, sheriff of said county, and in obedience to its mandate the said R. Todd confined this applicant in said jail of Milam county, and that this applicant, Robert Wilson, is now illegally confined in said jail, and restrained of his liberty, by said R. Todd, sheriff of said county of Milam, by virtue of said order of said court, and by virtue of said writ of commitment. Wherefore I pray your honor to grant and issue a writ of habeas corpus to have me forthwith before your honor, to the end that I may be discharged from such illegal confinement and restraint." Which application was signed and sworn to by said Robert Wilson.

On the trial the copies of the judgment of contempt and writ of commitment were introduced, and, in addition thereto, the following testimony was introduced: "J. C. Scott, the acting district attorney for the Twentieth judicial district of Texas, witness for the applicant, duly sworn, testified: 'On October 25, 1898, Robert Wilson, applicant, appeared before the grand jury of Milam county in obe-

dience to a subpoena, and while before said grand jury stated that he did not have on his person the bill of sale purporting to have been executed by Dock Simmons to 3 cattle, and witnessed by Allen Isaacs, and the defendant was then asked by the said grand jury where the said bill of sale was, which question the defendant refused to answer, and did not state to the grand jury that his answer to said question would not incriminate him. That during the summer of 1898 two of the said cattle described in said bill of sale were found butchered in a little pasture near C. J. Wells house, and under his control, about 3½ miles from Rockdale, in Millam county, Texas. One of the cattle not butchered was also found in said pasture. The defendant and Wells and Green Wilson were then and there partners in the butcher business, and said Wells used said pasture as a pasture. That after said cattle were found in said inclosure, a joint complaint was filed against applicant and said C. J. Wells and said Allen Isaacs for the theft of said cattle from M. K. Cummings; and that, when said Isaacs was arrested for the theft of said cattle, he gave as an explanation of their connection and possession of said cattle that the applicant had bought them from said Dock Simmons; and that said applicant and said Wells and Isaacs are now under bond for their appearance before this court upon the charge of theft of said cattle. That the said district attorney and grand jury have investigated the facts concerning the execution of said bill of sale at the present term of this court, and that the district attorney claims that said bill of sale is false and forged, and that the production of said bill of sale and defendant's answers to questions concerning same, and his answer to the question he refused to answer, might or might not incriminate him, and connect him with the commission of certain criminal offenses against the laws of this state.' The defendant, being duly sworn, testified as follows: 'That the production of said bill of sale, and his answers to questions concerning same, and his answer to the question he refused to answer, to wit, "Where is that bill of sale?" would tend to criminate him, and connect him with the commission of a criminal offense against the laws of the state, to wit, the theft of cattle and forgery; and for said reason, and no other, the defendant refused to answer said question before said grand jury. That if it be true that the applicant stated to the grand jury that he did not refuse to answer said questions for the reason that it would not incriminate him, and if he stated that his answer to said question would not incriminate him, the same were made under a misapprehension of the facts and the effect of said question and answer, and by inadvertence and mistake. That the defendant did not refuse to answer said question out of any disrespect of the grand jury or of this court.' Thereupon the court refused to discharge said applicant, but remand-

ed him to the custody of the sheriff, from which order he prosecutes this appeal.

The question presented for our consideration is, did the court have jurisdiction to adjudicate that appellant was in contempt of court by refusing to answer a question propounded to him by the grand jury, or for refusing to produce the bill of sale alleged to be in his possession? There is no question but that courts have authority to punish in proper cases of contempt; but the question here is, did the court have the power to render the particular judgment it did? For if the court undertook to compel the applicant to produce a paper or to answer a question which might tend to incriminate him in a penal offense, and to make his refusal to answer an offense against the authority and dignity of the court, and to punish him as for a contempt, then its action was null and void. The power of an appellate court in a question of this character was thoroughly reviewed in the case of *Ex parte Degener*, 30 Tex. App. 566, 17 S. W. 1111; and it is only necessary here to refer to that case as our authority to act in a matter of this character. It is insisted by the state that, although the question may have been an improper one, and not authorized under our constitution, yet it was a personal privilege, and by the acts and conduct of applicant before the grand jury he waived this privilege; that is, he there stated that his answer would not tend to criminate him. We think this view originates in a misapprehension of our statute on the subject of the examination of witnesses before grand juries. The grand jury had no authority itself to punish the witness for contempt. It could only refer the matter to the district judge. Article 426, Code Cr. Proc., provides as follows: "When a witness brought in any manner before the grand jury refuses to testify, such fact shall be made known to the attorney representing the state or to the court; and the court may compel the witness to answer the question if it appears to be a proper one, by imposing a fine not exceeding \$100, and by committing the party to jail until he is willing to testify." From this it will be seen that when the witness refuses to testify he is brought before the judge, as was done in this case; and it is then the duty of the judge to determine, from the nature of the question and the surroundings, whether or not the answer of the witness will tend to incriminate him. But the decision of the judge is not conclusive. The witness is the final arbiter of this question, as he alone can know whether the answer will tend to criminate him. We do not mean to say that he is the judge of this matter, but on his refusal the court makes the adjudication as to whether he is in contempt or not. *Ex parte Park* (Tex. Cr. App.) 40 S. W. 300. In this case applicant was brought before the court, and, no matter what may have occurred before the grand jury, when he then informed the court that he declined to answer the question or produce the bill of sale,

because his answer or the production of said bill of sale would tend to criminate him, it was the duty of the court to entertain his objection.

Did the applicant have the right to refuse to state to the grand jury or the court where said bill of sale could be found, or to refuse to produce the same? This involves the simple question whether or not the bill of sale would tend to criminate him, either in the offense which the grand jury were investigating, of theft of said three head of cattle, or in a charge of forgery of said bill of sale. Obviously, if the alleged bill of sale was fraudulent or forged, it would be a very material circumstance against him in the charge of theft of cattle, and in a charge of forgery it would also be very important. After applicant declined to produce the same, stating as his ground therefor the fact that it would tend to criminate him, we are at a loss to understand upon what hypothesis the court required him to answer. In the nature of things, there could be no difference between his testifying before the grand jury or before the court. Our constitution provides: "In all criminal prosecutions, the accused shall not be compelled to give evidence against himself." Bill of Rights, § 10. And this was as much a criminal prosecution when entertained before the grand jury as if it had been before the court. This question was thoroughly discussed, and the authorities reviewed, in *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 196, and we refer to that decision, and the authorities there cited. The same principle that protects a party against being compelled to give in oral testimony incriminating himself is also applicable when it is sought to require him to surrender any of his private books or papers. See *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524. We quote from that case as follows: "Any compulsory discovery by extorting the party's oath or compelling the production of his private books and papers to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom." It is held in a majority of the cases that, if the testimony merely furnishes a link in a chain of evidence that may convict him, or tend to convict him, the witness is protected by his constitutional privilege. But in this case there can be no pretense that the bill of sale was not material testimony; it was palpably so; and we are surprised that it did not occur to the judge at once that it was beyond his power to compel its production when the witness stated to him that it would tend to criminate him. In this particular the fundamental law of the land—our bill of rights—was the safeguard under which the applicant rested his claim or immunity from answering the question;

and it afforded a shield which no exigency of prosecution or desire for ferreting out crime would justify a court in disregarding. To have compelled an answer of the witness, as was sought in this case, was not only to strike down section 10 of our bill of rights, protecting citizens from being compelled to give evidence against themselves, but it was also in violation of another provision, which protects citizens against unreasonable seizures and searches. If the defendant had been on trial before a petit jury, the judge would have been no more authorized to have compelled him to produce the bill of sale as evidence against himself than he would have been authorized to require him to take the stand and testify as to the contents of the bill of sale. And we apprehend it will not be contended that he could be placed on the stand, and have been compelled to disclose the whereabouts or contents of the bill of sale. These sections were placed in our bill of rights for the purpose of protecting the citizen. Similar clauses are to be found in the constitution of the United States and all of the states of the Union. The principle goes back to the early days of English jurisprudence, to the star chamber inquisitions, and to the time of John Wilkes, when Lord Camden, in *Entick v. Carrington*, 19 How. St. Tr. 1029, planted firmly the principles of liberty regulating and restraining the inquisitorial powers of courts, which has ever since been the rule of law among all English speaking peoples. And in this day neither the legislature nor courts are authorized to violate these sacred provisions of our constitution. We therefore hold that the judgment of the lower court remanding the applicant to custody for refusing to produce said bill of sale, or to answer questions relating thereto, was violative of our bill of rights, and was illegal and void. The judgment is accordingly reversed, and the relator is ordered to be discharged from custody.

HURT, P. J., absent.

#### McAVOY v. STATE.

(Court of Criminal Appeals of Texas. Nov. 30, 1898.)

#### PERJURY — MATERIALITY OF FALSE TESTIMONY — INSTRUCTIONS.

1. In an action against a bank for a balance due on a deposit slip, a check containing a notation as to a portion of the deposit which it withdrew was introduced. There was no dispute as to the check, the only controversy being over the date of a payment shown on the deposit slip. One of the witnesses was afterwards prosecuted for perjury in his testimony concerning it. In the prosecution a witness testified as to the time when the notation was made on the check, and he in turn was prosecuted for perjury. *Held*, that his testimony was not shown to be material.

2. Where the question whether testimony of a witness afterwards accused of perjury was material depends on a number of facts, the

court should submit these facts to the jury, instructing them that, if they find the facts to be true, the testimony is material.

Appeal from district court, El Paso county; A. M. Walthall, Judge.

L. N. McAvoy was convicted of perjury, and he appeals. Reversed.

Jay Good, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of perjury, and his punishment assessed at confinement in the penitentiary for a term of three years; hence this appeal.

The perjury assigned is charged to have occurred on the trial of one Max Goodman, who was being tried in the district court of El Paso county for perjury alleged to have been committed in the trial of a case in the justice court, which is the same case out of which the perjury here assigned emanated. The particular predicate laid was as follows: That defendant, L. N. McAvoy, did willfully and deliberately state and testify as follows: "I saw the check for \$350.50 (meaning thereby the check above described) at the trial in the justice's court on the 16th day of June, 1896 (meaning thereby at the trial of the case of Gypsie Davenport against the First National Bank of El Paso, Texas), and I saw John Aiken put those figures '175.25' on that check with a pencil, at that time, during the trial, and while he was a witness in that case (meaning thereby \* \* \*), and I know the figures '175.25' were not on that check before that time (meaning thereby \* \* \*);" "and which said statement was material to the issue of said cause," etc. It is insisted that the proof does not show that said statement upon which the perjury alleged was based was material on the trial of said case. It is held that in charging perjury the pleader may either set out all the facts in the indictment, thus making it appear that the alleged false testimony was material to the issue being tried, or he may set out the false testimony, and merely allege that same was material testimony on the issue then being tried. White's Ann. Pen. Code, art. 206, § 831, subd. 6, and authorities there cited; 2 Bish. Cr. Proc. § 921. In this case the latter course was pursued, and on the trial the state undertook to show by evidence the materiality of the alleged false testimony to the case then on trial, to wit, the State of Texas against Max Goodman. Mr. Bishop says: "It is necessary to prove all, or so much less than all, the pleadings and evidence brought forward at the former trial as will duly present the question; whereupon the court, not the jury, will decide, as of law, whether what the defendant is shown to have testified to therein was material. Yet practically; as fact is involved with the law, the question must generally be passed on with the rest by the jury, under instructions from the court." 2 Bish. Cr. Proc. § 935. The state

proved a number of facts showing the proceedings both at the trial of the case in justice court, wherein Gypsie Davenport was plaintiff, and the First National Bank of El Paso was defendant, and also the proceeding on the trial of Max Goodman, in the district court, for perjury, alleged to have been committed by him on the trial of the aforesaid case in the justice court; and from these proceedings it is assumed by the state that the materiality of said alleged false testimony is made to appear. By reference to the proceedings in the justice court it will be seen that the suit of Gypsie Davenport against the bank was for an alleged balance due her by the bank on a deposit slip of \$250. A deposit slip for \$250 was introduced in evidence, and it showed an indorsement on the back thereof as follows: "Cash, 12-26-61." From the recitation of facts it is difficult to tell, but we take it, that the turning point in that case in the justice court was whether the above indorsement, showing a credit of \$61 on said deposit slip, was on said slip prior to the 16th of June, 1897, the day of the trial in the justice court,—it being contended by the plaintiff that it was placed thereon on the 29th of May, 1897, when Goodman, the transferee, presented the deposit slip to the bank for payment; and, on the other hand, it was contended by the defendant that said indorsement was on the deposit slip before that time, it having been placed there by an officer of the bank on the 26th of December, 1896; that the figures above set out showed that "12" meant the twelfth month, and "26" the day of the month, and "61" the amount of money then paid and to be credited on the slip. For the purpose, as the state claims, of showing that Gypsie Davenport had drawn all the money she had deposited in said First National Bank of El Paso, a check for \$350.50 in Mexican money, and on which appeared the figures "175.25," was introduced in evidence. On the trial of the perjury case this same check for \$350.50 in Mexican money was introduced in evidence, and not objected to by defendant. Aiken and Burgess, two witnesses for the state, both testified that the figures on said check, to wit, "175.25," in pencil, were on there prior to the trial of the case of Gypsie Davenport against the First National Bank of El Paso in the said justice court on June 16, 1897; and in that connection stated that the indorsement was to show that she had on that date been paid \$175.25 in American money for the check in Mexican money. It was shown that McAvoy was introduced as an expert on handwriting by the defendant in the case against Max Goodman in the district court, and he was asked (by whom does not appear, but, doubtless, by the prosecution) when the figures in pencil, "175.25," were put on the check for \$350.50, and he testified that said figures were put on there by John Aiken on the 16th of June, 1897, in the trial of the

case of Gypsie Davenport against the First National Bank of El Paso in Justice McKee's court for precinct No. 1 of El Paso county; that he saw John Aiken put said figures on said check, etc. This is the showing made by the statement of facts on which it is claimed that the materiality of said testimony is made to appear. It will be observed that this indorsement of "175.25" on said \$350.50 check cut no figure, so far as disclosed by the testimony, in the trial in the justice court. No question was raised on the indorsement, so far as we have been able to discover, on that trial; and the matter was first presented on the trial of Max Goodman for perjury in the district court. The perjury charged against him was with reference to the indorsement on the deposit slip, to wit, "Cash, 12—28—61;" that he should have sworn on the trial in the justice court that said indorsement was put on the deposit slip of \$250 on the 29th of May, 1897, when he presented it to the bank for payment. Now, we are at a loss to understand what bearing the \$350.50 check and the indorsement thereon of "175.25" could have in the perjury case against Max Goodman, unless it be conceded that because the witness McAvoy in that case (who is the appellant in this case), being mistaken as to the indorsement on the \$350.50 check, was consequently mistaken about the indorsement on the deposit slip. We cannot concede that it is legitimate testimony to show that because a witness was mistaken about some other matter in no wise connected with that in issue, he is, per consequence, mistaken as to the matter in issue. It is always admissible to contradict a witness on a material issue, and perjury can be predicated on the impeachment of a witness upon material matter. *Washington v. State*, 22 Tex. App. 26, 3 S. W. 228; *Williams v. State*, 2 Tex. App. 271; 2 Bish. Cr. Law, § 1032. But the general rule is that a witness cannot be contradicted upon immaterial matters. There are some English cases which hold that, if a predicate is laid, without objection, for the impeachment of a witness upon immaterial matters even, and the witness is contradicted without objection, a predicate for perjury can be laid on the impeaching testimony. *Id.* § 1035, citing *Reg. v. Gibbon*, Leigh & C. 109. We believe the better doctrine is otherwise,—that illegal testimony, not material to the issue, cannot be made so because admitted in the case without objection; and this is more in consonance with our statute, which requires that the testimony shall be material. *Misener v. State*, 34 Tex. Cr. R. 588, 31 S. W. 858; *Weaver v. State*, 34 Tex. Cr. R. 554, 31 S. W. 400. In our opinion, the state failed to show the materiality of this testimony to the issue then being tried between the state and Max Goodman. The defendant showed by two attorneys, who were familiar with the case (one being the judge who tried the former

case), that this testimony was not material. While this testimony was not admissible, yet no objection was made to it, and the witnesses appear to have had a proper conception of the matter. The court submitted the issue of the materiality of said testimony in a way to the jury, but we do not believe it was properly submitted. This materiality depended upon a number of facts. The court should, in a proper charge, have submitted these facts to the jury, and instructed them, if they found the same to be true, that then the alleged false testimony was material; that is, the materiality of the testimony was a mixed question of law and facts. *Washington v. State*, 22 Tex. App. 26, 3 S. W. 228; *Lawrence v. State*, 2 Tex. App. 479. It is not necessary to discuss other questions. For the errors discussed, the judgment is reversed, and the cause remanded.

HURT, P. J., absent.

#### BLUM v. STATE.

(Court of Criminal Appeals of Texas. Nov. 30, 1898.)

##### KEEPING AND EXHIBITING GAMING TABLES.

Evidence that in a different room, but in the same building in which accused carried on a lawful business, a gaming table was exhibited, near which he was seen standing, without taking part in the games, accused denying any connection therewith, will not support a conviction of keeping and exhibiting a gaming table.

Appeal from district court, Harris county; E. D. Cavin, Judge.

S. Blum was convicted of keeping and exhibiting a gaming table and bank for the purpose of gaming, and he appeals. Reversed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted for unlawfully keeping and exhibiting, for the purpose of gaming, a gaming table and bank.

The evidence discloses that appellant owned a saloon and grocery store in the Fifth ward in the city of Houston; that in the same building, but in a different room from which he carried on his business, the gaming tables were exhibited. Pratt, the only witness for the state who knew anything of these gambling transactions, testified in this respect as follows: "I never saw Blum dealing said games, or exercising any control over them, but saw him standing around the tables." Appellant testified in his own behalf as follows: "I did not keep or exhibit any gaming table or bank for the purpose of gaming, as alleged in the indictment. I was indicted and convicted last year for exhibiting gaming tables; and I state positively that subsequent to the day alleged in the indictment upon which I was convicted I have not kept or exhibited, or in any manner been con-

cerned in keeping or exhibiting, any gaming table or bank for the purpose of gaming." This is a statement of the evidence. There were two other witnesses, however, who testified in the case, but they knew nothing of the matter, and had seen no gambling in appellant's house. There are but two facts relied upon by the state to justify this conviction. The first is that the gaming tables were exhibited in a different room, but in the same building in which defendant carried on his business; and the second is that he was seen standing around the tables. Defensively, the evidence shows that the exhibition of the gaming devices was in a different room from that occupied by appellant, and that he exercised no control over the gaming tables, and, by his own testimony, that he had nothing to do with the exhibition of said gaming tables and was in no manner concerned in their exhibition. We do not believe this evidence justified the conviction of appellant for exhibiting the gaming tables. The fact that he stood around where they were being exhibited is not sufficient. He must be shown in some way to be interested in the exhibition of such banking games or tables. He was not charged with permitting gaming in a house or premises under his control, and, under this indictment, he could not be convicted, even had he permitted gaming in the house or premises under his control. We do not believe the evidence is sufficient to justify this conviction, and the judgment is therefore reversed, and the cause remanded.

HURT, P. J., absent.

#### RED v. STATE.

(Court of Criminal Appeals of Texas. Nov. 23, 1898.)

#### CRIMINAL LAW—PRINCIPALS—HOMICIDE—INSTRUCTIONS.

1. Pen. Code, art. 75, providing that a person encouraging another in the commission of an offense is a principal, does not preclude a conviction of such person of a different degree of the offense than that which the other is guilty of, where the intent of each was not the same.

2. Where there was evidence that a mother killed her child immediately after its birth, in defendant's presence, a charge to convict him of murder in the first degree, if she "unlawfully, violently, and intentionally" killed the child while he was present and encouraging her, with a deliberate and malicious purpose to take the child's life, is erroneous, as it does not make it incumbent on the jury to find the mother guilty of any degree of felonious homicide; Pen. Code, art. 75, providing that one encouraging the commission of an offense is a principal, where he knows of the actor's unlawful intent.

Appeal from district court, Franklin county; J. M. Talbot, Judge.

John Red was convicted of murder, and he appeals. Reversed.

King & King and S. M. Long, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of murder in the first degree, and his punishment assessed at imprisonment in the penitentiary for life; hence this appeal.

The charge in the indictment was the murder of an infant child immediately after its birth, by suffocation, strangling, and by some means unknown to the grand jury. On the trial the state introduced the mother of said infant, Epsy Keith, who was evidently an accomplice. Her testimony showed that illicit relations existed between her and defendant; that said child was born on Friday night, alive, no one being present except herself and defendant; that defendant immediately took the child from the room where it was born, and while it was still living and crying, and that she did not see the child again; that he returned in a short time, and thereafter, on the following Monday, informed her that he had buried it near the path leading to the spring under the large, double oak tree. She further stated as the reason for her making different statements in regard to this matter that she was afraid John Red, who had threatened her, would kill her. Several days after the birth of said child, in pursuance of the suggestion of Epsy Keith, it was found buried under the oak tree near the path. The umbilical cord was wrapped around its neck, but it was not shown that it was choked to death by this means. No marks of violence were shown on the body. The doctors who made the post mortem examination, after applying the hydrostatic test to the lungs, testified that in their opinion the child was born alive. There was also testimony tending to show that appellant, about the time suspicion was aroused in regard to the child, fled from the county, but was captured and brought back. The testimony also shows that after his arrest, and after he had been duly warned, he stated to the officer that Epsy Keith had killed the child by suffocating it with her hand, that he was present at the time, and that at her request he buried it. A number of witnesses were introduced by the defendant in impeachment of the witness Epsy Keith, showing that she had stated to a number of persons that the child was born dead, and exculpated appellant. These are substantially all the facts proved on the trial.

The court charged the jury only on murder in the first degree. Applying the law to the facts, he instructed them, in effect, in one paragraph of the charge, that if they believed the child was born alive, and appellant killed it by suffocating and strangling it, etc., of his express malice aforethought, to find him guilty of murder in the first degree. In another paragraph of the charge, the court, after defining who were principals, instructed the jury as follows: "Now, if you believe from the evidence, beyond a reasonable doubt, that Epsy Keith, in Franklin county, Texas, on or about the 20th day of December, A. D. 1896, did give birth to a child; that said child, if any, was born alive, and in existence, by



actual and complete birth, as explained to you; and if you believe from the evidence, beyond a reasonable doubt, that said Epsy Keith did on or about said time, in the county of Franklin and state of Texas, and after said birth, if any, unlawfully, violently, and intentionally, by strangling, smothering, or suffocating it, kill said child; and if you further believe from the evidence, beyond a reasonable doubt, that the defendant, John Red, was present, and knew the unlawful intent and purpose of the said Epsy Keith, and did then and there, with express malice aforethought, with a sedate and deliberate mind, and formed design to take the life of said child, aid by acts, or encourage by words or gestures, the said Epsy Keith in taking the life of said child, if she did take it,—then and in that case you will find the defendant guilty of murder in the first degree.” We have quoted at length the above charge, because appellant’s main contention for a reversal of this case is predicated thereon. He contends that the charge as to the guilt of Epsy Keith would only make her guilty of manslaughter, or at most murder in the second degree, and that appellant’s guilt is measured by hers; that is, he can be convicted for no greater offense than she could be convicted of. At common law there were principals of the first and second degree. “A principal of the first degree being one who does the act either in person or through an innocent agent.” “A principal of the second degree is one who is present, lending his countenance, aid, encouragement, or other mental aid, while another does the act.” 1 Bish. Cr. Law, § 648. Under our statute there is no such division of principals, but all are principals who are present and encourage in the act; including both the one actually performing the act, and others who may be present aiding in its performance. While there are no degrees under our statute, yet the principles governing the question who are principals are the same; and both at common law and under our statute it is not necessary to allege the facts relied upon to show the party to be a principal, although the offense may not have been actually committed by him, if he is a principal by reason of the part performed by him in the commission of the offense. *Williams v. State*, 42 Tex. 392; *Gladden v. State*, 2 Tex. App. 508; *Davis v. State*, 3 Tex. App. 91; *Tuller v. State*, 8 Tex. App. 501; *Mills v. State*, 13 Tex. App. 487. The contention of appellant that a principal of the second degree, or one who, under our statute, did not actually commit the offense himself, but who was present, and, knowing the unlawful intent, etc., aided the person who did commit it, can only be convicted of the same degree as the actual doer, is not a sound one. If he enters into the commission of the offense with the same intent and purpose, then his offense will be of the same degree as the actual doer, but he may have a different criminal intent from the one who

perpetrates or does the act; and in such case he will be guilty according to the intent with which he may have performed his part of the act. *Guffee v. State*, 8 Tex. App. 187; and authorities cited in *White’s Ann. Pen. Code*, § 92; *Rex v. Murphy*, 6 Car. & P. 103; 1 Whart. Cr. Law, §§ 214, 220, 479. We therefore hold that it is competent, under an indictment charging all as principals in murder, to convict one of such principals of one degree of felonious homicide, and another of some other degree of felonious homicide, according to the intent with which such principals may have performed the particular act attributed to and proved against them. And, if the court had properly charged as to the degree of guilt of Epsy Keith, the jury might have convicted appellant in this case of murder in the first degree, although they may have believed from the evidence that Epsy Keith killed the child, and under the proof would be guilty of some lower grade of felonious homicide. An examination of the charge, however, shows that same does not furnish the jury a proper rule by which to measure or gauge the degree of homicide as to Epsy Keith. They are told, if she by violence intentionally and unlawfully killed the child, and if he was present, and by his express malice, etc., aided, etc., he would be guilty of murder in the first degree. This charge, as to her, does not define any degree of felonious homicide. As to her, it is not a charge on murder in the first or second degree, because it contains no suggestion of malice aforethought, either express or implied, and it does not present a proper charge on manslaughter. *Jennings v. State*, 7 Tex. App. 350. Our statute on principals, which was given in charge by the court, provides as follows: “When an offense is actually committed by one or more persons, but others are present, and, knowing the unlawful intent of the person committing the offense, aid by acts, or encourage by words and gestures, those actually engaged in the commission of the unlawful act, all such persons are principals, and may be prosecuted and convicted as such.” *Pen. Code*, art. 75. So the general rule would seem to be that the guilt of the principal in the second degree, or one aiding the doer of the act, is measured by the intent of the one actually committing the offense. In order to measure this intent, the law measuring and defining the intent of the actor or doer, it occurs to us, should be properly given; the statute being, if a person present, knowing such unlawful intent, aids the doer thereof by acts, etc., he is guilty with the same intent and purpose. If in a particular case the actual doer of the offense may be guilty of one degree of felonious homicide, and the aider or abettor guilty of another degree, the case should be properly presented to the jury as to the person actually committing the offense, embracing his or her intent; and then the jury should be instructed that if appellant, knowing such intent of the actual com-

mitter of the offense, entered into it, and aided such doer, with some other intent on his part of a greater or less degree, to find him guilty and assess his punishment accordingly. In this case, if Epsy Keith killed the child, she may have been guilty of murder in the first or second degree,—possibly of manslaughter. If appellant aided or encouraged her, knowing the unlawful intent which possessed her, he may have been guilty of the homicide in the same degree, or he may have been guilty of the homicide in some other degree, according to the intent which actuated him. We hold that the jury should have been properly instructed as to the guilt of Epsy Keith (that is, of what degree of homicide, as suggested by the facts, she may have been guilty, based on her intent), and that then they should have been instructed, as suggested by the facts, of what degree of homicide appellant may have been guilty, predicated upon the intent which may have actuated him.

Appellant contends that this case should be reversed on account of certain denunciatory remarks of the district attorney in his closing argument. The remarks were improper, but it is not necessary to discuss them, inasmuch as the case must be reversed on account of the failure and refusal of the court to properly instruct the jury as above discussed. For the error of the court in failing to instruct the jury as heretofore discussed, the judgment is reversed, and the cause remanded.

HURT, P. J., absent.

#### DARLING v. STATE.

(Court of Criminal Appeals of Texas. Nov. 30, 1893.)

CRIMINAL LAW—APPEAL—RECORD—REVIEW—ARGUMENT—INSTRUCTIONS—SODOMY.

1. Where, on an appeal of a criminal case, a statement of facts is not filed within 10 days, as required, and no reason is shown for failure to so file it, a statement subsequently filed will not be considered.

2. In a prosecution for sodomy, the court need not, in defining an assault as an element of that crime, charge the penalty for assault and battery.

3. Where an objection to a remark of the prosecuting attorney is contained only in a motion for a new trial, which is not verified, and no bill of exceptions was preserved or charge asked to be given in regard thereto, it will not be considered on appeal.

Appeal from district court, Jefferson county; Stephen P. West, Judge.

Alfred Darling, alias Shorty, was convicted of sodomy, and he appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of sodomy, and appeals.

The statement of facts was filed 12 days after the adjournment of the court for the term, and no reason is shown why the same

was not filed within the 10 days allowed for that purpose. Said statement of facts cannot, therefore, be considered.

The first, second, third, and fifth grounds of the motion for a new trial cannot be considered, without the testimony. They are therefore not discussed. The fourth ground of the motion for a new trial is based upon the supposed error of the court in failing to instruct the jury as to the penalty prescribed by law for the commission of an assault and battery. It is not necessary, in a case of sodomy, in defining what it takes to constitute an assault, as an essential element of this crime, for the court to charge the penalty of assault and battery.

The sixth ground of the motion for a new trial states that the court failed to properly and fully describe the offense of sodomy. How and in what manner the charge is deficient is not stated. This ground of the motion is as general as it is possible for it to have been made. An examination of the charge, we think, will not support the contention. The charge is sufficient in this respect.

The seventh ground of the motion states that the manner and argument of the district attorney to the jury were very vehement when referring to the defendant; and it is stated that the district attorney called him "a raving, vicious bull, running at large upon the highways, seeking whom he should devour; was dangerous, and should be penned up where he would have no more such opportunities to commit such abominable and detestable crimes." This is simply stated as a ground of the motion for a new trial. It is in no way verified as being true. There was no bill of exceptions reserved, and no charge asked to be given the jury. In fact, as presented, we cannot consider said ground. As this record presents the case, the judgment must be affirmed, and it is so ordered.

HURT, P. J., absent.

#### PULLEY v. STATE.

(Court of Criminal Appeals of Texas. Nov. 30, 1893.)

CRIMINAL LAW—APPEAL—RECORD—REVIEW.

1. Error in denying a continuance cannot be considered on appeal, where the application is not in the record, and no bill of exceptions was preserved.

2. An objection that a verdict is contrary to law and evidence cannot be considered on appeal, where the record does not contain a statement of the facts.

Appeal from district court, Caldwell county; H. Teichmueller, Judge.

Bill Pulley was convicted of assault with intent to murder, and he appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. This conviction was obtained for an assault with intent to murder,—

the punishment being assessed at confinement in the penitentiary for two years; hence this appeal.

There are no bills of exception in the record, nor is the evidence before us. In the motion for new trial (there being no assignment of errors) the appellant sets up error on the part of the court in overruling his application for a continuance. If an application for a continuance was made, it is not in the record; nor was a bill of exceptions reserved to the court's refusal to continue the cause. It is also asserted that the verdict of the jury is contrary to the law and the evidence. The record does not contain a statement of the facts. The judgment is affirmed.

HURT, P. J., absent.

#### LOTT v. STATE.

(Court of Criminal Appeals of Texas. Nov. 16, 1898.)

##### ASSAULT WITH INTENT TO MURDER.

Defendant accosted complainant, and complained of her conduct with another man. He began cursing her, threatened to kill her, caught her by the wrist, and fired two shots, one of which lodged in her chin, and the other in her back. *Held* to support a conviction of assault with intent to murder.

Appeal from district court, Anderson county; W. H. Gill, Judge.

Charles Lott was convicted of assault with intent to murder, and he appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of an assault with intent to murder, and appeals.

There are no assignments of error in the record, and the only ground of the motion for a new trial is the alleged insufficiency of the evidence to support the conviction. Two witnesses, Lucy Thomas (the assaulted party) and her companion, Blanche Burton, testified positively to the fact that defendant accosted them as they entered the premises where they resided, and, after talking with Blanche Burton for a moment, called Lucy Thomas to one side, and had a conversation with her in regard to her conduct; being jealous of one Bill Miller. The witness denied being with Miller on the occasion testified to, and defendant began cursing her, threatened to kill her, caught her by the wrist, and fired two shots; one taking effect in her jaw or chin, and the other in her back, as she was fleeing from him. The defendant relied upon an alibi. A detail of the facts in this connection we deem unnecessary. The testimony presented two theories,—one for the state, which, if true, shows a deliberate, intentional attempt to take life; the other excluded his presence at the scene of the assault. The jury believed the testimony for the state, and we see no reason for disturbing their verdict. The judgment is affirmed.

HURT, P. J., absent.

#### ARMSTRONG v. STATE.

(Court of Criminal Appeals of Texas. Nov. 23, 1898.)

##### INTOXICATING LIQUOR—LOCAL OPTION—ELECTION—ORDER DECLARING RESULT—PUBLICATION—SALES—AGENCY—FORMER JEOPARDY—JURORS—COMPETENCY.

1. Where jurors who have heard the argument of a similar prosecution against defendant state that they have formed no opinion, and can try the case impartially, they are competent.

2. An objection that two members of a jury panel stated that they had formed an opinion will not be sustained when it is not shown that they were taken, or that defendant had exhausted his challenges.

3. In a prosecution for violating a local option law, the production of copies of a newspaper for four weeks, containing the publication of the order declaring the result of the election, is a sufficient showing of the publication of the order for the required length of time.

4. An order declaring the result of an election on the question of local option need not recite that local option was to remain in force only until another election might declare otherwise.

5. An order declaring the result of an election on the question of local option need not show the vote by precincts.

6. An order declaring the result of a local option election need not contain the exceptions authorizing the sale of liquors.

7. In a prosecution for violating the local option law, the evidence showed that the alleged purchaser gave defendant an order to a wholesale dealer. The liquor was sent to defendant at wholesale prices, and charged to him, and he delivered it to the purchaser in small quantities from time to time, receiving on each occasion the retail price of the amount delivered. *Held*, that the deliveries to the purchaser were sales.

8. Where, in order to cover up an illegal sale of liquor, defendant had a purchaser make an order on a wholesale dealer for a gallon, which defendant received and retailed to the purchaser in small quantities, a prosecution for making one sale to the purchaser does not bar a prosecution for another sale.

Appeal from Delta county court; C. C. Dunagan, Judge.

A. J. Armstrong was convicted of violating the local option law, and he appeals. Affirmed.

Sharp & Banister and James Patteson, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at confinement in the county jail for 20 days, and a fine of \$25; hence this appeal.

Appellant objected to the selection of a jury out of a panel of 12 men furnished him by the court, on the ground, as claimed by him, that said jurors were present in court during the argument of another case against him, involving a similar transaction, and that said jurors had formed an opinion. Said jurors were questioned as to this matter, and a number stated that they had heard a part of the argument of the counsel in the other case. Only two of the jurors, Moody and Davis, stated that they had formed any opinion from hearing the former case discussed. All of

said jurors stated that they could try the case fairly and impartially, regardless of what they may have heard of the other case in the argument. It is not shown what became of the jurors Moody and Davis,—whether they were taken; nor is it shown that appellant exhausted his challenges. There is nothing in this contention.

Several exceptions were taken to the admission of evidence tending to show the publication of a copy of the order declaring the result of the election, in the People's Cause, a newspaper published in Delta county. We think the loss of the paper in question was sufficiently accounted for; and also the production of copies of said newspaper of dates October 29, November 5, 12, and 19, 1897, from the files of said paper, was a sufficient showing of the publication of said order declaring the result the required length of time. That the publication was a true copy was sufficiently established by showing that it was an exact copy of the order itself. It was not necessary, in order that said order declaring the result be valid, that it should recite that local option was only to remain in force until another election might declare otherwise. This was a matter of law, and the right to have an election at the proper time could be exercised regardless of such a clause being contained in the order. Nor was it necessary that the order declaring the result should show the vote by precincts; nor was it necessary that said order contain the exceptions authorizing the sale of intoxicating liquors. See *Barker v. State* (decided at the present term) 47 S. W. 980.

Appellant also excepted to the charge of the court with reference to a sale of said liquor, and requested certain special instructions on this subject, which the court refused to give, and he excepted to such refusal. The court first defined what it took to constitute a sale, and then instructed the jury, if they believed that appellant sold the whisky to Henry Akard, to find him guilty; but if they believed that appellant acted as the agent of Henry Akard, and that he received from said Akard an order for said liquor, which he sent to Clark, and on said order said liquor was forwarded by Clark to appellant, and that he delivered the same to Akard, that he would be the agent of said Akard in the transaction, and they could not find him guilty; but if they believed that said liquor was ordered by defendant from Clark, and that he paid Clark less for said whisky than he obtained for it from Akard,—that is, if Akard paid him a profit on the whisky,—that he would not be an agent, but that such a transaction would constitute a sale. As we understand the evidence in this case, the instruction given by the court properly presented the issues made by the facts. The state's theory was—and this was sustained by evidence—that Akard desired to purchase whisky from appellant; that appellant suggested an order to Clark, which was executed

by said Akard. No money was requested to be paid at that time. The evidence does not show that appellant forwarded any money from Cooper to Clark, who was a wholesale dealer at Paris. Subsequently, Akard, on several occasions, called at appellant's place of business for whisky. It was delivered to him by appellant in pints and half pints, and Akard paid him at the time the retail price of said liquor. It was further in proof that the retail price was \$4 per gallon, and the wholesale price was from \$1.75 to \$2.25 per gallon; that appellant's course of dealing with Clark was to purchase at wholesale, and he sent him orders from time to time, with the request to keep them as he might need them; that the charge for the liquor was always made to appellant; that, when Akard purchased from appellant, he paid him from time to time at the retail price. We do not understand appellant, in his testimony, to deny that the transaction was consummated in the manner above stated, but claimed that he should have something in the way of profit for his trouble. If this transaction does not constitute a sale, then we fail to understand what it takes to make a sale. There is no pretense here that it was understood between the parties, Akard and appellant, that he was to receive a commission for his agency, or some compensation for his trouble. The record simply disclosed a very thin device to cover up an illegal sale of liquor; and the court, in our opinion, very properly instructed the jury that, if appellant was to receive in this transaction any profit or compensation above the actual cost price of the liquor, then it was a sale. This disposes of the requested instructions.

Appellant set up former jeopardy, but the court found against this plea. In our view, there was no former jeopardy. Because Akard gave appellant an order for a gallon of whisky did not make the transactions the same. This was simply a cover. The transactions were separate purchases of whisky by Akard from appellant on different occasions. The judgment is affirmed.

HURT, P. J., absent.

#### PILAND v. STATE.

(Court of Criminal Appeals of Texas. Nov. 23, 1898.)

#### INDICTMENT—VARIANCE—ARREST OF JUDGMENT—THEFT.

1. Under the statute providing that, on the arraignment under an information, the defendant shall, if his name is not correctly set forth therein, ask to have it correctly set forth, and, if he does not do so, the name shall be taken as his true name, the fact that a complaint charged one "Henry Pelan" with a larceny to benefit "of him, the said Henry Piland," while the information used the name "Henry Piland" throughout, is not sufficient ground to arrest a judgment of conviction, where defendant pleaded to the information, and no question was raised as to the point until after his conviction.

2. On a prosecution for the theft of a bale of cotton, evidence is sufficient to sustain a conviction where defendant was seen en route from the place where the cotton was stolen to where it was sold, driving a wagon with a bale of cotton in it, whereas he owned no cotton at the time, having previously sold his crop.

Appeal from Camp county court; Sam D. Snodgrass, Judge.

Henry Piland was convicted of the theft of a bale of cotton, and appeals. Affirmed.

Jones & Ralston, for appellant. Mann Trice, for the State.

DAVIDSON, J. This conviction was for the theft of a bale of cotton.

Appellant filed what he terms a motion for a new trial and in arrest of judgment, the first ground of which suggests that there is a variance between the name of appellant as set out in the complaint and in the information. The complaint charges that "Henry Pelan did then and there unlawfully and fraudulently take one bale of cotton, \* \* \* the property of R. L. Cason, with the intent to appropriate it to the use and benefit of him, the said Henry Piland." The information uses the name "Henry Piland" throughout. It is contended that the use of the name "Pelan" in the first instance in the complaint is a variance from the name "Henry Piland," subsequently used in said complaint and in the information. We do not believe this is a variance. No question was raised in regard to this matter until after the conviction. Appellant pleaded to the information which alleges his name to be "Henry Piland." A variance in the name of the person injured by the commission of the offense is much more serious than that of the defendant, for the latter can be cured by amendment, whereas the former cannot. Our statute provides that, when a party is arraigned, his name, as stated in the information or indictment, shall be distinctly called, and unless he suggests a different name, or that he is not indicted by his true name, it shall be taken that his name is correctly set forth in the pleading, and that thereafter he shall not be allowed to deny the same by way of defense. If he suggests that he bears a different name from that stated, the same shall be noted upon the minutes of the court, and the indictment amended, and the style of the case changed so as to give his true name, and the cause shall then proceed as if the true name had been so recited in the indictment. It occurs to us that this statute is made to meet just such a case as this. When the information was read, his name was read "Henry Piland," and to this he pleaded. We are of opinion that the point suggested by appellant comes too late. As before stated, this is not the name of a third party, but of the defendant himself, and by some mistake it seems that in one place in the complaint the name is spelled "Pelan" instead of "Piland." We do not believe that this was sufficient ground to arrest the judg-

ment, and the court was correct in not doing so.

It is further contended that the evidence is not sufficient to support the judgment. If the state's evidence is correct, defendant is the man who took the cotton from the gin yard of Cason at night, and carried it into an adjoining county, and there sold it or procured its sale. Defendant was seen en route from the place where the cotton was stolen to where it was sold, driving a wagon with a bay mule and a bay horse attached, and a bale of cotton in the wagon. It is shown that he owned no cotton at the time, having previously disposed of his crop. Defendant denied getting the cotton, and proved by the purchaser that he was not the man who sold the bale of cotton. It might be true that he did not in person sell the cotton to Dolinaki, the purchaser, and yet be guilty of the theft. The facts are very cogent and positive that he was the man who drove the team described to the place of the sale, and that he had a bale of cotton in the wagon. He denied carrying the bale of cotton, and denied the theft; but, if the testimony for the state be true,—and the jury believed it,—he carried said cotton in his wagon to the place of the sale. He being the only man in the wagon, the result would seem to be inevitable that he was guilty. The testimony justified this conclusion. His denial of the theft, and the evidence of his witnesses in support of his theory that he did not sell the cotton, were in direct conflict with the evidence for the state. The issue was sharply put. If the state's evidence was true, he was guilty. If his was true, he was not guilty. The jury decided this conflict, and the evidence for the state authorized them to reach this conclusion. The judgment is affirmed.

HURT, P. J., absent.

#### LANDERS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 23, 1898.)

##### ARSON—WHAT CONSTITUTES—EVIDENCE.

1. By the force of a dynamite explosion, splinters of the ceiling of a house were scattered on the floor. Some of these splinters were on fire. Some of the paper between the tin roofing and rafters also burned. *Held*, that on a trial under an indictment charging defendant with the burning of the house, but not drawn under Pen. Code 1895, art. 761, making the explosion of a house by explosives arson, it was error to refuse an instruction that the explosion did not come within the definition of "arson," unless it resulted in setting the house on fire, in contradistinction to the burning of the parts of the house blown off and detached therefrom.

2. There was evidence that defendant had purchased the dynamite, including the cap and fuse, with which the house was exploded. The motive for the arson was claimed to be the enmity of a friend of defendant, with whom he roomed, against the owner of the injured house. There were prints of a broad-toed shoe leading from defendant's boarding house to the injured house, together with returning footprints.

Defendant and his friend came home about 12 o'clock, while the explosion occurred about an hour later. One of them was heard going downstairs after having gone up to the room. The next morning after the explosion, defendant wore a pair of narrow, pointed shoes. Defendant's friend had two pairs of broad-toed shoes, but wore one pair, while the other pair was locked in his store, to which defendant did not have access. *Held*, that the proof was insufficient to sustain a conviction.

Appeal from district court, Clay county; George E. Miller, Judge.

John Landers was convicted of arson, and appeals. Reversed.

Barrett & Barrett and Frank Ford, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of arson, and his punishment assessed at confinement in the penitentiary for a term of five years; hence this appeal.

The case was one of purely circumstantial evidence. The theory of the state was that the house in question was set on fire by an explosion of dynamite. Several witnesses testified to hearing the explosion, and two or three testified to seeing a fire, or something burning, at or about the house after the explosion. The testimony of only one witness, to wit, R. D. Welborne, the owner of the house, tended to show any burning of the house. We quote from his testimony as follows: "The force of the explosion tore a hole through the roof of the house. The splinters of the ceiling were scattered on the floor, together with small portions of the paper roofing (the roof being first covered with paper, and afterwards with tin). Some of this paper and splinters laying on the carpet were on fire. \* \* \* The floor under the hole which had been blown in the house was almost covered with bits of the roofing and splinters, and some of these splinters had been blown down, together with pieces of the paper roofing, on the floor, and were laying on the carpet on the floor, and on fire; and I noticed some sparks dropping from the blown hole, and saw the fire between the paper roofing and the rafters. I smothered out the fire on the splinters and paper on the carpet, and finished putting it out with some water." We have quoted this much of the testimony because appellant claims the court committed an error in giving a certain charge in the case, and in refusing to give certain requested charges. The charge given by the court was as follows: "If you believe from the evidence that the explosion was, by design, caused on the roof of the house occupied and controlled by R. D. Welborne, and that a portion of the roofing of said house was composed of roofing paper, and that a portion of said roofing paper was by said explosion blown out of such roof, and that fire was thereby actually communicated to the house, such burning would constitute a 'burning,' as that term is defined in the main charge." Appellant excepted to this charge,

and asked the following: "The explosion of a house by means of an explosive matter does not come within the definition of 'arson,' unless it results in setting the house on fire." This charge was refused. The contention here is that, under the facts of this case, the jury might consider that, under the charge as given by the court, they would be authorized to find the defendant guilty, if they believed that certain portions of the house had been detached therefrom by the explosion and were afterwards found to be on fire, and that it was not at all necessary that the fire be communicated to the house itself. While it is true that the charge of the court, in a general way, instructed the jury that they must believe that by means of the explosion the fire was actually communicated to the house, yet we are not satisfied but that, under the peculiar circumstances of this case, the jury might consider, unless their attention was directed to the very question, that the burning of parts of the house blown off and detached therefrom might be arson. The charge requested directly instructed the jury that such a burning would not be arson, but the fire must be communicated to the house, or that portion thereof remaining. We think the requested charge should have been given. It is true, article 761, Pen. Code 1895, provides that "the explosion of a house by means of gun powder, or other explosive matter, comes within the meaning of arson." The indictment, however, was not drawn under this article; and the court did not appear to so conceive it, but gave a charge in accordance with the indictment. As stated, however, under the peculiar facts of this case, the requested charge should have been given. *Mulligan v. State*, 25 Tex. App. 190, 7 S. W. 664; *Woolsey v. State*, 30 Tex. App. 346, 17 S. W. 546; 1 McClain, Cr. Law, § 523.

Appellant also contends that the evidence is not sufficient to sustain the verdict. This is a case of purely circumstantial evidence. The testimony on the part of the state tended to show that appellant bought the dynamite, including cap and fuse, with which the house was exploded, in Ft. Worth, about 100 miles distant by rail from Henrietta, on the 3d of June, 1898. The explosion of the house occurred about an hour after midnight on the 8th of June following. Appellant returned from Ft. Worth to Henrietta on the evening of the 4th of June. One witness testified to seeing him have a small bundle in his hand at the time of his return. This is denied by appellant, and he introduced other evidence to that effect. The motive relied on by the state was that Meayers was a friend of appellant, and that he was rooming with him at the time; that said Meayers was at enmity with R. D. Welborne, the owner of the house, by reason of Welborne prosecuting said Meayers on account of violating the local option law. It was further shown that appellant roomed with Meayers at Mrs. McDonald's boarding house, about 250 feet from the Welborne

building. On the night of the alleged offense, Meayers and defendant came from the place of business of said Meayers to their sleeping apartment at the McDonald boarding house, which was upstairs, and across the hall, opposite the room occupied by Mrs. McDonald. They both came up together about 12 o'clock that night. Mrs. McDonald testified that she heard one of said parties go downstairs that night shortly after she heard the two come up, and before the explosion occurred. The evidence also showed that Meayers did go down shortly after they returned to their room, and went to another part of the town, and slept at Taylor's that night. The evidence in this connection also shows that defendant was the only person that slept in that room that night. The state, to make out its case, introduced evidence of tracks leading from Mrs. McDonald's boarding house to the Welborne building, and returning. The ground was moist from a recent rain. These tracks were plain and easily traced. They showed that the party was going at a faster gait on his return than in going, and that some outgoing tracks were displaced or marred by the returning tracks. In connection with these tracks, the state's witnesses showed that the next morning they saw appellant, and he had on a pair of narrow, pointed shoes, which they called "toothpick shoes," and they were old, and the soles broken and worn. The state's witnesses further testified that the tracks made by the party going and returning from the McDonald to the Welborne building the night before could not have been made with the toothpick shoes worn by appellant the next morning, but could have been made by the shoes which Meayers was wearing the next morning. This was the shape of the testimony concerning the tracks and shoes as left by the state. The defendant, however, showed (and this was not contradicted by any testimony for the state) that Meayers had but two pairs of shoes, and these were alike,—both broad toed; that he wore one of these pairs from the McDonald boarding house to Taylor's, where he stayed all night, and the other pair was locked up in his saloon, and that appellant did not have access thereto. This was substantially all of the inculpatory evidence against appellant. The rule with regard to circumstantial evidence is "that it must be such as to exclude to a moral certainty every hypothesis but that of the guilt of the accused of the offense imputed to him. This apprehends that every reasonable hypothesis besides that which coincides with the guilt of the accused must be sought for, and individually compared with all the facts proved, and rejected or excluded as incompatible with them, before the hypothesis of guilt is to be adopted. The result of this is that, if any of the facts or circumstances established in evidence be absolutely inconsistent with the hypothesis of the guilt of the accused, the hypothesis of his guilt cannot be true." Applying this test to the case in hand, it is evi-

dent that the tracks proved were an essential element of the state's case, and were relied on by it as a material link to connect defendant with the offense charged. It will be noted that there was no peculiarity about the tracks proved, except that they were made by a broad-toed shoe of a certain size. If the state had shown that appellant owned such a pair of shoes, or had access to such a pair of shoes (that is, shoes which would have made the tracks found), then the tracks proved would have been consistent with his guilt. But, when the uncontroverted proof established that the tracks were made by a character of shoe not shown to have been owned or worn by him, there was lacking in the proof an important and essential link in the chain of circumstances necessary to bind him to the offense. This is not like a case where the proof may consist of a number of strands, which form a cable, where one may be broken, and still enough of the strands remain to connect defendant with the offense; but here the proof consists of a single chain, in which an essential link is missing, or rather there is an inconsistency or incongruity in the proof regarding this link, which in effect negatives the prisoner's guilt. It is not only not consistent with the appellant's guilt, but inconsistent therewith. Indeed, it points with more force to the guilt of Meayers than defendant. He was absent from the house that night, at a time when, so far as the record shows, he might have committed the offense, and he wore shoes which might have made the tracks. While the tracks are traced to and from the exploded building to the McDonald house, Meayers' tracks were never traced from the McDonald house to Taylor's. The only proof that we find in this case that tends to connect appellant with the offense is as an accomplice, but he is not indicted as such. We hold that the proof in this case is not sufficient to sustain the conviction under this indictment. *Com. v. Phillips (Ky.) 14 S. W. 378.*

It is not necessary to notice appellant's assignment of error with reference to the misconduct of the jury, as it will not occur on another trial. We would observe, however, that it is not every view of the locus in quo of the offense by a jury which would authorize a reversal of a case. The judgment is reversed, and the cause remanded.

HURT, P. J., absent.

#### BELL v. STATE.

(Court of Criminal Appeals of Texas. Nov. 23, 1898.)

#### CRIMINAL LAW—THEFT—INSTRUCTIONS—PRINCIPAL—ACCOMPLICE.

1. An instruction that a certain witness is an accomplice, according to his own testimony, is erroneous, as it assumes that his testimony is true.

2. An instruction not to find defendant guilty on the testimony of a certain witness unless

his testimony has been corroborated, is improper, where the witness testified that he was an accomplice, as the instruction assumes the truth of such testimony.

3. A charge that if defendant and another searched for cattle pursuant to a conspiracy to steal them, and the other found them, and drove them to where defendant was, and they then took them together, then the act of such other in taking the cattle would be defendant's act, is erroneous; Pen. Code, 1895, arts. 74-78, requiring a person to do some act to aid or encourage another in the commission of an offense at the time it is committed, in order to make him a principal.

Appeal from district court, Hardin county; L. B. Hightower, Judge.

T. J. Bell was convicted of theft, and he appeals. Reversed.

W. L. Douglass and Lanier, Kirby & Martin, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of the theft of cattle, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

The theory of the state, mainly supported by the testimony of Pelt, was that the two yearlings in question were taken by Pelt (an accomplice) and the defendant from the range in pursuance of a conspiracy, were driven into the pasture of appellant, and the next day were driven by appellant to Beaumont, some 20 miles, and there sold. The testimony tending to corroborate the state's testimony of appellant's connection with the offense was that he was acquainted with the cattle of Gus Mobray, the alleged owner, and that these were yearlings sucking his cows, and the fact that he sold the yearlings to McFadden in Beaumont, and stated to him that he raised said yearlings. The theory of the defendant was that he and Pelt were on the range together; that he had some cattle of his own in his possession, gathered just before Pelt came up, and had started with them to his pasture, when Pelt suggested that he had two yearlings of his own that he would put in the herd, and get him to drive to Beaumont and sell for him; that thereupon appellant stopped the herd, and waited for Pelt, who went to some cattle in the prairie within view (as he stated about half a mile distant), cut out two yearlings, and drove to the herd; and that they then drove the entire herd to the pasture of appellant; that appellant, while he knew that Pelt had no cattle in that range, yet had no reason to believe that he was stealing said cattle, and that he received them and drove them to his pasture and thence to Beaumont and sold them; that, if he had any guilty connection with said cattle at all, it was not as an original taker, but at most only as a receiver after the said animals had been stolen. He denied any conspiracy between himself and Pelt to steal the cattle, and also testified, if he had stated to McFadden when he sold the cattle that he had raised them, it was only in a general way, as he had raised most of the 15 head he sold him. On this

presentation of the case the court gave a charge on theft generally, and also gave the following charge on theft in pursuance of a conspiracy: "But I charge you that if you find from the evidence that the defendant and the said Pelt had entered into a conspiracy to steal unbranded yearlings on the range, and in pursuance of such conspiracy they went in search of such cattle, and the said Pelt found the cattle mentioned in the indictment, drove the same to where defendant was, and together they fraudulently took and penned such cattle, then the act of Pelt in first taking the cattle would in law be the act of the defendant, and would connect the defendant with the original taking." The court also gave the usual charge defining who were accomplices, and then gave the following charge: "Now, you are charged that the witness John Pelt was an accomplice according to his own testimony, as that term is defined in the foregoing instruction; and you are further instructed that you cannot find the defendant guilty upon his testimony, unless you are satisfied that the same has been corroborated by other evidence tending to establish that the defendant did in fact commit the offense." Appellant objected to the charge on conspiracy on the ground that it made appellant a principal whether he was present or not at the commission of the offense; and he also objected to that part of the charge on accomplice testimony which stated to the jury that Pelt was an accomplice on his own testimony, and, in addition, he asked special charges, which he claims would have the effect to cure the errors of the court. One requested charge instructed the jury that the conspiracy could not be established alone on the uncorroborated testimony of a co-conspirator. We understand appellant's contention to be that the court's charge on accomplice testimony was on the weight of the evidence,—that is, that the matter of conspiracy between Pelt and appellant depended alone on Pelt's testimony, which was denied by appellant; that, on the doctrine of accomplices, Pelt might be an accomplice with the appellant by virtue of being a co-conspirator with him, and that, consequently, the effect of the court's charge was to tell the jury that it was true, as had been testified to by Pelt, that he was a co-conspirator with appellant; that this was upon the weight of testimony, and that the only possible way to have healed this error of the court was by giving the requested charge, in which the jury were told that, as to a conspiracy, the witness Pelt should be corroborated. In our opinion, this contention of appellant is correct. As we view the record, the jury were liable to regard Pelt as an accomplice by virtue of his testimony regarding the conspiracy between himself and appellant; and then to be told, in effect, that Pelt's testimony as to the conspiracy was true, was a charge upon the weight of the testimony. We doubt whether this error could have been cured at all. If it could have been, the charge



asked by appellant might have cured it. We would further observe in this connection that it is usual with judges, where the matter of a witness being an accomplice does not appear to be controverted, to instruct the jury that such a witness is an accomplice. In our view, much the better practice in all cases is to instruct the jury what it takes to constitute an accomplice, and then leave them free to find whether or not such a person is an accomplice.

Another objection is that the charge as framed by the court was upon the weight of the testimony, because it assumed as true the truth of the accomplice's testimony throughout, and then only required that the jury find that the state had introduced other testimony tending to corroborate the same. We are inclined to the view that the charge is amenable to this criticism. In every case where an accomplice testifies, the judge should be careful not to assume in any manner the truth of the accomplice's testimony, but leave the truth of that, as well as all other, evidence, to be found by the jury. For instance, the court should not tell the jury that, if they believed that the testimony of the accomplice has been corroborated, to find the defendant guilty, but in some method they should be clearly told, if they believed the accomplice's testimony to be true, and that it showed or tended to show that defendant was guilty of the offense, still they could not convict unless they further believed that there was other testimony, outside of the accomplice testimony, tending to connect defendant with the commission of the offense charged. The charge in this case, we believe, failed properly to do this.

With reference to the court's charge on conspiracy, we are led to make the following observations: No doubt the court apprehended some difficulty in framing a proper charge on the doctrine of principals in case the jury should believe the testimony of appellant and his son to the effect that they were not immediately present when the theft was committed; and, in order to solve said difficulty, gave the charge on conspiracy in which the jury were, in effect, instructed, if they believed there was a prior conspiracy existing between Pelt and defendant to steal the yearlings, and the theft was committed, in pursuance of such conspiracy, by Pelt, when defendant was not immediately present, but that he subsequently received the yearlings, and assisted in driving the same to his ranch, in such case he would be guilty as a principal. In *Dawson v. State* (Tex. Cr. App.) 41 S. W. 599, the doctrine of principals as defined by our statute was taken up and discussed, and it was there held that our statute defined who were principals and who were accomplices, and drew the dividing line between them, and that we would adhere to the rule laid down by the statute. Under the charge as given, the jury might entertain the view that, although appellant was not present, and

not then doing some act in aid of Pelt, who was actually committing the offense, he would be guilty; whereas, if the court had instructed the jury in accordance with the statute on the doctrine of principals, it would have been all that was required, and there would have been no possible confusion. If defendant was present, and doing some act to encourage or aid Pelt, who was actually committing the theft, he would be a principal. Or if he was not actually present, but was keeping watch, so as to prevent the interruption of the person engaged in committing the offense, or was then doing some other act in aid of or encouragement of the person actually committing the offense, he would be a principal. For the errors discussed, the judgment is reversed, and the cause remanded.

HURT, P. J., absent.

### GAINES v. STATE.

(Court of Criminal Appeals of Texas. Nov. 30, 1898.)

CRIMINAL LAW—CONTINUANCE—DILIGENCE—MATRIAL WITNESSES—REMARKS BY COURT—ASSAULT WITH INTENT TO MURDER—INTENT—SUFFICIENCY OF EVIDENCE.

1. A motion for a continuance, based on the absence of witnesses, on the ground that process for them had been requested several months before the trial, is properly refused where there was no effort on defendant's part in the meantime to ascertain whether the witnesses had been summoned.

2. The overruling of an affidavit for a continuance, stating merely that certain persons would testify that they were present at the time of the assault for which defendant was prosecuted, without itself stating said persons were present, and where none of the witnesses nor defendant in their testimony referred to such persons as being present at the difficulty, does not warrant the appellate court in reversing the case and granting a new trial.

3. Where an attorney asked a witness on cross-examination why he had not made a certain statement on his direct examination, it was not error for the court to state to the attorney that the witness had stated it on his direct examination, where the court thought that the attorney had either not heard or not understood the witness.

4. A conviction for an assault with intent to murder is proper though defendant had a loaded pistol at the time he made the assault with a hammer, where the state's evidence showed that the pistol was not in working order at the time.

5. The objection to a conviction for an assault with intent to murder, that the intent was not shown, in that, if defendant had desired to kill the prosecutor with the hammer used in making the assault, he could have done so, is not tenable where the state's evidence showed that he hit prosecutor repeatedly over the head with the hammer, until prosecutor fell to the ground, where he was picked up shortly afterwards, apparently lifeless.

Appeal from district court, Brazoria county; T. S. Reese, Judge.

Smith Gaines was convicted of an assault with intent to murder, and he appeals. Affirmed.

A. E. Masterson, for appellant. Mann Trice, for the State.

**HENDERSON, J.** Appellant was convicted of an assault with intent to murder, and his punishment assessed at confinement in the penitentiary for a term of five years; hence this appeal.

Appellant excepted to the action of the court overruling his motion for a continuance. Said motion was predicated on the absence of Mahala Winston and Sallie Jones. Appellant says that he requested process for these witnesses some time during the month of February of G. C. Leonard, deputy clerk of the district court, who promised to issue the same, and hand it to the sheriff. The state controverted the diligence in this respect, and showed by the affidavit of the clerk, F. Le Ribbens, that his stub book contained no process for said witnesses for the defendant; and by the affidavit of the sheriff, Williams, that he had served no such process. There was no counter affidavit from the deputy clerk, Leonard. But, concede that appellant applied in February to the deputy clerk for process, as he states, he did not follow it up afterwards, to see if same had been issued. This would be necessary to show diligence. The case was not called for trial until the 13th of July, and certainly by the least effort on the part of appellant during the interim from February to July he could have ascertained whether or not his process had been issued. District court met on the 27th of June, and there is no pretense that, even after district court met, up to the 13th of July, when the case was tried, there was any effort on the part of appellant to ascertain whether or not his witnesses had been summoned. There is not even here the pretense of diligence. However, even if there was no diligence, yet if, after the trial, we were convinced that the testimony of said witnesses was material, and probably true, we might reverse the case, because in such case the court below should have granted a new trial; but in this respect we find nothing to indicate that said two witnesses were present at or during the difficulty. None of the state's witnesses speak of them, and the defendant, who testified on his own behalf, does not state that they were present. If they had been, it occurs to us that this matter would have been shown by the evidence of some witness. And it will be noted, in the application itself defendant does not state that said witnesses were present, but merely states that they will testify that they were present at the time of the difficulty, and heard Charley Brown curse and abuse defendant, and defendant did not strike said Brown until after he had assaulted defendant. In this connection we would suggest to the legislature the importance, as a test of the truth of the matters contained in the application for a continuance, that on the motion for a new trial a defendant be re-

quired to produce the affidavits of the absent witnesses, and that he be afforded process for that purpose; or show good and sufficient reasons for the nonproduction of such affidavits. If this course is pursued, the court below will have something to govern it in passing on the motion for a new trial besides the mere affidavit of a defendant as to what he expects to prove by the absent witnesses.

As presented in the bill of exceptions, the action of the court in regard to the cross-examination of the witness Ed Wilson was not error. The bill shows that appellant's counsel asked Ed Wilson why he had not made the statement on his examination in chief that he requested the defendant not to strike Brown any more after the second lick had been struck, and that the court thereupon stated to counsel that the witness had stated that on his direct examination. The court explains this remark by saying that he made the statement because he recollected the testimony distinctly, and that he merely thought defendant's counsel had not heard or understood the witness. There was no impropriety in this.

Appellant objected to the witness Wilson testifying that immediately after the difficulty he saw white stuff on the head of the assaulted party Brown, and supposed it was brains. What purports to be a bill of exceptions shows that appellant objected to this on the ground that it was the mere opinion of the witness; whereupon the court remarked, as a matter of fact it was the brains. The court says, "This bill is not approved, and is incorrect, and without any foundation whatever." We understand by this that no exception was taken to the testimony, and, further, that the court made no such remark. If the contrary was the fact, appellant should have brought a bill up with the record, certified to by the bystanders, as the law requires. In the shape the matter is presented we cannot consider it.

Appellant excepted to several portions of the charge of the court, particularly the charge with reference to specific intent to kill, and the charge given by the court on aggravated assault; and he asked a number of special charges, which he claims were calculated to cure the errors in the charge of the court as given. We have examined the court's charge carefully, and, in our opinion, it is an admirable exposition of the law as applied to the facts. He gave a charge on assault with intent to murder, a charge on aggravated assault, and a charge on self-defense; all properly framed, and applying the law to the facts developed by the evidence, giving the defendant the benefit of the reasonable doubt on every phase of the case. There was no necessity, even if it be conceded that the requested charges were correct, to have given them.

Appellant insists that the verdict of the jury is contrary to the law and the evidence,

and he particularly insists that the state's testimony fails to show the specific intent to take the life of Brown. He predicates this insistence on the ground that appellant was shown to have had a pistol with three loads in it at the time of the assault by him with the hammer, and that, if he had wanted to kill Brown, he would have shot him, and not struck him with the hammer. Furthermore, that after he knocked Brown down with the hammer, and the witness Wilson left, there was nothing to prevent him from continuing to beat Brown with the pistol or hammer until he was dead. In this connection it will be noted that the state's testimony shows that immediately after the assault the pistol was examined, and it was not in working order. True, appellant says in his testimony that it was in working order when he made the assault; but we are looking at the case from the standpoint of the state, and the jury were not required to believe appellant's testimony. In answer to appellant's proposition that he could have killed Brown if he had wanted to, we would say that to all appearances, when Wilson returned, Brown was dead. He was severely wounded in the head by the blows from the hammer or pistol; was picked up from where he fell by Wilson and Cooper, when they returned, and carried in the house, and remained in a speechless and comatose condition until some time the next day. The manner of the attack as shown by the state's testimony manifested a deadly purpose. He came up behind Brown, who was sitting down, smoking, without any warning, with an iron hammer (which weighed about a pound) in his right hand; he struck Brown repeatedly over the head, until he fell to the ground, in the meantime holding a pistol in his left hand. Wilson, the only witness present, begged him in vain to quit. He refused to do so. Wilson feared to interfere, left, and went in pursuit of assistance, and defendant was standing over Brown, still beating him with the hammer or pistol, when he left. When he returned with Cooper, they found defendant had gone, and Brown stretched on the ground, apparently lifeless. Whether or not the pistol was loaded is immaterial. The manner of this attack with the hammer manifested a deadly purpose, and the jury were authorized to find that appellant had the specific intent to kill in making the attack. We have been discussing this question from the state's standpoint. If we take the testimony of appellant as true, he acted in self-defense. Brown not only cursed him, but first attacked him with the hammer, and he reached around the table, and grabbed his pistol, and struck Brown on the head, and the hammer fell from his hand, and he began to stagger. He struck him on the head again with the pistol, and he fell, and jumped on him, and struck him twice more with it. This testimony shows

an entirely different transaction from that indicated in the state's testimony. If he had killed Brown under these circumstances, it would have been justifiable homicide; and evidently he must have intended to kill him to prevent him (Brown) from killing him (defendant) with the hammer. In our view, there is no error in the record, and the judgment is affirmed.

HURT, P. J., absent:

#### RUCKER v. STATE.

(Court of Criminal Appeals of Texas. Nov. 23, 1898.)

#### CRIMINAL LAW—APPEAL—REVIEW—ASSAULT WITH INTENT TO KILL—EVIDENCE.

1. A judgment in a criminal case will not be reversed because of the admission of evidence, where only a part of that objected to was inadmissible, and the part objected to was not specifically pointed out in the bill of exceptions, and no injury is shown.

2. An instruction, in a prosecution for assault with intent to kill, that defendant was entitled to use no more force than was necessary to repel an assault on himself, is not objectionable for failing to state that he was entitled to use such force as to him appeared reasonably necessary, where the court had previously charged that he was entitled to defend himself against the assault of either or both complainant and his companion.

3. Evidence showed that defendant was present during an altercation between complainant and M.; that he mounted a horse, and rode away, armed himself with a razor, and later returned, and instigated a difficulty with complainant, and, during a fight which ensued, wounded him with the razor. *Held* sufficient to sustain a conviction of assault with intent to murder.

Appeal from district court, Atascosa county; M. F. Lowe, Judge.

Charlie Rucker was convicted of assault with intent to murder, and he appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of an assault with intent to murder, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

This case was reversed on a former appeal to this court (40 S. W. 991), and now comes before us on the second appeal. On the trial, the state introduced the witness Perkins, who testified that "the defendant galloped up on a horse to the house of Jim Rucker, got down, went into the house, and, while there, secured a razor or knife, saying that he would kill the yellow son of a bitch, and that he was then nearly crying." Appellant's counsel asked the witness if he had testified on the examining trial in regard to the fact that the defendant was crying or nearly crying when he came to the house of Jim Rucker. Witness replied that he was nearly crying, and that he so testified on the examining trial.

The examining trial evidence was then offered by the defendant, and the expression "that he was crying or nearly crying" was not contained in said examining trial testimony. Appellant, in that connection, introduced all of the examining trial evidence, as testified by this witness, as to what occurred at the house after the defendant came there, and also in regard to this witness' leaving the house and going down to the scene of the difficulty. The state, over the appellant's objection, was then permitted to introduce all the examining trial testimony of this witness. This was objected to, because not explanatory of the paragraph of said testimony read by defendant. Some of this examining trial evidence introduced by the state was the cross-examination of this witness on the examining trial, in regard to what occurred at the house of Jim Rucker when appellant galloped up there on horseback, while some of said testimony had no relation to said acts. Where some of the evidence objected to is admissible, and some not, it is necessary that the bill of exceptions point out that portion of the evidence which is objectionable. If the objection is of a general nature, and to all of said testimony, irrespective of whether or not it is objectionable, this court will not make the selection for the objecting party. Concede, however, that some of the examining trial evidence was not admissible, still, this related to the prior difficulty; and we do not understand there is any controversy in regard to the facts relating to the first difficulty, and therefore there was no injury.

Appellant excepted to this clause of the court's charge: "And you are further instructed, where violence is permitted to effect a lawful purpose, only that degree of force must be used which is necessary to effect such purpose." The objection is based upon the fact that in this connection the court failed to instruct the jury that if defendant was assaulted by Lamont and Sanders, or either of them, that he could use such force as to him appeared reasonably necessary to repel such assault. The court had previously charged that appellant would have the same right to defend himself against an assault by either Lamont or Sanders, or both of them, as he would have against an assault made by Lamont alone. This was sufficient.

Appellant also contends that the evidence is not sufficient to support the conviction. We think it is. There was a difficulty between Robert Miller and the assaulted party, Lamont. Defendant was present at the beginning of said difficulty, but mounted his horse, and galloped away, armed himself with a razor, returned to the scene of the difficulty, and some half hour later brought on a difficulty with Lamont, in which he took undue advantage of Lamont. He provoked Lamont to engage in a fight with his fist, while he was secretly prepared with a razor, and used it during the progress of the difficulty, in-

flicting three wounds upon appellant, evidently for the purpose of taking his life. The judgment is affirmed.

HURT, P. J., absent.

#### FINLEY v. STATE.

(Court of Criminal Appeals of Texas. Nov. 30, 1898.)

WITNESSES—IMPEACHMENT—INSTRUCTIONS—INTOXICATING LIQUORS—GIFT OR SALE.

1. Where a witness, introduced to prove a fact, instead of proving such fact gives damaging testimony against the party introducing him, he may be impeached.

2. The mere failure of a witness to testify to facts expected to be proved by him will not authorize his impeachment.

3. A witness in a local option prosecution testified that the transaction between him and defendant was not a sale, in that he paid no money for the whisky. He stated that, if he testified before the grand jury that he paid for the whisky, he was mistaken. A grand juror testified that the witness had stated before the grand jury that he paid for the whisky. *Held*, that it was error to refuse to give a charge limiting the latter evidence to the sole purpose of the impeachment of the witness.

4. Where defendant gave a person whisky, and the latter thereafter gave him money, not as the price of the whisky, but merely as a gift, the original transaction is not a sale, so as to be a violation of the local option law, unless it was merely colorable.

Appeal from Delta county court; C. C. Dunagan, Judge.

W. V. Finley was convicted of violating the local option law, and he appeals. Reversed.

James Patteson, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25, and imprisonment in the county jail for 20 days; hence this appeal.

Appellant objected to the introduction of certain evidence by a member of the grand jury as to statements made before the grand jury by the witness Sharp. Sharp was introduced by the state, and testified that the transaction between him and appellant was not a sale; that he did not pay any money at the time, and did not pay any afterwards; if he did, he had no recollection of it. He was then asked by the state's counsel if he did not testify before the grand jury that he paid for the whisky. In reply he stated that he may have said it, but he had thought about it since, and, if he did, he was mistaken. On this state of case, the state was permitted to introduce a member of the grand jury, and prove by said grand juror that Sharp was before that body, and stated that he paid for the whisky; that is, that he gave the seller of the whisky the money value afterwards, in order to make him even. This testimony was objected to on the grounds "that prosecutor could not impeach his own witness, be-

cause this testimony came from the grand-jury room, and that he did not claim surprise at any testimony of said witness." It is competent, where a party introduces a witness to prove a fact, and, instead of proving such fact, the witness states some damaging testimony against him, to impeach him. It does not appear to us that the state was surprised, or claimed any surprise, on account of the testimony; and, from the bill, it is doubtful to our minds whether the witness stated any fact on the stand of a damaging character against the state. The mere failure of a witness to testify to facts expected to be proved by a witness will not authorize his impeachment.

Appellant also asked a charge on the testimony of the grand juror, limiting said testimony to the sole purpose of the impeachment of the witness Sharp. This charge was refused by the court, and appellant excepted. Inasmuch as the testimony was of a character liable to be considered by the jury as original testimony, in determining whether or not there was a sale of the whisky, as well as for impeachment, we believe the court should have given the requested charge. The testimony presents two transactions or sales, and the court appears to have submitted both to the jury,—one of said sales by Finley to the witness Sharp in person, and one through Vaughan, as agent or intermediary. If objection had been made, the court should have confined the case to a single transaction, but we do not understand that any such objection was presented.

Appellant raises a question on the court's charge with reference to the sale through Vaughan, and he asked several special charges on that subject, which the court refused to give. The court's charge recites the facts presenting the theory of the state, and instructed the jury, if they believed said facts to be true, to find appellant guilty. This charge (while rather circuitous), we think, presents the theory of the state; and, if said facts are true, they show a sale. But we believe the counter proposition involved in appellant's special instructions should have been given on this point. We believe that appellant's contention is correct, and the fact relied on by him suggests the defense, to wit, that if appellant in the original transaction made no such sale to Sharp, but merely gave him the whisky, and Sharp thereafter gave him some money, not as the purchase money of the whisky, but merely as a gift, it would not have made the original transaction a sale, unless it was a sale at the time when the delivery was made. If, however, said transaction was merely colorable, and intended to cover up a sale, it would be in violation of the local option law. It is not necessary to discuss other questions raised, but for the errors presented the judgment is reversed and the cause remanded.

HURT, P. J., absent.

## HICKS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 30, 1898.)

### THEFT—SUFFICIENCY OF EVIDENCE.

On a prosecution for theft of a dog, evidence that accused passed by prosecutor's premises, and blew his horn, and the prosecutor's dog was afterwards found at accused's residence, five miles away, does not prove beyond a reasonable doubt that the taking was fraudulent, where the dog was returned as soon as accused learned its owner, and he explained his possession by the fact that, when near prosecutor's residence, he blew his horn to call his own dog, and, when she appeared, another dog was with her, and followed her to his home.

Appeal from district court, San Jacinto county; L. B. Hightower, Judge.

Allen Hicks was convicted of the theft of a dog, and he appeals. Reversed.

F. Campbell, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of the theft of a dog, and prosecutes this appeal.

The only question that requires consideration from us is the sufficiency of the evidence to support the conviction. A careful examination of the statement of fact convinces us that if, in fact, the taking is proved of the dog in question, it is not proved beyond a reasonable doubt that such taking was fraudulent. The most that can be said of the state's case is that appellant passed by the premises of the prosecutor, and blew his horn, and that prosecutor's dog was afterwards found at his home, some five miles from the prosecutor's residence. No concealment whatever is shown; and when prosecutor, a few days thereafter, went to the residence of appellant for his dog, he was informed that his dog was there, but appellant was at the time absent, the dog and one of his own having followed him off. Prosecutor left word for defendant to return his dog, if he did not want to be prosecuted. Appellant sent for his dog next day, and his messenger met appellant on the way to the owner's house with the dog and a certain bitch of appellant. The dog was there delivered to the messenger. Appellant explains his possession of the dog by the fact that, when he was in the vicinity of the owner's house, he had a bitch with him in heat, and, some time after he passed the owner's house, he blew his horn for his dog, which had run off after a rabbit or some game, and, when she came to him, the dog in question was with her, and that he did not at the time know whose dog it was; the dog followed his bitch home; that he took no control over him, but he stayed there after his bitch, like other dogs; that he learned on Sunday, after his return home, that the prosecutor had been to his house for the dog, and on Monday morning he started with the dog to the prosecutor's, in order to restore him, and met the messenger, and delivered the dog

to him. This testimony is not inconsistent with the testimony for the state, but explains in a reasonable manner appellant's possession of the dog. We do not gather from the state's testimony any such fraudulent intent as would constitute a theft of this dog; and, when we take into consideration the explanatory testimony of appellant, it excludes the idea that appellant had committed the theft of said dog. Because the testimony, in our opinion, is not sufficient to sustain the verdict, the judgment is reversed, and the cause remanded.

HURT, P. J., absent.

### MANIS v. FLOOD.

(Court of Civil Appeals of Texas. Nov. 26, 1898.)

#### WHO MAY DISTRAIN FOR RENT.

One must have not only an assignment of the arrears of rent, but a transfer of the reversion, to distrain for rent, as an "assign," under Rev. St. 1895, art. 3235, giving "all persons leasing or renting lands \* \* \* a preference lien on the property of the tenant," and article 3240, declaring that "when any rent or advances shall become due \* \* \* it shall be lawful for the person to whom the rents or advances are payable, his agent, assigns, heirs or legal representatives, to apply \* \* \* for a warrant to seize the property of such tenant."

Appeal from Montague county court; P. P. Dunford, Judge.

Proceeding on distress warrant by R. H. Flood against Joe Manis. Judgment for plaintiff. Defendant appeals. Reversed.

H. W. Hunt, D. M. Smith, and Levi Walker, for appellant. W. S. Jameson, for appellee.

STEPHENS, J. Appellant, having rented land from one Tallant, was sued by appellee, to whom Tallant had assigned the right to collect the rent. A distress warrant was also sued out at the instance of appellee, and levied on a portion of the cotton crop. The right of such an assignee to distrain for rent was controverted by appellant, and from a judgment sustaining the right, and denying him any recovery of damages, this appeal is prosecuted.

The remedy by distress is a summary one, and does not exist without a statute authorizing it. Article 3235 of our Revised Statutes of 1895, gives to "all persons leasing or renting lands or tenements," etc., "a preference lien upon the property of the tenant," etc. Article 3240 provides: "When any rent or advances shall become due, or the tenant shall be about to remove from such leased or rented premises, or to remove his property from such premises, it shall be lawful for the person to whom the rents or advances are payable, his agent, assigns, heirs or legal representatives, to apply to a justice of the peace \* \* \* for a warrant to seize the property of such tenant." The decision of the question at issue turns upon the meaning

to be ascribed to the word "assigns" as used in this statute. Appellant contends that it refers to the transfer of the reversion, and not merely to the arrears of rent, and cites a late case from Kentucky as authority. *Hutsell v. Bank*, 43 S. W. 469. The Kentucky statute differs somewhat, and perhaps materially, from our own, but the line of argument is persuasive. At an early day the New York statute, which seems quite as comprehensive as ours, received a construction such as appellant contends for, as will be seen from the following quotation from the opinion in *Slocum v. Clark*, 2 Hill, 476: "The counsel for the plaintiff in error is mistaken in supposing that the statute (1 Rev. St. [2d Ed.] p. 739, § 23) can help him out of the difficulty. That provides that 'the grantees of any demised lands, tenements, rents, or other hereditaments, or of the reversion thereof, the assignees of the lessor of any demise,' etc., 'shall have the same remedies by entry, action, distress,' etc., 'for the non-performance of any agreement contained in the lease so assigned, or for the recovery of any rent,' etc., 'as their grantor or lessor had or might have had if such reversion had remained in such lessor or grantor.' This act was taken from 32 Hen. VIII. cc. 34, 37, and was designed to extend to grantees and assignees of the reversion who were strangers to the lease, and to their personal representatives, certain remedies upon the covenants therein that were at least doubtful at common law; but it has no bearing upon the question before us. The 'rent' referred to in the statute is, doubtless, rent charge, which is regarded for many purposes as real estate, partaking of the nature of the lands upon which they are charged, and for which no remedy by distress existed as of common right. *Bradb. Dis.* 15, 32, 84; *People v. Haskins*, 7 Wend. 467." This line of construction runs through all the cases we have examined, and we have not been able to find any case to the contrary. The language of our statute is very general and indefinite, and hence contains nothing to warrant a different construction from that given this class of statutes elsewhere. The prevailing construction must be held to have been adopted when the statute itself was adopted. The word "assigns" refers not merely to the assignee of the rent debt, but refers to and includes the grantee of the lease or land. The judgment is therefore reversed, and the cause remanded for a new trial.

### HALSELL v. WISE COUNTY COAL CO.

(Court of Civil Appeals of Texas. Nov. 26, 1898.)

#### TRUST—PAROL EVIDENCE—STATUTE OF FRAUDS.

That a company directed its president as its agent to purchase land for it, and he agreed to, but subsequently purchased the land for himself, taking the deed in his own name, there-

by making him a trustee for the company, may be shown by parol, the contract of agency not being within the statute of frauds.

Appeal from district court, Wise county; J. W. Patterson, Judge.

Suit by the Wise County Coal Company against H. H. Halsell. Judgment for plaintiff. Defendant appeals. Affirmed.

T. J. McMurray, for appellant. R. E. Carswell, for appellee.

HUNTER, J. This suit was brought by the Wise County Coal Company, a Texas corporation, on the 10th day of April, 1896, against H. H. Halsell, in the district court of Wise county, to recover 143.3 acres of land, a part of the Rebecca Coleman survey, lying in Wise county, Tex., or all the interest of the defendant, Halsell, therein remaining unsold by him. It was alleged that Halsell, while the president of the company, in February, 1893, was appointed, by a vote of the directors, to purchase the land in controversy for the company, as its agent, and cause the title thereof to be vested in the plaintiff, and the defendant agreed to do so, the plaintiff to pay the purchase money; that, in pursuance of said arrangement, he did, on the 18th day of February, 1893, purchase the land for the sum of \$1,239, but caused the conveyance to be made to himself, claiming absolute title thereto, and on the 25th day of February, 1893, conveyed an undivided interest of one-half of the north half thereof to another party, for the sum of \$1,239 cash, who had sold it to others, so that the present holders thereof were innocent purchasers of such interest for value, without notice of the rights of plaintiff, and against whom, for this reason, no judgment was asked; that the said sum of \$1,239 so received by him was used and appropriated by him to his own use; that plaintiff has at all times been ready and willing to comply with its agreement with defendant, and pay him the amount he paid out for said land, and is now willing and ready so to do; that it had demanded of said Halsell a conveyance of the balance of said land, offering to repay him all sums paid out by him, and he refused to convey the same, but repudiated said agreement, and refused to account to plaintiff for the \$1,239 so received by him. Wherefore it is alleged that defendant, Halsell, holds the land in trust for the plaintiff, and the prayer is that the court so decree, and that it recover the same from him. The defendant answered by general and special demurrers, general denial, and also specially that, if there ever was an agreement between him and plaintiff that he should purchase said land for plaintiff, the same was without consideration, illegal, and void, for that there was no written memorandum of same; that if any order of the plaintiff's board of directors was made, directing him to buy the land for plaintiff, upon which to build a town, said order was void, because ultra vires, said corporation having no power or authority to buy or hold

land for the purpose of building a town, but only for the purpose of mining or digging coal, etc.; and also limitations of three and five years. The case was tried by the court without a jury, and judgment rendered for the plaintiff, and it comes here on a statement of facts, without any conclusions of fact or law found by the district judge.

The evidence contained in the record tends to prove substantially the following facts: On the issue of boundary the evidence is conflicting, but sufficient to sustain a judgment in favor of either party. It establishes that in February, 1893, the board of directors of the coal company agreed to purchase the land in controversy, for the purposes of a town site and railroad station, and for the coal that was known to exist below the surface. Appellant was at that time president of the company, and was present and presided at that meeting. The board of directors at the same meeting selected and appointed him to make the purchase for the company, and he agreed to do so. Nothing was said about what he should pay for the land, or upon what terms it should be bought, or whose money should be used in paying for it, nor was any particular number of acres designated. The land desired had been viewed out, however, a few days before by Halsell and two other directors of the company, and the general boundaries and outlines of the land desired were understood by all parties and known to appellant. Appellant bought the land on the 18th day of February, 1893, taking the deed to himself individually, paying therefor \$477.65 in cash and executing his two notes, each for the sum of \$477.65, due February 18, 1894, and February 18, 1895, respectively, and placed his deed upon record in Wise county on the same day. He immediately began exercising acts of ownership over the land. On February 25, 1893, he sold one-fourth interest in it to one Gibson for \$1,239, whose deed was placed on record in Wise county, March 14, 1893. On March 1, 1893, he conveyed a right of way across it to the Chicago, Rock Island & Texas Railway Company for one dollar, which deed was placed on record May 1, 1893. He sold and conveyed an undivided one-fourth interest therein to J. R. Stephens, one of the directors of the coal company, on March 18, 1893, but his deed was not recorded until March 20, 1895. No complaint was made to him of his action in buying the land for himself, or demand made upon him to convey it to the coal company, until the day this suit was filed against him, and then no money was tendered to him. The evidence is conflicting as to when he fenced the land. He testified that he fenced it "about April 8, 1893," but one of his witnesses testified that he fenced the south half of it in May and June, 1893, and the north half was not fenced until the spring of 1894. The coal company was solvent all the time, being worth about \$40,000 and owing no debts. Its assets consisted principally in coal lands in Wise county, but it

had no money at the time it directed appellant to buy the land for it. There is evidence tending to establish that it was understood between the parties that the stockholders would each pay his pro rata part of whatever the land cost, when the amount or price was ascertained. Some of the directors of the coal company knew in March, 1893, that appellant had bought the land for himself, and was claiming it as his individual property. The land was patented to the heirs of Rebecca Coleman on March 16, 1858. Halsell claimed under a regular chain of transfers to the certificate, beginning with a transfer of April 13, 1853, from Rebecca Coleman's administrator to Cleveland.

The only questions which we consider serious enough to discuss are (1) whether the evidence establishes a trust whereby Halsell held the land only as trustee for the coal company; and (2) whether, if it does establish such trust, the claim of the coal company is barred by limitation of three years.

The trust in this case is established by the evidence of C. D. Cates, a stockholder and one of the directors in the coal company in February, 1893, who was present at the called meeting of the directors when they agreed to buy the land, and appointed appellant, who was then president of the coal company, to make the purchase for the company, and who testified that appellant agreed to do so. No minutes of the meeting were produced showing such action, but it was shown that it was a called meeting, five of the nine directors being present, and no minutes were kept. The evidence of Cates is that "some one just suggested that Halsell buy the land, and we all agreed to it." H. Greathouse, one of the directors, testified that he was present at the meeting called by the company for the purpose of talking about buying the land; that appellant was present; that J. R. Stephens made a motion that defendant, Halsell, buy the land for the company; that he did not think the motion was written; that each member agreed to furnish his pro rata part. W. T. Simmons, a stepson-in-law of appellant, testified that he lived with appellant in February, 1893, and told him he thought of buying the land; that appellant "said he would rather I would not buy it; that the coal company had appointed him to buy it, and that, if I bought it, it would not look right, I being in the family, so I did not buy it. I had been in partnership with the agent of the land, and told Halsell how to buy it." He admitted that he had said nothing about this conversation until after he and appellant had a falling out; that he was not, at the time of testifying, on friendly terms with appellant; that he had instigated this suit against appellant, he having become a stockholder in the coal company. The appellant denies all the material statements of these witnesses.

The evidence of appellee company, if true, is sufficient to establish the relation of prin-

cipal and agent. The question of veracity was one for the court below to decide, and not for us. The company, as principal, had directed its president, as its agent, to purchase the land for it, and he agreed to do so. This relation, without doubt, may be established by parol evidence; and although the agent's subsequent wrongful act in purchasing the land for himself, and taking the deed in his own name, rendered him a trustee for the company, and this action is one to establish a trust in the land so conveyed to him, yet such a trust relation may be established by a preponderance of the evidence, like any other fact; and, where the evidence is conflicting, the jury, or the trial court, in the absence of a jury, has the right to weigh it, and determine the credibility of the witnesses, and make the findings according to the very truth of the matter, and when this is done we have no right to set aside such a finding, and substitute ours in the place thereof, even if we were so inclined. Considering Halsell, then, as an agent, which the court's judgment below, in legal effect, establishes, "it was a fraud on his part, 'pure and simple,' to take title in his own name for his own use. The act at once turned him into a trustee *ex maleficio*." *Squire's Appeal*, 70 Pa. St. 268. In *Dennis v. McCagg*, 32 Ill. 445, the supreme court of that state said: "The rule is well established that trustees and others sustaining a fiduciary and confidential relation cannot deal on their own account with the thing or the persons falling within that trust or relationship. This rule is applied to all persons in whom there is a trust and confidence reposed which would bring in conflict the interest of the trustee and cestui que trust. *Davoue v. Fanning*, 2 Johns. Ch. 261. The temptation of self-interest is too powerful and insinuating to be trusted, and it must be removed by taking away the right to hold the property purchased,"—citing *Thorpe v. McCullum*, 1 Gilman, 626; *Switzer v. Skiles*, 3 Gilman, 529. An eminent author on the subject of "Trusts" has written: "No person whose duty to another is inconsistent with his taking an absolute title to himself will be permitted to purchase for himself; for no one can hold a benefit acquired by fraud or a breach of his duty. All the knowledge of the agent belongs to the principal for whom he acts, and, if the agent use it for his own benefit, he will become a trustee for his principal. Whenever one person is placed in a relation to another, by the act or consent of that other, or the act of a third person, or of the law, so that he becomes interested for him or with him in any subject of property or business, he will in equity be prohibited from acquiring rights in that subject antagonistic to the person with whose interest he has been associated." 1 Perry, *Trusts* (4th Ed.) § 206. See, also, *Gardner v. Randell*, 70 Tex. 455, 7 S. W. 781, where the same rule, in effect, is laid down, and where it is declared



that such a contract is not within our statute of frauds. See, also, *Satterthwaite v. Loomis*, 61 Tex. 64, 16 S. W. 616, where the rule as above quoted, from the case of *Dennis v. McCagg*, is adopted, and the case cited and approved.

The issue of limitation of three years rests upon conflicting evidence as to the time adverse possession began. Appellant's own witness, Mahaffey, disputes him as to the time he fenced and took exclusive possession of the land. Appellant swears he fenced it "about April 8, 1893." Mahaffey swears: "It was fenced by defendant in May and June, 1893; that is, the south half, where the park is, was fenced at that time. The north half was fenced in the spring of 1894." This suit was filed April 10, 1896. So, if the three-years statute of limitation applies to an action of this character, and if the trust had been clearly repudiated and notice brought home to the principal, the court below has evidently found, upon conflicting evidence, that the defendant failed to prove adverse possession of the land for the period of time required by law; and this finding we must approve, in support of the judgment. We find no error in the judgment, and it is affirmed.

#### BELCHER v. MISSOURI, K. & T. RY. CO. OF TEXAS.

(Court of Civil Appeals of Texas. Nov. 26, 1896.)

On rehearing. Denied.

For former report, see 47 S. W. 384.

HUNTER, J. In this motion it is contended that we "erred in concluding as a matter of fact that the local agent of the appellee at Sherman, who received the car of hulls, and issued the bill of lading therefor, had no notice of the necessity of an immediate delivery, and the condition of Belcher at Gainesville, for the reason that such conclusion is not sustained by the evidence." We made no such finding as this. We found that he did not have such notice at the time he issued the bill of lading, which, in contemplation of law, was the time he received the hulls; and there is ample evidence to sustain this finding. In the first place, under a perfectly full and fair charge submitting this issue, the jury found against the plaintiff, which meant that they found that the agent at Sherman had no notice, at the time he issued the bill of lading, for that was the principal issue in the case. One of appellant's witnesses (Bonham) swears that the agent had such notice by telegram before noon on December 24th. Jones, who consigned and shipped the hulls and took the bill of lading, says he notified him on the 24th, but whether before or after the bill was signed he does not state. The agent swears that he did not have such no-

tice until Sunday morning, December 25th, and produced the telegram received by him, giving such notice. He did not remember any conversation with Jones about it. The evidence of the agent at Gainesville shows that it was not sent until 2:05 p. m., December 24th, and then to the train master at Denison. The train master forwarded it at 5:25 p. m. of that day to the agent at Sherman, where it was received by an operator, and after 5:45 p. m. of that day laid on the agent's desk at Sherman. It was not actually seen by the agent until Sunday morning, when he immediately sent for the car of hulls, which was then standing on the Texas & Pacific track at the oil mill. The car was not, in fact, received by defendant until Monday noon. The exact time of signing the bill of lading is nowhere shown, but it was deposited in the bank at Sherman between 12 m. and 2 p. m., December 24th. The jury having passed on all this evidence, and having found against plaintiff's theory, we did not feel authorized to reverse their finding, where the evidence is so conflicting. We, however, now amend our conclusion on this issue, and find that the evidence as contained in the record was sufficient to warrant the jury in finding either way. The other grounds of the motion have been fully considered, but must be overruled. The rehearing is denied.

#### MADDOX et al. v. SUMMERLIN et ux.<sup>1</sup>

(Court of Civil Appeals of Texas. Nov. 9, 1896.)

JUDGMENT—SATISFACTION—EVIDENCE—RES JUDICATA—GIFT TO WIFE—RIGHT OF HUSBAND'S CREDITORS.

1. That judgment against a husband had not been satisfied, when suit to subject property of the wife to payment thereof was begun, is not sufficiently established by production of an execution returned, "No property found;" it being inferable, from the fact that it was spoken of in the statement of facts as "the first execution issued," that there were other executions issued.

2. A judgment cannot be deprived of the effect of *res judicata* by evidence that the parties swore falsely in the action in which it was rendered.

3. For a gift by husband to wife, by improvements on her separate property with community money, to be reached by a person who has obtained a judgment against him and others, it must be shown, not only that the judgment creditor was his creditor at the time of the gift, and that the indebtedness still exists, but that the gift was fraudulent, and stood in the way of collection of the judgment; all the judgment debtors being insolvent, and all remedy at law being exhausted.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Suit by J. W. Maddox and others against R. L. Summerlin and wife. Judgment for defendants. Plaintiffs appeal. Affirmed.

<sup>1</sup> Writ of error denied by supreme court.

James Raley, for appellants. J. H. Clark, F. J. Wise, Ed. Haltom, and W. W. Walling, for appellees.

NEILL, J. This suit was brought on July 30, 1897, by appellants against appellees to subject certain real property of the separate estate of Mrs. R. L. Summerlin, to the extent of its increased value by reason of improvements placed thereon, which were alleged to have been paid for with community funds, to the payment of an alleged judgment in favor of the appellants against the appellee R. L. Summerlin. The appellees, defendants below, after excepting to appellants' petition, answered (1) by a general denial; (2) by specially denying that the improvements on a certain parcel of the land were paid for with their community property, but averred that the payment was made with money of the separate estate of the wife; (3) by pleading *res judicata* as to the other pieces of land. The appellants, by a supplemental petition, in replication to the plea of *res judicata*, sought to avoid the effect of the judgments pleaded by averring that they were obtained by false swearing of the appellees. An exception of appellees was sustained to appellants' supplemental petition. The exceptions of appellees to appellants' amended original petition were overruled. The case was then tried before a jury, who, under a peremptory instruction from the court, returned a verdict in favor of appellees, upon which the judgment appealed from was entered.

#### Conclusions of Fact.

(1) The only property involved in this litigation, not affected by the plea of *res judicata*, is a strip of land in the city of San Antonio, with a front of 150 feet on South Flores street, and running back 300 feet, to San Pedro creek. It is a part of the "Old Vanderhoeven Homestead," inherited by Mrs. Summerlin from her father, and is her separate property.

(2) On the 6th day of December, 1892, the appellants J. W. Maddox and T. L. Wren recovered a judgment, in the district court of Bexar county, against George W. Angle, R. H. McCracken, R. L. Summerlin (one of the appellees), and Joe W. Maddox, for the sum of \$3,596.98%. "The first execution" on the judgment was issued by the clerk of said court to the sheriff of Bexar county, and was returned, "No property found," by said sheriff, on April 3, 1893. If any other executions were issued,—and it may be inferred there were from the language, "Plaintiff then read in evidence the first execution issued," etc., appearing in the statement of facts,—it is not shown whether or not they were returned satisfied. The return on "the first execution" is the only evidence which might be taken as tending to show that the judgment had not been satisfied when this suit was instituted. We conclude that such evidence

is not sufficient to establish such fact in a case of this character.

(3) The indebtedness for which the judgment above described was rendered originated on the 21st day of May, 1885.

(4) Appellees were married on the 23d day of June, 1886. In 1888 and 1889, while they were husband and wife, a two-story frame house was built upon the strip of ground described in our first conclusion, and paid for by R. L. Summerlin with money acquired by him during his marriage. The amount paid by him for the building was \$2,700, and was intended by him as a gift to his wife. Such building is still standing on the ground, and has enhanced the value of the premises to the extent of its cost.

(5) It does not appear from the evidence that R. L. Summerlin was, when the money was expended in the construction of said building, insolvent, or that he invested said money in improvements upon his wife's separate property, with the intention of hindering or delaying his creditors. Nor is there any evidence in the record bearing upon the question of solvency or insolvency of R. L. Summerlin's co-defendants in the above-described judgment at any time, either before or after said judgment was rendered.

(6) The other property involved in this suit was, in suits in which the appellants and appellees were adverse parties, wherein the issue tried involved the same issue sought again by appellants to be raised in this cause, adjudged by the district court of Bexar county, in which said suits were pending, to be the separate property of Mrs. Summerlin. One of said judgments was rendered on the 1st day of April, and the other on the 29th day of June, 1897, and both are final and in full force and effect.

#### Conclusions of Law.

It will be observed, from the second count in appellants' second amended original petition, which seeks to subject that part of Mrs. Summerlin's property to which she pleaded former adjudication to their judgment, does not mention, or in any way refer, to the prior judgments in her favor settling the matter in controversy. It is only when they are pleaded by appellees in bar of their action that appellants notice them in their pleadings. Then they plead in replication that certain testimony of each of the appellees given on trial of the cases in which the judgments were rendered was untrue, and that said judgments were obtained by fraud and false swearing. Error is assigned to the court's ruling sustaining exceptions to such pleading and in excluding testimony offered by appellants to prove its allegations. "The fraud which entitled a party to impeach the judgment of one of our own tribunals must be fraud extrinsic to the matter tried in the cause, and not merely consist in false and fraudulent documents or testimony submitted to that tribunal, and the

truth of which was contested before and passed upon by it." *Hilton v. Guyot*, 159 U. S. 207, 16 Sup. Ct. 160. "Judgments are impeachable for those frauds only which are extrinsic to the merits of the case, and by which the court has been imposed upon or misled into a false judgment. They are not impeachable for frauds relating to the merits between the parties. All mistakes and errors must be corrected from within by motion for a new trial, or to reopen the judgment, or by appeal." *Freem. Judgm.* § 489. The solemn judgment of a court would become a jest if it could be impugned in the manner sought in this case. In this state parties are competent witnesses, and the truth of their testimony, like that of other witnesses, is passed upon by the jury. In many cases the testimony of adverse parties is in direct conflict. In such cases that of one or the other must be false. Then, after the jury has passed upon the truth of witnesses and judgment is entered on their verdict, the party defeated has only to wait until the judgment is invoked by his successful adversary, and have the issue tried over again, if a judgment can be impeached in the manner sought by appellants. The exceptions to appellants' replication to appellees' plea of *res adjudicata* were properly sustained, and the evidence offered by appellants to prove the pleading, held bad on the exceptions, was rightfully excluded.

When a husband erects buildings upon his wife's lands, or otherwise makes permanent improvements thereon, expending his own money for such purpose, and thereby increases its value, then the amount of such increase in value, for which no consideration has been paid, and which has been added to her separate estate by the husband in fraud of his creditors, may, in equity, be made a charge upon the land for their benefit. *Walt, Fraud. Conv.* (3d Ed.) § 26; *Lynde v. McGregor*, 13 Allen, 182; *Ware v. Shoe Co.*, 92 Ala. 145, 9 South. 136; *Seasongood v. Ware*, 104 Ala. 212, 16 South. 51; *Bailey v. Gardner*, 31 W. Va. 94, 5 S. E. 636; *Aber v. Brant*, 36 N. J. Eq. 116; *Humphrey v. Spencer*, 36 W. Va. 11, 14 S. E. 410. At common law, which is by statute made the rule of decision in this state, if the husband expends money upon lands of his wife by erecting buildings thereon, the presumption is that he intended it for her benefit, and he cannot recover the same. 1 Washb. Real Prop. (3d Ed.) 318; *Schouler, Dom. Rel.* § 203. This presumption, on account of our community system, may not obtain in Texas. Here the rule is that, if improvements are placed upon the wife's land with community funds, as was done in this case, her separate estate is charged in favor of the community with money so invested. *Rice v. Rice*, 21 Tex. 66; *Cameron v. Fay*, 55 Tex. 61; *Furrh v. Winston*, 66 Tex. 521, 1 S. W. 527. In the case under consideration the undisputed evidence, which

was introduced by appellants themselves, shows that the money invested by Mr. Summerlin in the erection of the house upon his wife's separate property was intended at the time as a gift to her. This would make the building her separate property, free from any charge in favor of the community, just as it would be at common law. But if, at the time of the gift, Mr. Summerlin was insolvent, the land upon which the house was built should, in equity, be charged to the extent of its increased value by reason of the improvements, for the benefit of such of his creditors as existed when the gift was made; for such gift would be deemed analogous to a fraudulent conveyance, and void as to creditors.

To impeach such gift, it is necessary, as it is in a suit to avoid a fraudulent conveyance, to allege and prove (1) that the plaintiffs were creditors at the time their debtor's money was invested in the betterment of his wife's land; (2) that such indebtedness still exists; (3) that the gift was fraudulent, and stood in the way of their collecting their debt; and (4) that they have exhausted their remedy at law. *Walt, Fraud. Conv.* § 140. One who was not a creditor of the donor, or of the grantor in a voluntary conveyance, at the time the gift or conveyance was made, cannot complain of it, for he is not prejudicially affected. If the indebtedness, though it may have subsisted when the gift or conveyance was made, is not proven to exist when the action is brought, no reason is shown for avoiding such gift or conveyance. If the debtor was solvent, either when the gift or conveyance was made, or the action is brought, having sufficient property, excluding that affected by the gift or conveyance, to satisfy his creditors, without hindering or delaying them, such gift or conveyance cannot be considered fraudulent, or as standing in the way of creditors collecting their debts.

If the judgment of appellants upon which this action is predicated had never been discharged, such fact was within their knowledge, and could have been easily proven. Mrs. Summerlin was not a party to that judgment, and was charged with no knowledge of the proceedings under it. It was not incumbent upon her to plead and show that it had been discharged; but, before her separate property could be subjected to it, it devolved upon the appellants to show that it had not been. Proof that "the first execution" was returned "No property found," over four years before this suit was instituted, did not discharge this burden. Appellants should have introduced the other executions, if any were issued, and shown by the returns upon them, if it appeared therefrom, that the judgment still subsisted; or, if the execution offered in evidence was the only one issued, such fact should have been established.

No evidence was introduced by appellants

tending to show that R. L. Summerlin was insolvent, and not amply able to discharge all his financial obligations, when he invested the money in erecting the building on his wife's land. His evidence was all that was offered on this question, and no inference of his insolvency at that time can be drawn from it. Besides himself, the judgment was against three other parties, any of whom were equally liable with Mr. Summerlin, none of whom were proven at any time, either before or after the judgment was rendered against them, to be insolvent. Unless each of them was insolvent when this suit was instituted, appellants cannot be said to have exhausted their legal remedy; for, if either was solvent, appellants' legal remedy was an execution on the judgment, if it had not been satisfied, against him.

Thus it is seen that, of the four essential requisites to the avoidance of a gift or voluntary conveyance, none, save the first, has been established in this case, and that, with the exception mentioned, no evidence was introduced tending to the establishment of any of them. Where there is no evidence tending to establish a fact essential to the plaintiffs' recovery, it is not error for the trial court, as it did in this case, to peremptorily instruct a verdict for defendants. There is no error in the judgment appealed from, and it is affirmed.

#### CLASSEN v. ELMENDORF et al.<sup>1</sup>

(Court of Civil Appeals of Texas. Nov. 9, 1898.)

#### BORING WELLS—CONTRACT—DAMAGES—ASSIGNMENT OF ERROR.

1. Under plaintiffs' contract to bore a well for defendant, providing, if no water was obtained, "plaintiffs should pull the casing free of charge, if possible to do so," the intention was that the casing should be saved to defendant, who furnished it; so that, though defendant is entitled to its value, plaintiffs not having pulled it, though it was possible, he is not entitled to damages for the loss of the water through such default, which was passed in boring because not satisfactory.

2. The question of excessive verdict cannot be considered in the absence of assignment of error questioning the amount.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action by Henry Elmendorf and others against J. H. Classen. From a judgment for plaintiffs, defendant appeals. Affirmed.

Frank J. Wise and Upson, Bergstrom & Newton, for appellant. R. L. Summerlin, T. A. Fuller, and Clark & Ball, for appellees.

#### Conclusions of Fact.

JAMES, C. J. See 37 S. W. 245, for nature of the case. We conclude that the evidence clearly established that it was possible to withdraw the casing from the well, and that

no water was had, as contemplated by the contract. We also conclude as a matter of fact that it clearly appeared that the matters in respect to which defendant claimed to have been damaged, by the failure of plaintiffs to extract the casing from the well, were not in contemplation of the parties when the contract was made, as a probable result of the failure to draw the casing. The value of the casing was shown to be 78½ cents per foot, for 750 feet, and this, and all other facts upon which the judgment is based, are undisputed. These conclusions will be explained in connection with the

#### Conclusions of Law.

Appellant, Classen, complains of the action of the judge refusing to allow his plea in reconvention to be considered, whereby he asked for damages for the loss of the use of water from the well for live-stock purposes. We think the court did not err in this. The testimony of plaintiffs shows that in drilling the well they found water at 300 feet, also at 700 feet, and at 1,300 feet, none of which was satisfactory to plaintiffs, and the well was bored deeper, to 1,400 feet. In boring the well, 750 feet of casing was found necessary in order to prevent caving, and this shut off the water found at 750 feet, which, it seems, was the only water struck that was of any significance at all, and it was not satisfactory, and the well was bored deeper. There is no evidence of what the water was that was struck at 1,300 feet, and the only certain thing in the evidence on this subject is that it was in such small quantity that it did not satisfy the parties or meet the purposes of the contract, and we know this from the conduct of the parties themselves, for the boring went on, and, when the well reached 1,400 feet, plaintiffs, with the concurrence of defendant, commenced to draw the casing, which was to be done only in case no water was obtained. In a question of what the parties to a contract intended by a provision thereof open to doubt, the construction placed upon it by them, as judged by their acts, ought to control. It is clear in this case, from the acts of the parties, that the well was considered a failure, and that the condition existed as intended and understood by the parties, which required plaintiffs to draw the casing; and in this connection we may say that the court committed no error in deciding that plaintiffs were liable for the value of the casing, and in taking that question from the jury.

We think it is equally clear from the evidence that all that the parties had in mind when they contracted that, if no water was obtained, "plaintiffs should pull the casing free of charge, if possible to do so," was that the casing should be saved to defendant, who furnished it, if the work proved unsuccessful. It could not have been in the mind of either party at the time of the contract that the casing should be drawn for the purpose of

<sup>1</sup> Rehearing denied November 30, 1898.

enabling defendant to use the well, or to use any water that was passed in boring the well, for the facts did not exist, and it is plain the parties had no such state of facts in contemplation. We may add that this form of damage appears from the record to have been introduced into the case since the decision of the former appeal, and was not even in the mind of the defendant when the case was first tried. The court held that plaintiffs could only recover two dollars a foot for the 1,400 feet by reason of the provision in article 8 of the contract, which reads: "But in no event shall the party of the first part receive more than two dollars per foot, save and except a sufficient flow as named in article 6 of this agreement is obtained." The flow mentioned in article 6 is "a strong stream of artesian water." The court construed the above provision as entitling plaintiffs to a greater sum than two dollars a foot only in the event of such flow, and we agree with this construction. The court rightly assumed, under the testimony, and under the contract, that plaintiffs were entitled to only two dollars per foot for the 1,400 feet bored. Appellant has no assignment of error which questions the amount of the verdict, and we therefore do not notice what he says on that subject. The judgment is affirmed.

#### WELLS, FARGO & CO. v. SIMPSON NAT. BANK.

(Court of Civil Appeals of Texas. Nov. 9, 1898.)

#### DRAFTS—PROTEST—FORGERY—AGENCY—INDORSEMENTS.

1. Protest is not necessary to hold a prior indorser of a draft, where it was paid, and subsequently it is discovered that the indorsement in the name of the drawee was a forgery.
2. The authority of an agent to transfer and indorse a draft cannot be questioned by the principal, who received the proceeds, in an action to recover the same of him.
3. One is under no obligation to an indorser of a draft from whom he receives it to inquire concerning the genuineness of preceding indorsements.

Appeal from Maverick county court; J. A. Bonnet, Judge.

Action by the Simpson National Bank against Wells, Fargo & Co. Judgment for plaintiff. Defendant appeals. Modified.

Winchester Kelso, for appellant. James M. Goggin, for appellee.

**JAMES, C. J.** It appears that a draft drawn by M. P. Ayers & Co., bankers, at Jacksonville, Ill., on the American Exchange Bank of New York City, to the order of Henry Kopp, was mailed at Jacksonville to Henry Kopp, in September, 1893, by Robert Vannier, addressed to some point, probably in Mexico. Kopp never received it. The draft was cashed (purchased) by the predecessor in business of the Simpson National Bank

(S. P. Simpson & Co.) from W. J. Chapman, who was Wells, Fargo & Co.'s agent at Eagle Pass, on October 6, 1893. The draft was then indorsed: "Pay to order of H. C. Brewster. Henry Kopp." "H. C. Brewster." "W. J. Chapman, Agt. Wells, Fargo & Co." S. P. Simpson & Co. indorsed it to its correspondent in New York for collection, and the latter presented it to the drawee, and it was paid, on October 11, 1893. In September, 1896, Kopp returned to Jacksonville, and found that the draft had been sent him, and he and Vannier went to the bank, saw the draft, and discovered the forgery. On February 28, 1897, Simpson's correspondent refunded the money to the drawee, and by authority charged Simpson & Co.'s account with the same. This action was brought on August 17, 1897, by the Simpson National Bank against Wells, Fargo & Co. to recover the amount of the draft, and it recovered a judgment for same, with interest from September 28, 1896.

The first assignment of error complains of the sustaining of plaintiff's exception to that part of the answer presenting as a defense that no protest of the paper was had, and no suit brought in time to hold defendant as indorser. Where protest is not required, the provision as to suit, which is a substitute for protest, does not apply. *Bank v. De Morse* (Tex. Civ. App.) 26 S. W. 417, and cases cited. Protest is contemplated in the event the paper is dishonored. In this case the draft was paid on presentation, and some years passed before the vice was discovered, and we think the principles upon which protest rests do not apply here. There is some question whether or not if the draft had not been paid when presented, on account of the forged indorsement it should have been protested with reference to defendants, and the necessity of protest in such case has been denied in this state. 2 Tex. Ct. App. § 337. This disposes of the first, fifth, and sixth assignments.

The second and third assignments are without merit, for the reason that both Vannier and Kopp had testified, without objection, that they had made the affidavits which were admitted in evidence, and hence their admission could not possibly have injured defendant, and for the further reason that the evidence outside of the affidavits establishing the forgery was undisputed.

According to the evidence and according to the statements in the fourth assignment, defendant received the money paid by Simpson & Co. to Chapman, defendant's agent at Eagle Pass, and, this being so, the authority of such agent to transfer the draft and indorse the same cannot be made an issue, and such fourth assignment is not well taken.

The testimony is also undisputed in this: That the forgery was not discovered by Kopp until September, 1896, and did not become known to the other interested parties until after this. The question of reasonable diligence in discovering the same does not enter into the case, so far as plaintiff and defend-

ant are concerned. Simpson & Co. and its successor in business were not under any duty to defendant to make any inquiry concerning the status of the indorsements preceding that of defendant's, as defendant was a guarantor of their validity. The evidence is clear as to the date at which plaintiff acquired knowledge of the forgery, and two years had not elapsed thereafter, when the action was commenced. There is therefore no merit in the seventh, ninth, and tenth assignments.

Appellee confesses error in the judgment in computing interest from September 26, 1896, instead of from February 26, 1897, when plaintiff paid the money to its correspondent in New York. In this respect the judgment will be reformed, and in all others affirmed.

#### LIMBERGER v. ENGLE

(Court of Civil Appeals of Texas. Nov. 2, 1898.)

##### APPEAL FOR DELAY—DAMAGES.

Appeal appearing to have been taken for delay, 10 per cent. damages will be allowed.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action by Mathew Engle against Henry Limberger, Sr. Judgment for plaintiff. Defendant appeals. Affirmed.

Webb & Finley and H. A. Maydole, for appellant. T. J. Newton, for appellee.

NEILL, J. The only question presented by the assignments of error is the sufficiency of the evidence to sustain the verdict. An examination of the statement of facts satisfies us of its sufficiency, and that the appeal was taken for delay. The judgment is therefore affirmed, with 10 per cent. damages.

#### SAN ANTONIO & A. P. RY. CO. v. HAMMON.<sup>1</sup>

(Court of Civil Appeals of Texas. Oct. 19, 1898.)

##### FINDINGS—REVIEW.

Findings as to contributory negligence, and amount of damages, on a proper charge and sufficient evidence, cannot be disturbed.

Appeal from district court, Bee county; James C. Wilson, Judge.

Action by W. H. Hammon against the San Antonio & Aransas Pass Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Proctors, for appellant. J. C. Crisp and S. B. Dabney, for appellee.

NEILL, J. This is the second appeal in this cause. The nature of the case can be seen from opinion of the court on the first appeal. *Hammon v. Railway Co.*, 35 S. W. 872.

#### Conclusions of Fact.

On the 4th day of April, 1894, Mrs. Musie Hammon, wife of appellee, was, without any negligence on her part, contributing to the accident, while crossing appellant's railroad track in the town of Beeville, by the negligence of appellant struck by one of its engines, and thereby seriously and permanently injured, to the damage of appellee in the sum of \$8,500.

#### Conclusions of Law.

None of the interrogatories propounded by appellee's counsel to Musie Hammon is obnoxious to the objections urged in the assignments of error, and the court did not err in permitting such interrogatories, and the answers to them, read in evidence to the jury. The charge of the court fully and fairly presented all the issues of fact arising from the evidence to the jury, and it was not error to refuse the special charges requested by appellant. The only questions in the case were as to the contributory negligence of appellee's wife, and the amount of damages sustained; and the jury, upon a proper charge, with sufficient testimony to sustain their verdict, having decided them adversely to appellant, it is not our province to disturb their finding. Therefore we affirm the judgment.

#### NORTHWESTERN MUT. LIFE INS. CO. v. FREEMAN.<sup>1</sup>

(Court of Civil Appeals of Texas. Nov. 2, 1898.)

##### LIFE INSURANCE—WAIVER OF FORFEITURE—APPLICATION.

1. Petition on life policy need not set it out entire, but only its substance, and facts showing the company's liability.

2. Recovery on a life policy can be had, though insured had engaged in an occupation which the policy declared should render it void; the general agents of the company, authorized to collect the premiums, though having no express authority to issue policies, or pass on applications, or waive conditions of policies or applications, having received premiums with knowledge of the change in employment.

3. Provision in application for life policy that no statement made by or to the person soliciting the application, or to any other person, shall be binding on the company, unless the same be reduced to writing, and approved by the officers of the company at its home office, has no bearing on the question of waiver of forfeiture from engagement in prohibited occupation by receipt of premium by general agent with knowledge of such change in employment.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action by Maymie C. Freeman against the Northwestern Mutual Life Insurance Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Houston Bros., for appellant. Lewy & Sehorn, for appellee.

<sup>1</sup> Writ of error denied by supreme court. 47 S.W.—65

<sup>1</sup> Rehearing denied November 30, 1898.

NEILL, J. This suit was brought by the appellee, Maymie C. Freeman, against the appellant, the Northwestern Mutual Life Insurance Company, on March 25, 1896, upon the policy of insurance described in our conclusions of fact. The substance of the policy was pleaded in appellee's petition, and such facts were averred as, if true, would show the liability of appellant. The appellant answered by general and special exceptions, a general denial, and by pleading specially that when killed the assured was engaged as a brakeman on a railroad train, and therefore by the terms of the policy it was not liable thereon. The appellee, by supplemental petition in replication to appellant's special plea, pleaded that the company was estopped from making such defense, upon the ground that its general agents, Peacock & Smith, had, with full knowledge of the fact that the assured had changed his occupation, and was engaged in the employment of a brakeman on a railroad train, received for appellant payment of the quarterly premiums falling due on October 9, 1894, and January 9, 1895. All of the exceptions of appellant to appellee's petition were overruled, except one. The case was tried before a jury, the principal issue being as to whether Peacock & Smith, as agents of the company, knew when they received payment of either of the premiums falling due on October 9, 1894, and January 9, 1895, that the assured was employed as a brakeman on a railway train; and the trial resulted in a verdict upon which judgment was entered against appellant.

#### Conclusions of Fact.

On the 9th day of April, 1894, appellee issued its policy to Robert Randolph Freeman, in consideration of \$10.67, payable quarterly on the 9th days of April, July, October, and January, and every year thereafter during the first 20 years of the continuation of said policy, and obligated and bound itself to pay to appellee, Maymie C. Freeman, the wife of the assured, the sum of \$1,500, in 60 days after due proof of the fact and cause of the death of Robert R. Freeman. The policy provides that if the assured shall be personally engaged as an engineer or fireman of any locomotive engine, in switching or in coupling or uncoupling cars, or be employed in any capacity on any trains or railroad, except as a passenger or sleeping-car conductor, mail agent, express messenger, or baggage master, it shall be null and void. Attached to the policy was the original application for the insurance, made and signed by the assured, Robert Randolph Freeman, in which the tenth paragraph is as follows: "Do you understand and agree that no statements, representations, or information made or given by or to the person soliciting or taking this application for a policy, or to any other person, shall be binding on the company, or in any manner affect its rights, unless such statements, representations, or information be re-

duced to writing, and presented to and approved by the officers of the company at the home office? Yes." At the time the policy was issued, the assured kept a livery stable in Austin, Tex., but afterwards abandoned such vocation, and on or about the 25th day of October, 1894, applied for the position of, and became, a brakeman on the Galveston, Harrisburg & San Antonio Railway Company, and on the 7th day of April, 1895, while performing his duties as a brakeman on one of the company's trains, was killed. All the premiums due on the policy at the time of his death had been paid; the quarterly premiums due on October 9, 1894, and January 9, 1895, having been paid for the assured by his brother, J. H. Freeman, to Peacock & Smith, general agents of appellant company, to whom renewal receipts had been forwarded by the company for collection. The assured never gave appellant or its general agents, Peacock & Smith, notice of the fact that he had changed his occupation from livery stable keeper to that of a railroad brakeman. But Messrs. Peacock & Smith, as general agents of the company, knew of such change in his vocation; and as general agents of appellant company, with knowledge of such change, accepted and remitted to the home office of the company the quarterly premium paid on January 9, 1895. The policy of insurance was effected through the agency and solicitation of Peacock & Smith, but they had no express authority to issue policies of insurance, or to pass upon applications for policies, or to waive any conditions of policies or of applications for policies. After the death of the assured, his brother, J. H. Freeman, applied to Messrs. Peacock & Smith, as agents of appellant, for blanks on which to make out proof of death, and such blanks were furnished to him by them; but at the time they told him that the company would refuse to pay the policy, on account of the change of assured's occupation. Ever since its knowledge of the assured's death, appellant has denied any liability upon the policy, upon the ground that Robert R. Freeman was engaged at the time of his death in a vocation prohibited by the policy, and which by its terms rendered it void.

#### Conclusions of Law.

1. It was not necessary for appellee to set out in her petition the entire policy. She was only required to plead its substance, and aver such facts as would show appellant's liability thereon. *Insurance Co. v. Rivers* (Tex. Civ. App.) 28 S. W. 453; *Insurance Co. v. Watt* (Tex. Civ. App.) 39 S. W. 200. Her petition conformed fully to these requirements. Therefore the court did not err in overruling appellant's exceptions to it.

2. It is a well-established principle that if a forfeiture has occurred for breach of any condition in an insurance policy, and the company thereafter, with knowledge of the facts, unconditionally accepts and retains a pre-

mium, it thereby waives the former forfeiture, and is estopped thereafter from setting up the grounds of forfeiture as a defense. 2 Joyce, Ins. § 1369, and authorities cited in note 151; Insurance Co. v. Hanna, 81 Tex. 487, 17 S. W. 35; Morris v. Insurance Co. (Tex. Civ. App.) 43 S. W. 898; 2 Beach, Ins. § 762, and authorities cited in note 2; Richards, Ins. § 77; Walsh v. Insurance Co., 6 Am. Rep. 664; Insurance Co. v. Raddin, 120 U. S. 183, 7 Sup. Ct. 500; McGurk v. Insurance Co. (Conn.) 16 Atl. 263. As is said by Mr. Justice Gray in Insurance Co. v. Raddin, supra: "If insurers accept payment of a premium after they know there has been a breach of a condition of the policy, their acceptance of the premium is a waiver of the right to avoid the policy for that breach. Upon principle and authority there can be no doubt about this. To hold otherwise would be to maintain that the contract of insurance requires good faith of the assured only, and not of the insurers, and to permit insurers knowing all the facts to continue to receive new benefits from the contract, while they decline to bear its burdens."

3. It is a general rule, settled by an unbroken current of authority, that notice to an agent when acting within the scope of his authority, and in reference to a matter over which his authority extends, is notice to the principal. This rule rests upon two theories. The first is based on the legal identity of the agent of the principal,—in the fact that the agent, while keeping within the scope of his authority, is, as to the matter embraced within it, for the time being the principal himself, or at all events the alter ego of the principal. The other is based upon the rule that it is the duty of the agent to disclose to his principal all notice or knowledge which he may possess, and which is necessary for the principal's protection or guidance. This duty the law presumes the agent to have performed, and imputes to the principal whatever notice or knowledge the agent then possessed, whether he has in fact disclosed it or not. Mech. Ag. §§ 718, 719. There is no controversy about the fact that Peacock & Smith, as agents of appellant company, were authorized to collect the premiums upon the policy issued to appellee's husband. No limitation upon this authority is shown or attempted to be shown, for it cannot seriously be contended that the question and answer contained in the application for the policy quoted in our conclusions of fact in any way relate to the collection of the premiums.

4. As to whether Peacock & Smith at the time they received payment of the premiums had notice of the fact that the assured was then engaged in the employment of brakeman upon a railroad train was a question to be determined by the jury. This question was submitted to the jury in an appropriate charge, and the jury having determined the question in favor of appellee, and there being evidence which, in our minds, was sufficient

to show that the last premium was received by said agents with full notice of the fact that Robert R. Freeman was then employed as a brakeman, we cannot disturb the jury's findings. It is not for us to pass upon the credibility of the witnesses. That is the exclusive province of the jury, and if they, with the witnesses before them, credited those of the appellee rather than the witnesses of the appellant, it was their affair, not ours.

5. It follows from what we have said that the court did not err in admitting evidence to show that Peacock & Smith, as agents of appellant, had knowledge, when they received the premiums due on the policy, of the fact that the assured was employed as a brakeman on the train, nor in submitting in its charge the issue raised by such testimony (it having been pleaded) to the jury, nor in refusing to hear special charge No. 2 asked by appellant.

The appellant cannot complain of that part of the charge which instructs the jury that, should they find for plaintiff, their verdict would carry interest from the 6th day of June, 1895, because it had from the outset denied any liability upon the policy. When it denied its liability, its cause of action arose, and appellee was entitled to interest from that time. Insurance Co. v. Josey, 6 Tex. Civ. App. 293, 25 S. W. 685; Insurance Co. v. Jacobs, 56 Tex. 312. There is no error in the judgment appealed from, and it is affirmed.

# CHICAGO, R. I. & T. RY. CO. v. LANGSTON.

(Court of Civil Appeals of Texas. Nov. 28, 1898.)

## PERSONAL INJURIES—EXAMINATION BY DEFENDANT'S SURGEON.

Where plaintiff, in an action for personal injuries, has exhibited her legs in the presence of the court, and physicians who have examined them have testified for her that she would not be able to wear artificial legs, defendant is entitled to have an examination by experts of its own selection, for the purpose of testifying on said point, though they are in its regular employment as surgeons.

Hunter, J., dissenting.

Appeal from district court, Montague county; D. E. Barrett, Judge.

Action by Rosa Langston against the Chicago, Rock Island & Texas Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

Graham & Turner and J. M. Chambers, for appellant. C. B. Randell and W. W. Wilkins, for appellee.

STEPHENS, J. In attempting to board one of appellant's passenger trains at Bridgeport, Tex., on the night of September 13, 1895, appellee fell or was thrown under the car, and in consequence thereof both of her feet were crushed and had to be amputated. On ac-



count of this severe injury and great loss, she recovered a verdict and judgment for \$25,000, from which this appeal is prosecuted.

On the question of appellant's liability, the evidence, both as to negligence and contributory negligence, was conflicting, and that issue was fairly submitted to the jury, both in the rulings on the evidence and in the charge, though possibly there was error in permitting a certain line of argument complained of. We proceed, therefore, to consider the exclusion of certain expert testimony affecting the measure of recovery.

Upon her examination in chief, she being the first witness, appellee, after fully describing her injuries, unwrapped her injured limbs, and exhibited them in the presence of the court and jury. Just before doing so she testified: "My right leg is still sore. The other one is healed up. They are both tender. I have some little tin things that I put on my legs when I move from one place to another, and my daughter and son with me. It takes two persons to lift me. I cannot bear any weight on my right leg." Here the tin things, termed "cans" by some of the witnesses, were shown to the jury, attended with an explanation of how they were worn. Just before resting her case she offered Dr. Poindexter as an expert witness, who testified: "I examined her limbs, where the amputation was performed, this morning. One is partially healed, and the other is not. It is in a very irritated condition, and my notion is will probably be that way always. I do not think it will ever heal. I do not think it would be a very good idea to amputate any more. I would consider it dangerous now to her life. She cannot use artificial limbs on those stumps. You can use only on healed stumps; hers are unhealed. You could not use artificial limbs on either one of them. One looks like it has been healed. The other one never has been healed; at least, it shows places there that there might be indications of pus. It is irritated, red, and inflamed." Upon further examination, cross and redirect, his testimony tended to prove that, in his opinion, the limbs would never heal, because of "a deposit of calcine matter," and that this condition resulted from the splitting of the bones at the time of the injury; and also that, in his opinion, no harm resulted from the use of the tin cans. Appellant offered as experts in its behalf Drs. Saunders and Rely, who qualified themselves as such. Dr. Saunders testified: "I haven't examined the plaintiff in this case. Taking the plaintiff injured as she is, I think I could tell by an examination, with reasonable certainty, whether the stubs of her limbs would ever get well enough for her to wear artificial limbs." He then proceeded to explain how an examination would enable him to determine whether artificial limbs could be worn, and stated positively that such examination would enable him to tell whether the existing trouble was due to a diseased bone. His

testimony was at variance with that of Dr. Poindexter as to the advisability and effect of wearing the tin cans. Dr. Rely had amputated the limbs soon after the accident, more than two years before the trial, and testified: "If I should examine her now, I think I could tell whether she is now able, or would at any time hereafter be able, with proper care and treatment, to wear or use artificial limbs. I advised her, while treating her, that she would be able to wear artificial limbs. I told her that she would be able to wear them in four months. \* \* \* She moved away before the time was out."

Appellant was denied the opportunity on the trial of having these witnesses examine the injured limbs, and testify in relation thereto, as will more fully appear from the following bill of exceptions: "Be it remembered that on the trial of the above-entitled cause the defendant requested of plaintiff's counsel permission for Dr. Bacon Saunders and Dr. H. Rely, surgeons of defendant, and in defendant's regular employment, to examine the condition of plaintiff with reference to her injuries, which permission was refused by plaintiff's counsel, on the ground that said Saunders and Rely were in the employment of the defendant, and plaintiff's counsel offered to have plaintiff examined by any number of physicians the court might see proper to appoint, on defendant's application, who were not in any way connected with plaintiff or defendant; that defendant's counsel thereupon made application to the court, and requested the appointment of said Saunders and Rely to examine the plaintiff; that thereupon plaintiff's counsel made the same objection they had made to defendant's counsel, and renewed their said offer; that defendant's counsel thereupon said they would not insist upon the appointment of Dr. Rely, but would be willing for the court to appoint a commission of three physicians and surgeons to examine plaintiff, provided one of them was the said Dr. Bacon Saunders; that the reason that the defendant insisted on the appointment of said Dr. Saunders was because of his known reputation as a surgeon, and because defendant's counsel did not believe that his equal was accessible to the court; that plaintiff's counsel objected to the appointment of Dr. Saunders, on the ground that he was in the employment of defendant, and had been brought here by defendant from Ft. Worth for the express purpose of testifying in its behalf, and on the ground that he might be a partisan, but stated that any three doctors or any number of doctors whom the court would regard as competent and impartial, and who were not connected, by employment or otherwise, with the plaintiff or defendant, would be acceptable to plaintiff, and plaintiff had no objection to such commission being appointed by the court to make such examination; that the court asked plaintiff's counsel if Dr. Saunders,

Relly, and Stinson would be satisfactory, whereupon they objected to Drs. Saunders and Relly for the reasons stated above; that they did not know Dr. Stinson, but, if the court thought that he was competent and impartial, they did not object to him, or any number of doctors of that description; that thereupon defendant's counsel objected to the appointment of any commission unless the said Dr. Saunders was also appointed, because of his said reputation as above stated; that the court then said that he would appoint Dr. Stinson, if he was satisfactory to the parties, and he could act or not, as they saw proper; that thereupon the defendant introduced Drs. Saunders and Relly, and asked each of said witnesses if he could tell, by an examination of plaintiff's injuries, whether or not she, the plaintiff, would ever be able to use artificial limbs, which question both of said witnesses answered in the affirmative; that thereupon defendant's counsel propounded the following interrogatory to each of said witnesses separately, 'Doctor, will you please here and now examine the plaintiff and her injuries?' that plaintiff's counsel objected on the ground that said witnesses were in the employment of the railway company, and were partisan, and not impartial, and that they had not been appointed by the court to make such examination, and defendant had no right to have such examination made without the consent of plaintiff, and that plaintiff was ready to submit to an examination by doctors considered by the court to be impartial and competent, and who were not in any way connected, by employment or otherwise, to plaintiff or defendant; which objection was sustained by the court, and the defendant excepted, and here tenders this its bill of exceptions, the same being No. 16. Defendant could have proved by said witnesses that plaintiff could at that time wear artificial limbs without pain, and get about on them in such manner that her injuries could not be detected in her locomotion. The conversation between the court and counsel relative to the appointment of a commission, above referred to, was not in the hearing of the jury."

Dr. Stinson, being thus permitted to make an examination, did so, and was offered as a witness by appellee. After describing what his examination disclosed, he was asked: "Take that limb in its present condition, and allow it to go on without an operation, could she use an artificial limb?" to which he answered: "It is possible that a limb might be devised where the pressure would not fall on the end of the stump. It is possible to devise an artificial member where the stump would not be in contact with the limb, and it might be possible for her to wear it. If the stump should come in contact with the artificial member, she could not wear it." In the main, however, his testimony was favorable to appellee, and

tended to show that artificial limbs could not be used, though not so much so as that of Dr. Poindexter. No other experts were introduced.

In this state of the record, was it material error for the court to refuse the request of appellant to have experts of its own selection examine the injured limbs so exhibited to the court and jury, and give their opinions as to whether appellee was capable of using artificial limbs? If error at all, it was clearly material. The amount of the verdict should, and doubtless would, have been materially less if the jury had believed that, instead of being a helpless cripple for life, appellee was capable of locomotion by means of artificial limbs. It is to be inferred from the record that the testimony of Drs. Saunders and Relly, if they had been permitted to make the necessary examination, would probably have been favorable to appellant. But, if not, the bill of exceptions above contains a positive statement to that effect, which we accept.

Every lawyer of experience in the trial of cases knows that experts differ widely in opinion on such matters, quite as much as experts themselves differ in reputation and skill. It is not, therefore, for the court to determine in advance what experts the jury shall believe. That is the peculiar province of the jury. The fact that Saunders and Relly were in the employment of appellant as surgeons went to the weight, and not the admissibility, of their testimony, for any relevant testimony they were capable of giving would not have been excluded upon this ground.

As this was the single specific ground of objection urged to their making an examination of the injured limbs, preparatory to giving an opinion, we come to the question, seeing that the ruling was probably prejudicial, whether the court erred in denying appellant's request for such preliminary examination. If appellee had not made proffer of her injured limbs to the court and jury, the request to have experts appointed by the court to make an examination over her objection would present the question which has been repeatedly before the courts, and upon which the decisions are in hopeless conflict, so much so that judges of the same court, notably of the supreme court of the United States, are divided in opinion upon it. For the two opposing lines of argument, see the majority and minority opinions in *Railway Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. 1000. This court, and presumptively our supreme court, stands committed to the views expressed by the majority of the court in the *Botsford* Case. *Railway Co. v. Pendery* (Tex. Civ. App.) 36 S. W. 793, in which writ of error was refused.

But, inasmuch as appellee invited an inspection and examination of her wounded

limbs by making profert of them on the trial, we have finally concluded that the case presents a different question from that so often considered, and that its solution should not be influenced by our cherished Anglo-Saxon principle of personal security. In our opinion, it would be a perversion of that principle to apply it in a case like this, where the plaintiff, unfortunate and pitiable though she be, voluntarily lays bare before the court and jury her afflicted members for the inspection and examination of the judge, jury, and advocate. For all the purposes of the trial, she thus waived her right to object, upon the ground of an invasion of her right of personal security, to a reasonable and proper examination, under the direction of the court, of the wounded parts. She thus, by her own voluntary act, conferred upon the court jurisdiction to compel what otherwise she might have refused to submit to. Having conferred the jurisdiction, she could not take it away at pleasure, without trifling with the court. It lasted as long as the trial lasted. In our bill of rights it is provided that the accused in a criminal prosecution "shall not be compelled to give evidence against himself," and yet it is held that, if he voluntarily takes the witness stand, he must submit to cross-examination.

It was not pretended that either of the experts offered was personally offensive to appellee, or that the proposed examination would be attended with danger, delay, or inconvenience even. Personal security in any form was not so much as mentioned, eo nomine at least, as a ground of objection. Dr. Rely, it will be remembered, amputated her limbs in the first instance. The only specific objection urged was that the proposed experts were in the employment of appellant, and might be biased. This objection, as before seen, went to the weight, and not to the admissibility, of the evidence. It is to be inferred from the record that, if this objection had been overruled by the court, the examination would readily have been submitted to then and there. We cannot, therefore, escape the conclusion that the real objection to the proposed examination was other than personal security, and hence that the numerous cases cited as authority, both in and out of this state, are not in point.

The only case cited or found that is at all parallel is that of *Haynes v. Town of Trenton*, 27 S. W. 622, decided by the supreme court of Missouri. The point decided is thus correctly stated in the eighth syllabus, which seems to have been prepared by the judge: "Per Macfarlane, J. (Black, C. J., and Brace, J., concurring): Where plaintiff exhibits his injured leg to the jury on a trial as to the cause of the injury, it is error to refuse permission to the adverse party to have the leg examined in open court by experts, with a view to introduce their testimony as to the character of the injury and its probable permanency." In the course of the opinion of

Judge Macfarlane, in which two of the other three judges of that division of the court seem to have concurred, and from which the remaining judge does not seem to have dissented, this language is used: "Defendant had the undoubted right, in this case, at any time after the injuries had been shown to the jury, to have physicians examine the injured leg, and testify as experts to its character and probable permanency. The question was not as to the right of defendant to have an examination of the injuries made, but as to the right to test the effect and reduce the weight of evidence introduced by plaintiff." So we hold in the case at bar, not that the court should have appointed physicians to make an examination in the first instance, for we have no statute prescribing such procedure, but that when appellant's counsel made the following proposition, as shown in the bill of exceptions, "Doctor, will you please here and now examine the plaintiff and her injuries?" the objection made by appellee's counsel should have been overruled, and the witnesses permitted then and there, or at such other reasonable time and place as the court might appoint, to make the proposed examination, and give the result of it to the jury. It seems to us that this would have been simple justice, and consequently that it ought to have been done, thereby avoiding the appearance of an ex parte trial on this important issue. No harm could have resulted from such a course. Upon this ground, therefore, we feel constrained to order a reversal of the judgment.

The argument of appellee's counsel of which complaint is made was apparently of a very damaging character, in that it was calculated to arouse sympathy for appellee and prejudice against appellant. It purported, however, to be based upon facts in the record, though some of the inferences, at least, if not all, were wholly unwarranted by the facts proven, and were clothed in language calculated to substitute in the minds of the jury such inferences for facts. In view of the conclusion already reached, we need not determine whether the judgment should be reversed upon this ground, taken in connection with the large and alleged excessive amount of the verdict. Reversed and remanded.

(Nov. 29, 1898.)

HUNTER, J. (dissenting). I regret that I cannot agree with my brothers on the opinion they present in this case. I think that the ruling of the learned district judge in refusing to require the plaintiff to unwrap and expose her wounded limbs to the company's doctors was exactly correct. It appears from the bill of exceptions that they were "surgeons of defendant and in defendant's regular employment"; that the plaintiff's counsel had previously refused to allow them to examine her upon this ground, offering, however, at the same time, "to have plaintiff examined by any number of physicians the court might see prop-

er to appoint, on defendant's application, who were not in any way connected with plaintiff or defendant." Defendant then made application to the court, and upon this application the court appointed Dr. Stinson to make the examination, refusing to appoint the company's doctors, or either of them, stating that Stinson could act or not, as the parties themselves desired. At this juncture, it seems, defendant's counsel placed two of the company's doctors on the stand, and requested them then and there "to examine the plaintiff and her injuries," and I infer that the aforesaid doctors were then and there about to seize the plaintiff's limbs, and examine them, *nolens volens*, when her counsel came to her rescue, again objecting to the assault upon her by these corporation doctors, placing their objections upon the grounds (1) that they were in the employment of defendant, and were partisan, and not impartial; (2) that they had not been appointed by the court to make such examination; and (3) that defendant had no right to have such examination without the plaintiff's consent, agreeing at the same time to submit herself to such examination at the hands of any other doctors considered by the court to be impartial and competent, and not in the employment of defendant.

In order to have a clear understanding of the question as it stood for decision in the district court, at least upon the motion for a new trial, and as it stands in this court, I think it is proper to state here that the record shows that defendant accepted the order appointing Dr. Stinson to make the examination, and acted upon it; because the undisputed evidence is that, after he was appointed, defendant's counsel took him to Mrs. Langston, and caused him to examine her, and then failed to put him on the witness stand, when the plaintiff herself called him as a witness, and he testified fully as to the condition of her injuries, and whether she would be able to wear artificial limbs or not, his evidence agreeing in the main with that of Dr. Poindexter. It is important to note, furthermore, that this effort to force an examination was not made until after the plaintiff had been twice upon the witness stand, and had testified fully, and exhibited her limbs to the court and jury, and her cross-examinations, partly referring to the condition of her limbs and ability to wear artificial limbs, cover 10 pages of typewritten matter in the record; that it nowhere appears in the record that the company's doctors were not present during her entire examination as a witness, and had every opportunity to view and examine the injured limbs and question her fully concerning the same; that it occurred after she had closed her evidence in chief. It also appears that Dr. Poindexter had examined her limbs on the day the trial began, and it nowhere appears, nor does defendant's counsel contend, that Dr. Poindexter and Dr. Stinson were incompetent, or had not made a thorough examination, or were interested in behalf of the plaintiff, or in any manner par-

tial to her, or prejudiced against the company, but they stand here as graduated, competent, and experienced physicians and surgeons, with long years of practice, without a breath of complaint against them of any character, and it does not appear that the company's doctors did not hear them testify, fully describing the injuries and their condition and appearance. I think that, under this view of the case, the court did not err in refusing to appoint the company's doctors to examine her limbs out of court. Her counsel had refused to consent to the appointment, and the court, in the absence of a statute, had no power to enforce such an order against her will. We held this, in effect, in the *Pendery Case*, cited by the majority, and the supreme court refused a writ of error therein.

Nor did the court err in refusing to compel her to submit to an examination of the company's doctors in open court on the trial. Our supreme court has intimated this view on several occasions, and I think has, in effect, so decided. *Railway Co. v. Norfleet*, 78 Tex. 323, 14 S. W. 703; *Railway Co. v. Johnson*, 72 Tex. 101, 10 S. W. 325; *Railway Co. v. Underwood*, 64 Tex. 466.

In the *Norfleet Case*, *supra*, Chief Justice Stayton said for the court: "Such an order should never be made, unless in a case in which the ends of justice imperatively demand it, and in no case should such an order be made when the party is willing to be examined by competent and disinterested men without such order. If, however, a court should refuse to make such an order under a state of facts that would justify it, this would not be ground for reversal, if it appeared that during the trial opportunity for such examination was given. On the trial of this case plaintiff submitted his injured limb for examination, it was examined, and there is no reason to believe that any physician or surgeon brought by appellant would have been refused an opportunity to make a full examination."

Our present Chief Justice Gaines, in the *Johnson Case*, *supra*, speaking for the court, said: "If this power should be exercised at all, it should be by the appointment by the court of one or more disinterested experts, either of its own selection or such as may be agreed upon by both parties." Our brothers of the Fifth district, it seems, take the same view of the question (*Railway Co. v. Nelson*, 5 Tex. Civ. App. 387, 24 S. W. 588); and so it has been ruled in the First (*Railway Co. v. Berling*, 14 Tex. Civ. App. 544, 37 S. W. 1083); and our supreme court refused a writ of error in the latter case.

The court of appeals of Kentucky hold "that such examination may be required in the exercise of a sound discretion on the part of the trial court, and when it fairly appears that the ends of justice require it, and that knowledge of necessary and material facts can only be brought to light by such examination"; and that court affirmed a judgment, where the lower court had refused to

make such an order, because "eighteen months had elapsed from the time of the accident to the date of the trial, and it was apparent to all that the appellee was a cripple. It was an undisputed fact that he had suffered extreme and excruciating pain. His right thigh was broken, his left thigh mashed, and his body otherwise bruised and injured. An examination by the company's expert physicians, or by a commission of learned doctors, might have informed the jury of the exact nature of the trouble under which the appellee labored, and have clothed their information in the usual technical nomenclature of the profession, but the patent fact that the man had thus suffered and was a cripple could not have been explained away. In the courts where the power to compel a submission to such an examination is upheld—and it is denied in many—it is not held that a defendant has an absolute right to demand such an order, but, as we have said, the motion therefor is addressed to the sound discretion of the court." *Distilling Co. v. Riggs* (Ky.) 45 S. W. 99.

In *Railway Co. v. Rice*, 144 Ill. 227, 33 N. E. 953, the supreme court of Illinois say: "The extent to which courts have gone, sustaining the power to compel such examinations, is that such orders may be made in the sound legal discretion of the trial court, when it appears that such an examination is reasonably necessary to the attainment of justice. \* \* \* But the ruling in this case was placed upon the broad ground that the court had no power to grant the motion, and this case is committed to that doctrine." *Parker v. Enslow*, 102 Ill. 272; *Loyd v. Railway Co.*, 53 Mo. 515.

In *Railway Co. v. Michaels*, 57 Kan. 474, 46 Pac. 938, the supreme court of Kansas, while asserting the power of the trial court to compel a physical examination, denied it to the railway company in that case, because the application was not made until after plaintiff had closed his evidence, and, furthermore, because no necessity was shown to exist requiring such an order.

In *Stuart v. Havens*, 17 Neb. 211, 22 N. W. 421, the same question arose, and in almost identically the same manner as here. In delivering the opinion of the supreme court of that state, Justice Maxwell said: "The plaintiff below, on his direct examination, was asked to show his arm, which he claimed was injured by falling into the excavation, to the jury. This he did without objection, and afterwards three physicians who had treated the arm professionally testified as to its condition, without objection. Afterwards the defendant below asked the court below to make an order requiring Havens to exhibit his arm to four physicians called by him [the defendant]. This the court refused to do;" and error was assigned on this refusal. Discussing this assignment, the court further said: "Where, in a case like this, experts are called by a party, and permitted to make

a personal examination of the person injured, and to testify therefrom, there is danger that they will feel under obligations to the party calling them, and, however honest they may be, color their testimony somewhat in his interest; while in many, if not most, cases their general views upon the question will be known to the party producing them before they are called. In any event, the evidence partakes somewhat of a partisan character. To avoid this, they should be agreed upon by the parties, or appointed by the court, and an examination, if desired, should be made before the trial begins, although the court may permit it to be made during the progress of the trial."

The reasoning in the above case is of peculiar force here, because the bill of exceptions here shows that the company's counsel knew and were able to state to the court in advance what these company doctors would swear, for they insert in the bill these words: "Defendant could have proved by said witnesses that plaintiff could at that time wear artificial limbs without pain, and get about on them in such manner that her injuries could not be detected in her locomotion." The majority, it seems, rely upon this statement for a predicate that the evidence of these doctors would have been so favorable to defendant as to have influenced the jury in determining the amount of the verdict, and therefore, in their judgment, the excluded evidence was material.

I have no right to doubt that counsel's statement was true, and, being true, it was almost sufficient in itself, in my judgment, to exclude the witnesses from testifying as experts, because an expert should come onto the witness stand without himself knowing what his evidence will be, where he is ignorant of the facts upon which his opinion is desired, as must have been the case here, to show any necessity for the examination, and to entitle appellant to raise this question at all. See, also, *Turnpike Co. v. Bally*, 37 Ohio St. 104; *Railroad Co. v. Finlayson*, 16 Neb. 578, 20 N. W. 860; *Railroad Co. v. Hill*, 90 Ala. 74, 8 South. 90; *Shepard v. Railroad Co.*, 85 Mo. 632.

I conclude, then, from the trend of the cases cited, holding that the trial court would have the power to order the examination, that this power should be exercised only in cases where the facts cannot be obtained otherwise, and the ends of justice imperatively demand it, and not where, as in this case, the nature and extent of the injury was patent, and the limbs had been exhibited to the court and jury, and it is not shown that defendant's physicians were not present at the time. While this specific objection was not made by defendant's counsel, yet, if the evidence was properly excluded for any legal reason, this court should not reverse the judgment.

But I justify the action of the court upon the further ground that the courts of this

country, in the absence of a statute, have no such powers. It may be that the state, by an act of the legislature, might require ladies in such cases to submit to such examinations in response to the imperative demands of justice, under the penalty of being denied relief in her courts; but under our constitution such a statute would raise a serious question, and it would not be in accord with the genius of the American republic, nor with the sentiment of the people of Texas.

The supreme court of the United States, in the case of *Railway Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. 1000, denied the existence of such a power in any court. Justice Gray says: "The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass; and no order or process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country."

In *Railway Co. v. Griffin*, 25 C. C. A. 417, 80 Fed. 282, where the physical examination of the plaintiff was asked for during the trial, Judge Woods, in delivering the opinion of the circuit court of appeals, after citing *Railway Co. v. Botsford*, supra, says: "The reasoning of that case forbids a compulsory examination during the trial equally with one in advance of the trial."

In *Lyon v. Railway Co.*, 142 N. Y. 298, 37 N. E. 113, the court of appeals of New York, speaking through Mr. Justice O'Brien, shows that the power to compel a party to submit to personal examination by physicians exists only by virtue of an amendment to an article of their statute authorizing plaintiff's deposition to be taken, and, after citing with approval the above language of Mr. Justice Gray, he adds: "This amendment has changed the law, but it is not so certain that it will ever change the general sentiment of mankind which was expressed in Judge Gray's remarks." See, also, *McQuigan v. Railway Co.* (N. Y. App.) 29 N. E. 235; *Roberts v. Railroad Co.*, 29 Hun, 154; *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401, 28 N. E. 860.

In the *Newmeyer* Case, supra, the supreme court of Indiana said: "To say that the power rests in the sound discretion of the court does not meet the case, for the real question is as to whether the power exists at all. So far as we know, the courts of this state have never attempted to exercise such a power, and we are of the opinion that no such power is inherent in the courts. We think the bet-

ter reason is against the existence of such a right, and, in the absence of some statute upon the subject, we do not think the courts should attempt to compel litigants, against their will, to submit their persons to the examination of strangers for the purpose of furnishing evidence to be used on the trial of a cause. Should a litigant willingly submit, there could be no legal objection to such an examination, and should he refuse to submit to a reasonable examination his conduct might possibly be proper matter for comment; but this is quite a different matter from compelling him, against his will, to submit his person to the examination of strangers."

In *Mills v. Railway Co.* (Del. Super. 1894) 2 Hardesty, 31, 40 Atl. 1114, it was held that, although the plaintiff had exhibited his leg on the trial to the jury, and at noon recess to the company's physicians, he could not be compelled to expose it again to the jury, for the purpose of explanation by one of said physicians.

True, the language of Judge Gray was used in a case where the examination was sought out of court; but from the reasoning above I am led to believe, with the circuit court of appeals in the *Griffin* Case, supra, that, if her body was secure from the "touch of a stranger" out of court, this right of personal security would follow her even on the witness stand. And, though she may have voluntarily exhibited her limbs to the jury on one occasion during the trial, there is not power enough in the American governments, state or federal, in a controversy between herself and a private person or corporation, to lift the hem of her tattered skirt, and expose her mangled limbs to public gaze, or require her to do so against her will. The right of personal security, wherever the common law of England obtains, is one of the absolute rights of individuals, and the pride of the Anglo-Saxon race, and in our Declaration of Independence we have declared it to be inalienable. She cannot deprive herself of it. She cannot contract it away. Nor can she by any act of hers estop herself from the right to assert it. It is the shield of her person, except against the state's right to punish her for crime whereof she is duly convicted according to the laws of the land.

I would gladly close this dissent here, but if there is any assignment in the record upon which I could agree to a reversal of the judgment it would be my duty to do so. Hence I feel compelled to discuss other assignments, in order that my reasons for not agreeing may be known.

It was proved by several of plaintiff's witnesses that none of the trainmen or other servants of defendant assisted or offered to assist the plaintiff in boarding the train. Defendant moved to exclude this evidence from the jury, because it was not the duty of defendant to furnish passengers with servants to assist them in boarding or alighting from its trains, except where they are old or infirm, or incumbered with baggage or bundles,

etc., and that such evidence was calculated to mislead the jury. The court refused to exclude it, and, under the circumstances of the case, I think properly. It seems that, where the passenger is not afflicted or incumbered in some way, it is not the duty of the railway company to assist her in boarding the train or alighting therefrom. In such cases, it is only necessary for the company to stop its trains at the stations for a length of time reasonably sufficient for passengers to get off and on, of course furnishing them proper and safe facilities for doing so. When this is done, the passenger must do the rest. But plaintiff's theory was that as it was night, and the platform was not lighted, and as the train was behind time, and only stopped from three to ten seconds,—not long enough to discharge and take on the passengers in safety, without assisting them,—it was a question for the jury to determine whether, under these circumstances, it was negligence in the company to fail to assist the passengers in boarding the train on that occasion; and, in that view and theory of the case, I think the evidence was competent. *Railway Co. v. Miller*, 79 Tex. 78, 15 S. W. 264; *Railway Co. v. Finley*, 79 Tex. 85, 15 S. W. 266; 4 Elliott, R. R. § 1628, and cases cited.

The twelfth assignment of error complains of the opening speech of the plaintiff's counsel, and the points raised are shown by the following statement from appellant's brief: "Judge Wilkins, one of plaintiff's counsel, in his opening argument, used the following language: 'Gentlemen of the jury, this is an unequal contest,—this poor woman on one side, and this powerful corporation on the other. I say that the evidence shows that it is an unequal contest. Look at the array of witnesses on one side that came here for the railway company, and the number that came for Mrs. Langston. We allege in our petition that the train crew was drunk. There was enough testimony in this case to raise the issue. It don't seem to me that the men could have been sober, and gave no attention to the passenger cars and passengers in the cars. It was a grave charge made upon the conductor and his underlings. They knew the charge had been made, and the attorneys of the railway company knew the charge had been made, and they didn't open their mouths about it. The man who run that engine was charged with being drunk, and didn't deny it. There were some depositions taken in this case, by the notary who had testified in this case,—questions propounded by the defendant and crossed by the plaintiff, and the answers written down, sworn to by the witnesses, and certified to by Mr. Collier,—that never found their way into this court house. Who is responsible for that I do not know. I hope no lawyer in this case. It was not the proper thing to do. Gentlemen of the jury, when these depositions were taken, if it was found by anybody who had any authority in the matter

that they were against the defendant, it was their duty to let them be returned to the court, filed here as testimony in this case, to be used by the plaintiff if she saw proper to use them, even if the defendant did, on those depositions, lose the case. But they disappeared. Where they went I do not know. I don't know who was responsible for them, whether it was the agents of the railway company or the notary public, and I don't believe it was the lawyers. But they are gone. Those depositions were against the defendant; otherwise they would be on file here to-day, to be read to you. We were entitled to them, but we did not get them. That poor woman who sits there with her limbs cut off, helpless as she is, was entitled to those depositions, to be used for whatever they were worth. But you can't get them. They are gone. Collier testified that he took them, but no explanation is made of their absence. They are unaccounted for. Nothing more is said about them by the defendant. When he testified that they hadn't been returned to the court, they didn't attempt to explain it away. Nothing more was said about it. They ought not to have done this poor woman that way; they ought to have given her a fair chance. This is almost a death struggle for her. If there is anything in her favor, let her have the benefit of it. Don't take it away. Don't rob the grave. Give her a fair show,'—which language and argument the defendant then and there accepted to in open court, as calculated to leave a false impression on the minds of the jury as to the duty and liability of the defendant, to arouse their prejudice against defendant, and elicit their sympathy in behalf of the plaintiff; which objection the court overruled, to which ruling defendant then and there excepted, and tendered its bill of exceptions No. 17." The court, before signing, added the following explanation to this bill: "The above bill is signed, with the following modification and explanation: The remarks of Mr. Wilkins contained in the first paragraph of the above bill of exceptions were objected to, at the time made, by Mr. Lassiter, of counsel for defendant. Mr. Wilkins objected to being interrupted. Mr. Lassiter said that he would not interrupt the speaker any more. Mr. Wilkins replied that he did not wish to be interrupted unless there was good grounds for it, but that he would thank Mr. Lassiter to call his attention to the fact that he was out of the record, if that should occur, and that he (Wilkins) would correct it. Mr. Lassiter, who followed Mr. Wilkins in the argument, discussed before the jury the remarks made by Mr. Wilkins, as set forth in said bill of exceptions." It seems, from the district judge's explanation of this bill, that he did not understand that any part of the speech was objected to except the first paragraph, which relates only to the case presenting an unequal contest, with "this poor woman on one side and this powerful corporation on the

other," and to the remarks about the train crew being drunk. In support of the first statement, he said to the jury: "Look at the array of witnesses on one side that came here for the railway company, and the number that came for Mrs. Langston." The record indicates that there were about 10 witnesses who testified for the plaintiff, and about 26 for the defendant. The remarks about the train crew being drunk were explained by him to be based upon the fact "that the petition charged it, and that the defendant's counsel knew it, and did not open their mouths about it." His remarks show that he only inferred they were drunk, because "when on the stand they did not deny it, and because it did not seem to him that they could be sober and give no attention to the passenger cars and passengers in the cars." I am unable to see that any harm could have resulted from this part of the opening speech, and, if so, it was easily answered and easily turned against the side using such assertions and inferences for argument. An advocate worthy of the name understands very well how to turn such unsupported arguments and assertions to his own advantage with powerful force, and ought to be delighted at the opportunity to do so, without troubling any court with such matters. I am very much averse to limiting counsel in their speeches to the jury, so long as they keep within the bounds of any kind of inferences which may be drawn from proven facts or from the absence of such. These attenuated, filmy inferences often establish the weakness of the speaker's cause, and ought to be gratifying to the opposing counsel, where he has the opportunity of answering them, rather than ground of complaint. The reference to the depositions which Collier had not returned was not improper. There was sufficient evidence admitted, without objection from appellant, to entitle counsel to contend that they had been taken by defendant, and, being unfavorable to it, had been withheld, and never filed. The inference was legitimate and strong from the facts proved. The balance of the speech, if considered as objected to, was rather in the nature of an appeal for justice and for sympathy, and was not any stronger than the facts of the case warranted. It is perfectly legitimate, in my judgment, for an advocate to magnify the wrongs which he conceives have been perpetrated upon his client by the adverse party, and appeal to the humanity and sympathy of the jury or court,—to their sense of right and justice; aye, sweep every chord of every sentiment of the human soul, until they vibrate in unison with those of the speaker. This is one of the purposes of oral argument, and to deny an advocate these rights is to violate the law of the forum, and deprive litigants of the advantages they have a right to expect from the employment of skilled, able, eloquent, or experienced lawyers. A distinguished writer on the subject says: "The benefit of the constitutional right to

counsel depends very greatly on the freedom with which he is allowed to act, and to comment on the facts appearing in the case, and on the inferences deducible therefrom. The character, conduct, and motives of parties and their witnesses, as well as of other persons more remotely connected with the proceedings, enter very largely into any judicial inquiry, and must form the subject of comment, if they are to be sifted and weighed. To make the comment of value, there must be the liberty of examination in every possible light, and of suggesting any view of the circumstances of the case, and of the motives surrounding it, which seem legitimate to the person discussing them." Weeks, Attys. at Law, § 110. And again, quoting from the case of *Garrison v. Wilcoxson*, 11 Ga. 154, he says: "Parties have a right to appear by counsel, and it is the privilege of counsel to address the jury on the facts. If the jury are to disregard the argument of counsel altogether,—if they are to shut their ears to their illustrations, comments, and reasonings,—how unmeaning, indeed how absurd, is the appearance of counsel! It is a most valuable right to be represented by learned and eloquent counsel, not only before the court as to the law, but also before the jury as to the facts." Weeks, Attys. at Law, pp. 240, 241; Abb. Tr. Brief Pl. "Counsel's Address to the Jury," p. 136, § 11, and cases cited. See, also, *Railway Co. v. Brown* (Tex. Civ. App.) 40 S. W. 612; *Ferguson v. Moore* (Tenn. Sup.) 39 S. W. 343. The only point that can legally be made against eloquent appeals to the sympathies of the jury is that the verdict is for more than the evidence fairly sustains, and cannot otherwise be accounted for; and, where such is the result of such appeals, it is the duty of the courts to set aside such verdicts or reduce them to a sum sustained by the evidence. Counsel may therefore appeal to the sympathies of the jury, but at the risk of having the verdict set aside or reduced by the court, if excessive.

This brings me to the only other serious question in the case, and that is whether the verdict is excessive. It is for \$25,000, with no exemplary damages included. Is this sum more than enough to fairly compensate the plaintiff for her pecuniary loss and physical and mental suffering? I have hunted the books through for some definite rule to guide me in the solution of this question, and have found none. I do not think that the eloquent and pathetic language of counsel complained of pushed the verdict beyond the amount at which the mute appeals of her mangled limbs would have placed it. But even these mute appeals sometimes do great injustice, especially with humane and tender-hearted men, whose sympathies, all unconsciously, overcome their reason and judgment, and, when this is so, it is the duty of courts to set aside or reduce verdicts found under such influences. The highest function of a trial court is to arrive at exact justice



in the particular case, but this must be attained according to the law of the land; otherwise no man could know his rights or duties. In the trial of such causes as this, where the damages claimed are unliquidated, and are based, not only upon pecuniary loss, but upon physical and mental suffering as well, it is the peculiar province of the jury to assess the amount of the damages, and, when assessed by them, the court has no right to disturb their verdict, unless it is shown that some error has entered into the estimate, or that it has been unduly affected by some improper influence. In *Brooke v. Clark*, 57 Tex. 113, our supreme court said: "In a case of this nature, where the actual damages may include mental suffering through life, the court can rarely set aside a verdict as excessive." In *Railway Co. v. Porfert*, 72 Tex. 353, 10 S. W. 213, where plaintiff had one leg broken, and was disabled for life, and had suffered 21 months, and his leg was not well at the trial, the court said they could not say that \$14,167 damages was excessive, though large, where the trial judge had approved it; citing *Railway Co. v. Dorsey*, 66 Tex. 148, 18 S. W. 444, and numerous other Texas cases. See, also, *Railway Co. v. McClain*, 80 Tex. 98, 15 S. W. 789, and cases cited; 1 *Suth. Dam. (2d Ed.)* §§ 459, 460; 3 *Suth. Dam. (2d Ed.)* § 1256, and note. Here the record shows that the plaintiff was 37 years old at the date of the injury, was in robust health, and engaged in a business that brought her an income of from \$3 to \$5 per day, say an average of \$1,500 a year. It is shown that she is now helpless, and requires the aid of an assistant or servant all the time, and probably will the rest of her life. The proof shows that this assistant or servant will cost her from \$30 to \$50 per month, say an average of \$500 a year. This gives \$2,000 a year, counting the loss of her income and what she must necessarily pay out on account of the injury. It was proved that her health had been impaired by reason of this injury, and that she had been compelled to employ physicians and buy medicines, and in all probability would have to continue to do so for years. This last item might run from \$100 to \$300 a year, or even more. I am not informed by the statement of facts what her life expectancy is, nor what amount would be required to purchase for her an annuity of \$2,000 or \$2,500 a year during the remainder of her natural life, if such can be obtained in this country. The statement of facts shows: "It was admitted by defendant's counsel that her injuries were permanent, and that she suffered all the pain that any person would suffer from such injuries." Her physical suffering, the record shows, had been great and intense up to the time of the trial, a period of 32 months, and

her back and breast, which she testified were also injured in her fall under the wheels, were paining her on the trial, as well as her limbs. One of her limbs was not then healed, and the other, though healed, was extremely tender, and the evidence tended to prove that they would never be well unless she submitted to another amputation, which would be attended with danger to her life. She was suffering pain on the day of the trial, and in all probability would continue to suffer the balance of her days. Her mental sufferings over her mutilated condition for life—dragging out a living death, as it were—can be better imagined than described. All these facts and figures the jury had before them, and they have found an amount which at first shocks the conscience, until the injury is contemplated; but, when the injury is considered, I am unable to say that it is excessive. The record fails to furnish any data which enables me to point out wherein and how much it is excessive; and hence I have finally concluded, after many consultations and much hesitation, that there is nothing in the record that would justify this court in setting it aside. The jury were certainly severe, but I cannot say unjust. The district judge before whom the trial took place is distinguished for his fairness, impartiality, and learning. He heard all the witnesses testify; observed their manner; became conversant with every detail of the facts; himself saw the condition of the injured limbs, and the full effect they had produced upon the health, happiness, and life of the plaintiff; and it was his duty to see that no injustice was done the defendant, but to accord to it all of its rights under the law. He has ratified the verdict by refusing to set it aside, and I fail to see wherein we are justified in reversing his judgment. I think the judgment ought to be affirmed.

#### AVANT v. COWLEY et al.<sup>1</sup>

(Court of Civil Appeals of Texas. Nov. 9, 1898.)

#### APPEAL—REVIEW—FILING BRIEFS.

Where no briefs are filed, only fundamental errors will be considered.

Appeal from district court, Frio county; M. F. Lowe, Judge.

Action by J. H. Avant against W. B. Cowley & Co. From a judgment for defendants, plaintiff appeals. Affirmed.

NEILL, J. As no briefs are filed by either party to this appeal, we have examined the record only for fundamental errors, and finding none, affirm the judgment. Affirmed.

<sup>1</sup> Rehearing denied November 30, 1898.

**AUSTIN NAT. BANK v. BERGEN et al.**  
(Court of Civil Appeals of Texas. Nov. 30, 1896.)

**GARNISHMENT—NONRESIDENT DEFENDANT—JUDGMENT—AMENDMENT.**

1. A real-estate broker's commission, though the amount thereof be not specifically agreed on, is susceptible of definite ascertainment, and hence may be the basis of garnishment.

2. The court has jurisdiction in garnishment to enter judgment against a nonresident to the extent of the property garnished.

3. Property in possession of one who is merely a collecting agent is subject to garnishment in a suit against his principal.

4. A personal judgment against a nonresident, of whom jurisdiction was acquired by publication, may be corrected by restricting it to the fund attached by the garnishment.

Appeal from Travis county court; A. S. Walker, Judge.

Action by Bergen, Daniel & Gracy against the Bank of Commerce of Kansas City, defendant, and the Austin National Bank, garnishee. There was a judgment for plaintiff against garnishee, and garnishee appeals. Affirmed.

West & Cochran, T. W. Gregory, and G. W. Allen, for appellant. Walton & Hill, for appellees.

**FISHER, C. J.** The Bank of Commerce of Kansas City was indebted to the appellees for commissions due in negotiating the sale of certain property in the city of Austin, owned by the Bank of Commerce. Suit was brought by appellees on that demand against the bank, and the appellant, the Austin National Bank, was garnished. The Bank of Commerce owned property here in the city of Austin, which, through the negotiations of appellees, was sold to McKean, Ellers & Co. One thousand dollars of the purchase price was paid into the Austin National Bank by McKean, Ellers & Co. After this amount was paid into the bank, appellees brought a suit against the National Bank of Commerce of Kansas City, and garnished the Austin National Bank, who thereupon notified the National Bank of Commerce that \$500 of the amount received from McKean, Ellers & Co. was held by the garnishee, to await the outcome of the suit. The appellees, on discovering the mistake that they had made in suing the National Bank of Commerce, instead of the Bank of Commerce, thereafter brought suit against the Bank of Commerce; and during the time between the bringing of the suit against the National Bank of Commerce and the Bank of Commerce the National Bank of Commerce transferred to the Bank of Commerce the full amount of money that the Austin National Bank had collected from McKean, Ellers & Co. This transfer was not of the identical money that was collected by the Austin National Bank, as \$500 of that money was then in the possession of the garnishee, and was never transmitted or went into the possession of the National Bank of Commerce or the Bank of Commerce, and

the transfer spoken of between the two banks was made by an entry and order upon the books of the bank by direction of the president of the Bank of Commerce and the National Bank of Commerce, who was one and the same person. The garnishee contends that at the time the writ of garnishment was served upon it in this case, by reason of the transfer on the books, as aforesaid, the money had been paid over to the Bank of Commerce, and, consequently, it had no funds in its possession belonging to the Bank of Commerce, but that the money in its possession did belong to the National Bank of Commerce. In response to this, the appellees contend that the transfer between the two Banks of Commerce was fictitious, or was made in fraud of the rights of appellees, and for the purpose of evading the payment of plaintiffs' claim.

The appellant first contends that the plaintiffs' suit against the Bank of Commerce is upon an unliquidated demand, and therefore cannot support a writ of garnishment. Plaintiffs' suit is one for commissions earned as real-estate agents in the sale of certain property for the bank. It is susceptible of proof and of definite ascertainment. The commission that a party earns in the sale of real estate can be as accurately measured and ascertained as would be the case where the party sues for the reasonable value of property or of his services, where no definite and specific amount had been previously agreed upon; and in cases of this character numerous authorities might be cited, holding that they were sufficiently certain upon which to base attachment or garnishment process.

It is next contended that the judgment rendered against the Bank of Commerce in favor of the appellees cannot support garnishment process, because it is void on the ground that it was a personal judgment against a non-resident defendant. The judgment of the lower court on appellees' demand against the bank was reformed and corrected so as to apply only to the funds garnished. Garnishment process subjects the funds or the property reached by it to the jurisdiction of the court, and it has been definitely settled in this state that such a proceeding is one in rem. Appellant contends that the funds in its hands were not subject to garnishment process, because its possession was simply that of agent for its principal, the Bank of Commerce. The National Bank of Commerce and the Austin National Bank were simply collecting agents for the Bank of Commerce, and, if it held in its possession property belonging to that bank, it could be reached by the garnishment process, as well as if its possession was held by some third party.

In response to those assignments of error which complain of the refusal of the court to give certain charges, and complain of the errors of the court in its charge, it is sufficient to say that, in our opinion, there is evidence in the record which warrants the conclusion that the transaction between the National

Bank of Commerce and the Bank of Commerce in pretending and undertaking to transfer the fund here in possession of the Austin National Bank was a device and scheme for the purpose of defeating the garnishment suit of the appellees.

The letters which were complained of, and offered in evidence, we think were admissible. Also, it was proper for the court to amend the judgment, complained of in appellant's tenth assignment of error. We find no error in the record, and the judgment is affirmed. Affirmed.

#### CITY RY. CO. v. THOMPSON.

(Court of Civil Appeals of Texas. Dec. 3, 1898.)

#### STREET RAILROADS—NEGLIGENCE—APPEAL—FINDINGS OF FACT.

1. When the evidence is conflicting, and there is sufficient to sustain the verdict, if true, it will not be disturbed.

2. Plaintiff, driving beside a street-car track, turned onto the track to get around a wagon standing in the street, and was struck by a street car going in the same direction, which was at least 15 feet away when plaintiff first turned onto the track. The motorman could have seen the obstruction, and that plaintiff would have to go onto the track to get around it. By reversing the machinery, the car could have been stopped within a space of 5 feet. *Held* to sustain verdict that the motorman was negligent.

Appeal from district court, Tarrant county; W. D. Harris, Judge.

Action by A. Q. Thompson against the City Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Orrick & Terrell, for appellant. Gillespie & Smith, for appellee.

**HUNTER, J.** This suit was brought by A. Q. Thompson in the district court of Tarrant county against the City Railway Company of Ft. Worth, to recover damages for personal injuries alleged to have been sustained by his wife on account of a collision, caused by the negligence of defendant's servants, between one of its electric cars and the buggy in which his wife was riding on Jennings avenue, one of the public streets of said city, on the 10th day of November, 1895. The negligence charged was as follows: "Plaintiff says that the injuries so inflicted upon his said wife were caused through the carelessness and negligence of the defendant's agent and servant, the motorman then in charge of said car; that the said motorman, although he knew, or could have known by the exercise of ordinary care and diligence, that the said Mrs. Thompson was in a perilous situation, though the same was unknown to her, failed to give any notice or warning of any kind that said car was approaching; that plaintiff's said wife was driving along said street near the track of the defendant, being still unaware of the approach of said car from behind, and attempted to pass

around a wagon, which obstructed the passage on the side of the street on which she was driving; that the defendant's agent and servant in charge of said car knew, or could have known by the exercise of ordinary care and diligence, that plaintiff's wife would be necessarily compelled to drive onto said track, in order to pass around said wagon, and discovered, or could have discovered, by the exercise of ordinary care and diligence, the perilous situation of plaintiff's wife, in time to have stopped said car, and thereby prevented the collision which occurred." The answer was a general denial, and contributory negligence on the part of Mrs. Thompson, in that, being in front of the car, at a safe distance from the track, and going in the same direction, she negligently and unexpectedly drove onto the track so close in front of defendant's car as to make it impossible for defendant's motorman to stop the car before striking her buggy. The case was tried by a jury, and verdict and judgment were rendered for \$250, from which the street-railway company has appealed.

The evidence is conflicting; so much so that a verdict for either party would have been sustained thereby; but, the jury having found for the plaintiff, it is evident that they gave credence to the plaintiff's witnesses, and to his theory of the case, and we are therefore without power to disturb their finding, as his evidence is sufficient, if true, to sustain it. The evidence in the record tends to establish that Mrs. Thompson, accompanied by Mrs. Norvell, was driving north on Jennings avenue, in her buggy, with the top up, but no side curtains on. The street car in question was going in the same direction. Both had stopped a minute or so before the accident occurred at the Texas & Pacific Railroad crossing, to await the passing of a train, or probably some train switching. When the way was clear, Mrs. Thompson, who had observed, or had an opportunity to observe, that the car was waiting to cross as she was, drove rapidly across the Texas & Pacific tracks northward, on the east side of the street-car track, somewhere from a few feet to nine inches from the east rail thereof. An ice wagon had stopped to deliver ice at a saloon, and was standing across the east side of the street, and, in order to pass it, she turned to the left, intending to cross the street-car tracks to the other side, and as she turned, Mrs. Norvell, who remembered that the street car was behind them, looked back, and saw the car coming towards them rapidly,—at the rate of  $4\frac{1}{2}$  or 5 miles an hour,—probably about 45 feet from them, as plaintiff's evidence tends to prove, and the motorman then looking off to the left, and giving no alarm. Mrs. Norvell exclaimed, "We shall be killed!" when Mrs. Thompson turned her head to the left, and saw the car, and, believing she could not get across the track, pulled her horse back to the right side of the street, off the track;

but the dashboard of the car caught the left forewheel of the buggy and crushed it, pushing the buggy about four or five feet before stopping. When the motorman saw the danger the ladies were in, he did all in his power to stop the car; but the evidence tends to show that, by the use of proper diligence, he would have seen their perilous position earlier, and could have stopped the car before reaching them. Mrs. Thompson did not look back to see if a car was coming, before driving on the track. She was in a hurry, and did not hear any car or bell, and did not know of any danger, or think of any, when she turned to cross the track. The street was unobstructed, and the motorman could have seen her, and could have seen that the ice wagon obstructed her side of the street, for more than 100 feet ahead of him. The defendant's evidence tends to prove that she drove onto the track about 10 or 15 feet from the front end of the car, and that with the appliances at hand it was impossible to stop the car before striking her; but there is evidence also tending to show that by reversing the machinery of the car, and putting on the brakes, the car could have been stopped in from 5 to 10 feet. One of appellant's employes testifying that, "If the brake is thrown on, and the power reversed about four or five points it would stop the car wheels right then, and, if they go forward, they will slide; and that, running four or five miles an hour, the car would possibly slide five feet."

We have carefully considered all the assignments of error, and overrule them. The questions raised therein are of such a character that discussion thereof would not be of benefit to anybody. The charge of the court was unobjectionable, and the special charges asked and refused were mostly charges on the weight of the evidence, or, when correct, the court had already given them in the main charge. The evidence as to the injury sustained and amount of damages, though quite conflicting, is sufficient, we think, to sustain the verdict. The principles of law touching the duty of a street-railway company, while propelling its cars through the streets of a busy city like Ft. Worth, to keep a lookout ahead, not only to avoid injuring persons discovered to be in peril, but to discover them on the track, or approaching the track, where they are likely to be injured, are so fully and ably discussed by Justice Brown in *Railway Co. v. Mechler*, 87 Tex. 631, 30 S. W. 899, and the rule is there so clearly laid down that it were useless labor for us to attempt to do more than cite the case. The learned judge, speaking for the supreme court in that case, lays down the general rule thus: "The person operating the car must exercise that amount of vigilance that a man of ordinary prudence would have exercised under the same circumstances. This may, under some conditions, require the use of every available means to avoid the injury; but it is, after all, ordinary care in degree,

because a man of ordinary prudence under like conditions would do the same thing; yet it might be the utmost care, or great care, as regards the quantum of diligence, because the particular circumstances demanded that much." He cites approvingly the rule as stated by the supreme court of Missouri in *Winters v. Railway Co.*, 99 Mo. 517, 12 S. W. 653, where that court says: "It is the duty of defendant's servants to be on the lookout, and to take all reasonable measures to avoid injuries to persons who may be upon the streets. The duty to be on the watch is no more than ordinary care, under such circumstances. The care to be used, to be ordinary care, must depend upon the surrounding circumstances." See, also, *Railroad Co. v. Renken* (Tex. Civ. App.) 38 S. W. 829. Considering these rules, and applying them to the facts in this case, it seems to us that it was the duty of the motorman in charge of this car to look, not only ahead on his track, to see that his way was clear, but to look on each side of his track, to see that no one was about to get on it, and that no conditions or circumstances presented themselves which would evidently compel persons then in his view, passing along the street, to go upon the track in front of his car, such as were disclosed here by the position of the ice wagon and the position of the ladies and the course they were driving. If he saw the buggy and the ice wagon,—as, in the exercise of ordinary care, he should,—he evidently saw that it was extremely probable that these ladies, in order to pass the ice wagon, would drive onto the track at that place, and he should have been on his guard, ready in a second's time to bring into requisition all the power and every appliance he had at command to stop the car, and avoid injury, if it were possible to do so. The appellant's motorman in charge of the car testified that the car was 10 or 15 feet from the buggy when it turned to go on the track, and that it was then five feet from the track. He was sounding his gong, he says, and had been since he crossed the railroad,—100 feet or more back,—and that he set the brakes as tight as he could as soon as they started to the track; but he does not state that he reversed his machinery, and this reversing, it seems, is the most efficient mode of stopping the car. If both forces had been applied, the car could have been stopped in five feet, and, consequently, the injury averted. We find no error in the judgment, and it is affirmed.

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GULF, C. & S. F. RY. CO. v. BARNETT.  
(Court of Civil Appeals of Texas. Nov. 30, 1898.)

CARRIERS—INJURY TO PASSENGER—FAILURE TO LIGHT PLATFORM.

1. Where a passenger, while attempting to board a train, was injured by stepping off a platform, the end of which he could not see because of darkness, the sufficiency of the plat-

form was not involved, and the submission of that issue to the jury was error.

2. Rev. St. 1895, art. 4521, requiring railroads, under a penalty, to keep their depots or passenger houses lighted, and open to ingress and egress of passengers, does not apply to depot platforms or other places, where passengers are expected to get on or off trains.

3. Where a passenger was injured by stepping off the end of a platform, which he could see because of darkness, the question whether the railroad company was negligent in failing to light it was for the jury.

Appeal from district court, Runnels county; J. O. Woodward, Judge.

Action by J. T. Barnett against the Gulf, Colorado & Santa Fé Railway Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

J. W. Terry and Charles K. Lee, for appellant. Guion & Truly, for appellee.

KEY, J. On the night of January 14, 1898, appellee was at Talpa, a station on the line of appellant's railroad, for the purpose of boarding the train and traveling to Ballinger, Tex. He had procured his ticket, and, when the train arrived, he walked down the platform near the rear end of the train, stepped or fell from the end of the platform, got his hand caught under the train and injured. For this injury he sought to recover damages in this suit, alleging in his petition that appellant was guilty of negligence in failing to have proper approaches to its depot, and in failing to properly light the depot and platform. At the trial in the court below verdict and judgment were rendered for the plaintiff, and the railway company has appealed.

The first paragraph of the court's charge reads as follows: "It is the duty of every railroad company doing business in this state to keep in a reasonably safe condition all portions of their platforms and approaches thereto where passengers landing from or entering the cars would naturally or ordinarily be likely to go. It is also the duty of every railroad company doing business in this state to keep its depots or passenger houses in this state lighted and open to the ingress and egress of all passengers who are entitled to go thereon, and every railroad company, for such failure to comply with the same, will be liable to the party injured for all damages by reason of such failure."

The first proposition stated in this charge is objected to on the ground that the testimony raises no such issue; and the other proposition is objected to because it, in effect, told the jury that the failure to do certain things would constitute negligence.

The platform at the depot in question is 152 feet long and 6 feet 9 inches wide. At the end where appellee fell, it is 1 foot 4 inches from the ground at the corner nearest the railroad track, and 2 feet 1 inch from the ground at the other corner. The plaintiff's case is based upon the theory, and his testimony is to the effect, that it was so dark

that he could not see where the platform terminated, and that, supposing the platform to extend further, he stepped beyond its edge, and thereby fell. It is true the testimony shows that there were no steps at the place where he fell, but, if there had been, it is not probable that they would have prevented appellee from falling. He was not attempting or expecting to descend from the platform to the ground, nor was he attempting to get from the ground to the platform. He was on the platform, expecting to step therefrom to the train; and, if his own testimony is to be credited, he inadvertently stepped off the platform, because there was not sufficient light to distinguish where it terminated. Therefore, according to the testimony presented by the record, the question of sufficiency or insufficiency of approaches to the depot or platform is not involved in the case, and should not have been submitted to the jury.

The other portion of the charge complained of is embraced in article 4521 of the Revised Statutes of 1895, which reads as follows: "Every railroad company doing business in this state shall keep its depots or passenger houses in this state, lighted and warmed and open to the ingress and egress of all passengers who are entitled to go therein, for a time not less than one hour before the arrival and after the departure of all trains carrying passengers on such railroad, and every such railroad company, for each failure or refusal to comply with the provisions of this article, shall forfeit and pay to the state of Texas, the sum of fifty dollars, which may be sued for and recovered in the name of the state in any court of competent jurisdiction, and shall be liable to the party injured for all damages by reason of such failure." It will be observed that this is a penal statute, a designated sum being prescribed as a forfeiture recoverable by the state for each day the statute is violated. Such being its character, its import should not be extended by construction, and it should be held to impose only such burdens and obligations as are distinctly stated. It imposes upon railroad companies doing business in this state the duty of keeping their depots or passenger houses lighted and warmed and open to the ingress and egress of all passengers for the period of time therein designated. The places required to be lighted, warmed, and open are depots or passenger houses, and it is obvious that these do not include platforms or other places where passengers are expected to get on and off trains. The word "depot," like "passenger house," as used in this statute, means some character of house or building that can be warmed and open as well as lighted.

The plaintiff cannot complain merely because there was no light in the depot. His complaint is a failure to light the platform, and, if it had been or was sufficiently light-

ed, it is immaterial whether or not there was any light inside the depot. Hence we conclude that the statute referred to has no application to this case, and that the question of negligence or not, in furnishing light on the platform, should have been left entirely to the jury, and the charge quoted should not have been given. It is true that in other portions of the charge the court did submit to the jury whether or not the matters complained of constituted negligence, but we think the charge under consideration was at least calculated to confuse the jury, and, as it had no application to the facts of this case, it should have been omitted. In a case falling within the purview of the statute, the court might properly instruct the jury that a failure to do that required by the statute would constitute negligence; but, as this case does not fall within the statute, it would not be proper to so charge. We overrule the other assignments of error presented by appellant, as well as the cross assignments urged by appellee. For the error pointed out the judgment is reversed, and the cause remanded. Reversed and remanded.

#### CITIZENS' RY. CO. v. GIFFORD.

(Court of Civil Appeals of Texas. Nov. 30, 1898.)

##### ELECTRIC RAILROADS—NEGLIGENCE.

1. A company operating electric street cars is not required to put up and maintain its wires so as to absolutely prevent injury to persons coming in contact with them, regardless of the care used by the company; but it is sufficient if it uses the ordinary care which a person of ordinary prudence would use under like circumstances to prevent injury.

2. It is not proper for the court to tell the jury that certain facts would amount to negligence.

Appeal from district court, McLennan county; Sam R. Scott, Judge.

This is an action by appellee, Willie Gifford, by next friend, A. R. Gifford, against the Citizens' Railway Company, an electric street-car railway company in Waco, for damages for personal injuries resulting from alleged negligence of the company in allowing a charged wire to remain in the street, with which the boy came in contact, and was severely burned. It seems a charged wire was down in the street, about 50 feet from the boy's home, and his mother sent him after the cow. In driving the cow home, she went over the live wire, was slightly touched by it; and the boy, following, came in contact with it, was shocked and burned. Defendant pleaded demurrers, a general denial, and contributory negligence. Verdict and judgment for plaintiff, from which this appeal is taken. Reversed.

Clark & Bolinger, for appellant. T. A. Blair and Dyer & Dyer, for appellee.

47 S.W.—66

COLLARD, J. (after stating the facts as above). The court instructed the jury as follows: "It was the duty of the defendant company to so construct, operate, and maintain the wires with which they operate their cars in such manner and with such a degree of care and skill as to prevent injuries resulting to persons who may come in contact with such wires; and a failure upon the part of defendant or its servants and employes to so construct and maintain their said wires along their car line would constitute negligence." This charge is erroneous, as it requires the company to so put up and maintain its wires as to absolutely prevent injuries to persons coming in contact with them, regardless of the care used by the company; and the charge is erroneous in that it declares the failures stated to constitute negligence. The degree of care required of a company operating electric street cars in order to exonerate it from liability to a person coming in contact with its wires must depend on the circumstances, the place, the nature of the agency, and the likelihood of injury. *Railway Co. v. Matula*, 79 Tex. 582, 15 S. W. 573. The circumstances may require much greater care in one class of cases than in another. The use of electricity on streets and in public places to operate cars may be very dangerous to the public, or it may be less dangerous, according to the situation and surroundings. We believe the rule is that ordinary care is required, such as a person of ordinary prudence would use under like circumstances to prevent injury. Ordinary care may require much greater vigilance and skill in one case than in another, dependent upon the elements of danger; but, still, it would be ordinary care that the law would impose upon the person or company controlling and operating the agency. *Railway Co. v. Smith*, 87 Tex. 348, 28 S. W. 520. It was not proper for the court to tell the jury that certain facts would amount to negligence. Because of the error in the charge, the judgment of the court below is reversed, and the cause remanded. Reversed and remanded.

#### MEDLAN v. ABEEL.

(Court of Civil Appeals of Texas. Nov. 30, 1898.)

##### BILLS AND NOTES—FAILURE OF TITLE—BURDEN—CONSIDERATION—ASSIGNMENT.

1. The grantee in a warranty deed retaining a vendor's lien executed a vendor's lien note, providing that, should title to the land fail before maturity, the note should be void. *Held*, in an action on the note, that the burden was not on the payee to show that the title had not failed, but failure of title was a defense which the maker could interpose.

2. In a suit on a vendor's lien note providing that, should title to the land fail before maturity of the note, it should be void, the maker could set up failure of consideration, to the extent of the quantity of land lost; and this though the note had been assigned, since the assignee took it charged with the condition,

and hence acquired no greater right than the original payee.

3. A note, given for part of the price of land, which provided that, should title fail before the note's maturity, it should be void, contemplated that the maker should only pay for that part of the land to which he received a good title; and hence, part of the land being lost, the cash payment should be deducted, in an action on the note, from the value of the land not lost, and judgment given for the amount remaining due for such land.

Appeal from district court, McLennan county; Marshall Surratt, Judge.

Action by T. P. Abeel against A. B. Medlan and others. There was a judgment for plaintiff, and defendant Medlan appeals. Modified.

Arnold & Arnold and Charles B. Pearre, for appellant.

FISHER, C. J. This is a suit by Abeel, against Medlan, Finks, and Albert Abeel, on a note for \$1,000 executed by Medlan, and payable to James C. Moses and P. L. Moses, and transferred by these parties to the appellee T. P. Abeel, and to foreclose a vendor's lien on certain lands, of which the note represented a part of the purchase price. The court below instructed the jury to return a verdict in favor of plaintiff, against Medlan, for the sum of \$460, and 8 per cent. interest thereon from the 1st day of November, 1889, the date of the note, and 10 per cent. attorney's fees, and to foreclose the lien on 320 acres of land,—an undivided interest in the 640-acre tract described in the plaintiff's petition. The judgment was in accordance with this instruction. He also instructed judgment against the indorsers on the note,—Finks and Albert Abeel. To this latter part of the judgment there is no complaint, as only Medlan has appealed.

The facts, briefly stated, are as follows: James C. Moses and his wife, P. L. Moses, claimed to own the David Moses 640-acre survey, in Young county, Tex. On the 1st day of November, 1889, they sold to the appellant Medlan 500 acres of this survey, and executed to him therefor a deed with general covenants of warranty, retaining a vendor's lien upon the land described; and, as a consideration for the land so purchased, Medlan agreed to pay \$1,260. Two hundred and sixty dollars was paid by him in cash at the time, to Moses and wife; and for the remainder, \$1,000, on November 1, 1889, he executed his note, as follows: "\$1,000. No. —. Graham, Tex., Nov. 1st, 1889. On or before January 1st, 1895, I promise to pay to the order of James C. Moses & P. L. Moses the sum of one thousand dollars, with interest at the rate of eight per cent. per annum from the date hereof until paid, for value received; payable at Graham, Texas, upon the conditions herein named and set forth. This note is given in part payment of the purchase money for 560 acres of land out of the David Moses 640-acre survey, in Young county, Texas (should the title to said land fail before the

maturity of this note, then this note shall become null and void, or, should any suit for the recovery of said land be pending at the maturity thereof, then this note shall not fall due until said title be perfected), this day deeded to me by James C. Moses and P. L. Moses; and for the payment hereof, together with the interest hereon, according to the tenor and reading hereof, a vendor's lien is hereby acknowledged; and, in case of legal proceedings on this note, I agree to pay ten per cent. on the amount as attorney's fees. A. B. Medlan." Indorsed: "J. C. Moses. Pay to T. P. Abeel or order. J. H. Finks & Co." At the February term, 1894, of the district court of Young county, 80 acres of this land was recovered; and at another term of the court, in August, 1896, one-half of the remaining land so purchased by Medlan was recovered in a suit against him. Medlan, in reply to the plaintiff's suit, set up the failure of title to the land lost, and consequent failure of consideration of the note sued upon, by reason of the recovery of the land in these two suits mentioned.

It is contended by appellant that the provision in the note relieving Medlan from responsibility for the value of the land that may be lost by suits placed the burden upon the plaintiff to show that the title to the land had not failed, or, in other words, that Medlan had a good title to all of the land sold to him by Moses. We do not think the note, when construed with the deed, should be given this effect. It was a condition subsequent,—a defense that Medlan could interpose, if the title that he acquired by the deed had been lost by reason of some superior right.

There is a complaint made as to the form of the indorsement to the plaintiff. We think the indorsement was sufficient to vest in the plaintiff title to the note.

But we think the appellant is correct in his third proposition, in that the court rendered judgment for a greater amount against Medlan than he was liable for, and foreclosed the lien on too much of the land. Medlan, under the terms of the note, had the right to set up a failure of consideration to the extent of the quantity of land that he had lost; and the appellees took the note charged with this right, and acquired no greater right than the original payee in this respect. This is the effect of the terms and conditions of the note. Now, it is clear from the facts that, of the 560 acres that Medlan purchased, he lost 80 acres in one suit, and 240 acres in another, which left him 240 acres. The entire consideration paid for the 560 acres was \$1,260, or, in other words, at the rate of \$2.25 an acre. Therefore, for the 240 acres to which he has title he is only liable for \$540, and from this amount should be subtracted the \$260 cash that he paid. He would have the same right to offset against the plaintiff's demand the \$260 cash that he paid to Moses, as he would have had if the suit had been

brought by Moses, because it is contemplated by the terms of the note that Medlan should only pay for the quantity of land to which he received a good title. This amount, subtracted from the \$540, leaves \$280, which is the amount of principal due Medlan, with interest thereon from the 1st day of November, 1889, at the rate of 8 per cent., and 10 per cent. on this amount as attorney's fees. Therefore the judgment of the court below will be reformed and rendered here in favor of T. P. Abeel, as against Medlan, for the sum here stated, and for foreclosure of the vendor's lien on the undivided interest of Medlan, to the extent of 240 acres of the land described in the judgment of the trial court, with all costs of appeal against appellee. Reformed and rendered.

### ABNEY et al. v. STATE.

(Court of Civil Appeals of Texas. Nov. 30, 1898.)

#### TAXATION—STATUTE OF LIMITATION—CONFEDERATE SCRIP—SURVEY—SCHOOL FUND.

1. The fact that Gen. Laws, Sp. Sess., 16th Leg. p. 15, forbidding any statute of limitation to be pleaded in defense to a claim for delinquent taxes, was omitted from the Revised Statutes of 1896, does not permit the two-years limitation to operate against such claim, the law being re-enacted to take effect at once by the 24th legislature, October 9, 1895, five weeks only intervening, which was not sufficient to create a bar.

2. Since, under the statute (Act April 9, 1881) granting Confederate land certificates, the locator having located two surveys, one for himself and one for the school fund, could not obtain patent therefor until a selection of one of them by the land commissioner, the title remained in the state until then, and the land was not taxable.

Appeal from district court, Lampasas county; John M. Furman, Judge.

Action by the state against W. B. Abney and others. There was a judgment for plaintiff, and defendants appeal. Reversed.

This suit was brought by the state against Walter Acker, J. C. Matthews, and W. B. Abney, April 28, 1898, to recover \$56.36 for taxes, penalty, and costs for 1886, 1887, 1888, 1889, and 1890, assessed against the unknown owner of an undivided interest in the Mrs. L. Priest survey, in Lampasas county, patented to Acker and Toland, December 17, 1890; that is, 719 acres out of the 736¼-acre survey, described by metes and bounds. Plaintiff also prayed for foreclosure of lien on the land. The taxes and costs sued for were, state tax and interest, \$25.12; county tax and interest, \$27.48. Defendants filed, May 5, 1898, general and special exceptions, and answered that, prior to 1886, Acker and Toland were owners of Confederate scrip No. 1,834, for 1,280 acres of land; caused one survey of 719 acres to be located in Lampasas county, the land described in petition, and in October, 1890, the survey was corrected to include 736¼ acres, an equal num-

ber of acres, with alternate survey, selected by the state for school fund, the same not contiguous to the survey described in the petition; that on December 17, 1890, the state, by the commissioner of the general land office, designated the survey to be taken for the public school fund situated in another county, and patented to Acker and Toland the survey described in the petition; that Acker and Toland had no right to demand patent for the survey in Lampasas county until about December 17, 1890, and therefore it was not subject to taxation. Defendants also pleaded the statute of limitations of two years. May 21, 1898, the court overruled defendants' exceptions, and, trying the case without a jury, rendered judgment for plaintiff for \$57.17, and foreclosed the lien, as prayed for in the petition, from which defendants have appealed.

The facts established on the trial are as follows: "(1) It is agreed that the Lucinda Priest certificate, by virtue of which the land in controversy was located, was surveyed in two surveys, one of which was located in Lampasas county, and one in another county, and not contiguous to the survey in Lampasas county; that the survey in Lampasas county was made prior to 1886, and contained 719 acres, and the other survey, the field notes thereof having been corrected, contained 736¼ acres; but some time in the year 1890 the survey in Lampasas county was corrected, and, as corrected, contained 736¼ acres, and is the same survey that was patented to Acker and Toland, as assignees, on December 17, 1890, and included within its boundaries the 719 acres surveyed prior to 1886; and at the time of its location, prior to 1886, and up to 1890, the 719 acres in Lampasas county was claimed by the locators, Acker and Toland. (2) And it is further agreed that if the land described in plaintiff's petition was subject to taxation in the years from 1886 to 1890, both inclusive, and the taxes claimed by plaintiff are not barred by limitation, then the plaintiff is entitled to recover the amount sued for in this cause. (3) And it is further agreed that the defendants are now, and were when this suit was instituted, the owners of the land described in plaintiff's petition. (4) And it is further agreed that the land described in plaintiff's petition, against which taxes are claimed, is a part of a survey of 736¼ acres patented to Acker and Toland, as assignees of Mrs. Lucinda Priest, on December 17, 1890, said land having been located by virtue of Confederate scrip No. 1,834, and that the alternate survey selected by the state, for the state school fund, was not located contiguous to said survey patented, as aforesaid, to Acker and Toland, and that the state never made its selection of said school survey until December 17, 1890."

After finding the facts as stated, the court declared the law as follows: "(1) I find the law to be that from the time of the location



of a certificate on land subject to location, and the survey of such land, and the return of the field notes and certificate to, and filing same in, the general land office, the entire equitable and beneficiary interest in said land becomes vested in the owner of the certificate, and from that time the interest of such owner is taxable, even though the patent may not issue until long after. The land is subject to taxation, and the issue of the patent relates back to the original location and entry. (2) I find that, by the act of 1897, patents issued on locations made by virtue of Confederate scrip are validated, even though the school and individual section or surveys made by virtue of such certificate may not have been made contiguous or adjacent to each other. (3) I find that the legislature, by the act of 1897, in validating the patent, validated also the proceedings which culminated in the issuance of the patent; and, as the patent relates back to the original location and entry, any errors, irregularities, or defects therein are cured, and it is now as though none had ever existed; hence I conclude that the land described in plaintiff's petition is, under the law, chargeable with the taxes for which the state sues. The act of 1897, validating the patent, is not in the nature of a donation or legislative grant, but is merely an act to cure defects in the title evidenced by the patent. (4) I find the bar of the statute of limitations, sought to be interposed by the defendants to defeat the recovery of the taxes sued for in this case, cannot avail; and hence I find for plaintiff the amount of taxes, costs, etc., as prayed for, with foreclosure of tax lien on property described in its petition."

Walter Acker, W. B. Abney, and J. C. Matthews, for appellants. M. M. Crane and John M. King, for the State.

COLLARD, J. (after stating the facts). The first question discussed by appellants in their brief is: "Was the state's and county's claim for taxes barred by the statute of limitations of two years?" Our opinion is that it was not. At the special session of the 16th legislature, the following statute was enacted: "No delinquent taxpayer shall have the right to plead in any court, or in any manner rely upon, any statute of limitation by way of defense against the payment of any taxes due from him or her, either to the state or any county, city or town." Gen. Laws, Sp. Sess., 16th Leg. p. 15. The codifiers omitted this act in compiling the Revised Statutes of 1895; but at the first called session of the 24th legislature, October 9, 1895, the identical act of 1879 quoted above was re-enacted, which took effect immediately upon its passage. Gen. Laws, 1st Called Sess., 24th Leg. p. 6. Then, if it could be said that limitation would run against the state when the statute is silent upon the subject, it could only run from the time the Revised Statutes took effect to the

time the law was re-enacted,—from September 1 to October 9, 1895. This is true, also, as to the claim for county taxes. The period during which the statute was silent was not sufficient to create a bar, and there was therefore no vested right. We believe both acts of 1879 and 1895 had a prospective effect, and should be applied to all taxes then due and thereafter accruing for which suits might afterwards be brought. *Mellinger v. City of Houston*, 68 Tex. 42, 8 S. W. 249. In the emergency clause of the act of 1895, cited as a reason why the act should take effect at once, it is stated that "whereas there is now no law in this state to prevent delinquent taxpayers from setting up the statute of limitation as a defense against the payment of any taxes due," etc. Doubtless this declaration referred to the short period above mentioned, when the statute was not in force, and it is a legislative construction of the law as to that period, but certainly it is not for the time when the act was in force.

On the second question raised in appellants' brief, we concur with them that the land was not taxable until the commissioner of the general land office had selected the survey for the permanent school fund, and that no taxes would accrue in the years prior to that time.

It was held in *Smith v. McGaughey*, 87 Tex. 67, 26 S. W. 1073, that the intent of the statute granting these Confederate certificates, in providing that the locator should locate two surveys of like amount,—one for himself, and one for the school fund,—was to give effect to that provision of the constitution of 1875 which donated to the school fund one-half of the unappropriated public domain. And it was also held that the locator, for obvious reasons, could not make his own selection, and obtain patent for the survey selected by him, but that the duty of selection devolved upon the commissioner of the general land office. The locator could not demand a patent to the particular survey he may have intended for himself. Until the commissioner acted, there was no severance of land from public domain, and no divestiture of the state's title. It remained in the state, and was not taxable. The act of 1897, validating locations of these certificates in surveys not contiguous, did not affect the question. It was still the duty of the chief of the land department to make this selection, and at least the title did not vest until this selection was made. The validating act did no more than to ingraft upon the original act the right to locate the two surveys in different places, not contiguous. The locator's title was conditional, and depended upon the act of the commissioner. In *Pitts v. Booth*, 15 Tex. 453, it was held that land located by conditional certificate was not taxable, and would not be until the unconditional certificate issued; and it was also decided that lands are not taxable until a patent can be demanded. It is only when a valid certificate has been located upon land subject to location, and the field notes returned to the land office in prop-

er time, that a patent can be demanded and the land taxed. *Upshur v. Pace*, 15 Tex. 533. The location of a genuine certificate upon public land subject to location, and return of the field notes to the general land office in time required by law, severs the land from the public domain, and vests the equitable title in the owner, upon which he can demand a patent. *Dibrell v. Smith*, 49 Tex. 480. Until everything necessary to severing the land from the public domain is done, the title, both legal and equitable, remains in the state. *Taylor v. Robinson*, 72 Tex. 369, 10 S. W. 245; 25 Am. & Eng. Enc. Law, 112; *Railway Co. v. Prescott*, 16 Wall. 603; *Railroad Co. v. McShane*, 22 Wall. 445; *Wisconsin Cent. R. Co. v. Price Co.*, 133 U. S. 496, 10 Sup. Ct. 341; *Northern Pac. R. Co. v. Trall* Co., 115 U. S. 601, 6 Sup. Ct. 201. Under the facts agreed on, the land was not subject to taxation by the state or county for the years claimed; and it follows that the judgment of the lower court should be reversed, and here rendered for the appellants; and it is so ordered. Reversed and rendered.

# GREER et al. v. FIRST NAT. BANK OF MARBLE FALLS.

(Court of Civil Appeals of Texas. Nov. 30, 1898.)

## PRINCIPAL AND AGENT — APPARENT AUTHORITY — APPEAL — STATEMENT OF FACTS — SALES — FACTORS.

1. Where an agent had been acting for his principal in a locality for several months, buying cattle, and drafts drawn by him in payment thereof were honored and paid by his principal, and he had the apparent authority of a general agent, his act in purchasing cattle to be consigned to the principal, and giving a draft on him to one who had no knowledge of his limited authority, will bind the principal.

2. A finding of the trial court as to whether there had been a ratification of an agent's acts is conclusive, where there is no statement of facts.

3. Assignments of error in the admission of evidence cannot be considered, in the absence of a statement of facts.

4. In an action against a commission merchant on a contract for the outright purchase of cattle made with defendant's agent, an issue as to the custom of commission merchants with reference to advance on shipments is immaterial.

Appeal from district court, Burnet county; John M. Furman, Judge.

Action by the First National Bank of Marble Falls against Greer, Mills & Co. Judgment for plaintiff, and defendants appeal. Affirmed.

Matlock, Cowan & Burney, for appellants. J. G. Cook and West & Cochran, for appellee.

FISHER, C. J. This is an action by appellee against the appellants for the sum of \$1,174.59. The case was tried before the court without a jury, and judgment rendered in favor of appellee for the sum sued for. The case, briefly stated, is as follows: Page &

Stubbs were indebted to the appellee in several thousand dollars, and, to secure the payment thereof, appellee held a mortgage on certain cattle owned by Page & Stubbs. These cattle were sold to E. C. Good & Co. by Page & Stubbs for shipment to the appellants, Greer, Mills & Co., live-stock commission merchants in the city of Chicago, for sale; one Abbott, the agent of appellants, agreeing with the agent of appellee that, if the mortgage held by appellee was released, Greer, Mills & Co. would pay off the amount of indebtedness due appellee. In pursuance of this agreement, the cattle were shipped. There is no statement of facts in the record, but a full history of the transaction is stated in the conclusions of fact and law found by the trial court, which are here set out in full:

## "Conclusions of Fact.

"(1) That on or about November 14, 1896, Messrs. Page & Stubbs were indebted to the First National Bank of Marble Falls, plaintiff herein, in the sum of \$8,885.21, with interest at 10% per annum from June 1, 1896, which indebtedness was secured by the chattel mortgage on certain cattle described therein, offered in evidence, which indebtedness and mortgage is fully described in plaintiff's petition.

"(2) Likewise at the same time Messrs. Page & Stubbs were indebted to Rudolph Ebling in the sum of \$9,820.50, with interest from June, 1896, which indebtedness was secured by the chattel mortgage on certain cattle therein described, which indebtedness and mortgage are fully described in plaintiff's petition.

"(3) That shortly prior to that time, with the entire consent of the plaintiff and Rudolph Ebling, Page & Stubbs had sold the cattle covered by the mortgages (as a whole, and not by the head) to Good & Castleberry, for a lumping sum of \$20,250; it being understood that the proceeds of the sale should be first applied (after actual expenses in reference to the care and pasturage of the cattle) to the satisfaction of said mortgages.

"(4) That in pursuance of this agreement there was paid over by the purchasers, Good & Castleberry, to Otto Ebling, agent for Rudolph Ebling and plaintiff bank, the proceeds of the sale of all cattle so mortgaged that were disposed of by Good & Castleberry on the range; all of said cattle being thus disposed of, save and except about 790 head; said sums of money so paid being credited by Otto Ebling, agent for plaintiff and Rudolph Ebling, to the indebtedness of Page & Stubbs; leaving due by Messrs. Page & Stubbs to Rudolph Ebling and to plaintiff bank the sum of \$14,774 on said 14th of November, 1896.

"(5) That Otto Ebling was the agent of the plaintiff bank and of his brother, Rudolph Ebling, in all the transactions out of which this controversy arose.

"(6) That on or about November 13, 1896, having been previously advised thereto by Page that one Geo. L. Abbott, acting for the

defendants, would pay for the cattle already narrated as sold to Good & Castleberry, for the purpose of receiving the proceeds of such sale Otto Ebling reached San Angelo; and, upon making inquiry, he was advised that Geo. L. Abbott was the agent and representative of the defendants.

"(7) Thereupon he and Abbott conferred together, and, Otto Ebling having satisfied himself as to Abbott's position, they then proceeded together to Miles Station, on the G., O. & S. F. R. R., from which point it had been previously agreed that the cattle hereinbefore mentioned should be shipped to Greer, Mills & Co.

"(8) Otto Ebling, before the cattle were shipped, demanded of Abbott that he give him drafts on the defendants for the amounts still due his principals, viz. the sum of \$14,774, wherefore, after some parley, Abbott gave the drafts for the following sums each, viz: the form of the drafts being as follows, to wit:

"The First National Bank of Ballinger. \$5,200.00. Ballinger, Texas, Nov. 14th, 1896. Act. of 10 cars of cattle. Pay to the order of Otto Ebling, cashier, fifty-two hundred and 00/100 dollars. E. C. Good & Co., per Geo. L. Abbott. To Greer, Mills & Co., U. S. Yards, Chicago, Ills.'

"The First National Bank of Ballinger. \$6,500. Ballinger, Texas, Nov. 16th, 1896. Act. 12 cars of cattle. Pay to the order of Otto Ebling, cashier, sixty-five hundred and no/100. E. C. Good & Co., per Geo. L. Abbott. To Greer, Mills & Co., U. S. Yards, Chicago, Ills.'

"(9) Previous to accepting these drafts, however, said Ebling inquired of said Abbott as to their form, and was assured by Abbott that this was the form of draft that he always gave upon defendants, and same would be paid.

"(10) The next day Otto Ebling, while at Ballinger, wired the defendants as follows:

"Ballinger, Texas, Nov. 16, 1896. Greer, Mills & Co.: Will you pay Geo. L. Abbott's draft for E. C. Good & Co. for fourteen thousand seven hundred and seventy-four dollars, account thirty cars cattle? Otto Ebling.'

"And on same day defendants wired to Ebling as follows:

"11/16/96. To Otto Ebling, Ballinger, Texas: If the E. C. Good & Company cattle are for shipment to market at once, we will honor Geo. L. Abbott's draft. [Signed] Greer, Mills & Co.'

"Which telegram was on the same day received by the said Ebling at Ballinger.

"(11) That, at the time of sending and receiving said telegrams by said Ebling, said cattle had been partly shipped; but all were easily accessible, and could have been easily stopped in transit.

"(12) After accepting the drafts mentioned in paragraph 8, said Ebling, as agent for plaintiff bank, and for his brother, Rudolph Ebling, credited Page & Stubbs with the sum

total of said drafts, to wit, the sum of \$14,774, and no longer looked to Page & Stubbs for payment of that sum.

"(13) Geo. L. Abbott had been representing the defendants in the San Angelo country for several months prior to this transaction, buying cattle to be consigned to defendants, soliciting consignments of cattle to be sold by defendants, loaning money on cattle for defendants; and drafts drawn by said Abbott were honored and paid by defendants.

"(14) Neither the plaintiff nor Rudolph Ebling, nor their agent, Otto Ebling, was aware at the time of the giving of the drafts that said Abbott's authority was other than that of a general agent and representative of defendants.

"(15) The defendants refused to pay the drafts, which were protested for nonpayment, but subsequently remitted to Otto Ebling the sum of \$10,862, leaving due the plaintiff the sum of \$1,174.59, and Rudolph Ebling the sum of \$2,737.41, which sums have never been paid.

"(16) Had the drafts mentioned in paragraph 8 been signed by Geo. L. Abbott alone, the undisputed evidence of defendants was that they would have promptly paid the same, notwithstanding at that time Abbott had no funds with defendants.

"(17) I find further that Abbott was interested in the proceeds of the profits of the cattle shipped to Greer, Mills & Co., but this fact was concealed by him from all parties hereto, and was unknown to Otto Ebling, Rudolph Ebling, and plaintiff bank.

"(18) I further find that Geo. L. Abbott represented the defendants as their agent, but that in fact his authority was limited, and that negotiations for loans, advances, etc., on cattle made by him were so made after a course of correspondence with defendants; but I further find that the plaintiff bank had no notice or knowledge, nor had Rudolph Ebling nor Otto Ebling, either personally or as agent, any notice or knowledge, of any limitation of the authority of said Abbott as such agent.

#### "Conclusions of Law.

"(1) I conclude that Abbott being the agent of defendants, and his acts being within the scope of his apparent authority, so far as disclosed and known to plaintiff and Rudolph Ebling and Otto Ebling, this agency must be presumed to be general, and his acts are binding on the defendants.

"(2) Under the terms of the two telegrams, the defendants became liable to the plaintiff, as they constitute a ratification of the original agreement made between plaintiff and Abbott, defendants' agent.

"(3) The fact that defendants would have paid the draft, if signed by Geo. L. Abbott alone, was a ratification of his act, under all the surrounding circumstances, and bound defendants.

"(4) The ratification of the acts of said Geo. L. Abbott by defendants bound them, even

though said Abbott exceeded his authority in the original agreement.

"(5) Judgment will therefore be rendered in favor of plaintiff bank against the defendants, individually and as a firm, for the sum of \$1,174.59, with interest at the rate of 6% per annum from November 14, 1896, to April 19, 1898."

Appellants' first assignment of error is not framed in accordance with the rules. It embraces and embodies several distinct propositions. However, we will, in a general way, pass upon the questions there presented.

We find no variance between the allegations of plaintiff's pleading and the findings of fact and law of the trial court. Plaintiff did allege the contract upon the part of Greer, Mills & Co., through their agent, Abbott, to pay off and satisfy the debt sued upon. The findings of fact are to that effect.

It is complained that the conclusion reached by the court, that the contract made with Abbott had been ratified by the appellants, is erroneous, because it does not appear that the appellants had full knowledge of the terms of the contract. The real question in the case is whether Abbott had the authority to bind the appellants by such a contract. The findings of the court upon this question, in our opinion, conclusively dispose of this issue adversely to the contention of appellants. But if it should be held that ratification was necessary, in order to hold the appellants responsible, there is nothing apparent upon the face of the record which shows that the conclusion reached by the court on this question was not warranted by the facts. It is true, as contended for by appellants, that, in order to constitute ratification, the principal must have knowledge of the transaction and the conduct sought to be ratified. But in this case there is no statement of facts in the record, and we cannot tell what evidence the court had before it on this question. The trial court, in finding conclusions, is not required to set out all the facts upon which it bases those conclusions; and there is nothing upon the face of the record in this case which would indicate that the court, in reaching its conclusions, undertook to set out all the facts in evidence upon which they were based. From aught that appears, there may have been abundant proof upon this issue, as well as every other issue in the case on which the appellants complain the court reached a wrong conclusion. And, in disposing of those objections that are raised to the admission of certain testimony, it is sufficient to say that as to these questions no reversible error is shown, because, in the absence of a statement of facts, we cannot tell whether the admission of such testimony, even if we were prepared to hold it irrelevant, influenced the conclusions reached by the trial court. Every intendment is indulged in favor of the conclusions of fact and law found by the trial court. There may have been abundant testimony

before the trial court authorizing the conclusions reached by it, independent of the evidence objected to; and, in the absence of a statement of facts, we cannot determine but what the conclusions of the court may be based upon other testimony in addition to that objected to. But, however this may be, we think the evidence was admissible. The explanation appended to the bills of exceptions states the purposes for which much of this testimony was admitted, and we think, for the purposes there stated, that the evidence was admissible.

There was no error in the ruling of the court as complained of in the tenth assignment of error, in sustaining the demurrers to the defendants' answer setting up custom of commission merchants with reference to advances on shipments. The question of custom of commission merchants was not a proper issue to be inquired into in this case. Here plaintiff's suit was upon a contract made with the agent of appellants, and the liability of appellants under this contract could not be limited or controlled by the character of custom that prevailed among the commission merchants in making advances upon shipments.

We do not desire to discuss any other questions presented in the record, because, in our opinion, all the questions are settled by the conclusions of fact and law as found by the trial court. We find no error in the record, and the judgment is affirmed. Affirmed.

#### TEXARKANA & FT. S. RY. CO. v. BULGIER.<sup>1</sup>

(Court of Civil Appeals of Texas. Nov. 10, 1898.)

#### EMINENT DOMAIN—EVIDENCE OF OWNERSHIP—PLEADING—DAMAGES.

1. In an action for damages by the operation of a railroad along a street in front of plaintiff's premises, evidence showed that plaintiff derived title from R., to whom he gave a note for the price, secured by a lien, which note became due before suit brought. R. testified that he conveyed the land to plaintiff, and spoke of it as his, though nothing was said as to whether or not the note was paid. Plaintiff had built his residence on the lot, and was living there. *Held* sufficient to warrant a conclusion that the note was paid, and that the land was plaintiff's property.

2. Where a petition stated that because of the noise, smoke, dust, etc., caused by the operation of defendant's railroad along a street in front of plaintiff's residence, it was rendered unfit for habitation and its value destroyed, and claimed damages in a stated sum, injury to the realty is expressly charged, and the allegation of the amount of damages, with the destruction of the value, is sufficient, at least for the admission of evidence.

3. Where plaintiff was damaged by noise, dust, and smoke from a railway running along a public street, the fact that lot owners generally abutting on the same street suffered similar injury furnishes no reason why plaintiff may not recover.

<sup>1</sup> Rehearing denied.

Appeal from district court, Jefferson county; Stephen P. West, Judge.

Action by C. C. Bulgier against the Texarkana & Ft. Smith Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Greer & Greer, for appellant. Votaw, Martin & Chester, for appellee.

**WILLIAMS, J.** Appellee brought this suit to recover damages resulting to him, as the owner of a lot abutting on Railroad avenue, a public street in Beaumont, from the construction along such street of appellant's road. The petition stated his damages as follows: "That, by the constant operation by defendant of its engines and cars over said road and switch track both day and night as aforesaid, said engines generate gas, steam, and smoke, and distribute it, with dust, ashes, and cinders, in the air, which is blown into and through plaintiff's said residence, all of which is very unpleasant and offensive to plaintiff and his family, as well as damaging and destructive to said plaintiff's household furniture; and the great noise being constantly created by the operation of said engines and cars, ringing of bells, blowing of whistles, both day and night, is such a constant annoyance to plaintiff and his family as to render his said residence unfit for habitation, and virtually destroys its value. Plaintiff says that by reason of the premises above alleged he has been damaged in the sum of one thousand dollars." The answer, among other things, denied that the value of plaintiff's property had been injured by its road, and alleged that such value had been thereby increased. Upon a trial before the judge, judgment was rendered for plaintiff for \$750; the measure of damages fixed by the court being the difference between the market value of plaintiff's property just before the construction of the road and such value just afterwards. We conclude that the evidence was sufficient to show that damage—thus measured—to the property was caused by the construction and operation of defendant's railroad along said street.

The evidence showed that the lot in question had belonged to John H. Rachford. Plaintiff derived his title from Rachford and his wife by a deed which expressed a consideration of \$375, of which \$175 was paid, and \$200 was secured by note payable January 23, 1895, and the deed reserved a lien upon the land until the note should be paid. The suit was brought September 25, 1896, and was tried December 16, 1897. Rachford testified, as a witness for plaintiff, that he had conveyed the land to him; that plaintiff had been damaged, giving the amount of the damage; spoke of the property as plaintiff's property; and stated that he intended to bring suit for damages to other property owned by himself. Nothing was said as to

whether or not the note had been paid. The court below concluded that the inference was justified that the note had been paid. The evidence further showed that plaintiff had built his residence upon the lot, and was living upon it as his home. We think the court was justified in this conclusion, and it therefore becomes unnecessary for us to consider what would be plaintiff's rights in case the note remained unpaid, and the further question as to whether or not in that case Rachford's evidence would estop him and his wife from claiming damages from appellant.

Several of the appellant's assignments of error are disposed of by our conclusions of fact just stated.

By its proposition under the third assignment, appellant contends that the allegations of the petition do not state the cause of action upon which the court found in plaintiff's favor, viz. for damages for an injury to plaintiff's property, but attempt to state a cause of action of a different nature. The petition does expressly aver that the causes stated rendered the residence unfit for habitation, and virtually destroyed its value, and that thereby plaintiff was damaged in the sum stated. Thus, injury to the value of the realty is expressly charged; and while the market value of the property before and after the construction of the road, and the difference therein, are not stated, the allegation of the amount of the damages, in connection with that of destruction of the value, is, in our opinion, sufficient, at least to admit evidence. The special injury to the realty is charged, and the amount of the damages stated. *Knittel v. Schmidt* (Tex. Civ. App.) 40 S. W. 508, and authorities there cited.

By its proposition under its fourth assignment, appellant asserts that the court improperly allowed damages to plaintiff for injuries to property such as were suffered by lot owners generally whose lots abutted on the same street. We do not think that the fact mentioned furnishes a reason why plaintiff may not recover. *Railway Co. v. Goldberg*, 68 Tex. 683, 5 S. W. 824. Affirmed.

**COX v. HIGHTOWER**, District Judge.  
(Court of Civil Appeals of Texas. Nov. 17, 1898.)

**WRITS OF ERROR — ABILITY TO SECURE COSTS — TRIAL COURT — DUTY TO HEAR ISSUE AFTER THE TERM — MANDAMUS — JUDGES.**

1. Rev. St. 1895, art. 1401, provides that, where appellant is unable to pay the costs of an appeal or give security therefor, he may prove his inability before the county judge or before the court trying the case, and the court trying the case, if in session, or the county judge of the county in which the suit is pending, shall determine the right of the party to his appeal. *Hodg*, that the court in which the case was tried has jurisdiction to determine the issue after the term of the court at which the judgment was rendered.

2. Mandamus lies to compel the court in which a judgment was entered to determine the

issue as to the ability of plaintiff in error to pay the costs of an appeal, under Rev. St. 1895, art. 1401, notwithstanding the statute provides another forum in which the issue may be tried.

3. A judge may be directed by mandamus to proceed to the trial of an issue as to the ability of plaintiff in error to pay the costs of an appeal or give security therefor, as provided by Rev. St. 1895, art. 1401, since it is not an attempt to control his judgment.

Original application by Frances W. Cox against L. B. Hightower, district judge, for mandamus. Granted.

F. Campbell, for complainant. Baker, Botts, Baker & Lovett, for respondent.

GARRETT, O. J. The complainant, Frances W. Cox, a resident of Polk county, was the plaintiff in a suit in the district court of that county, entitled "No. 2,233, Frances W. Cox v. The Houston East & West Texas Railway Company," which, on the 8th day of December, 1897, was tried in that court, and resulted in a judgment for the defendant. During the next term of the district court after the one at which the judgment was rendered, the complainant, on June 6, 1898, made an application to the district clerk for a writ of error to bring the judgment of the court in the case of Cox against the Houston East & West Texas Railway Company before this court for review. She filed with her application her affidavit of the same date, stating her inability to pay the costs, which was in proper form, and asked that, in case of contest, the issue be tried by the district court. A contest was filed by the defendant company with the district clerk. When the matter was called for trial, the court dismissed the application, because the court was of the opinion that he had no jurisdiction to hear and determine the issue after the term of the court at which the judgment was rendered had elapsed. The statute requires the appellant or plaintiff in error to make strict proof of his inability to pay the costs, or any part thereof, such proof to be made before the county judge of the county where such party resides, or before the court trying the case, which shall consist of the affidavit of the party stating his inability to pay the costs, unless contested; and in that event it is "the duty of the court trying the case, if in session, or the county judge of the county in which the suit is pending, to hear evidence and determine the right of the party" to this appeal. Rev. St. 1895, art. 1401. This statute has received construction in a number of cases, but none of them have determined the question here involved. In *Graves v. Horn*, 89 Tex. 77, 33 S. W. 322, it was held that the affidavit must be presented to the judge on the bench, and that an affidavit before the clerk was not sufficient. The action of the court is to be invoked. "The court trying the case, if in session," must hear and determine the right of the party. There is no language in the statute limiting the power of the court trying the case to the session at which the case

was tried, nor can there be any reason for such a limitation. The statute gives the right to sue out a writ of error in forma pauperis, as well as an appeal. A writ of error could possibly be applied for during the term of court at which the judgment was rendered; but such a thing is so rare in practice that it may be said that it was not in the legislative mind when the provision for writ of error in forma pauperis was made, but that the statute has a general and practical application. There being only two terms of the district court a year, in order to facilitate the right of appeal and writ of error, proof of inability to pay costs was authorized to be made before the county judge, who is constantly in his county, and easily accessible when the district court is not in session. It was not the intention of the legislature to vex the district judge with such questions while engaged in holding court in some other county. A proper construction of the statute requires the district judge, sitting as a court, to hear and determine the application, if the court of which he is the presiding judge, and in which the judgment was rendered, is in session, though it may be at a subsequent term of the court. Although the complainant had another forum in which the question might be tried, the district judge may not refuse to try it when properly brought before him, and that fact cannot defeat the right of the complainant to a mandamus; non constat that the county judge might hold that he had no right to pass on the matter while the district court was in session.

It is said by counsel for the respondent that this court has no power to issue a writ of mandamus to the district judge requiring him to hear and determine the question of the inability of the complainant to pay the costs, because the judge, in declining to hear the matter, sat as a court, and exercised a judicial discretion in determining that he was without jurisdiction to do so. A judge may be directed by mandamus to proceed to the trial of a case, but his judgment cannot be controlled. In the case of *Ewing v. Cohen*, 63 Tex. 482, cited by counsel, the writ was denied because it was sought to revise the action of the county judge in dismissing an appeal because of an insufficient appeal bond, — a clear case where the writ would not lie. See, also, *State v. Morris*, 86 Tex. 226, 24 S. W. 393. The application now before the court presents a case like that of *Schultze v. McLeary*, 73 Tex. 92, 11 S. W. 924. The writ in that case was ordered without question. Special Judge McLeary, in holding that the regular judge (Noonan) was not disqualified, and refusing for that reason to try the case, might be said in a sense to have exercised a judicial discretion, but he was required to try the case. Other questions sought to be raised do not properly come up for decision, for to pass upon them would be to direct the district judge how they should be decided. It is the opinion of the court that it was the duty

of Judge Hightower to hear and determine the proof upon the application of the complainant, and the contest thereof, and the writ of mandamus will issue as prayed for.

# **GALVESTON, H. & H. R. CO. v. BOHAN.**

(Court of Civil Appeals of Texas. Oct. 13, 1898.)

**NEGLIGENCE—MASTER AND SERVANT—INJURIES—ASSUMPTION OF RISK—OPINIONS—WITNESSES—EXAMINATION—DAMAGES—INSTRUCTIONS—VERDICT—HARMLESS ERROR.**

1. When facts alleged in the petition do not develop contributory negligence on plaintiff's part, it is unnecessary to allege due care on his part.

2. Allegations in a petition that plaintiff was injured through the negligence of defendant employer in hauling cars loaded with rock, and that a rock was on the track, having fallen from one of the cars, and the plaintiff's injury was caused by the engine on which he was riding striking the rock, are sufficient as an allegation that the rock was on the track through defendant's negligence.

3. When the answer to a question improperly calling for a conclusion of a witness is, if anything, favorable to the party objecting, the error is harmless.

4. The opinion of an expert in the operation of railroads as to whether a track walker was necessary is admissible.

5. The admission of an answer to the question whether, if the freight yards were not properly inspected by the people employed for that purpose, they performed the duty for which they were employed, is harmless error, as it is a self-evident fact.

6. Where defendant's witness states that one of plaintiff's witnesses was untruthful, he may be asked, on cross-examination, if the latter was not given a recommendation by defendant, when he quits its employ.

7. A witness can testify to the condition of a footboard on a switch engine, when the evidence shows that its condition was the same when the witness examined it as it was on the day of the accident.

8. Requests for instructions are properly refused when the substance of them is incorporated in other instructions given.

9. In order to authorize the appellate court to set aside a verdict as excessive, it must appear that the jury was influenced by prejudice or passion.

10. A verdict for \$14,000 damages for the loss of plaintiff's arm is not excessive, when he was 35 years old, earning \$115 per month, and was in a fair way for promotion, and has since been unable to do anything, and is not qualified for any employment not requiring the use of both arms.

## **On Rehearing.**

1. A witness who is an expert in the care of railroad tracks and has had many years' experience as section foreman, is competent to testify as to the necessity of a track walker in a particular freight yard, although he has not worked in such yard within two years.

2. A witness testifying as an expert may give his opinion upon the very issue on trial.

3. The opinion of an expert as to whether it was as necessary that defendant have a track walker in its freight yard on Sunday as on any other day is admissible.

4. In an action for an injury caused by the footboard of an engine striking a rock on the track, defendant's requests for special instructions as to the footboard being out of repair, and charging plaintiff with knowledge of its condition, are properly refused when defendant

is not charged in the pleadings with any negligence in regard to the condition of the footboard.

5. Plaintiff, whose duties as yard master for defendant required him to frequently ride on switch engines from one place to another in a freight yard, where he knew that rocks frequently fall from cars upon the track, did not assume the risk of a switch engine on which he was riding striking a rock on the track.

6. The use of the word "natural" instead of "ordinary" in the sentence "natural risks of employment" is harmless error where an instruction that plaintiff "assumed the risks and dangers ordinarily incident to his employment" has already been given.

Appeal from district court, Galveston county; William H. Stewart, Judge.

Action by J. W. Bohan against the Galveston, Houston & Henderson Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed and rehearing denied.

Davidson, Minor & Hawkins, for appellant. Lovejoy, Sampson & Malevinsky, for appellee.

**GARRETT, O. J.** This suit was brought by the appellee to recover damages for personal injuries received by him from being run over by a switch engine while in the employment of appellant as night yard master in Galveston. He was hurt on Sunday, November 8, 1896, about 7:30 o'clock p. m., in the switch yard of the appellant, in the city of Galveston, on switch track No. 1, between Thirty-Eighth and Thirty-Ninth streets in said city. Appellee was riding on the footboard of the tank of the engine, and was going from the lower part of the switch yard of the appellant up to the roundhouse over switch track No. 1. The engine was backing. There were with appellee on the footboard two other employes. The engine was going west at the rate of from four to six miles an hour, when the north end of the footboard came in contact with a rock on the track, which broke and jarred the board so as to throw those riding on it off to the ground. Appellee fell along the north side of the track, and the engine ran over and mangled his left arm so that it had to be amputated at the shoulder. He was injured also upon the leg. One of the men was thrown upon the center of the track and was killed; the other escaped injury. Appellee recovered judgment for \$14,000. At the time he was injured he was earning \$115 a month, but since then he has been unable to do anything. He was 35 years old, and was prompt and efficient in the discharge of his duties. The main track of appellant's road enters Market street at the city limits in the west, and runs east along the center of Market street to Thirty-Third street. On the south side of the main track are a number of switch tracks. Switch track No. 1 lies next to the main track, and at the point of the accident the distance between the centers of each of these tracks is 14 feet 3 inches; the distance between the nearest rails being 9 feet 2 inches. The ground between the tracks is very nearly even with the top of the ties. It is covered with cinders, and

slopes a little towards track No. 1. The space between the tracks is in constant use as a way for persons on foot and on bicycles. A flat car projects 2 feet beyond the rails of a track, and is of a standard height of 4 feet. From the edge of a car standing on the main track to the end of the cross ties on track No. 1 is 5 feet 9 inches. Appellant had been engaged in transporting rock for use in the construction of the government jetties, and that afternoon had hauled a train load of rock, loaded on flat cars, along the main track, and switched them on to the wharf track, to be taken to the jetties at the east end of the island. Rocks that had fallen from the cars which the appellant was in the habit of transporting were frequently noticed lying about the yard, but it was the duty of the section men and track walkers to remove them, and keep the tracks clear, so that they would not be in the way, and cause accidents; but in cases of emergency the switchmen and men working in the yard would remove them. Appellee's duty as yard master was to receive orders as to the cars that were to be made into or taken from trains, and to distribute them to their proper places, and to see that they were so distributed by the switch crews; and in performing this duty he would sometimes couple and uncouple cars. He had gone on duty on the night of the accident about 7 o'clock. He went from the office, where he had received information as to the cars to be taken out, and walked down the main track to where the switch engine was, and rode back upon it from about Thirty-Third street to where he was injured. He did not see the rock in time to avoid the accident, and was injured without fault on his part. Appellant had in use at the time four switch engines, numbered 82, 86, 87, and 94. Engine 94 had passed up, or west, on the switch track No. 1, about 6 o'clock, going to the roundhouse, and did not strike the rock. There was a conflict in the evidence about the height of the footboard on each of these engines, Nos. 94 and 87. Some of the testimony showed that the footboard on No. 94 was lower than on No. 87, from which it might be inferred that the rock was not on the track at the time No. 94 passed up, or it would have struck it. There is no evidence to show that the cars loaded with rock were negligently loaded, but from all the testimony we think that there was sufficient evidence to show that the appellant was negligent in not discovering the rock upon the track, and in not removing it. The rock was clearly the cause of the accident.

Appellant's 2d, 4th, 5th, 6th, 8th, and 11th assignments of error all relate to alleged error on the part of the court in overruling special exceptions to the petition. None of them were well taken. The allegations of the petition as to negligence of the appellant in failing to keep the track in a reasonably safe condition were sufficient, and, as the facts alleged did not develop contributory negligence on the

part of appellee, it was unnecessary to allege the exercise of due care on his part. It was averred that the appellee was injured through the negligence of the appellant in hauling the cars loaded with rock, and the petition then alleged the fact of the presence of the rock upon the track, by falling from one of the cars, and the manner of the accident, from which it sufficiently appeared that the rock was on the track by the negligence of the appellant, and was the proximate cause of the accident. The petition did not aver a state of facts that disclosed an assumption of the risk by appellee, but pertinently set out the facts attending the accident which caused the injury, and the appellee's relation thereto.

The 13th, 14th, 15th, 18th, 19th, 20th, 21st, and 22d assignments of error complain of the action of the court in the admission of evidence. J. H. Hill, a witness for the appellant, was asked by counsel for the appellee on cross-examination if it would not be an act of prudence and proper care to have section hands, and those employed for that purpose, to follow a train, and see that no rocks fell upon the track, or interfered with the movement of trains in any way, which was objected to by counsel for appellant, because the question called for the opinion and conclusion of the witness; but, as the answer did not prejudice the defendant, and was favorable to it, rather than otherwise, the error, if any, was immaterial, and the same may be said of the answers to the questions in the 14th and 19th assignments. The evidence of the witness C. H. Jones was admissible. It was shown that he was an expert in the matter of operation of railroads, and that it was proper that there should be a track walker for the purpose, so that the roads might be safely operated. There is nothing in the objection to the question under the 18th assignment, in which the witness was asked that, if the yards were not properly inspected by the people employed for that purpose, did they perform the duty for which they were employed? Under the 20th assignment of error appellee's counsel was permitted to ask the witness Conlon, appellant's master mechanic, on cross-examination, when Fletcher, a witness for appellee, quit the employment of the company, and if he did not give him a recommendation at the time; to which Conlon answered that he quit February 18, 1897, and that he had given him a recommendation. This was admissible for the reason that on direct examination the witness had stated that Fletcher was not a truthful man, and that he would not believe him. Counsel for the appellee, as complained of in the 17th assignment of error, in referring to the testimony of one of appellant's witnesses, used the following language: "Mr. Hill got on here, and said, a one-armed man, a one-legged man, one-eyed, half-headed man could do it." No injury was shown to have resulted from the statement of counsel, and it does not appear



that witness did not say what was attributed to him. The evidence of the witness Jackson was admissible to show that there were the same reasons for having a track walker on Sunday as on any other day. There is nothing in the objection to the testimony of the witness Fletcher as to the condition of the footboard of the engine No. 94, because the evidence shows that the footboard was practically in the same condition at the time that Fletcher examined it as it was on the day of the accident. Nothing prejudicial appears in the remark of counsel made as shown by the 23d assignment of error.

We have examined the various instructions requested by the appellant and refused by the court, as well as those given in the charge to the jury, and complained of in numerous assignments of error, and find nothing in any of them for which the judgment of the court below should be reversed. We deem it unnecessary to set them out, or to refer to them in detail, for they present no questions of law arising in the case that require discussion. Quite a number of special charges were given at the request of the appellant, which fully presented the issues in the case and the defense relied on. Some of the charges requested and refused might have been given, but the substance of them was incorporated in those already given at the request of appellant. There is nothing in the evidence to show negligence on the part of appellant in the loading or handling of the cars of rock, but from the evidence the jury were authorized to find that the appellant was negligent in failing to discover the rock upon the track, and in not removing it before the engine No. 87, on which the appellee was riding, passed along it, and after the rock train had passed. Engine No. 94 may have passed over the rock because its footboard was higher, or the jar caused by its passage may have caused the rock to shift or fall in a little different position, so that it would be struck by the footboard of engine No. 87. So we must conclude that from all the circumstances the jury might have properly drawn the conclusion that the appellant ought to have discovered and removed the rock between the time it fell from the train of rock cars and the accident. We cannot say that the verdict of the jury was without evidence to support it. There is nothing in the evidence that calls for any instruction upon the assumption of risk by the appellee.

Appellant complains that the amount of the verdict was excessive, and it also brings up a bill of exceptions, which shows that when the motion for a new trial was passed on the judge who tried the case below stated that he thought the verdict was excessive; but as the court of civil appeals, under the law, would have the right to enter a remittitur for any excess that there might be, he would overrule the motion. We do not think that this remark of the judge should require this court to set aside the verdict, if other-

wise it should remain undisturbed. It is sufficient to say that he did not grant a new trial, and it is our duty to pass upon the verdict of the jury without reference to what the judge who tried the case below might have thought about it, as long as he did not see proper to set it aside. The amount of the verdict is very large. It is larger than we would have assessed the damages at if the case had been submitted to us as a jury, but, in order to authorize us to set aside the verdict, we must be able to say that the jury was influenced by prejudice or passion,—either prejudice against the defendant, or sympathy for the plaintiff. There is nothing but the amount of the verdict from which we could say that there was either prejudice or passion, and the amount, taken in comparison with the amounts of other verdicts that have been approved by the supreme court and the courts of civil appeals, is not so large as to be unconscionable, or to force the conclusion that there was passion or prejudice. The loss of an arm is a very serious loss. The evidence shows, also, that the appellee at the time of his injury was earning \$115 a month, was competent and efficient in the discharge of his duties, and could reasonably expect further advancement and promotion in position and salary, and that since then he had been unable to do anything. In addition to the loss of his arm, he sustained other personal injuries, and, although he is now in a healthy condition, he had suffered great pain, both mental and physical. He is not qualified for any employment at which he could make a livelihood without the use of both arms. We refer to the cases of *Railroad Co. v. Randall*, 50 Tex. 260, *Railway Co. v. Lane*, 79 Tex. 643, 15 S. W. 477, and 16 S. W. 18, and *Railway Co. v. Cooper*, 2 Tex. Civ. App. 42, 20 S. W. 990. The judgment of the court below will be affirmed. Affirmed.

On Motion for Rehearing.  
(Dec. 1, 1898.)

The appellant strenuously insists, in an elaborate motion for a rehearing of this case, in which its views are ably presented, that this court has erred in overruling many of the numerous assignments of error presented on the hearing. We overrule the motion for a rehearing, but in doing so will briefly notice some of the questions raised.

The witness C. H. Jones testified as an expert railroad man in the care of railroad tracks. It was immaterial that he had not worked in the yard where the accident occurred within two years prior to the date thereof. He stated that he had had many years' experience as a section foreman, and properly qualified himself as an expert whose business it was to inspect tracks. A witness testifying as an expert may give his opinion upon the very issue on trial. *Scalf v. Collins Co.*, 80 Tex. 514, 16 S. W. 314. The jury are authorized to disregard the testimony of an

expert. They may believe or disbelieve it as that of any other witness. *Railway Co. v. Hadnot*, 67 Tex. 503, 4 S. W. 138; *Kennedy v. Upshaw*, 66 Tex. 454, 1 S. W. 308. In the opinion of Jones, a track walker was necessary in order to keep the tracks unobstructed, free or safe, so that trains could be operated over them. Other experts may have been of a different opinion, or facts may have been put in evidence tending to contradict the opinion; and from all the evidence the jury would decide the issue. Having a track walker was a matter about which the witness could state his opinion,—whether or not it was necessary, proper, or customary. In the opinion of the witness it was necessary to have one. There is a very wide range given to the admission of expert testimony. Every industry has its experts, and the operating of railroads in every branch requires expert knowledge. The engineer, fireman, brakeman, conductor, section foreman, and experienced men in other departments may testify as to what is usual, customary, or necessary to be done in their special lines of work. *Railway Co. v. Henning* (Tex. Civ. App.) 39 S. W. 302; *Id.*, 90 Tex. 656, 40 S. W. 392; *Bonner v. Mayfield*, 82 Tex. 234, 18 S. W. 305; *Railway Co. v. Thompson*, 75 Tex. 501, 12 S. W. 742; *Railway Co. v. Johnston*, 78 Tex. 536, 15 S. W. 104. The question propounded to the witness Hill, as shown by bill of exception No. 7, was: "If your yards were not properly inspected by the people you employed for that purpose that day, did they perform the duties for which they were employed?" The answer was: "I should say, no, they did not; although I want to qualify that by stating our yards are very large, and I do not think every foot of our yard is gone over every day. We do not go up one track and down the other every day, because we have twenty-six miles of track in Galveston." The question was objected to because it called for the opinion of the witness. If so, it was one that would be entertained by everybody. If one is employed to do a certain thing, and does not do it, it is self-evident that he does not do his duty. The question was an idle one, propounded on cross-examination, and should not have been asked, as it did not tend to prove any fact in issue; but it was harmless, and the answer of the witness went further than a response to the question in an explanation favorable to the defendant. Hill was also asked "as shown by bill of exception No. 8," the following question: "I will ask you if a higher degree of diligence with respect to inspecting your track and roadbed over which loaded rock cars pass is not required than other kinds of freights?" It was objected to as calling for the opinion of the witness. The answer was: "There are no specific instructions given as to rock. The same degree of care is exacted in handling all kinds of freight." The answer treats the question as one of fact, and answers it as a fact that no specific instructions were given

as to the handling of rock, but that the same degree of care was exacted in handling all kinds of freight. The answer was favorable to the defendant, if the question should be considered as one calling for an opinion, because it states, in effect, that no higher degree of diligence is required. So, if the question called for the fact as to the practice of the company, it was unobjectionable, and proper. If it called for the opinion of the witness, the answer was favorable, and the error, if any, was harmless. The accident occurred on Sunday. The evidence showed that the section men whose duty it was to keep the track clear did not, as a usual thing, work on Sunday. As appears from bill of exception No. 10, counsel for plaintiff asked the witness Andrew Jackson: "Was it not as necessary on Sunday, as any other day, that the defendant should have a track walker in its yards?" Answer, "Yes, sir." The objection was that the question called for the conclusion of the witness. The witness was familiar with the work of section men, had been employed in that capacity for a number of years, and had qualified himself as an expert before answering the question. The question might have been framed so as to elicit the fact that it was customary for the defendant to operate its road on Sundays as well as on other days of the week. This would have developed the same necessity for a track walker on that day, then, as on others. It was a fact, as appeared from the evidence, that the road was being operated on Sunday; so we can see no injury to the defendant in the error, if any there was; but the witness being familiar with the operation of railroads, we do not see any error in getting his shorthand rendition of the fact. We think there should be no hesitation in concluding that the court did not err in refusing to instruct the jury to return a verdict in favor of the defendant. As stated in the conclusions filed herein, the evidence supported the verdict in the respect that the defendant may have been negligent in failing to discover and remove the rock, and remove it in time to prevent injury to the plaintiff, and that the plaintiff was injured without fault on his part.

Special instructions Nos. 7 and 9 requested by the defendant, and refused, were fully covered in a better instruction given at its request. The instruction referred to is as follows: "The jury are instructed that to entitle the plaintiff to recover herein it must appear from the evidence that defendant knew, or could have known by the exercise of ordinary care on its part, of the alleged obstruction on or near the track of defendant, causing plaintiff's injuries; and if you believe from the evidence that an engine of defendant passed along and over said track where plaintiff was injured, safely, on the evening of November 8, 1896, and that thereafter the obstruction causing plaintiff's injuries was placed on or near said track where plaintiff was injured, but that the

same was not known to the defendant, or that such alleged obstruction was of such a nature, or had existed for such a length of time, that, in the exercise of ordinary care, it could not have been discovered by the defendant before plaintiff was injured, then you will find for the defendant. The term 'ordinary care,' as used herein, is such care as an ordinarily prudent man would use under like or similar circumstances."

The special instructions Nos. 13 and 14, with references to the footboard being out of repair, and charging plaintiff with knowledge of its condition, were properly refused, because they would have introduced an issue into the case not made by the pleadings. The petition alleged that the injury received by the plaintiff was the result of the negligence of the defendant in two respects, viz. in the handling of cars improperly loaded, and in failing to discover and remove the rock which caused the accident. So it would have been error to give the instructions above referred to.

All of the remaining special instructions, to wit, Nos. 15, 16, 17, 18, and 19, requested by the defendant, were properly refused, because they are charges upon the assumption of risk by the plaintiff. The facts in the case do not warrant any such instructions. Plaintiff's duties required him, as yard master, to pass over the tracks in the yard, and to go from one place to another, frequently, upon the switch engines. The defendant owed him the duty of furnishing him a safe place to work, and seeing that the tracks were kept free from obstructions. His knowledge that rocks frequently fell from the rock trains, and, if not removed, would render the premises dangerous, did not prevent him from continuing in the service, relying on the defendant to discharge its duty in keeping the tracks clear of obstructions. The sagging of the footboard was not considered as a defect liable to cause the accident, but was a fact developed in the evidence to show that the footboard on the engine 87 was lower than on 94, which preceded it up the track. The plaintiff had the right to assume that the defendant would see that the tracks were kept free of obstructions on Sundays, whether it was customary for the section men to work on that day or not. According to his testimony, a man was supposed to be in the yards all the time, taking care of the tracks,—Sundays as well as other days; that when there was no regular track walker there was a regular section foreman, whose duty it was to go through the yards; and that it was his understanding, and he relied on it, that the defendant had men to watch the track on Sundays. The plaintiff did not rely for recovery upon the negligence of appellant in any of these respects.

Appellant complained of the action of the court in giving the special instruction at the request of the plaintiff. The complaint is

addressed to the failure of the said charge to instruct the jury as to assumed risks by reason of appellee's knowledge of the dangerous condition of the yards, and the want of proper inspection on Sundays. As we have stated above, the case did not authorize such instruction.

The word "natural" instead of "ordinary" in the sentence "that said plaintiff, in entering such service, assumed the natural risks of the employment," etc., was not a proper word, but the charge was not misleading, the court having already instructed the jury that "the plaintiff assumed the risks and dangers ordinarily incident to his employment."

The conclusions of fact already filed by the court are believed to be sufficiently full upon the issues presented. The facts which the appellant now requests the court to find are either facts that are uncontroverted, or those of an evidential character. The motion for additional conclusions of fact, as well as the one for rehearing, is overruled.

#### WATERS et al. v. TOWNSEND.

(Supreme Court of Arkansas. Nov. 12, 1898.)  
BOARD OF PUBLIC HEALTH—ABATEMENT OF NUISANCE.

Sand. & H. Dig. § 5132, gives municipal corporations power to prevent nuisances from anything dangerous, offensive, or unhealthy, and to cause any nuisance to be abated, within the jurisdiction given to the board of health. Section 5203 gives the city council power to establish a board of health, and to invest it with such powers and impose such duties on it as are necessary to secure the city from "contagious, malignant and infectious diseases." *Held*, that the city council had authority to confer power on the board of health to abate a house infected with smallpox, as a nuisance dangerous to the public health.

Appeal from circuit court, Garland county; Alexander M. Duffie, Judge.

Action by J. A. Townsend against W. W. Waters and others. There was judgment in favor of plaintiff, and from an order denying a new trial the defendants appeal. Reversed.

Appellee, J. A. Townsend, was the owner of a house and lot in the city of Hot Springs. The board of health of said city, composed of W. W. Waters and other appellants, caused this house to be torn down and removed. Townsend thereupon brought this action against them to recover damages occasioned to him by the removal of such house. The defendants, for answer, alleged that by the laws and ordinances of the city of Hot Springs they constituted the board of health of said city, charged with the duty of preserving the sanitary condition thereof, and with the removal of nuisances dangerous to the health of the inhabitants. It was also alleged, in substance, that the house in question was a nuisance; that it was in a dilapidated, decayed, and filthy condition; that it was used in part as a cheap boarding house; that during a recent epidemic of smallpox many cases

of such disease had existed among the inmates of such house, and that by reason of the condition of said house it was impossible to disinfect the same and render it safe for human occupancy, and that said house was a constant source of danger to the inhabitants of said city; and that its removal was necessary. There was evidence at the trial tending to support the allegations of the answer. The circuit judge, among other instructions, gave at request of plaintiff the following instruction, to which defendants objected, and afterwards duly excepted: "(4) The law provides that the city council, by proper proceedings, may abate a nuisance; but the city council had no authority to delegate to the board of health the power to say that the plaintiff's house was a nuisance, and then to tear it down as such, without some ordinance or resolution of the city council declaring it to be a nuisance, and directing its abatement as such. And if you find that the defendants, acting in their official capacity as the board of health, passed a resolution declaring said house a nuisance, and, without further authority from the city council, had the same destroyed, their acts in so destroying said house were unauthorized, and they are liable therefor as individuals." The same view of the law was conveyed in other instructions given by the presiding judge, but it is unnecessary to set them out. There was a judgment in favor of plaintiff, from which defendants appealed.

Greaves & Martin, for appellants. Wood & Henderson, for appellee.

RIDDICK, J. (after stating the facts). The question presented by this appeal is whether a city council can confer upon the board of health power to abate nuisances dangerous to the public health. The circuit judge charged the jury at the trial that the city council had no such power, but that was before the case of *Gaines v. Waters* was determined by this court. We said there that the "contention that the city council could not delegate to the board of health the power to determine judicially that a certain structure is or is not a nuisance has no bearing on the case, for the reason that the council itself had no such power, nor does the board of health, in abating nuisances, exercise judicial powers, within the usual meaning of such term." *Gaines v. Waters*, 64 Ark. 609, 44 S. W. 353; *Cole v. Kegler* (Iowa) 19 N. W. 843, 6 Am. & Eng. Cr. Cas. 361, and note. We think it equally clear that counsel for appellee are mistaken in their contention that the power to abate a nuisance is a legislative power. "Legislative power is the power to enact laws, or to declare what the law shall be." *And. Law Dict.* It is the power to enact new rules for the regulation of future conduct, rights, and controversies. *Coolley*, *Const. Lim.* 110-112. It is very plain that the board of health does not, in abating a nuisance, exercise any such power. The legis-

lature has expressly conferred upon the city council legislative power in the matter of creating a board of health, and has authorized the council to invest the board "with such powers and impose upon it such duties as shall be necessary to secure the city and the inhabitants thereof from the evils of contagious, malignant and infectious diseases." The powers which the council is thus authorized to confer upon the board are not specifically enumerated, further than they must be such only as "shall be necessary to secure the city and the inhabitants thereof from the evils of contagious, malignant and infectious diseases." From the language used, we do not think that the legislature intended that the functions of the board shall be advisory only, but that it intended to authorize the council to confer upon the board such limited discretionary and executive powers as might be necessary to effect the purpose for which the board was created. *Aull v. City of Lexington*, 18 Mo. 401. Within the limitations named, a discretion is given the city council. The power to abate nuisances dangerous to the public health comes, as we think, fairly within the limitations imposed by the statute. We therefore adhere to our former ruling, that the city council may confer upon the board of health power to abate such nuisances. *Gaines v. Waters*, 64 Ark. 609, 44 S. W. 353; *Cole v. Kegler*, *supra*. The nuisance must be one, the abatement of which tends to protect the city and the inhabitants thereof from the evils of contagious, malignant, and infectious diseases. The council could not confer upon the board power to abate a nuisance which tended only to injure property rights or the morals of the inhabitants of the city. It must be one affecting the public health.

It follows from what we have said that in our opinion the circuit judge erred in instructing the jury. The judgment is therefore reversed, and a new trial ordered.

#### TAYLOR et al. v. STATE.

(Supreme Court of Arkansas. Nov. 5, 1898.)

SALE OF LAND—NONPAYMENT OF TAXES—TRESPASS  
—ACTION BY THE STATE.

1. *Sand. & H. Dig. § 6606*, provides that the clerk of the county court shall record the list of lands delinquent for taxes, advertised for sale, and the notice of sale, and shall certify in what newspapers such list was published, the date of the publication, and the length of time same was published. *Held*, that a sale where no record of publication and no certificate thereof were made was invalid, and would not pass title.

2. *Sand. & H. Dig. § 3895*, provides that any person who shall knowingly cut down timber on the lands of another shall be liable to the owner in double its value. *Held* that, to entitle the state to recover for an alleged trespass, it must show that it was the owner of the land on which the trespass occurred.

Bunn, C. J., dissenting.

Appeal from circuit court, Greene county; Felix G. Taylor, Judge.

Action by the state against H. Taylor and another. There was a judgment for plaintiff, and defendants appeal. Reversed.

This action was brought, under the provisions of chapter 85, p. 928, Sand. & H. Dig., to recover damages for trespass upon certain lands which it was alleged the state owned, by cutting and removing therefrom certain timber and ties. The answer denied the taking of the timber and ties as alleged in the complaint, and denied that the state was the owner of the land, timber, and ties. On the trial, over the objections of appellants, and to which they at the time excepted, the court permitted the appellee to introduce in evidence what purported to be a copy of the records of the state land office, of "forfeited lands in Greene county," certified to be a true copy of such record, under the hand and seal of the commissioner of state lands, and showing the forfeiture to the state, in three separate tracts, of the lands described in appellee's complaint, in the year 1892, for the taxes of 1891. Following such certificate was what purported to be a copy of a certificate from the clerk of Greene county that it was a true and correct list, and a copy of a second certificate from the same source that the same had been recorded. The appellee also introduced a certified copy of the records of the state land office, showing the donation of the lands by certain persons, and the subsequent relinquishment thereof by them; also, a similarly authenticated copy of the records of the same office showing a sale and conveyance of the lands mentioned in section 34 to J. L. Carroll by the commissioner, June 11, 1895, for \$200, and of the south half of the land described in section 33 to W. J. Wood, March 25, 1895, for \$100. The appellee read in evidence the deposition of J. F. Ritchie and C. B. Myers, commissioner and deputy commissioner of state lands, who stated that in making these two sales all timber previously cut from the land was reserved. A. C. Johnson, for appellee, testified that between January, 1895, and June 11, 1895, the appellants had cut from the lands described in appellee's complaint, in section 34, 118,518 feet of timber, worth \$1 per thousand, and 2,800 ties, worth 10 cents each, and between January 1, 1895, and March 25, 1895, they had cut from the lands described in appellee's complaint, in section 33, 546 ties, worth 10 cents each. He had notified appellants that the land and timber belonged to the state, and, in his capacity as deputy timber inspector, had forbidden them cutting the timber. The appellants then introduced the "record of the list and notice of the sale of lands in Greene county in 1892 for the taxes of 1891," showing the lands described in appellee's complaint advertised for sale as delinquent for the taxes of 1891, in three separate tracts, and to which record was attached a cer-

tificate showing the publication of said notice and list on "May 12, 1892, and May 19, 1892; the first insertion being 30 days before June 8, 1891, which was the date of sale." This certificate was dated May 12, 1892, and signed, "T. B. Kitchens, Clerk, by J. R. Miller, D. C." Appellants read in evidence the deposition of C. W. Stedman, who stated that J. R. Miller succeeded T. B. Kitchens as clerk of Greene county, and witness was deputy under Miller, having had no connection with the office, and having done no work whatever therein, during Kitchens' incumbency. He began working in the office in December, 1892, and continued until November, 1894. Witness here examined the record of the list and notice of the sale of lands in Greene county in 1892 for the taxes of 1891, and stated that he prepared the certificate of publication thereto attached, and Miller signed it after Kitchens was no longer clerk, after Miller was clerk, and after witness began work for Miller as his deputy. Miller instructed him to prepare the certificate, saying that it had been overlooked. A further statement of facts is unnecessary. The judgment was for appellee, and this appeal taken.

Block & Sullivan, for appellants. E. B. Kinsworthy, Atty. Gen., and Luna & Johnson, for the State.

WOOD, J. (after stating the facts). It may be conceded that the certified copy of the original clerk's certificate of lands forfeited to the state for the nonpayment of taxes, made by the state land commissioner, which he states was made from the original on file in his office, was properly admitted in evidence, and that it was sufficient to show prima facie title in the state to the lands in controversy. Still, under the facts of this case, that would not enable the state to maintain this action; for it is shown by the uncontradicted proof that there was no certificate attached to the record of advertisement for the sale of the lands, showing its publication, as required by section 6606, Sand. & H. Dig. Such a certificate was attached, but it appears that it was done long after the sale occurred, and long after the one who was clerk before and at the time of the sale had gone out of office; and the certificate that appears of record was made in his name, and signed by his deputy, by the direction of Miller, who was clerk at the time the certificate was attached. While the record of publication and the certificate thereof are made evidence of the facts in said list and certificate contained, and while said facts cannot be controverted or supplemented by evidence alunde, it is perfectly legitimate to show that what purports to be the record is supposititious, and that at the time such a record was required to be kept there was in fact none in existence.

As there was no record of the publication of these lands for sale, and a certificate there-

of, according to the requirements of section 6606, Sand. & H. Dig., said sale was absolutely void, and the state acquired no title thereunder. *Martin v. Allard*, 55 Ark. 218, 17 S. W. 878. Now, the statute under consideration only gives the right of action to the owner. Sand. & H. Dig. § 3896. The state in this case, it appears, was not only not the owner, but did not have either the actual or constructive possession, of the land. Under the statutes of some states, even a void tax title draws after it constructive possession of land unoccupied. But such is not our law. *Gates v. Kelsey*, 57 Ark. 523, 22 S. W. 162; *Woolfork v. Buckner*, 60 Ark. 163, 29 S. W. 372. When the sovereign assumes the attitude of a litigant, in the absence of some statutory provisions to the contrary, she is subject to the same rules and principles as apply to other litigants who invoke the aid of the courts and the processes of the law to enforce their rights or redress their wrongs. This court has repeatedly held that, in order to entitle one to maintain an action of trespass to realty, he must have either the actual or constructive possession thereof. He must have the legal title to, or be in the actual possession of, the land. *Ledbetter v. Fitzgerald*, 1 Ark. 448; *Wilson v. Bushnell*, Id. 465; *Smith v. Yell*, 8 Ark. 470; *Gracie v. Robinson*, 14 Ark. 438; *McKinney v. Demby*, 44 Ark. 74. See, also, *Merrick v. Britton*, 26 Ark. 505; *Gunsolus v. Lormer* (Wis.) 12 N. W. 62; *Johnson v. Elwood*, 53 N. Y. 432; *Thompson v. Burhans*, 61 N. Y. 67; and other cases cited in appellants' brief, from other states, are instructive. This statute does not broaden that doctrine. On the contrary, if anything, it narrows and restricts it, by giving the relief provided to the owner. It requires, according to our decisions, the legal title to put one in the constructive possession of land. See Arkansas cases cited supra. We are of the opinion, therefore, that in order to maintain the present action the state should be required to show that she is the owner of the land upon which the alleged trespass occurred. If she were permitted to maintain the action upon a mere prima facie title, what would hinder the true owner from also maintaining the action, and thus subjecting the trespasser to two actions, and a double recovery for the one wrong? The state having failed to show that she is the owner of the land, it follows that the court erred in its declarations of law. The judgment is therefore reversed, and the cause is remanded for new trial.

BATTLE, J., absent, not participating.

BUNN, O. J. (dissenting). This is an action by the state against the defendants, Taylor and Routh, in the Greene circuit court, for cutting and removing timber from the lands in the complaint mentioned as the lands of the state, under the provisions of chapter 85, Sand. & H. Dig.,—the damages laid at double

the value of the timber alleged therein to have been cut and removed as aforesaid. The state claims title by a tax forfeiture and sale for the taxes of 1891, made in the year 1892. The plaintiff exhibited with her complaint a certificate of the clerk of Greene county, showing the said lands to have been struck off to the state at said tax sale, and also the certificate of the commissioner of state lands, showing the lands in controversy to be the lands so certified to the state, and also, in both instances, that the certificates were of record. The defendants answered, merely denying taking the timber and ties as alleged, and also denied title in the plaintiff. Evidence, in addition to the copies of the records, was introduced by the state as to the cutting and removal of the timber and ties by the defendants, and the value thereof. The defendants gave exceptions to the introduction in evidence of the copy of the records in the office of the commissioner of state lands, and then introduced in evidence the record of the list and notice of the sale of lands in Greene county in 1892 for the taxes of 1891, showing the lands described in appellee's complaint advertised for sale as delinquent for the taxes of 1891, in three separate tracts, to which record was attached a certificate showing the publication of said notice and list on May 12, 1892, and May 19, 1892; the first insertion being 30 days before June 8, 1892, which was the date of sale. This certificate was dated May 12, 1892, and signed, "T. B. Kitchens, Clerk, by J. R. Miller, D. C." Appellants also introduced the record of lands of Greene county sold to the state in 1892 for the taxes of 1891; showing a sale of the lands mentioned in appellee's complaint, in three tracts, for the taxes of 1891 and penalty, together with the following charges against each tract as costs of sale, to wit: Clerk's fees, 25 cents; advertising, 25 cents; and sheriff's fees, 10 cents; aggregating 60 cents,—some or all of which they claim to be overcharges. They also read in evidence the deposition of C. W. Stedman (deputy of Miller, who succeeded Kitchens as clerk of said county), who had not served at all under Kitchens; showing that, at the instance of Miller, he himself made out or signed the certificate of the notice of sale, Miller saying at the time that it had been overlooked.

Without going into an inquiry as to whether or not any of these defects, or all of them, had the effect of invalidating the tax sale and forfeiture to the state, we address ourselves to the task of ascertaining whether or not a willful trespasser, claiming neither title nor right of possession, is permitted to allege and show defects in a plaintiff's title which is good on its face, and therefore makes a prima facie case for him; and, secondly, whether such a trespasser is permitted to show a defect in the state's tax title, good on its face, by testimony showing the omission or neglect of officers in the proceedings anterior to the

sale. The court decided in *Railway Co. v. Parks*, 32 Ark. 131, that section 5206, Gantt's Dig., cut off all defenses against a tax deed, except the few therein named, and that in so far the section was unconstitutional, upon the ground that the deed, except in the respects named, was made conclusive evidence. Subsequently the legislature made changes in corresponding sections of our revenue laws, by making the recitals in deeds prima facie evidence only, and also in giving the right and privilege to him who was the owner at the time of the sale, or who had become the owner by purchase or otherwise from the state or federal government, or one holding under the owner (but to no others), to contest the tax title by showing that he had in fact paid the taxes, and through mistake of the officers the lands were sold notwithstanding such payments, or that the officer selling the same had been guilty of fraud, or fraud in the purchaser. Being already privileged to show that his land was not subject to the tax, these provisions were supposed to cover any meritorious defense which an owner might have against the forfeiture and sale of his lands; and hence, while all decisions subsequent to the one cited refer to it, yet they all hold the amended statute (see sections 6623-6625, Sand. & H. Dig.) as cutting off only defenses on the ground of mere irregularities not mentioned in their notices; and hence, with that construction upon them, the present sections are not unconstitutional in any respect. *Radcliffe v. Scruggs*, 46 Ark. 96; *Townsend v. Martin*, 55 Ark. 192, 17 S. W. 185. While this court has gone to the full extent of permitting attacks to be made on tax deeds, yet no case is found where this right is given at all to any one except the owner, or one holding and claiming under him; for he is the person named in the acts as the person who will be permitted to make these attacks. This being the state of the law, can it be said that a willful trespasser can defend at all? He surely has no merit in any defenses he may make, and it is only because of the meritoriousness of any defense that the strict rule of the statute has been modified by the courts. In ordinary suits in ejectment, notwithstanding the old rule that a plaintiff must rely upon the strength of his own title, and not upon the weakness of that of his adversary, yet the rule has been growing more and more relaxed, so that in the modern state of the law it is a mooted question that a willful trespasser will be allowed to contest a prima facie title; because of the fact that, however successful he may be in showing that the plaintiff's is not the better title, he can never show that he has any. But it is unnecessary to discuss this phase of the question. If the defendant trespasser desires to protect himself from claims for damages from two claimants, it is quite easy for him to have the owner make a party to the suit; and, indeed, the trial court should have this done, even without his motion.

## STATE v. GRUGIN.

(Supreme Court of Missouri, Division No. 2.  
Nov. 7, 1898.)

### HOMICIDE—PROVOCATION—RAPE OF DAUGHTER— INSOLENT WORDS—QUESTIONS FOR JURY —INSTRUCTIONS—MANSLAUGHTER.

1. Where it appeared in evidence, in a trial for murder, that defendant was informed, on the day of the homicide, at about 9 or 10 o'clock in the forenoon, that his infant daughter had been ravished by deceased, about a month previously, and that, at about 8 or 4 o'clock in the afternoon, defendant went a distance of about three miles, to the place where deceased was working, and shot and killed him, it was error to charge that the jury should find defendant guilty of murder, on finding such facts, and that such act was committed by defendant in consequence of anger engendered by such report of the rape of his daughter, and of his belief of such report, as the effect of such evidence to reduce the grade of defendant's crime from murder to manslaughter should have been submitted to the jury.

2. Such instructions were also erroneous, in that they dictated to the jury, as a matter of law, what was a sufficient provocation for the act of defendant, and what was a sufficient cooling time for the passion excited by the information communicated to him, which were questions for the jury.

3. Such instructions were also objectionable as commenting on the evidence.

4. Instructions that mere excitement or agitation does not destroy the element of deliberation in murder in the first degree, and that, in passing on defendant's motives and intentions, and the reasonableness and good faith thereof, the jury should take into consideration any agitation and excitement, if such were shown, were inconsistent, and calculated to mislead.

5. Where there were no "indications of brutality and atrocity" attending a homicide, unless a homicide effected by means of a shotgun, at close range, is necessarily brutal and atrocious, the use of such terms in an instruction was erroneous.

6. Where defendant, who had been informed that his infant daughter had been ravished by his son-in-law, while on a visit to him and her sister, called on the perpetrator of the outrage, and inquired of him why he had done so, and, on receiving the insolent and defiant reply, "I'll do as I damn please about it," shot and killed him, the question whether such words constituted a reasonable provocation should have been left to the jury, with an instruction that, if they should so find, then defendant was guilty of no higher offense than manslaughter in the fourth degree.

7. Defendant, on being informed that his infant daughter had been ravished by deceased, went to see the latter, with the avowed purpose of placing him under arrest, and, on receiving an insolent and defiant reply to a question respecting such criminal conduct, shot and killed him. On the trial of defendant for murder, the "previously chaste character" of his daughter having been shown, an instruction, on his behalf that, if the jury believed from the evidence that deceased had intercourse with such daughter at the time in question, and that she was then unmarried, of previously chaste character, and under the age of 18 years, then deceased was guilty of a felony, even though they should find that she consented to such intercourse, was refused. *Held*, that such instruction should have been given, with the addition that, if deceased had committed such deed, then defendant, having probable ground to suspect him of being guilty, had the right to arrest him, as his right to be there for such purpose, if he went in good faith to arrest him,

was not affected by the fact that he shot deceased in hot blood, because of his aggravating language.

Gantt, P. J., dissenting.

Appeal from circuit court, Macon county; Andrew Ellison, Judge.

Sealous Grugin was convicted of murder in the second degree, and he appeals. Reversed.

Ben Eli Guthrie, Dysart & Mitchell, and Ben Franklin, for appellant. The Attorney General, Sam. B. Jeffries, and W. W. Graves, for the State.

SHERWOOD, J. The appeal in this instance is taken by defendant from the judgment of the trial court, which, based on the verdict of the jury, adjudged and sentenced him to the penitentiary for the term of 15 years, as punishment for the crime of murder in the second degree. The indictment was for murder in the first degree. There had been a mistrial, at the end of which defendant was admitted to bail in the sum of \$5,000.

Briefly told, the substance and general outline of the evidence is this: Jeff Hadley, who was killed on the 6th of May, 1896, had, about a year prior to that date, induced Louella, one of the daughters of defendant, to run away with him and get married. This was done after defendant, not liking the bad habits of Hadley, had forbade him to visit his house. These circumstances naturally produced bad blood between the parties, and gave rise to reciprocal threats being made by them; defendant, on the occasion of the daughter being carried away by Hadley and married, remarking: "It looks like I ought to take my gun and go kill him," or words to that effect. On his part, Hadley was not backward in making threats respecting his recalcitrant father-in-law, by exhibiting a knife and revolver, and inquiring how they would do for "Old Seal," etc. These threats of Hadley's had been told to defendant. Time went on, however, and occasionally Louella would visit her old home, and on perhaps two occasions her husband accompanied her, and on one occasion she visited the house of her father, the Sunday before the homicide, which occurred on Wednesday, and took dinner there. Defendant had also visited his daughter perhaps once or twice, and taken a meal or two with her, her husband being present. The families lived something over two miles apart, and both were by no means in affluent circumstances. Defendant owned, and lived on, a little place of his own, and Hadley had rented a 40 of his wife's brother-in-law, who lived also on the same place, and about a quarter of a mile distant. Defendant was about 50 years old, and had been twice married; and of the first marriage there had resulted several children,—all of them daughters and married, except two, Caroline and Alma, who lived at home,

and a son, about grown, and also unmarried, who remained with his father, assisting in working the little farm. Alma was 16 years old in April, 1896. On the afternoon of the 8th or 9th of that month she went to the house of her brother-in-law Hadley, and remained with him and her sister overnight. It is alleged that during the night he ravished her. On her return home the next day she had evidently been weeping, and her sister Caroline, with whom she slept, frequently would be awakened nights by her sister's crying, and, finding her weeping, would ask what was the matter, when she, without reply and still weeping, would turn her face to the wall. This continued for several weeks. On the Sunday next before Wednesday, May 6, 1896, Alma, who was not permitted to meet George Stephens, her betrothed, at her father's, met him at R. S. Tate's, her mother's father, and there, without grossness, she imparted to him the secret of her sad story. Receiving this information, Stephens conveyed it the same day to Dan Tate and John Tate, the uncles of Alma, and also to Ransford, her brother. By Wednesday morning following, the information of the matter had reached the ears of R. S. Tate, the grandfather, who came down to the field on his place where Stephens was at work, and there, at his request, Stephens told what he had heard to the grandfather, and to Web Morse, who was with the latter. Tate, the grandfather, not being on good terms with defendant, and thinking it best he should be informed of the matter in hand, asked Morse to go over to Grugin, who was something about three quarters of a mile distant at work in his field, and tell him about it. Morse, accordingly, taking with him Ancil Milan, as Tate asked him, went and delivered the message of old man Tate. Morse, speaking of this message to Grugin, said: "I told Mr. Grugin that the report was that Jeff Hadley had ravished his girl about four weeks ago up at his house; that we didn't know whether he knew it or not, and that Mr. Tate wanted me to tell him." It was about 9 o'clock in the morning when this message was delivered. Morse states that its delivery "seemed to hurt defendant dreadfully." "He wanted to know how I got it. I says, 'Your son knows it, and my boy knows it;' and he said, 'My son? You fellows stay here, and I will go and see my boy.' The boy was out of sight, over the hill." When defendant reached the place where his son was plowing, and asked him about the truth of the report, his son replied, "Pa, it must be so." Receiving this answer, defendant, greatly agitated, told his son to "turn out; that our family is ruined." Proceeding with his story, Morse says: "He went over, and directly he came back. Tears were running down his eyes, and he was terribly red in the face. He was crying. He says, 'Boys, it is so; Ransford says it is so;' and



he says, 'I will take my shot gun, and go and kill him.' Then we tried to pacify him, but it didn't seem to do very much good. After he said he would kill him, we told him that he hadn't better do it; that the thing was not positive. I told him it was not proof,—it was not proven that it was so yet. I says, 'How will you find out?' He says, 'I will go to the house, and Caroline will tell me.' Leaving the field where Morse was, between 10 and 11 o'clock, defendant went up to his house to see his daughter Caroline, and Morse returned to old man Tate, and told him he had delivered his message. Defendant, on reaching his house about 11 o'clock, spoke to Caroline, and requested her to ask Alma if the report about Hadley and herself was true, when she replied it was, and Alma, a few minutes afterwards, reaffirmed the same thing to her father. Her father at that time was excited and crying, and, the witness being prostrated with the excitement incident to such an occasion, her father was occupied the most of the time until noon in taking care of her. About that time Gordon came, and defendant, having an engagement, had to assist him in setting up a cornplanter, and dinner had to be prepared for him. Not much dinner, it seems, was eaten by that stricken household. When Milan left, between 10 and 11 o'clock, in order to tell Tate that his message had been delivered, he promised to come by on his return home and see defendant. He did so, arriving some time after the noon hour. On Milan's arrival, he told defendant that, as Hadley might get the news of the discovery of his crime, he might get away, and advised defendant that he had better go and get him, and turn him over to the officers. Having no doubt now, as defendant states, of Hadley's guilt, and fearing he would escape, as suggested by Milan, defendant says: "I thought I would go up there, and see Mr. Hadley, and take charge of him until I could get an officer." With this end in view, defendant took his double-barreled shotgun and four shells, loaded with ordinary shot, and started to the place where Hadley lived. He arrived there about 3 o'clock in the afternoon; saw Hadley at work in the field planting corn; spoke to his daughter Louella, as he crossed the fence; and approaching Hadley, and when within a few feet of him said: "Jeff, whatever possessed you to rape Alma, my daughter?" Hadley replied, "I will do as I damn please about it." Defendant says that, as Hadley made this insolent reply, "he pitched forward, as though he was coming at me,—coming to me. I had my gun on my shoulder at that time, and when he made his spring forward I pulled my gun off my shoulder and shot him. I then started home. From where I was standing in my tracks here I would pass close up, probably three or four feet; I

don't know the cause of it, but I shot him the second time; but why I made the second shot I don't know, but I did it, and I walked straight towards home. I then met Jenson and his wife, and the woman hallooed at me, and wanted to know why I had shot Jeff. I says: 'He has raped one of my daughters, but he will not rape another one.' Then I walked straight on down the road."

This history of the tragedy is as sufficient a statement as I could make of the facts embodied in this voluminous record. Of course, I have not deemed it necessary to recount the various items of testimony touching what defendant is alleged to have said, both before he took up his shotgun and started on his errand and after he had surrendered himself and was lodged in jail, tending to show that his purpose was other than that he testified to, as above stated. His story not being an unreasonable one, and not stamped with improbability, he was entitled to have the theory which it embodied presented to the jury by appropriate instructions; and, speaking about instructions, the court, at the request of the state, gave twenty, covering almost six pages of closely-printed matter. At the request of defendant, the court gave nine instructions, modifying two of them. Defendant then asked another instruction, which the court gave, with a modification. Thereupon defendant asked the court to modify that modification. This being refused, defendant asked the court to give seventeen other instructions, covering six more closely-printed pages. Judging by this record, and the immense acreage of the instructions asked, given, modified, and refused, the trial judge must have had his patience sorely tried. I do not intend to incumber our Reports with them, lest, by so doing, I encourage and foster an imitation of their vastness and "damnable iteration." In discussing them I shall only refer to such as specially require comment. And, in passing, it is well enough to say that the instructions which begin the long series given on request of the state are in usual and appropriate form, and correctly, in connection with others, lay down the definition of murder in the first and second degrees. Omitting any discussion of the instructions at the present, the subject will be recurrd to hereafter. The salient topics which this record presents, and on which our attention will be centered, are these: First. Did the outrage perpetrated by Hadley on his young sister-in-law, Alma, defendant's daughter, authorize and require a submission to the jury of the question whether defendant's shooting Hadley was done in "hot blood," and therefore only manslaughter? Second. Did the insolent and defiant reply of Hadley, when questioned by defendant as to the vile deed he had done to the latter's daughter, authorize and require a submission to the jury of the question whether the words used by Hadley were such as to generate a sufficient or reasonable provocation so as to produce hot blood, and thus low-

er the grade of the homicide in either degree to manslaughter? Third. Whether certain instructions given at the instance of the state should have been refused. Fourth. Whether a certain instruction asked by defendant should have been given either as asked or in a modified form?

1. In discussing the first question propounded, we are necessarily brought into contact with that line of cases which treat of "hot blood" and how it may be engendered. Among other familiar instances furnished by the books are those where a husband finds a man in the act of adultery with his wife, and immediately kills him or her. That is accounted but manslaughter, and it is the lowest degree of that offense; and therefore, in such a case, the court directed the burning in the hand to be gently inflicted, because there could not be a greater provocation. *T. Raym.* 212. According to the old books, such discovery of the wife's adultery must have been made in the very act, and the killing must have been done "directly on the spot," in order to reduce the homicide to manslaughter. 4 *Bl. Comm.* 191; 3 *Greenl. Ev.* (14th Ed.) § 122. The husband must have "ocular inspection of the act, and only then." *Pearson's Case*, 2 *Lewins, Cr. Cas.* 216; 1 *Hale, P. O.* 487. But since the law, as other sciences, makes progress, it is no longer accounted necessary that a husband should have "ocular inspection," etc. It suffices if the provocation be so recent and so strong that the husband could not be considered at the time master of his own understanding. *State v. Holme*, 54 *Mo.* 153. In the case just cited, the case of *Mahe v. People*, 10 *Mich.* 212, was approved, the facts in that case having been these: "The prisoner offered evidence tending to show the commission of adultery by H. with the prisoner's wife. Within half an hour before the assault the proof showed that the prisoner saw them going into the woods together under circumstances calculated strongly to impress upon his mind the belief of an adulterous purpose; that he followed after them to the woods; that they were seen not long after coming from the woods, and that the prisoner followed on in hot pursuit, and was informed on the way that they had committed adultery the day before; that he followed H. into a saloon, in a state of excitement, and there committed the assault. The court held that the evidence was proper, as from it it would have been competent for the jury to find that the act was committed in consequence of the passion excited by the provocation, and in a state of mind which would have given to the homicide, had death ensued, the character of manslaughter only. The evidence showed that the prisoner, in following H. from the woods, was laboring under great excitement; that, when a friend told him on the way what had happened the day before, his passion was increased; and that, when he arrived at the saloon, the per-  
aspiration had broken out all over his face."

And in that case it was ruled that the question as to what is an adequate or reasonable provocation is one of fact for the jury; and so, also, is the question whether a reasonable time had elapsed for the passion to cool, and reason to resume its control.

And in *Mahe's Case* it is said: "To the question, what shall be considered in law a reasonable or adequate provocation for such a state of mind, so as to give to a homicide, committed under its influence, the character of manslaughter? on principle the answer, as a general rule, must be, anything the natural tendency of which would be to produce such a state of mind in ordinary men, and which the jury are satisfied did produce it in the case before them. \* \* \* It is doubtless, in one sense, the province of the court to define what, in law, will constitute a reasonable or adequate provocation, but not, I think, in ordinary cases, to determine whether the provocation proved in the particular case is sufficient or reasonable." This is essentially a question of fact, and to be decided with reference to the peculiar facts of each particular case. As a general rule, the court, after informing the jury to what extent the passions must be aroused and reason obscured to render the homicide manslaughter, should inform them that the provocation must be one the tendency of which would be to produce such a degree of excitement and disturbance in the minds of ordinary men; and if they should find such provocation from the facts proved, and should further find that it did produce that effect in the particular instance, and that the homicide was the result of such provocation, it would give it the character of manslaughter. \* \* \* The law cannot justly assume, by the light of past decisions, to catalogue all the various facts and combinations of facts which shall be held to constitute reasonable or adequate provocation. Scarcely two past cases can be found which are identical in all their circumstances, and there is no reason to hope for greater uniformity in future. Provocations will be given without reference to any previous model, and the passions they excite will not consult the precedents. The same principles which govern, as to the extent to which the passions must be excited and reason disturbed, apply with equal force to the time during which its continuance may be recognized as a ground for mitigating the homicide to the degree of manslaughter, or, in other words, to the question of cooling time. \* \* \* The passion excited by a blow received in a sudden quarrel, though perhaps equally violent for the moment, would be likely much sooner to subside than if aroused by a rape committed upon a sister or a daughter, or the discovery of an adulterous intercourse with a wife; and no two cases of the latter kind would be likely to be identical in all their circumstances of provocation. No precise time, therefore, in hours or minutes, can be laid

down by the court, as a rule of law, within which the passions must be held to have subsided, and reason to have resumed its control, without setting at defiance the laws of man's nature, and ignoring the very principle of which provocation and passion are allowed to be shown at all in mitigation of the offense. The question is one of reasonable time, depending upon all the circumstances of the particular case, and where the law has not defined, and cannot without gross injustice define the precise time which shall be deemed reasonable, as it has with respect to notice of the dishonor of commercial paper. In such case, where the law has defined what shall be reasonable time, the question of such reasonable time, the facts being found by the jury, is one of law for the court; but in all other cases it is a question of fact for the jury, and the court cannot take it from the jury by assuming to decide it as a question of law, without confounding the respective provinces of the court and jury." See, also, *Rex v. Lynch*, 5 Car. & P. 324; *Rex v. Hayward*, 6 Car. & P. 157; *State v. Norris*, 2 N. C. 429; *Starkie, Ev. (Ed. 1860) pp. 768, 769.*

In *Cheek v. State*, 35 Ind. 492, it was ruled, on a trial for murder, that it is error to exclude evidence tending to show that the person killed by the defendant had entered into a combination with a third person to induce the defendant's wife to elope with such third person, and leave her husband and children, and that the facts tending to prove such combination, of late date, had come to the knowledge of the defendant; the court remarking: "There was some evidence given, and much more offered, but rejected by the court, tending to prove that the deceased, who was the father of the defendant's wife, was and had been in an unnatural combination with one Clem, to induce the defendant's wife to leave him and elope with Clem. This evidence, so far as the acts, sayings, and doings of Harrison, of a late date, had been communicated or come to the knowledge of the defendant, should have been admitted. This evidence would have tended to show the state of Cheek's mind, and a reason for his being so highly frenzied upon his meeting the deceased, as testified to by Dr. Kyle."

Commenting on the subject of the "adequacy of the cause of excitement," Bishop remarks: "The doctrine under this head, appearing as it does in the books in illustrations rather than in rules, hardly admits of reduction to rule. Not attempting an impossible exactness, we may deem it, in a general way, to be that the law accepts human nature as God has made it, or as it manifests itself in the ordinary man, and every sort of conduct in others which commonly does in fact so excite the passions of the mass of men as practically to enthrall their reason the law holds to be adequate cause." 2 Bish. New Cr. Law, § 701.

Touching the subject of "cooling time," Wharton observes: "Of course, hot blood could continue to exist, even after a day's delay; but this, which would sustain a conviction of manslaughter, is very different from a defense of excusable homicide, ending in an acquittal." 1 Whart. Cr. Law (9th Ed.) § 496. Elsewhere, the same author, when discussing the point in hand, says: "Men's temperaments, also, vary greatly as to the duration of hot blood; and it must be remembered that we must determine the question of malice in each case, not by the standard of an ideal 'reasonable man,' but by that of the party to whom the malice is imputed. A man may be chargeable with negligence in not duly weighing circumstances which would have checked his passion, or which, when his passion was aroused, would have caused it more speedily to subside. But he is not chargeable with malice when he was acting wildly and in hot blood. Hence, whether there has been cooling time, so as to impute to the defendant malice, is to be decided, not by an absolute rule, but by the conditions of each case." *Id.* § 480.

In *Biggs v. State*, 29 Ga. 723, Parish had entered the bedchamber of Biggs, and insulted his wife by a personal indignity and by words. Biggs permitted Parish to escape, with threats of punishment should he remain in the city. The next morning the would-be seducer appeared at the hotel breakfast table, and brazenly seated himself within two chairs of his intended victim; whereupon Biggs shot at, but unfortunately missed, him. Being indicted and tried for an assault with intent to murder, the trial court refused to admit evidence of what transpired in the bedchamber the night before, and this upon the theory that sufficient time had elapsed for passion to subside and for reason to resume her sway. But this refusal was held error; Lumpkin, J., saying: "To shut out the scene which transpired in the bedchamber is to deprive the jury of the power of appreciating the transport of passion kindled in the bosom of Biggs by the presence of Parish."

In this connection, it must not be forgotten what a high estimate the men of all nations have placed on the chastity of their women and on the inviolability of their persons. Some of the fiercest tumults and wars have had their origin in assaults made on the modesty or honor of women. Notwithstanding this, the law as yet has made no provision and provided no punishment for many such instances. Nay, more; a brother who detected a man in the act of adultery with his sister, and thereupon stabbed him to death, was, by the supreme court of Pennsylvania, adjudged guilty of murder. *Lynch v. Com.*, 77 Pa. St. 205.

Lord Macaulay, in his "Report on the Indian Code," very forcibly points out the gross injustice of accounting a husband who slays an adulterer, found with his wife, only guilty

of manslaughter, and yet holds a high-spirited brother, who, in a paroxysm of rage, kills the seducer of his sister, guilty of murder. Proceeding further, Lord Macaulay says: "There is another class of provocations which Mr. Livingston does not allow to be adequate in law, but which have been, and while human nature remains unaltered will be, adequate in fact, to produce the most tremendous effects. Suppose a person to take indecent liberties with a modest female, in the presence of her father, her brother, her husband, or her lover. Such an assault might have no tendency to cause pain or danger, yet history tells us what effects have followed from such assaults. Such an assault produced the Sicilian Vespers. Such an assault called forth the memorable blow of Wat Tyler." It is difficult to conceive any class of cases in which the intemperance of anger ought to be treated with greater lenity. So far, indeed, should we be from ranking a man who acted like Tyler with murderers, that we conceive that a judge would exercise a sound discretion in sentencing such a man to the lowest punishment fixed by the law for manslaughter.

When testifying before the "Homicide Amendment Committee," in 1874, Blackburn, J., said: "Supposing a man is actually keeping company with a young woman. She cannot be called his sister or his ward, or even under his protection. And suppose a ruffian steps forward, and, in the presence of the other, pulls up her petticoats, and catches hold of her, and the other struck him down, and the man died. That case was before Mr. Justice Pattison, at York. Somehow or other the jury and Mr. Justice Pattison contrived to acquit him altogether. I think that was provocation that would reduce it to manslaughter."

If, as Bishop states, the "law accepts human nature as God made it, or as it manifests itself in the ordinary man, and every sort of conduct in others which commonly does in fact so excite the passions of the mass of men as practically to enthrall their reason the law holds to be adequate cause," I do not see how defendant is to be denied the benefit of that theory in the painful circumstances of the present case. To him, in contemplation of law, the foul wrong done his child, though not revealed to him until the morning of the day of the homicide, was as fresh and potent to stir his blood as if done on that very morning. If this be the case, then the law, while it softens the punishment of a husband who slays an adulterer found in his bed, surely cannot be so illogical as to deny a like result to a father who slays the ravisher of his young daughter. Indeed, it might well be said that in the latter case there should be greater lenity shown by the law than in the former, because the wife has been a consenting party to the homicide-producing adultery. The trial court, while it admitted the evidence which preceded the

killing, yet by its instructions denied that such evidence had any effect to lower the grade of defendant's crime from either degree of murder to manslaughter. If the evidence referred to was to be denied any effect, then it should not have been admitted. The instructions for the state under review were also erroneous in that they dictated to the jury, as a matter of law, what was a sufficient or reasonable provocation, and what a sufficient cooling time. They were also guilty of the serious fault, prohibited by the statutes and condemned by numerous decisions of this court, of commenting on the evidence, to wit, by stating to the jury that "if the jury find that such information was brought to Grugin on the forenoon of said day, and on the afternoon of said day, about three or four o'clock, Grugin shot and killed Hadley because of this report, and his belief of it, to wit, that his daughter had been raped, then they will find defendant guilty of murder." Again, the instruction is given "that, if they believe from the evidence that Grugin was informed that Hadley had ravished his daughter about one month before, and that information came to Grugin about nine or ten o'clock in the forenoon, and that in the afternoon Grugin went a distance of about three miles, and shot and killed Hadley, in his cornfield at work, because of his (Grugin's) anger on account of said rape, and his belief that said rape had occurred, then the jury should find the defendant guilty of murder," etc. These comments on this point occur some four or five times. Such comments are sufficient of themselves to cause a reversal.

The tenth instruction given on behalf of the state told the jury "that, under the law, mere excitement or agitation do not, of themselves and alone, destroy the element of deliberation in murder in the first degree," etc.; while the ninth instruction given on defendant's request told the jury "that, in passing upon the defendant's motives, intentions, and purposes, and the reasonableness and good faith of the same, they should take into consideration any agitation and excitement of mind and feelings, if any such were shown, as well as all other facts and circumstances shown in evidence." These two instructions cannot be reconciled, and were well calculated to mislead the jury, and, if the prior positions taken in his opinion are correct, then the tenth instruction aforesaid is not the law.

The fifth instruction is wrong, because there were no "indications of brutality and atrocity" in the commission of the homicide, unless it can be said that homicide done by means of a shotgun, at close range, is necessarily brutal and atrocious.

2. The second interrogatory is next for consideration. It embodies and comprehends the question whether words constitute a sufficient or reasonable provocation in law. Of course, the books abound in utterances of the platitude that words, however opprobrious, constitute no provocation in law. Speaking as the

organ of this court, I have often uttered this platitude myself, but the statement is subject to many qualifications. The general good sense of mankind has in some instances so far qualified the rigor of what is termed the "ancient rule" that a statute has been passed in Texas which reduces a homicide to manslaughter where insulting words are used to or concerning a female relative. The killing is reduced to manslaughter where it occurs as soon as the parties meet after knowledge of the insult. 9 Am. & Eng. Enc. Law, 581.

In Alabama a statute provides that opprobrious words shall, in some circumstances, justify an assault and battery. *Riddle v. State*, 49 Ala. 389. And in that state, without any statutory provision on the subject, it has been determined that "insult by mere words," when the defendant acts on them and he has not provoked them, may be weighed by the jury, with other evidence, in determining whether the killing was murder in the first or second degree. *Watson v. State*, 82 Ala. 10, 2 South. 455.

After speaking of *Morley's Case*, 6 How. St. Tr. 771, Hale says: "Many who were of opinion that bare words of slighting, disdain, or contumely would not of themselves make such a provocation as to lessen the crime into manslaughter, yet were of this opinion: That if A. gives indecent language to B., and B. thereupon strikes A., but not mortally, and then A. strikes B. again, and then B. kills A., this is but manslaughter; for the second stroke made a new provocation, and so it was but a sudden falling out, and though B. gave the first stroke, and, after a blow received from A., B. gives him a mortal stroke, this is but manslaughter, according to the proverb, 'The second blow makes the amray.' And this was the opinion of myself and some others." 1 Hale, P. C. 456.

Now, in the case Hale supposes, it is, as he says, the second stroke that made a "new provocation"; but the second stroke was given by A. Then what made the old provocation? Evidently, the "indecent words" of A., which, given by A. to B., prompted the latter to give the first stroke. So, in *Morley's Case*, it was agreed that, "if, upon ill words, both of the parties suddenly fight, and one kill the other, this is but manslaughter; for it is a combat betwixt two upon a sudden heat, which is the legal description of manslaughter." In this instance, also, it must be noted that "ill words" were the provocation that made the hot blood which resulted only in manslaughter. To test this matter further, suppose no "ill words" used; what then the crime? Evidently murder. It is said in the books that, though an insufficient assault or demonstration do not import coming violence, still it and insulting words combined may so excite the passions as to reduce the killing to manslaughter. 2 Bish. New Cr. Law, § 704. If the inchoate assault be naught as provocation, and the opprobrious words be naught as provocation, I am unable to see how the addi-

tion of these two ciphers can make a unit. "The moment, however, the person is touched with apparent insolence, then the provocation is one which, ordinarily speaking, reduces the offense to manslaughter." 1 Whart. Cr. Law (9th Ed.) § 456. And it is held that such "apparent insolence" may be manifested in a variety of ways; as, for instance, by a contemptuous jostling on the street, by tweaking the nose, by filiping on the forehead, or by spitting in the face. In most of these instances and illustrations there is no physical pain or injury inflicted. The "sudden heat" springs from the indignity—the insult—offered, and from nothing else. Kelly, Cr. Law, § 518. This being true, the law should not be so unreasonable as to deny to an insult offered in words the same force and effect which all men recognize that it has as a matter of fact. If it "so excite the passions of the mass of men as to enthrall their reason, the law should hold it adequate cause" for the reduction of the grade of the offense resulting from the use of the insulting words. No sound distinction can, it seems, be taken in principle between insult offered by acts and that offered by foul and opprobrious words.

I will now refer to some adjudications where insulting words have been held a sufficient basis for a charge of an instruction on the offense of manslaughter. Where the prisoner was indicted for the willful murder of his wife, Blackburn, J., in summing up, said: "As a general rule of law, no provocation of words will reduce the crime of murder to that of manslaughter, but, under special circumstances, there may be such a provocation of words as will have that effect. For instance, if a husband, suddenly hearing from his wife that she had committed adultery, and he, having no idea of such a thing before, were thereupon to kill his wife, it might be manslaughter. Now, in this case, words spoken by the deceased just previous to the blows inflicted by the prisoner were these: 'Aye; but I'll take no more for thee, for I will have no more children of thee. I have done it once, and I'll do it again.' Now, what you will have to consider is, would these words, which were spoken just previous to the blows, amount to such a provocation as would, in an ordinary man, not in a man of violent or passionate disposition, provoke him in such a way as to justify him in striking her, as the prisoner did?" Reg. v. Rothwell, 12 Cox, C. C. 145. In that case (tried in 1871) the husband seized a pair of tongs, close at hand, and struck his wife three violent blows on the head, from which she died within a week, and the verdict was for manslaughter.

In Reg. v. Smith, 4 Fost. & F. 1066 (tried in 1866), a woman had left her husband, and gone off and lived in adultery with one Langley. He having died, she returned to her home, and her husband forgave her, but she did not prize this forgiveness, because on the next night after her return she violently abused him, taunting him with her preference for

Langley, and declaring, had he not died, she had not returned. While this was going on, she was so violent as to have to be held by two other women who were present. Her husband sat by her on the seat trying to pacify her. Finally, she broke from the women who were holding her, and repeating, with much foul language, her preference for Langley, spat towards her husband; whereupon he, who was then standing up within a yard of her, gave her a blow in the neck with a sharp-pointed pocket knife, which caused her immediate death. And the jury were, in substance, charged: An assault, too slight in itself to be sufficient provocation to reduce murder to manslaughter, may become sufficient for that purpose, when coupled with words of great insult. A verdict of guilty of manslaughter was returned.

This case arose in Tennessee: The defendant killed Jones with a deadly weapon. Jones, being at defendant's house, used obscene language in the presence of defendant's family and at his table. Defendant being tried, he was convicted of murder in the second degree. The lower court held the words of the deceased, however obscene, and his conduct, however vexatious, could not amount in law to reasonable and adequate provocation, and, upon that view of the law, withdrew from the jury the consideration of the facts. Upon this the supreme court held: "It ought to have been left to the jury to determine, under proper instructions, whether the obscene language of the deceased, used in the presence of the defendant's family, and at his table, in connection with his vexatious conduct, was calculated to produce such excitement and passion as would obscure the reason of an ordinary man, and induce him, under the excitement and passion so produced, to strike the blow, and whether in fact the blow was stricken in consequence of the heat of passion so produced. \* \* \* Being greatly excited, upon sufficient cause, he is impelled by a sudden motive of revenge, and that includes the idea of malice, whether he strikes with a deadly weapon or not. The fact that he used a deadly weapon, in connection with other circumstances, may be properly looked at in determining whether the blow was the result of the sudden passion; but when the jury are satisfied that the defendant was impelled by sudden passion, produced by sufficient provocation to strike, the simple fact of using a deadly weapon would not make the blow malicious." *Seals v. State*, 3 Baxt. 459.

In *Wilson v. People*, 4 Parker, Cr. R. 619, the accused was convicted of murder in the first degree. The statutes in that state as to murder and manslaughter are the same as our own. The deceased had been struck on the head by a hatchet or some other weapon, but died, it seems, in consequence of falling into the water and drowning. The lower court had charged that the "heat of passion" meant by the statutes could not be produced or provoked by "words of the most aggravated

character." Commenting on this charge, Wright, J., observed: "The law, respecting the infirmities of our nature, attaches a less degree of criminality to acts of violence perpetrated under an excitement provoked by the assailed. The passions may be heated as effectually by words as by acts, and an assault may be provoked oftentimes as readily by the former as the latter. In cases of assault of the person, it has always been held that provocation by words has gone far to mitigate the legal wrong. \* \* \* It is enough that the passions are heated by the acts or conduct of the one upon whom the assault is made, and it matters not whether this state is produced by acts or words, if either the one or the other are naturally calculated to produce it."

So, it will be seen that there are circumstances where words do amount to a provocation in law, i. e. a reasonable provocation to be submitted to the determination of the jury, and, if found by them to exist, then the crime is lowered to the grade of manslaughter. If there ever was a case to which this principle should be applied, it would seem it should be applied to the case at bar. A father is informed that his young daughter, just budding into womanhood, has been ravished by his son-in-law, while under the supposed protection of his roof. Arriving where the son-in-law is, and making inquiry of him why he had done the foul deed, that father receives the answer, "I'll do as I damn please about it." This insolent and defiant reply amounted to an affirmation of Hadley's guilt. So long as human nature remains as God made it, such audacious and atrocious avowals will be met as met by defendant. It should be held, therefore, that the words in question should have been left to the jury to say whether, in the circumstances detailed in evidence, they constituted a reasonable provocation, and, if so found, that then defendant was guilty of no higher offense than manslaughter in the fourth degree.

3. Relative to one of the instructions asked by defendant, but refused by the court. This instruction was asked: "If the jury believe from the evidence that the deceased, Hadley, had intercourse with Alma Grugin in the year 1896, and that she was then unmarried, of previously chaste character, and under the age of 18 years, then said Hadley was guilty of a felony, and this is true, even though you may further find that she consented to such intercourse." This instruction lays down the law as announced by this court in *State v. Knock*, 142 Mo. 515, 44 S. W. 235. That Alma Grugin was of "previously chaste character," is shown by Hadley's remark to Alma that "you are not the first; I've broke in lots of them." The instruction should have been given, with the addition that, if Hadley had done the deed mentioned, then defendant, having probable ground to fairly suspect him of being guilty, had the right to arrest him. *State v. Albright*, 144 Mo. 538, 46 S. W. 620.

Such modifications or additions, to complete or rectify an improper instruction, are authorized by a long line of decisions of this court. *State v. Clark* (decided at the present term) 47 S. W. 886. And, if defendant went in good faith to arrest Hadley, his right to be there for that purpose would not be destroyed because he shot Hadley in hot blood because of the reply Hadley gave him. The judgment should be reversed, and the cause remanded.

BURGESS, J., concurs in toto. GANTT, P. J., does not concur as to that portion of paragraph 2 in reference to words being regarded as a reasonable provocation by either court or jury.

GANTT, P. J. (dissenting). With the utmost respect for the opinion of my brethren, I find myself unable to agree to so much of the opinion in this case as announces that words alone constitute a sufficient or reasonable provocation to reduce the grade of a homicide from murder to manslaughter. On the contrary, I think it can be established, beyond the peradventure of a doubt, that, by the law of this state, "neither words of reproach, how grievous soever, nor indecent provoking actions or gestures, however much calculated to excite indignation or arouse the passions, are sufficient to free the party killing from the guilt of murder. To have the effect to reduce the guilt of killing to the lower grade, the provocation must consist of personal violence." I quote from Whart. Cr. Law (9th Ed.) § 455. Long, however, before Dr. Wharton wrote his excellent treatise, East, in his *Pleas of the Crown*, had stated the law in this wise: "Words of reproach, how grievous soever, are not provocation sufficient to free the party killing from the guilt of murder, nor are contemptuous or insulting actions or gestures, without an assault upon the person, nor is any trespass against lands or goods. This rule governs every case where the party killing upon such provocation made use of a deadly weapon, or otherwise manifested an intention to kill or to do some great bodily harm." In *State v. Starr*, 38 Mo. 271, Judge Wagner, speaking for the court, adopted Wharton's statement above quoted, and said: "This rule is well established, and we imagine it would not be the part of wisdom to substitute in its place one fluctuating or less rigid, which would require the accused to be judged in each case according to the excitement incident to his natural temperament, when aroused by real or fancied insult given by words alone. Kely. 135. There must be an assault upon the person, as where the provocation was by pulling the nose, purposely jostling the slayer aside in the highway (*Lanure's Case*, 1 Hale, P. C. 455), or other direct and actual battery. *Reg. v. Stedman*, *Forest Crown Law*, 292. But, even in such cases, it will be unavailing when death ensues in a conflict upon provocation sought by the slayer, or upon a punctilio proposed by him, such as challenging the deceased to take

a pin out of his sleeve if he dared. 3 Greenl. Ev. § 147." In *State v. Branstetter*, 65 Mo. 149, this court, through Henry, J., unanimously approved Judge Wagner's statement of the law in *State v. Starr*, supra. In *State v. Hill*, 69 Mo. 451, in discussing an instruction which declared that "provocation, to be sufficient to mitigate or extenuate homicide as applicable to this case, should amount to personal violence or injury to the defendant, and mere words of reproach, how abusive soever they may be, are no provocation sufficient to free the party killing from the guilt of murder," this court said: "The first clause of the instruction declares that no provocation will mitigate or extenuate a homicide unless it amounts to personal violence or injury to defendant. The contrary was held in *State v. Weiners*, 66 Mo. 13; and while the court may not have intended, and probably did not intend, that no provocation less than personal violence or injury to defendant would reduce the crime from murder of the first to murder of the second degree, but that no other provocation would reduce it to manslaughter, the instruction was so worded and constructed as to be calculated to mislead the jury." In *State v. Kotovsky*, 74 Mo. 247, this court said: "Deliberation," as defined by this court, was not an essential element of murder at common law, but the man who in a passion, engendered by opprobrious words or other just provocation, as contradistinguished from lawful provocation, slew the one who uttered them, at the instant, was deemed guilty of murder, although the passion engendered by the insult was as great as that produced by a blow, and yet the latter provocation reduced the homicide to manslaughter, while the other did not mitigate the offense." "Our statute declares murders committed by 'lying in wait,' by poison, and in an attempt to perpetrate certain specified felonies, and all other willful, deliberate, and premeditated murders, to be of the first degree; and all other common-law murders to be of the second degree; and those murders committed in a heat of passion, engendered, not by what was legal provocation at common law to reduce a homicide from murder to manslaughter, but by opprobrious epithets or other insults, sufficient to arouse the same heat of passion which would be caused by a technical legal provocation, one of the second degree. What is such a provocation? An insult to a person, either by accusing him or a member of his immediate family of some infamous act, opprobrious words, or indecent gestures which convey imputations of criminal baseness against a person or his family, sufficient to arouse, in a man of ordinary pride and self-respect, a high state of passion and a spirit of resentment, are of such provocations, and the sufficiency of the provocation is to be determined by the court." In *State v. Elliott*, 98 Mo. 150, 11 S. W. 566, this court again said: "The principle of law is too well established to admit of question that words alone,

however provoking or insulting, will not reduce the killing to manslaughter. They alone do not furnish an adequate cause for passion." In *State v. Howard*, 102 Mo. 142, 14 S. W. 937, this court said: "The defendant, it is true, testified to certain threatening and abusive language used by the deceased. But the law is well settled that provoking or insulting words, or mere verbal threats, will not reduce the killing to manslaughter. Standing alone, they constitute no such provocation as will reduce the crime below murder." In *State v. Ellis*, 74 Mo. 207, it was said: "Now, at common law, if precisely the same state of mind which, when produced by a blow, will constitute the killing manslaughter, is produced by such grievous and degrading words of reproach as are naturally and justly calculated to produce that state of mind, the instant killing in such state of mind of the provoker will be murder. In a moral point of view, certainly the offense is no greater in the one case than in the other, but still the law declares it to be murder." *State v. Welners*, 66 Mo. 13; *State v. Curtis*, 70 Mo. 599; *State v. Robinson*, 73 Mo. 306; *State v. Bulling*, 105 Mo. 204, 15 S. W. 367, and 16 S. W. 830; *State v. Martin*, 124 Mo. 514, 28 S. W. 12. Other cases might be added, but surely no principle of law has ever been announced more frequently by this court. That this doctrine was not considered a mere platitude by this court in the various cases cited, an examination of the cases will, I think, clearly demonstrate. Conceding that certain states have, by statutes, so modified the law that insulting remarks concerning a female relative are made sufficient provocation, this only proves that the general doctrine, as announced by this court, is the prevailing rule, even in those states. The law has not been relaxed as to other insulting epithets and opprobrious words.

I shall not attempt to disguise my sympathy with the prisoner in this case. If, as the evidence seems clearly to establish, the deceased made the heartless and outrageous expression attributed to him, to the wronged father, it was well calculated to arouse all the passions of the defendant's nature; but "hard cases are the quicksands of the law," and we ought not, in my opinion, to overturn the law which has prevailed since the organization of the state. The learned circuit judge who tried this case, and the judges of all the circuit and criminal courts, are expected to be governed by the decisions of this court; and I am unwilling to say that they have erred during all these years in instructing juries that words alone, however opprobrious or insulting, will not reduce an intentional homicide, with a deadly weapon, from murder to manslaughter, after the numerous and unbroken line of decisions by this court to the same effect. Believing the law should remain settled on this point, I most respectfully dissent from this part of the opinion of my learned and able associate.

### ABBOTT v. GILLUM et al.

(Supreme Court of Missouri, Division No. 2.  
Nov. 21, 1898.)

#### APPEAL—REVIEW—OVERRULING MOTION FOR NEW TRIAL—EXCEPTIONS.

Where the overruling of a motion for a new trial is not excepted to; only the record proper can be reviewed.

Appeal from circuit court, Pike county; Reuben F. Roy, Judge.

Action by A. G. Abbott against Wright Gillum and another. There was a judgment for defendants, and plaintiff appealed. Affirmed.

A. W. Stewart, for appellant. Elliott W. Major and J. D. Hostetter, for respondents.

BURGESS, J. This is an action for \$5,000 damages for false imprisonment. It was tried before the judge and jury in the circuit court of Pike county, where there was a verdict and judgment for defendants, and plaintiff appealed. While the bill of exceptions discloses that plaintiff filed his motion for a new trial, and that it was overruled, it does not show that he excepted to the action of the court in overruling the motion; and under the repeated and uniform rulings of this court, unless an exception be taken and preserved, by bill of exceptions, to the action of the court in overruling a motion for a new trial, there is nothing before the supreme court for review except the record proper. *Ross v. Railroad Co.*, 141 Mo. 390, 38 S. W. 928, and 42 S. W. 957; *State v. Murray*, 126 Mo. 529, 29 S. W. 590; *State v. Hitchcock*, 86 Mo. 231; *Wilson v. Haxby*, 76 Mo. 345; *Danforth v. Railway Co.*, 123 Mo. 196, 27 S. W. 715; *State v. Harvey*, 105 Mo. 816, 16 S. W. 886; *McIrvine v. Thompson*, 81 Mo. 647; *State v. Marshall*, 30 Mo. 400. We find no error in the record proper, and therefore affirm the judgment.

GANTT, P. J., and SHERWOOD, J., concur.

### STATE v. LUCAS.

(Supreme Court of Missouri, Division No. 2.  
Nov. 21, 1898.)

#### THEFT—INDICTMENT—QUASHING—DISCRETION OF COURT—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—IMPEACHING EVIDENCE.

1. The fact that the word "guilts," in an indictment for hog-stealing, is spelled "guilts," does not vitiate the indictment.

2. The discretion of a trial court in ruling on a motion to quash an indictment cannot be reviewed.

3. A motion for a new trial must be supported by an affidavit of defendant, unless some excuse is shown for the omission.

4. Newly-discovered evidence which is merely for impeachment is not ground for a new trial.

Appeal from circuit court, Pulaski county; L. B. Woodside, Judge.

Ed. Lucas was convicted of grand larceny, and appeals. Affirmed.



Joe McGregor and Manes & Davis, for appellant. Edward C. Crow, Atty. Gen., and Sam B. Jeffries, Asst. Atty. Gen., for the State.

SHERWOOD, J. The jury impaneled to try defendant for grand larceny, said larceny consisting in stealing some hogs, as herein-after described, found him guilty as charged, and assessed his punishment at two years in the penitentiary. The indictment is as follows: "The grand jurors for the state of Missouri, summoned from the body of Pulaski county, impaneled, charged, and sworn, upon their oaths present that Ed. Lucas, late of the county aforesaid, on the 12th day of November, 1895, at the county of Pulaski, state aforesaid, eight head of hogs,—one sow with both ears off, of the value of ten dollars; three guilts marked with a swallow fork and upper bit in the right ear, of the value of five dollars each; and four shoats marked with a swallow fork and upper bit in the right ear, of the value of two dollars and fifty cents each,—and all of the aggregate value of thirty-five dollars, of the personal property of one James Waymire, then and there being, feloniously did steal, take, and carry away, against the peace and dignity of the state. A true bill. D. A. Clarborn, Foreman of the Grand Jury. W. D. Johnson, Prosecuting Attorney."

1. The trial court very properly denied the motion to quash the indictment. It is in usual and approved form. The fact that the word "gilts" is spelled with a "u" does not vitiate the indictment. Mere bad spelling does not have that effect, where the meaning is plain, and the word is idem sonans with the word properly spelled. 1 Bish. New Cr. Proc. §§ 354, 357, 688.

2. Trial courts have a discretion as to quashing indictments, which will not be revised by a higher court. 1 Chit. Cr. Law, 300; 1 Bish. New Cr. Proc. § 761; State v. Rector, 11 Mo. 28. So that, in any view, the mere failure to quash is not ground of appeal in this court.

3. The evidence in this case is unquestionably sufficient to warrant the finding of the jury, and the instructions on the part of the state and on behalf of defendant set forth the law of the case very plainly before the triors of the facts.

4. The motion for a new trial is unsupported by the affidavit of defendant. This is a fatal defect, unless some valid excuse appears for the unwarranted omission. State v. McLaughlin, 27 Mo. 111; State v. Campbell, 115 Mo. 391, 22 S. W. 367; State v. Fischer, 124 Mo. 460, 27 S. W. 1109. Besides, the only tendency of the supposed newly-discovered evidence was to contradict a witness who had testified for the state. This of itself makes the application for a new trial on the ground of newly-discovered evidence bad. State v. Welsor, 117 Mo., loc. cit. 570, 571, 21 S. W. 443, and cases cited.

5. Relative to the alleged separation of the jury, the evidence pro and con was submitted to the court, and we perceive no reason for disturbing its ruling in this regard.

These views result in affirming the judgment. All concur.

## STATE v. WHITMORE.

(Supreme Court of Missouri, Division No. 2  
Nov. 21, 1898.)

### ARSON—INDICTMENT—SUFFICIENCY.

1. Under Rev. St. 1889, § 3511, providing that the burning of "any dwelling in which there shall be at the time some human being" is arson in the first degree, and section 3512, providing that "every house, prison, jail," etc., shall be deemed a dwelling house, an indictment for arson in the first degree, charging defendant with burning a jail, which fails to allege that it is a dwelling house, is fatally defective.

2. Under Rev. St. 1889, § 3512, providing that a jail which is occupied shall be deemed a dwelling house of any person having charge thereof, or so lodged therein, within the meaning of the statute defining arson, an indictment for burning a jail must allege its ownership.

3. When it was in charge of the sheriff, who resided in the upper story of it, such ownership should be laid in him.

4. Where defendant was convicted of arson in the first degree, and the indictment proves defective, the state cannot treat matters of description, which are necessary only under the statute defining arson in the first degree, as immaterial and surplusage, and thus bring it within the provisions of the statute defining arson in the third degree.

Appeal from circuit court, Grundy county; P. C. Stepp, Judge.

Eugene J. Whitmore was convicted of arson in the first degree, and appeals. Reversed.

Harber & Knight, for appellant. Edward C. Crow, Atty. Gen., and Sam B. Jeffries, Asst. Atty. Gen., for the State.

SHERWOOD, J. Arson the charge, 10 years' imprisonment in the penitentiary the punishment, and the indictment as follows: "The grand jurors for the state of Missouri, and from the body of Grundy county, duly impaneled, charged, and sworn, upon their oaths present and charge that on the — day of —, 1897, at Grundy county, Missouri, one Eugene Whitmore, being then and there a prisoner confined in the county jail of Grundy county, Missouri, then and there situate, the said county jail being then and there the prison of the said Grundy county, Missouri, wherein the prisoners convicted of misdemeanors were then and there usually confined and lodged, and wherein also certain human beings, officers, servants, and employes of said county, in charge of and employed in said county jail, then and there did usually lodge, he, the said Eugene Whitmore, did then and there feloniously, willfully, and maliciously set fire to the county jail aforesaid, and the said county jail then and there willfully, feloniously, and maliciously did

burn, in which said county jail were then and there divers human beings, who usually lodged therein, against the peace and dignity of the state. John W. Schooler, Prosecuting Attorney for Grundy County, Missouri." The sufficiency of this indictment having been challenged, it is in order to determine that point.

Sections 3511, 3512, Rev. St. 1889, relating to the crime of arson, are these:

"Sec. 3511. Arson First Degree. Every person who shall willfully set fire to or burn any dwelling house in which there shall be at the time some human being, or who shall willfully set fire to or burn any boat or vessel in which there shall be at the time some human being, or who shall willfully set fire to or burn any bridge or causeway upon any railroad, shall upon conviction be adjudged guilty of arson in the first degree.

"Sec. 3512. Dwelling House Defined. Every house, prison, jail or other edifice, which shall have been usually occupied by persons lodging therein, shall be deemed a dwelling house of any person having charge thereof or so lodged therein; but no warehouse, barn, shed or other out-house shall be deemed a dwelling house, or part of a dwelling house, within the meaning of this or the last section, unless the same be joined to or immediately connected with and is part of a dwelling house."

Section 3515 of the same article is the following:

"Every person who shall willfully set fire to or burn any house, building, barn, stable, boat or vessel of another, or any office or depot or railroad car of any railroad company, or any house of public worship, college, academy or school-house, or building used as such, or any public building belonging to the United States or this state, or to any county, city, town or village, not the subject of arson in the first or second degree, shall, on conviction, be adjudged guilty of arson in the third degree."

The first question presented for consideration is the sufficiency of the indictment, defendant insisting that it fails to charge any offense under the law. I have quoted the several sections aforesaid in order to show under which section the indictment was intended to be drawn. Evidently the indictment was drawn under section 3512, and is for arson in the first degree. The lower court so treated it, because it instructed the jury that, if they found defendant guilty as charged, they should assess his punishment at not less than 10 years' imprisonment in the penitentiary, an instruction only proper where a trial occurs for arson in the first degree. There are, as it seems to me, several defects in this indictment, which I will now proceed to make comment upon. To begin with, the indictment is bad because it does not allege that the building burned was a "dwelling house," because where this is the statutory term employed, there the indictment must use it, or else the indictment will be ill. *McLane*

*v. State*, 4 Ga. 335; *State v. Sutcliffe*, 4 Strob. 372; 1 Whart. Cr. Law (9th Ed.) § 840. These words are words descriptive of the crime of arson in the first degree, and therefore must be employed.

Within the meaning of section 3512, a jail, when "usually occupied by persons lodging therein, shall be deemed a dwelling house of any person having charge thereof or so lodging therein"; but, in order to make the burning of such building arson in the first degree, there must be in the building at the time of the burning some human being. At common law the ownership of the house must be alleged, and proved as laid. 1 Whart. Cr. Law (9th Ed.) § 841. Our statute has not done away with this requisite of the common law. In fact, section 3512 has made such provision as renders it easy to allege and prove the quasi ownership. Such ownership should therefore have been alleged, and as the jail was in charge of the sheriff, and as he, with his family, lived in the upper story of it, the ownership should have been laid in him, giving his name. In New York, where the statute in regard to arson in the first degree is, with the exception of the words "in the nighttime," substantially identical with our own, it has been ruled that the house or building burned must be described as the house or building of the person in possession. *People v. Gates*, 15 Wend. 159. We have been referred to *State v. Johnson*, 93 Mo. 73, 5 S. W. 699, as upholding the view that the ownership has been sufficiently alleged in this case; and it is true that case does so hold, but that ruling was made by quoting only a portion of section 3512, to wit, "every house, prison, jail or other edifice, which shall have been usually occupied by persons lodging therein"; thus cutting the section in two, and leaving off the important and controlling words, "shall be deemed a dwelling house of any person having charge thereof, or so lodging therein." With those words thus omitted, that ruling was correct; but their omission was an emasculation of the statute, and wholly unwarranted. That case therefore should no longer be held as binding authority. An additional reason occurs why *Johnson's Case* should not be followed as a precedent: The indictment, though for the same degree of arson as the present one, does not allege that there was a human being in the penitentiary at the time of the burning. This was doubtless the fact, but that did not help the indictment. There are doubtless cases where the charge consists in burning a public building; where no ownership is necessary to be specially alleged, any more than to say that it was "the county jail of — county." *Com. v. Williams*, 2 Oush. 582; *State v. Roe*, 12 Vt. 93.

If the present indictment had been drawn under section 3515, such a general averment would indubitably have been sufficient. But the indictment was drawn under section 3512 aforesaid, and therefore it is unnecessary to consider, except by way of illustration, what

would have been the proper form of an indictment drawn under section 3515.

Again, defendant having been tried and convicted, under section 3512, of arson in the first degree, the state will not be allowed to treat matters of description, which are only necessary to be alleged under that section, as immaterial and surplusage, and thus bring this case under the provisions of section 3515. In civil cases a party will not be allowed to take inconsistent positions in court. *McClanahan v. West*, 100 Mo. 309, 13 S. W. 674, and cases cited. And in criminal cases, in like circumstances, the state should also be estopped from trying a cause on one theory in the lower court, and then insisting in this court, upon affirmance of the judgment on another and different theory. Inasmuch as the indictment in this case is, for the reasons stated, wholly insufficient, the judgment should be reversed, and defendant discharged, and it is so ordered. All concur.

#### STATE v. WADE.

(Supreme Court of Missouri, Division No. 2.  
Nov. 21, 1898.)

##### HOMICIDE—INDICTMENT—SUFFICIENCY.

1. Under Bill of Rights, § 22, which declares that in criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation, the conclusion of an indictment for the murder which fails to show that the grand jury charge that the killing was murder is insufficient, although Rev. St. 1879, § 1821, provides that no indictment is invalid for omitting to allege that the grand jurors were impeached, sworn, or charged, etc.

2. Where a count in an indictment for murder does not have the formal conclusion alleging that the killing was murder, the count only charges manslaughter.

3. The failure of an indictment to contain a proper conclusion may be taken advantage of by motion in arrest.

4. The second count of an indictment for homicide, which charges that the murder was committed "in the manner and form aforesaid" (referring to the first count), but which does not allege what the manner and form or the means was, is fatally defective.

5. The failure of the first count in an indictment to contain a formal conclusion is not cured by a formal conclusion in the second count.

Appeal from circuit court, Clay county; E. J. Broadbuss, Judge.

Francis M. Wade was convicted of murder in the second degree, and appeals. Reversed.

J. L. Farris, W. A. Cravens, and W. J. Courtney, for appellant. Edward C. Crow, Atty. Gen., Sam B. Jeffries, Asst. Atty. Gen., and W. W. Graves, for the State.

**SHERWOOD, J.** Charged with murder in the first degree, because of shooting to death, with a shotgun, Alexander Schamel, defendant was found guilty of the second degree of that offense, and his punishment assessed at 20 years in the penitentiary. The difficulty which resulted in the tragedy had its origin in those fruitful sources of homicide in this

state,—a disputed boundary and a division fence.

The first count in the indictment charged the homicide to have been perpetrated with a shotgun, and is in usual and approved form. But that count is bad, because it has no conclusion, such as was pointed out to be necessary in *State v. Meyers*, 99 Mo. 107, 12 S. W. 516, and cases cited. Owing to such omission, the first count only charges manslaughter. *Id.*, 99 Mo., loc. cit. 115, 12 S. W. 518. Such a defect may be taken advantage of on motion in arrest, and, if no such motion be made, it is equally available in this court on appeal or writ of error. *Id.*, 99 Mo., loc. cit. 112, 12 S. W. 517. Such point was, however, made in the lower court by motion in arrest.

The second count in the indictment is the following: "And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge that Lewis Wade, before the said felony and murder was committed in the manner and form aforesaid, and by the means aforesaid, at the time and place aforesaid, did then and there unlawfully, feloniously, willfully, deliberately, and premeditatedly incite, move, procure, aid, counsel, hire, and command him, the said Francis M. Wade, to do and commit the said felony and murder aforesaid, in manner and form aforesaid, and by the means aforesaid, at the time and place aforesaid, to do and commit; and the grand jurors aforesaid, upon their oaths aforesaid, do say that Francis M. Wade and Lewis Wade, him, the said Alexander Schamel, at the time and place aforesaid, in the manner and by the means aforesaid, feloniously, on purpose, willfully, deliberately, premeditatedly, and of their malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state. William H. Woodson, Prosecuting Attorney."

The second count is also defective in these particulars: It does not allege what were "the means aforesaid," nor what "the manner and form aforesaid" by which "the said felony and murder was committed." Though it is well settled that time, place, or person may be referred to by the use of the words "said," "aforesaid," "same," etc., yet this is the limit of such short method of reference; it cannot without more particularity, without express reference to a previous count, supply those descriptive averments which enter into the vitals of the offense. *State v. Wagner*, 118 Mo. 626, 24 S. W. 219, and cases cited. Such reference, Bishop says, "must be so full and distinct as, in effect, to incorporate the matter going before with that in the count wherein it is made." 1 Bish. New Cr. Proc. § 431. Thus, he says, by way of illustration, that though the first count charged an assault on "Esther Ricketts, an infant above the age of ten, and under the age of twelve, years," etc., yet that the second count, by the use of the words "the said Esther Ricketts," did not, with such reference, carry with it the allegation contained in the

first count, that Esther Ricketts was "an infant above the age of ten, and under the age of twelve years"; citing *Reg. v. Martin*, 9 Car. & P. 215. So, also, where a first count set out the larceny of goods of a stated value, and ownership, it was adjudged such ownership and value were not incorporated into the second count, which charged a receiving of the "goods aforesaid"; citing *State v. Lyon*, 17 Wis. 237. In *Keech v. State*, 15 Fla. 591, the precise point now under consideration was adjudicated. There the first count in the indictment charged that William Newton murdered Ellen Wells; and, second, that the accused, Mary Ann Keech, alias Mary Ann Newton, etc., in the state of Florida, was accessory thereto before the fact, and did counsel, hire, and procure the said William Newton to commit the murder. The second count omitted to allege the fact of the murder by William Newton, in express words, but charges that Mary Ann Keech, on, etc., in the state of Wisconsin, did aid the said William Newton by hiring, etc., the commission of the murder of Newton, "in manner and form aforesaid," referring to the allegation of the murder as stated in the first count. And this reference in such second count was held insufficient, in that it omitted those averments which were necessary to a complete statement of the offense. In *State v. Longley*, 10 Ind. 482, it was ruled—and this in accordance with the universal rule that each count in an indictment is required to be sufficient in itself—that averments in one count cannot aid defects in another. This is only announcing in another form the familiar rule "that each count in an indictment must be a complete indictment in itself." To the like effect, see *Watson v. People*, 134 Ill. 374, 25 N. E. 567; 1 Chit. Cr. Law, 249; Whart. Cr. Pl. (9th Ed.) § 299; *State v. Phelps*, 65 N. C. 450.

We come now to consider the formal conclusion to the second count, and what effect it has in this case. Upon this point it has been ruled that, though the last count contain the usual and correct conclusion, yet that one count, with a proper conclusion, does not help another without it. *State v. Cadle*, 19 Ark. 618; *State v. Soule*, 20 Me. 19. Inasmuch as the indictment is fatally defective in matter and manner aforesaid, we will not go into the other errors assigned, but reverse the judgment and remand the cause. All concur.

#### SHELY v. SHELY.<sup>1</sup>

(Court of Appeals of Kentucky. Dec. 1, 1898.)

TRIAL—REQUEST BY COURT OF JURY TO DELIBERATE FURTHER—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

1. The jury, after considering for two days a case, the trial of which had consumed a week, being apparently unable to agree, the court asked them to deliberate further, referring to the length of time it had taken in trying the case, and saying, "I feel that no twelve men can be

found better qualified than you to decide it." Held, that the statement was not objectionable.

2. Newly-discovered evidence not of a conclusive or preponderating character does not authorize a new trial.

Appeal from circuit court, Fayette county.

"Not to be officially reported."

Action by W. F. Shely against J. D. Shely on two promissory notes. Judgment for plaintiff, and defendant appeals. Affirmed.

Forman & Bartlett, for appellant. Breckinridge & Shelly, for appellee.

HAZELRIGG, J. The appellee sued his brother, the appellant, on two notes, and as to one of them was met with a plea of non est factum. While the amount of this note is for \$326 only, the feeling engendered by this answer, and the unusual effort made by each brother to sustain himself against the other, prolonged the trial for about a week; and when finally the jury retired to consider the case, it remained apparently unable to agree for some two days, but, after direction by the court to try again, a verdict was at last returned for plaintiff, the appellee. This direction or admonition of the court furnishes a ground of complaint on this appeal. It was as follows: "Gentlemen, I will ask you to deliberate further on this case. This is not done to punish you. I never have and never will try to force any juror to find a verdict which his conscience does not approve. But you know the length of time we have taken in trying this case, and I feel that no twelve men can be found better qualified than you to decide it; and it is given to you for further deliberation in the hope that you may be enabled, after further consideration, to make a verdict." We can find no fault with this statement. Even if it be true, as appellant avers in his grounds for new trial, that up to the time it was made a majority of the jury stood for the defendant, the statement contains nothing whatever of an objectionable nature. We have carefully examined the objections made by appellant to the court's rulings on certain matters of testimony, and find no error which could have affected the substantial rights of the appellant; nor do we think that the alleged newly-discovered evidence was of a conclusive or preponderating character. The judgment is affirmed.

#### SMYSER v. FRANCK.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 22, 1898.)

DEPOSITIONS—VENDOR AND PURCHASER—SHORT-AGE IN EXCHANGE OF LANDS.

1. Depositions are not admissible against a defendant in a cross petition who was not a party thereto when they were taken.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

2. There can be no recovery for a shortage in the exchange of lands, in the absence of evidence as to the value of the land omitted from the deed.

Appeal from circuit court, Jefferson county.  
"Not to be officially reported."

Actions by George Hendricks and William T. Scholl against J. L. Smyser and Jacob T. Franck to quiet title. Judgment for money in favor of Jacob T. Franck against J. L. Smyser on cross petition, and J. L. Smyser appeals. Reversed.

Alfred Selligman, Phelps & Thum, and O'Neal & Pryor, for appellant. Harris & Barr, for appellee.

GUFFY, J. This record discloses the fact that the appellant and appellee exchanged or swapped parts of town lots or city property owned by them respectively. It is claimed that appellant was to receive from appellee certain property fronting on the Shelbyville pike, or Frankfort avenue, and appellant was to convey to appellee property on Prospect alley, or avenue, at the rate of two feet for each one foot obtained by appellant on Frankfort avenue. Some time after the conveyance had been made, appellee seems to have reached the conclusion that Smyser was not entitled to all the property which was in fact included in the deed made to him, or that appellee had not had conveyed to him as much land as he was entitled to. Smyser in the meantime had sold the property so conveyed to him by appellee, and some sort of action or proceeding was taken in court in regard either to the title or possession of the property in contest. From the record before us, we infer that the court below decided in favor of the vendees of appellant and against the appellee. We also find from the record before us that the court rendered a judgment in favor of appellee against appellant for the sum of \$525, from which appellant prosecuted an appeal to the superior court, and the court reversed that judgment, for the reason, as given in the opinion, that appellant was not before the court at the time the judgment was rendered. After the return of the case, pleadings were filed and proof taken, and upon final hearing the court rendered judgment in favor of appellee against appellant for \$525; and from that judgment this appeal is prosecuted.

The depositions filed prior to the appeal seem to have been excluded by order of court, and properly so, as they were taken before appellant was a party to the complaint of appellee. The real ground of contention is as to the making of deeds, or the ground in controversy appears to be that upon the part of appellant it is assumed that Shelbyville pike had been changed to Frankfort avenue, and widened 16½ feet, and that the appellee's lot stopped or was bounded by the avenue as extended, and therefore upon that basis or assumption appellant received only the number of feet he was entitled to under

the terms of the contract aforesaid. Appellee's contention is that the extension had not in fact been made, but that he was owner of the property up to the original line of the Shelbyville Pike, and that, inasmuch as he had not received his proportion of two feet to one, he either owned the extension, or ought to have pay from Smyser therefor, to the extent of shortage. We fail to find any proof in this record as to the value of the parcel of land that is alleged to have been conveyed to appellee, or as to the value of the 16½ feet alleged extension. It therefore follows that the judgment is not sustained by sufficient evidence. But, if the proof sustained the judgment as to the value, still we are inclined to the opinion that the preponderance of the evidence sustains the contention of appellant, namely, that the conveyances were made in accordance with the contract in question, and understood at the time by the parties, and acquiesced in for a considerable time by the appellee, or, in other words, that appellee failed to show such fraud or mistake as entitled him to any relief. For the reasons indicated, the judgment appealed from is reversed, and the cause remanded, with directions to dismiss appellee's cross petition, and for proceedings consistent herewith.

#### LOUISVILLE & N. R. CO. v. KELLER.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 26, 1898.)

CARRIERS—RIGHT OF PASSENGER LEAVING TRAIN TO SHELTER IN WAITING ROOM — OBSTRUCTION OF WAY—EXCESSIVE VERDICT — PUNITIVE DAMAGES.

1. As a passenger leaving a train at a station was entitled to an unobstructed way to the waiting room for shelter, she may recover damages for injuries from exposure to a rain-storm by reason of the fact that the way was obstructed by a freight train.

2. A verdict for \$260 for such injuries is not excessive, punitive damages being authorized.

3. As plaintiff was laughed at and tantalized by defendant's servants on the train while exposed to the storm, an instruction authorizing punitive damages was proper.

Appeal from circuit court, Bullitt county.

"Not to be officially reported."

Action by Millie Keller against the Louisville & Nashville Railroad Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

Fairleigh & Straus and Edward W. Hines, for appellant. Charles Carroll, for appellee.

WHITE, J. The facts of this case appear to be that appellee, in company with some other ladies and a little boy, bought tickets for passage over appellant's road, at Louisville, to go to Shepherdsville. They were carried the distance, and when the passenger train reached the station at Shepherdsville it

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

was raining and hailing very hard. Appellee was assisted from the passenger train by the brakeman to the ground, and there left. She had no umbrella. It was raining and hailing. Just before this passenger train came to the depot a freight train of 31 cars came also to the depot, and this freight train was on the track between the depot and the passenger train from which appellee alighted. To seek shelter from the storm, appellee must either crowd under the freight train and get into the depot, or go around the freight train and go back to the depot on the other side of the freight train. To go around the freight train, appellee must travel between the tracks, with a train on either track; and to go the shorter distance would be to go in front of the engine, something near 100 yards,—the other way, about 200 yards,—and then the same distance back to the depot. On the side of the passenger train opposite the freight train there was no house, and, on account of a wire fence, appellee could not have gotten out that way. Appellee did neither of these things, but stood there in the storm, without protection from the rain and hail, till the freight train was moved out of the way, this time variously estimated at from two to ten minutes. The proof shows that while appellee was thus subjected to the rain and storm she was laughed at and tantalized by some of the employes on the train. When appellee reached the depot, she was wet, and her clothes soiled. There she found her friend waiting, and she went her way. This action was brought for the damage for being compelled to remain in the storm, because no shelter was provided, or rather because of the negligent obstruction by the freight train of the way to the depot. Appellant, by its answer, denied all negligence; denied its duty to keep an unobstructed passage to its waiting room from the train; denied that, at the time appellee was subjected to the wetting from the storm, it owed her any duty, or that she was then a passenger; pleaded that the injury was caused by the act of God, and not by any negligence or carelessness on its part. A trial resulted in a verdict for appellee in the sum of \$280. After motion and grounds for new trial had been overruled, this appeal is prosecuted.

The reasons assigned for a new trial are: Refusal to peremptorily instruct the jury to find for appellant; in giving instructions to the jury; in refusing instructions asked for by appellant; that the verdict is contrary to law and not supported by the evidence, and is excessive.

Counsel for appellant contends that, when appellee was assisted from the passenger train at the depot for which she purchased her ticket, the appellant ceased to owe her any duty; that she ceased to be a passenger, and the appellant was not negligent in permitting the freight train to stand on the track nearest the depot; and that, as there was a way open between the tracks to go to the town of Shep-

herdsville, appellee, if she desired shelter, should have gone that way, and in any event she must have been exposed to the storm and rain in going to Shepherdsville, even if the freight train had not been where it was. Counsel, on this premise, argues conclusively that the case must be reversed, for several reasons. We cannot assent to such a proposition. We are of the opinion that appellee did not cease to be a passenger when she alighted from the train; but, on the contrary, was a passenger, and entitled to protection from the weather, in the depot of appellant, for a reasonable length of time to prepare to resume her journey. Being entitled as a passenger to the use of depot for shelter, she was likewise entitled to an open and unobstructed way thereto, and especially is this true under such circumstances as were here presented.

The instructions given present the law more favorably to appellant than it was entitled to, as they, in effect, tell the jury that appellee must have sought shelter in Shepherdsville, when she had a right to shelter at the depot where she alighted. The instructions refused were properly so, for two reasons: First, they were erroneous and did not state the law; second, they were, in effect, given, and as given are more favorable to appellant than it was entitled to. We are also of the opinion that the instructions permitting punitive damages was properly given, as the facts proven in the case show that appellant was guilty of gross negligence in obstructing the way to the depot. Appellee had a right to alight from the train at the place provided for shelter for passengers, either to or from Shepherdsville; and, with this way obstructed as it was shown to be, the practical effect was to put appellee off the train 200 yards from the depot in a storm. This it could not do. The verdict is not excessive, and is not flagrantly against the evidence.

Appellant also complains of the action of the trial court in giving to the jury an instruction authorizing punitive damages. This was not error. The conduct of the servants and employes on the train, if true, authorized an instruction on punitive damages. Finding no error prejudicial to appellant, the judgment is affirmed, with damages.

#### WIGGINS v. COMMONWEALTH.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 28, 1898.)

CRIMINAL LAW—CONTINUOUS PROSECUTION—CONTINUANCE—CHALLENGE TO JURORS.

1. Where an indictment for the murder of John Bruce, found at a former term, was remanded to the grand jury, and an indictment returned for the murder of N. K. Bruce; there being nothing to show that the offense charged in the latter indictment was the same as that charged in the former, a motion for a continuance, made at the term at which the new indictment was returned, is governed by

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Cr. Code, § 189, which by amendment of May 15, 1886, applies only to a motion for continuance made at the term at which the indictment was found.

2. Under Cr. Code, § 215, requiring each party to exhaust his challenges to each juror before the other begins, where a juror was accepted by the commonwealth, and not challenged by the defense, the defendant could not, after the panel was filled, peremptorily challenge such juror.

Appeal from circuit court, Muhlenberg county.

"To be officially reported."

Alexander Wiggins was convicted of manslaughter under an indictment for murder, and appeals. Reversed.

Jonson & Wickliffe, for appellant. W. S. Taylor, Atty. Gen., and M. H. Thatcher, for the Commonwealth.

DU RELLE, J. The appellant was indicted for the murder of John Bruce in January, 1897, and the case continued from term to term, until September 6, 1898, when, upon motion of the commonwealth, the indictment was dismissed, "and this prosecution is remanded to the present grand jury of Muhlenberg county." On the same day another indictment was returned by the grand jury, accusing appellant of the murder of N. K. Bruce. On the same day the case was called, the commonwealth announced ready for trial, and appellant moved for a continuance upon the ground of the absence of a material witness, who, it was claimed, would show threats by deceased against appellant, and who had been recognized to appear upon the trial of the first indictment at that term. The court permitted the affidavit to be read upon the hearing as a deposition, but refused to require the commonwealth to admit the truth of the averments therein contained.

By section 189 of the Criminal Code it is provided that "when the ground of application for a continuance is the absence of a material witness, and the defendant makes affidavit as to the facts which such witness would prove, the continuance shall be granted, unless the attorney for the commonwealth admit upon the trial that the facts are true." By an amendment to section 189, adopted May 15, 1886, it was provided that, upon such application, "the attorney for the commonwealth shall not be compelled, in order to prevent the continuance, to admit the truth of the matter it is alleged in the affidavit such absent witness or witnesses would prove, but only that such witness or witnesses would, if present, testify as alleged in the affidavit" (Acts 1886, c. 1145); with a further provision that the commonwealth is permitted to controvert the statements of such affidavits by other evidence, etc. It is further provided that the provisions of the amendatory section shall not apply to a motion for continuance made at the same term at which the indictment in the action is found.

There seems to be nothing in this record to show that the killing of N. K. Bruce, char-

ged in the second indictment, was the same offense charged in the former indictment; and, this being so, we are constrained to the conclusion that section 189 of the Code applies, and not the amendatory act, for the reason that the motion for the continuance was made at the same term at which the indictment in the action was found.

Another objection is that, after a juror had been accepted by the commonwealth and not challenged by the defense, the defense was not permitted, when the panel was filled, to peremptorily challenge such juror. This seems to us to be specifically provided for by Cr. Code, § 215, which requires that each party must exhaust his challenges to each juror before the other begins; and this has been construed in *Munday v. Com.*, 81 Ky. 237, where, in an opinion by Chief Justice Lewis, it was held that "the defendant, as well as the commonwealth, is therefore required to exhaust his challenges to each juror of a panel when presented to be passed upon." This ruling was therefore not error. The judgment is reversed, and cause remanded, with directions to award appellant a new trial, and for further proceedings consistent herewith.

SMITH et al. v. MILLER'S ADM'R et al.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 26, 1898.)

CONSTRUCTION OF WILL—GRANDCHILDREN INCLUDED BY DEVISE TO CHILDREN.

Under a devise of testator's estate to his wife for the support of herself and the children of the marriage during her life or widowhood, and at her death or marriage to be equally divided among testator's "then living children," the descendants of deceased children share in the division on the widow's death.

Appeal from circuit court, Graves county; "Not to be officially reported."

Action by J. H. Brewer, administrator with the will annexed of W. W. A. Miller, and administrator of Rebecca Miller, for a construction of the will of W. W. A. Miller. Judgment construing will, and D. A. Smith (by guardian) and Dallas Miller appeal. Reversed.

D. G. Park, for appellants. Robbins & Thomas and W. W. Robertson, for appellees.

GUFFY, J. W. W. A. Miller departed this life in Graves county, Ky., on the — day of —, 1880, after having first made and published his last will and testament, which was duly probated. The fifth clause of the will reads as follows: "I desire that my wife, Rebecca Miller, shall be made my sole heir, to keep or dispose of my whole property as she may think best for the support of herself and the children during her life or widowhood; and at her death or marriage to be sold, and the proceeds (if any is left) or the

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

property without selling, to be equally divided among my then living children." The widow did not marry, and in June, 1887, the widow died intestate. It appears that J. H. Brewer was appointed administrator de bonis non with the will annexed of said W. W. A. Miller, and also appointed administrator of Rebecca Miller, and instituted suit in the Graves circuit court, and, among other things, asked for a construction of the will. It appears that at the time of the death of the testator he had five living children, namely, S. G. Miller (now McGrew), Bettie Miller, Ezra Miller, Milford Miller, and Rosa Miller, all unmarried at the time. Milford Miller died in 1885, leaving one only heir, Dallas Miller. Rosa Miller married Elbert Smith, and died in 1885, leaving one only child, D. A. Smith.

It was claimed upon the part of the surviving children that by the terms of the will they were entitled to the entire property mentioned in the will, while it was contended for the grandchildren that each was entitled to one-fifth of said property. The court adjudged that the three living children were entitled to the entire estate, and from that judgment this appeal is prosecuted. Several other controversies were involved in the consolidated suits in which the judgment aforesaid was finally rendered, but the only question presented here for decision is as to the correctness of the judgment appealed from, or, in other words, it is necessary to determine the meaning or the true construction to be placed upon the fifth item of the will aforesaid. We have carefully examined the authorities relied on by both appellants and appellees, and we are of opinion that under the doctrine announced by this court in *Dunlap v. Shreve*, 2 Duv. 389, *Chenault's Guardian v. Chenault's Ex'rs*, 88 Ky. 83, 11 S. W. 87, and *Fuller v. Martin*, 96 Ky. 500, 29 S. W. 315, the testator used the term "children" in the general sense of issue or descendants, and that there is nothing in the will to indicate or authorize the court to hold that it was the intention of the testator to exclude the descendants of any of his deceased children from an equal division of the property referred to. It results, therefore, that the judgment appealed from is erroneous, and the same is reversed, and the cause remanded, with directions to adjudge to the appellants, Dallas Miller and D. A. Smith, one-fifth each of the property in contest, and for proceedings consistent herewith.

#### SHARPE v. MCCREERY et al.1

(Court of Appeals of Kentucky. Nov. 26, 1898.)

#### APPEAL AND ERROR—SUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT—PARTNERSHIP.

1. A verdict found on conflicting evidence sufficient to support a verdict for either party will not be disturbed on appeal.

1 Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

2. One who shares in the profits and losses of a business is a partner.

Appeal from circuit court, Jefferson county.

"Not to be officially reported."

Action by James McCreery & Co. against George Rinker and Augustus Sharpe on an account. Judgment for plaintiffs, and defendant Augustus Sharpe appeals. Affirmed.

M. A., D. A., & J. G. Sachs, for appellant. A. C. Rucker and Pryor, O'Neal & Pryor, for appellees.

GUFFY, J. The appellees instituted this action in the Jefferson circuit court, common pleas division, against George Rinker and the appellant, Augustus Sharpe, alleging that said defendants were partners trading and doing business under the firm name of George Rinker, and that as such they bought of plaintiffs a certain bill of goods, amounting to \$947.34, for which plaintiffs prayed judgment. Rinker made no defense, but the appellant, Sharpe, denied at any time being a partner, and having anything to do with the buying and selling of goods in question; and, in short, disclaimed any connection with, or liability for, the purchase of the goods in question. After the issues were made up and evidence heard, the jury returned a verdict in favor of the plaintiffs against the appellant for the amount claimed, and, his motion for a new trial having been overruled, he has appealed to this court, and asks a reversal.

The grounds for a new trial are, in substance, as follows: (1) The verdict is not sustained by sufficient evidence, and is contrary to law and evidence; (2) errors of law occurring at the trial, as shown by the stenographic report of the trial and the court record herein, which errors were excepted to as they occurred by said Sharpe, said errors consisting principally in granting erroneous instructions, and excluding competent testimony offered by said Sharpe, and admitting other testimony against said Sharpe's objections.

More than 200 pages of evidence are embraced in the bill of exceptions. It is therefore impracticable to attempt to recite the substance thereof, and the same, if stated, would be of no benefit to either party. We are not of opinion that any error prejudicial to the substantial rights of either party as to the admission or rejection of testimony occurred during the trial. It may be true that the evidence is conflicting, and, in our opinion, would have been sufficient to sustain a verdict for either plaintiffs or defendants, and, this being true, we are not authorized to disturb the verdict of the jury.

The instructions are as follows: "No. 1. The court instructs the jury that unless they shall believe from the evidence that on the 16th day of October, 1894, when plaintiffs sold the goods sued for herein, the de-



fendant Augustus Sharpe was a partner of the defendant George Rinker in the dry-goods business, they should find against the defendant Rinker only in the sum of \$947.34, with interest from the 1st day of January, 1895; but if they shall believe from the evidence that the defendant Sharpe was, at the time mentioned, a partner of Rinker in said business, then they should find against both of the defendants in the sum named. No. 2. Unless the jury shall believe from the evidence that the defendant Sharpe was to share in the profits and losses of said business, they should find against the defendant Rinker only. But if Sharpe was to share in the profits and losses of said business, then he was a partner, and the verdict should be against both of the defendants." It appears that both parties excepted to the instructions, which seem to have been given by the court on its own motion, but neither appellant nor appellees offered any instructions. It seems to us that the instructions correctly stated the law applicable to the case on trial; hence no reversal can be had on account of any error of law. Perceiving no error to the prejudice of appellant's substantial rights, the judgment appealed from must be and is affirmed, with damages.

**ALLEN et al. v. DILLINGHAM'S ASSIGNEE.<sup>1</sup>**

(Court of Appeals of Kentucky. Nov. 30, 1898.)

**INSOLVENCY — PREFERENCE OF CREDITORS — ASSIGNMENT BY OPERATION OF LAW—HOMESTEAD.**

1. A guarantor is a debtor, within Ky. St. § 1910, providing that every act done by a debtor in contemplation of insolvency, and with the design to prefer one or more creditors to the exclusion of others, shall operate as an assignment of all the debtor's property.

2. Two months before making an assignment for the benefit of his creditors, one who was liable as guarantor of a debt of a corporation, of which he was a stockholder and the president, executed to the creditor a conveyance of his dwelling house, which was practically his only unincumbered property; the consideration being paid in most part by the transfer to the grantor of the claim against the corporation of which he was guarantor. Just before executing the deed, the guarantor wrote to the grantee that, if business improved, he would pull out and make the money with which to redeem the property, but, if business did not improve, he would desire that the grantee should be protected, and, in the event the corporation should go down, he would wish the transfer to be made so long before that event that no one could attack it as an act of bankruptcy. *Held*, that the conveyance was made in contemplation of insolvency, and with the intent to prefer the grantee, and therefore operated as an assignment for the benefit of creditors.

3. Where a deed executed to a creditor is declared to be a preference, and to operate as an assignment for the benefit of creditors, the grantee is entitled to the benefit of the grantor's homestead exemption in the property conveyed.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Appeal from circuit court, Jefferson county. "To be officially reported."

Action by H. V. Loving, assignee of W. H. Dillingham, against Charles E. Arnold and others to have a certain conveyance declared to operate as an assignment for benefit of creditors. Judgment for plaintiff, and defendants appeal. Reversed.

James Quarles, Chas. Quarles, and Charles, Spence & Quarles, for appellants. D. J. Heyman, for appellee.

GUFFY, J. This appeal is prosecuted from a judgment of the Jefferson circuit court, chancery division, rendered in the suit of H. V. Loving, assignee, etc., against Charles E. Arnold, etc.; the object of the action being to obtain a judgment holding that a certain conveyance of a house and lot in Louisville, Ky., to Charles E. Arnold, was made with the intent to prefer N. R. Allen's Sons, and in contemplation of insolvency upon the part of the vendor, Dillingham. The opinion of the court below contains so clear a statement of the matter in controversy, as well as the law applicable thereto, that we copy as follows from said opinion:

"The Curd & Sinton Manufacturing Company was a corporation organized in 1889 under the general laws of Kentucky, with corporate power to carry on the manufacture of saddles, harness, etc., at Louisville. Its capital stock was \$100,000. From the beginning of its business, W. H. Dillingham was a stockholder and president of the corporation. He held originally \$25,000 of the stock, and his holding was enlarged in 1894 to \$75,000. During the continuance of the business of the corporation he resided in Louisville, and he now resides there. The defendants Charles Allen and Nathan Allen reside in Kenosha, Wisconsin, where they have carried on for many years the business of leather manufacturers as partners under the firm name of N. R. Allen's Sons. The Curd & Sinton Manufacturing Company was a customer of N. R. Allen's Sons during the entire term, or nearly so, of its business existence; and, until the guaranty hereinafter stated was executed, sales made by N. R. Allen's Sons to the Curd & Sinton Manufacturing Company were upon the sole credit of the corporation. In December, 1894, W. H. Dillingham and Harry Sinton were the only stockholders of the corporation; Mr. Dillingham owning \$75,000, and Mr. Harry Sinton \$25,000, of the \$100,000 of the capital stock. At that time N. R. Allen's Sons, following a business policy which they had adopted, requested Mr. Dillingham and Mr. Sinton to guaranty personally the present and future indebtedness of the corporation to them. Complying with this request, a paper was executed and delivered in the following language: 'Louisville, Ky., Dec. 19th, 1894. N. R. Allen's Sons, Kenosha, Wis.—Gentlemen: In reply to your letter on the 18th inst., we, the undersigned, in consideration of one dollar to us in hand paid by

N. R. Allen's Sons, and other good and valuable considerations, do hereby, singly and collectively, guaranty to said N. R. Allen's Sons the payment of any indebtedness now contracted, or which may hereafter be contracted, by the Curd & Sinton Mfg. Co., of Louisville, in favor of said N. R. Allen's Sons. W. H. Dillingham. Harry Sinton.' The indebtedness of the Curd & Sinton Manufacturing Company to N. R. Allen's Sons aggregated in March, 1897, about \$19,540. Mr. Dillingham individually owned a costly dwelling house on Broadway, in Louisville, where he, with his family, resided; and on the 27th of March, 1897, he conveyed this dwelling house and lot to the defendant Charles E. Arnold for the recited consideration of \$28,000. His wife joined in the conveyance. Mr. Arnold is a brother-in-law of the defendant Allen, and resides in Milwaukee, Wisconsin. It is not now disputed that this conveyance was made to Arnold to the use and benefit of N. R. Allen's Sons,—a trust wholly undeclared in the deed; that the consideration was not in fact \$28,000, but \$20,000; and that the consideration was paid in most part by the transfer to W. H. Dillingham of the indebtedness of the Curd & Sinton Manufacturing Company to N. R. Allen's Sons, aggregating about \$19,540, and represented by promissory notes of the corporation, except as to \$1,400, which latter sum stood in open account. On the 26th of May, 1897, two months after the execution of the deed from Dillingham to Arnold, both the Curd & Sinton Manufacturing Company and W. H. Dillingham, individually, made deeds of assignment of their respective property to the plaintiff, H. V. Loving, as assignee for the benefit of their creditors. That both the corporation and Mr. Dillingham were insolvent at the time of the assignments is nowhere disputed. This suit was brought by the assignee of W. H. Dillingham, attacking the deed from Dillingham to Arnold as a preferential arrangement made to favor N. R. Allen's Sons to the other creditors of Dillingham, and seeking to recover the property to the use of the assigned estate, under the provisions of the Kentucky Statutes authorizing such actions by assignees. Ky. St. § 84.

"The defendants, at the outset, contend that the transaction, in any event, is not within the act of 1856 against preferences by debtors, for the reason that Dillingham was not a debtor of N. R. Allen's Sons, within the meaning of the act. The act (Ky. St. § 1910) is as follows: 'Every sale, mortgage or assignment made by debtors, and every judgment suffered by any defendant, or any act or device done or resorted to by a debtor, in contemplation of insolvency and with the design to prefer one or more creditors to the exclusion, in whole or in part, of others, shall operate as an assignment and transfer of all the property and effects of such debtor, and shall inure to the benefit of all his creditors (except as hereinafter provided) in proportion of the amount of their respective demands,

including those which are future and contingent; but nothing in this article shall vitiate or affect any mortgage made in good faith to secure any debt or liability created simultaneously with such mortgage, if the same be lodged for record within thirty days after its execution.' Undoubtedly, if Mr. Dillingham's obligations to N. R. Allen's Sons upon his guaranty of the indebtedness to them of the Curd & Sinton Manufacturing Company was not such as made him a debtor to them within the meaning of the act, then his conveyance to Arnold is unassailable, for at common law the transaction is a valid one. The argument for the defendants is that the liability of one who guaranties the payment of a debt of another is purely collateral, and contingent upon a future event, namely, the failure of the debtor to pay the debt at its maturity, and, beyond this, that the liability of the guarantor is further contingent upon giving him seasonable notice of the default of the principal debtor. Such a contingent obligation, it is argued, is not a debt, and he that is under it is not a debtor, but possesses the potentiality of becoming a debtor. Whatever may be the rule in other states, it is the well-established law of Kentucky that, in order to fix the liability of one who has guarantied the debt of another, it is not necessary to give the guarantor notice of the default in payment by the principal debtor. Upon such default the guaranty is broken, and an action will at once lie against the guarantor. *Lowe v. Beckwith*, 14 B. Mon. 184. Certainly it is true that, if the principal debtor pays the debt at maturity, that fact absolves the guarantor. The same is true of one who is a surety. There is no substantial difference between a surety and a guarantor. Certainly the former obliges himself by joining the principal in the original instrument or agreement, whilst the obligation of the latter is collateral and apart from the original instrument or agreement. But in substance there is no difference. I think it cannot be said, whatever may be the technical differences between the obligation of a surety and the obligation of a guarantor, that the legislature, in employing the word 'debtor' in the statute under consideration, intended to include one and exclude the other. The evil of preferential arrangements by one is quite as great as the evil of preferential arrangements by the other. It cannot be doubted that a surety is a debtor, within the meaning of the act. In the very nature of things, the case must be an exceptional one where the surety would undertake to prefer a creditor to whom he is only bound as surety; and such a case, so far as I know, has not been before the court of appeals. Nevertheless that court has decided that an act of preference in favor of individual creditors, to the exclusion of creditors to whom the actor is bound only as surety, is within the act of 1856, which is at last to hold that a surety is a debtor, within the meaning of that act. *King v. Moody*, 79 Ky.

63. I hold that Mr. Dillingham, upon his guaranty, was a debtor of N. R. Allen's Sons, within the meaning of the act of 1856. The conveyance from Dillingham to Arnold was obviously made for the purpose of paying the debts due from the Curd & Sinton Manufacturing Company to N. R. Allen's Sons, and of discharging the obligation of Dillingham to that firm upon his guaranty of the payment of those debts. It is wholly immaterial that the notes of the corporation to Allen's Sons were by them transferred to Dillingham, and that the latter took credit therefor upon the books of the corporation. Whatever form the transaction took, the essential purpose was to pay Allen's Sons; and that was the essential effect, if the conveyance is to stand. Now it is contended for the defendants that Mr. Dillingham did not make the conveyance in contemplation of insolvency, nor with the design to prefer Allen's Sons to the exclusion either in whole or in part of his other creditors. That Mr. Dillingham did not believe at the time of the conveyance that he was then insolvent is in no sense decisive of this point. Undoubtedly, both he and the corporation at and before that time were in great financial straits,—a condition of affairs which Mr. Dillingham knew and felt the burden for a considerable time before the deed was made. These are the landmarks: (1) Extreme financial embarrassment at the time the deed was made. (2) An effort to secure at least a part of the debt due Allen's Sons by the execution of mortgage bonds, payable to bearer, upon the plant of the corporation, which was abandoned because the bonds were of no value without recording the mortgage, and the mortgage was not recorded for fear of unpleasant consequences. (3) The conveyance of Mr. Dillingham's dwelling, practically his only unincumbered assets, to Arnold, to the use of Allen's Sons, in payment of their pre-existing debts. (4) The assignment of both the corporation and Mr. Dillingham within two months after making the conveyance to Arnold. (5) The condition of affairs was substantially the same at the time of the assignment as at the time the deed to Arnold was made. There was between those times no material disturbance or change of the relationship between assets and liabilities. There were no sudden losses or calamities or casualties. It would be difficult to conclude from this outline of facts that the conveyance was not made in contemplation of insolvency. The facts in detail in no sort relieve the situation. These need not be gone over. It will be sufficient to refer to their salient features: The appraisement of Mr. Dillingham's assets and statement of his liabilities made soon after the date of assignment shows an aggregate of direct liabilities of \$153,080.50; and of contingent liabilities, \$70,460.15; and the aggregate value of assets, \$116,531. What Mr. Dillingham owed at the time of the assignment he owed at the time of making the deed to Arnold, and what property he owned at the

one time he owned at the other. This is true, substantially, and it is undisputed. Moreover, between the two dates there had been no severe fluctuations in the values of his property; and beyond this, with inconsiderable exceptions, his property consisted of stock and bonds, the market value of which was easily ascertainable from day to day. Mr. Dillingham might have known at the date of the deed to Arnold that his stock in the corporation was a worthless asset, or at all events nearly so. While it is perfectly certain that he did not know that fact, because he says so, nevertheless his want of knowledge can avail nothing, under the circumstances of this case. The conveyance to Arnold must be held to have been made in contemplation of insolvency, within the meaning of the act of 1856. *Thompson v. Heffner's Ex'rs*, 11 Bush, 353.

"It remains to be determined whether the conveyance to Arnold was made by Mr. Dillingham with the intent to prefer Allen's Sons to the exclusion in whole or in part of his other creditors. Certain it is that the conveyance, if it is to stand, has the effect of preferring Allen's Sons, and of excluding the other creditors of Mr. Dillingham, at least in part. The business relationship between Mr. Dillingham, through the Curd & Sinton Manufacturing Company, and Allen's Sons, was such as to excite a desire in Mr. Dillingham to save them from loss, if possible. That was a natural and just sentiment. That he entertained such a desire is evidenced by a letter written by him to Allen's Sons with reference to the conveyance to them of his dwelling house, and before the conveyance was made. The letter is dated March 15, 1897, and in it, among other things, Mr. Dillingham says: 'Therefore I have about made up my mind, if you are still willing to make the deal which was proposed when you were here, that I will accept it, as it would be an immense relief to the business for the time being,—say, for at least two years; and in case that the business of the country generally improves, and if, under those circumstances, there is any profit to be made in the saddlery and harness business, of course, I would pull out, and make the money with which to redeem the house, etc.; and in case the general business of the country does not improve, or in case, for any reason, there should be no profit, and only continuous loss, in this business, I would desire, of all things, that N. R. Allen's Sons should be safely protected against any loss whatsoever. In the event that the Curd & Sinton Manufacturing Company should go down, I would wish the transfer of the house to your firm to be made so early, and so long before such an event, that no one could possibly come into court and plead that it was done while we were in the contemplation of bankruptcy, and hence, under our law, that it was an act of bankruptcy, and should be set aside.' It is vain to say, in the presence of this letter, either

that Mr. Dillingham did not make the conveyance in contemplation of insolvency, or that he did not make it with the intent to prefer Allen's Sons."

It seems to us that in view of the foregoing facts, as recited in the opinion supra, and which opinion is fully authorized by the evidence, the judgment adjudging the conveyance in question to operate as assignment of the property of Dillingham for the benefit of his creditors was proper. But it is further insisted for appellants that, even if the judgment holding the conveyance to operate as an assignment should be affirmed, the court below erred in not allowing or adjudging to appellants \$1,000 interest in the property conveyed, or, in other words, not adjudging that they should be paid \$1,000 out of the proceeds, being the value of the homestead right of Dillingham. The case of *Gideon v. Struve*, 78 Ky. 134, when properly understood and considered, does not sustain the judgment of the court below in denying to appellants the \$1,000. It will be seen from the statute under which this suit is prosecuted that a conveyance made in contemplation of insolvency only operates to subject the property of the vendor not exempt from execution, and it has been repeatedly held by this court that a party may convey exempt property for the purpose of preferring a creditor without such conveyance being held to operate as an assignment of his property for the benefit of all his creditors. In other words, a debtor may make such disposition of his exempt property as to him may seem right, and no creditor can be heard to complain. If Dillingham had included a separate homestead worth \$1,000 in the conveyance to appellants, for the purpose of preferring them, and in contemplation of insolvency, it would hardly be contended that the vendee could not hold the same. If the appellee or other creditors had obtained an execution and levied upon the property in question, the same appearing to be indivisible, and it had been sold at the price of \$20,000, unquestionably Dillingham would have been entitled, under the statute, to \$1,000 of the purchase money. It can make no difference, in principle or in equity, that Dillingham had conveyed the entire property to the appellant Arnold for the benefit of N. R. Allen's Sons. To the extent that he can pass a perfect and indefeasible title to the property, the same must necessarily inure to the benefit of his vendee. Hence it follows that the appellants are entitled, in addition to the sums allowed to them in the judgment, to the further sum of \$1,000, to be paid out of the proceeds of the sale of the property in question; and, in the event (which is not probable) the property should only sell for \$1,000, appellants would be entitled to the whole thereof. This court, in *Calloway v. Calloway*, 39 S. W. 241, substantially announced the doctrine herein indicated. For the reason indicated the judg-

ment appealed from is reversed, and cause remanded, with directions to adjudge to appellants \$1,000 out of the proceeds of the sale of the property in question, and for proceedings consistent herewith.

# RICHMOND CEMETERY CO. v. SULLIVAN, Judge, et al.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 22, 1893.)

## RAILROADS—SUBSCRIPTIONS TO STOCK—POWER OF COUNTY TO ISSUE NEW BONDS IN LIEU OF OLD ONES.

1. Under the act of 1888, incorporating the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, that company had authority to receive subscriptions of stock by counties through which its road passes, and such counties had authority to issue bonds to pay such subscriptions.

2. The fiscal court of a county has power to issue new bonds to the full amount of old bonds called in, though purchasers have contracted to pay a premium therefor, as there will be cost of issuing and selling the new bonds, about the necessity for and amount of which the fiscal court is the proper judge.

3. Ky. St. § 1852, empowering the fiscal court of the several counties to call in outstanding bonds, and issue new bonds in lieu thereof, is valid, not being prohibited by the provisions of the constitution relating to the tax rate of counties, or to the creation of original indebtedness by them.

Appeal from circuit court, Madison county. "To be officially reported."

Action by the Richmond Cemetery Company to enjoin the Madison county fiscal court from calling in certain original bonds, and issuing and selling in lieu thereof new bonds. Judgment dismissing petition, and plaintiff appeals. Affirmed.

J. Tevis Cobb, for appellee.

LEWIS, O. J. In 1889, bonds of Madison county, of the face value of \$125,000, bearing interest at the rate of 5 per cent., and payable in 30 years, were issued and sold to pay a subscription to the capital stock of the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, made on behalf of that county. This action was brought by the Richmond Cemetery Company, a corporation, owning one of these bonds, to enjoin the Madison fiscal court from calling in the original bonds, and issuing and selling in lieu thereof new bonds, bearing interest at the rate of 4 per cent. S. D. Parrish, a citizen and taxpayer of Madison county, filed an answer and cross petition against the Madison fiscal court, the answer of which had been previously filed. In his cross petition he puts in issue the validity of the subscription to the capital stock of said railroad company, and of the original bonds issued in payment thereof, and also denied the legal right of the fiscal court to issue the new bonds. By the judgment ap-

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

pealed from, demurrer to the petition of plaintiff, the Richmond Cemetery Company, also to the cross petition of Parrish, was sustained, and the injunction asked for denied.

Legal existence of the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, its authority to receive subscriptions of stock to its capital stock by counties, as well as authority of counties through which its railroad passes to issue bonds to pay such subscription, have been more than once considered and recognized by this court. The legality and regularity of the proceeding in which the subscription was made and the original bonds issued by the Madison fiscal court, as well of that in which they are called in, and new bonds are issued, are made, by the record in this case, to satisfactorily appear. It also appears, and is admitted by the plaintiff, that, by the terms of the subscription of stock and of the original bonds, they were made redeemable in whole or in part, at the option of the county, at any time after five years from their date. There can be no question about the policy and advantage to the county of calling in the old bonds, and issuing of the new bonds; for not only will a reduction of 1 per cent. interest be secured, but the new bonds have already been sold at a premium conditioned upon the legality of the action of the county court being judicially determined. It appears that the original issue of \$125,000 of bonds has been reduced by payments to \$112,000. And a question is made as to the power of the fiscal court to issue new bonds to the full amount of the latter sum, as the sum of \$3,360 is contracted to be paid by the purchaser of the new bonds in the way of a premium. But as there will be cost and expenses of issuing and selling the new bonds, about the necessity for and amount of which the fiscal court is the proper judge, we will not undertake to decide as to the propriety of their action in that respect.

Section 1852, Ky. St., contemplates the necessity and advantage to counties burdened with bonded debt, and expressly authorizes the calling in of outstanding bonds, and the issue of new bonds in lieu of them, whenever it can be done with profit and advantage to such county. The validity of that statute and authority of a fiscal court of a county to so call in old, and issue in lieu thereof new, bonds, in pursuance of its provisions, was expressly recognized by this court in the case of *Smith v. Mercer Co.* (decided at the present term) 47 S. W. 596. Neither section 157, which relates to the tax rate of cities, towns, and counties, nor section 158, which relates to the creation of original indebtedness by them, nor section 159 of the constitution, which provides for collection of tax sufficient to pay the interest on such original indebtedness, was intended to, or does, prohibit legislative power enacting a statute like section 1852. Judgment affirmed.

## MUDD v. CARICO et al.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 22, 1898.)

**STATUTE OF FRAUDS — PROMISE TO PAY DEBT OF ANOTHER — AGREEMENT THAT SEVERAL NOTES SHALL MATURE ON FAILURE TO PAY ANY TWO OF THEM.**

1. An agreement to pay, as part of the consideration for land, a debt due by the vendor to another, is not a promise to pay the debt of another, within the statute of frauds.

2. Where a contract for the sale of land provided that, if any two of the purchase-money notes should become due and be unpaid, the vendor might treat them all as due, and enforce his lien therefor, the receipt of payments on the notes was not a waiver of the right to treat them as due; it not being necessary that two of the notes should be wholly unpaid, in order to mature them all.

Appeal from circuit court, Daviess county.

"To be officially reported."

Action by Wilfred Carico and others against John A. Mudd to enforce a vendor's lien. Judgment for plaintiffs, and defendant appeals. Affirmed.

George W. Jolly, for appellant. Little & Little and Wilfred Carico, for appellees.

WHITE, J. The petition herein alleges that in 1893 the appellee Wilfred Carico, as executor of B. F. Dougherty, sold to Jerome Hayden a certain lot in the city of Owensboro, the consideration being \$5,000, of which sum \$1,000 was paid in cash, and five notes of \$800 each were executed for the balance; that in November, 1895, Hayden and wife sold, and by deed conveyed, to appellant, Mudd, a one-half undivided interest in the property, the consideration for the purchase, among other things, being "that the said Mudd assume and pay to the plaintiff one-half of the aforesaid purchase money then due and to become due thereon, and said Mudd so assumed and so promised to pay"; that afterwards, in 1896, Hayden sold to appellant the remaining one-half interest in said property, the consideration for this last interest being that Mudd was to assume and pay the remaining half of the purchase money. To this petition appellant filed an answer by which it is pleaded that there was in the deed from the appellee to Hayden a stipulation, viz.: "It is understood and agreed by the parties hereto that, in the event any two of said notes become due and be unpaid, the said party of the first part [appellee] may treat them all that are unpaid as due, and enforce his lien for same." Appellant then pleads certain payments made on the notes, and alleges that, by receiving said payments, appellee waived his right to treat the notes as due, and to enforce his lien. A demurrer was sustained to this answer, and appellant failing to plead further, judgment was ren-

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

dered for the sum due, and enforcing the lien. From that judgment this appeal is taken.

It is insisted by counsel for appellant that, taking the petition most strongly against the pleader, the averment quoted above means a promise to plaintiff to pay the notes of Hayden, and this, not being alleged to be in writing, was within the statute of frauds, and no recovery could be had thereon. Conceding that the petition states that the promise was made by appellant to appellee, and was yet the consideration of the lot deeded by Hayden to appellant, it was not within the statute of frauds. It was an undertaking by appellant to pay off his own obligation. *Jennings v. Crider*, 2 Bush, 322; *Hodgkins v. Jackson*, 7 Bush, 342; and the recent case of *Daniels v. Gibson* (decided at this term) 47 S. W. 621.

The demurrer to the answer was properly sustained, as the facts pleaded, viz. the receipt of payments on the notes, did not operate as a waiver of the contract right to treat all notes as due, if two remain unpaid after they become due. This provision did not mean that the two notes must be wholly unpaid, but that, if two were not fully paid, the appellee could treat all as due. Finding no error, the judgment is affirmed, with damages.

#### MILLER v. FERGERSON.<sup>1</sup>

(Court of Appeals of Kentucky. Oct. 8, 1898.)

USURY—VENDOR AND PURCHASER—EQUITY.

1. Where the amount of a loan and interest thereon for five years were added together, and separate notes aggregating the amount executed therefor, payable before the expiration of the five years, the contract was usurious.

2. While it was permissible, as part of the consideration for land, to add, to the principal, interest for five years, and make separate notes aggregating the amount, payable before the expiration of the five years, yet, the vendor having come into a court of equity to enforce his lien, claiming the right, given him by the contract, to treat all of the notes as due, because the purchaser was in arrears as to as many as four of them, he must submit to such judgment as a chancellor ought to render, and can recover only the principal, with interest thereon at 6 per cent. from date of the sale.

Appeal from circuit court, Daviess county.

"Not to be officially reported."

Action by W. H. Ferguson against H. E. Miller to enforce a vendor's lien. Judgment for plaintiff, and defendant appeals. Reversed.

Hill & Hill, for appellant. Robert S. Todd, for appellee.

LEWIS, C. J. This action was brought on 50 promissory notes, of \$38.35 each, executed April 24, 1894, payable, respectively, July 1, 1894, and the 1st of each month thereafter; each bearing interest from its maturity. According to the allegations of the petition, there were 60 notes originally executed, the first one falling due having been paid, and judgment

is asked for amount of each of 13 notes, together with interest on each from its maturity, and on \$1,764.10, being amount of the remaining 46 notes, together with interest thereon from September 5, 1895, when the action was commenced, until paid. It is alleged in the petition that appellee sold to appellant a certain lot of land, in consideration of which the 60 notes were executed, and gave at the time a bond for a deed, to be executed as soon as a house to be erected by appellant on said lot was completed, and to pay for which appellee agreed to advance and loan to appellant the sum of \$650. The deed was executed, acknowledged, and delivered July 6, 1894. It was stipulated in the bond that, in case appellant got in arrears as to payment of as many as four of said notes, appellee should have the right to treat all as due and payable. And he, alleging in his petition that 13 of them were past due, elected to treat them all as payable, and asked judgment therefor. In his answer, appellant stated that the lot mentioned in the petition was 56 feet front, and the consideration he agreed to pay appellee therefor was \$20 a foot, aggregating \$1,120; that thereto was added \$650, money loaned for the purpose of erecting improvements on the lot, aggregating \$1,770, on which 6 per cent. interest was calculated for five years from April 24, 1894, making the amount of principal and interest \$2,301, for which 60 notes were given, of \$38.35 each. It is further alleged in the answer that the \$650 was not all loaned at that time, but furnished in different installments at subsequent periods, and that said sum constituted no part of the consideration for the lot. Another ground of defense to the action was that the line shown him by appellant, by which he was guided in erecting his improvements, runs on land set apart for a public alley. But, as a deed to the lot duly acknowledged was delivered to and accepted by him, he has no ground of defense or counterclaim on that account, until evicted from that part of the lot alleged to be in the alley.

In our opinion, the lower court erred in sustaining a demurrer to the answer, and rendering judgment for the entire amount claimed in the petition. In the first place, according to statements in the answer, which are to be taken as true on demurrer, the sum of \$650 was exclusively for loaned money; and, while the agreement to count interest thereon for five years might have been enforced at end of that period, no part of the principal and interest thus added together was collectible before, because the transaction would be thereby rendered usurious. So, as the record now stands, appellee is entitled to recover \$650, and interest thereon at the rate of 6 per cent. from the date or dates at which the money was loaned, up to date of the judgment. But we think that sum should be credited by \$38.35, amount of the first note, as of the date it was paid. In the second place, although, as consideration for the land, the agreement be-

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tween the parties to add interest to the principal sum of \$1,120 was legal and permissible, still, as appellee, taking advantage of the misfortune of appellant, has come into a court of equity for enforcement of that agreement, at a time and in a manner not reasonably anticipated when it was made, he must consent to such judgment as, under the circumstances, a chancellor ought to render. In our opinion, accepting the answer as true, appellant is entitled to recover of appellee, in addition to \$650, the aggregate of \$1,120, and interest thereon at rate of 6 per cent. from date of the land sale, until date of the judgment appealed from. Wherefore the judgment is reversed, and case remanded, for proceedings consistent with this opinion.

### KENT v. RILEY.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 29, 1898.)

#### JUDGMENT — PETITION TAKEN FOR CONFESSION — CONCLUSIVENESS OF JUDGMENT.

Where a petition alleged a partnership between plaintiff and defendant to buy and sell cattle, and that plaintiff had advanced to defendant a certain amount for that purpose, and had received from defendant a certain smaller amount on account of the sales of partnership cattle, a judgment taking the petition for confessed, and reciting that plaintiff had received the amount named in the petition on account of the sales of partnership cattle, precluded defendant from showing that he had paid to plaintiff an additional sum on that account.

Appeal from circuit court, Daviess county.  
"Not to be officially reported."

Action by W. P. Kent against C. Riley, Jr., to recover balance alleged to be due on settlement of partnership. Judgment for defendant, and plaintiff appeals. Reversed.

Welford Carico and Eli H. Brown, for appellant. J. A. Dean, for appellee.

PAYNTER, J. It is averred in the petition that the appellant and appellee formed a partnership to buy, feed, and sell cattle; that the contract was evidenced by a writing filed with the petition; that, by its terms, the appellant was to advance all the money necessary to purchase and handle the cattle, the appellee to pay him at the rate of 6 per cent. interest on one-half of the amount so advanced, from the date of such advancement; that the appellee was to buy the cattle, and have the general superintendence of the business, for which he was to receive no compensation; that the profit and loss were to be equally shared by them. It is further averred in the petition that the appellant had advanced, on the order and call of the appellee, \$3,871.57; that he had received the sum of \$3,090.03 on account of the sales of cattle owned by the firm. The summons which issued upon the petition was executed January 4, 1894; and, on February 13th fol-

lowing, the allegations of the petition were taken for confessed, and a commissioner was appointed to state the partnership accounts; and he did so from the statements which were taken for confessed in the petition, no other evidence having been offered. The judgment of the court in taking the allegations of the petition as true recited that the plaintiff had "received the following sums of money on account of the sales of cattle owned by said firm, Kent & Riley, to wit: May 30, 1887, \$793.02; and, on the same date, \$2,297.01,—making a total of \$3,090.03." In the subsequent proceedings in the case, the appellee sought to show that the appellant was paid an additional sum of \$275 on account of firm cattle sold. The effect of this is to impeach the judgment which had been rendered by the court containing the recital quoted. If the allegation is true that the appellant had only received \$3,090.03,—and it must be so treated in this proceeding,—he could not have received the \$275; and the judgment precludes the appellee from showing that fact. The petition does not allege what sums, if any, the appellee had paid out on partnership account. The sums which he used of the partnership funds for his individual purpose, and not satisfactorily accounted for, exceed one-half of any sums which he has shown that he paid out for the benefit of the firm. From this view of the case, he was not entitled to any credits on the sum which was shown by the petition to be due the appellant; and we are of the opinion that the court should render a judgment based on the first report made by the commissioner. The judgment is reversed for proceedings consistent with this opinion.

### TOLIVER v. COMMONWEALTH.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 25, 1898.)

#### HOMICIDE—SELF-DEFENSE—DYING DECLARATIONS — CONTINUANCE.

1. Where the only issue was as to whether defendant did the killing charged, an instruction as to self-defense was improper.

2. Where deceased, who lived about five hours after he was shot, said to his father, "I am killed this time," and requested that B. be sent for to write his affidavit, saying, "I am afraid you cannot get him here in time," his statements as to the killing were admissible as his dying declaration.

3. Under Code Cr. Prac. § 189, providing that a continuance asked on account of the absence of material witnesses at the term at which the indictment was found shall be granted, unless the attorney for the commonwealth will admit on the trial "that the facts are true," the accused is not entitled to a continuance where the commonwealth agrees that the competent parts of the affidavit may be read to the jury "as the true statements" of the absent witnesses, where such statements relate merely to declarations of witnesses for the prosecution.

4. Where a witness for the prosecution admitted that he had made statements out of court

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inconsistent with his testimony, defendant was not prejudiced by the refusal to grant a continuance asked on account of the absence of witnesses who would have testified as to such statements.

Appeal from circuit court, Harlan county.

"To be officially reported."

James Toliver was convicted of murder, and appeals. Affirmed.

E. E. Hogg and W. F. Hall, for appellant.  
W. S. Taylor and M. H. Thatcher, for the Commonwealth.

PAYNTER, J. The jury found the defendant guilty of the murder of M. Gross, and fixed his punishment at confinement in the penitentiary for life. He seeks a reversal because—First, the court overruled his motion for a continuance; second, in admitting as evidence statements of the deceased as his dying declaration; third, error in instructing the jury. We will consider the questions raised in their reverse order.

He denied that he did the shooting which resulted in the death of Gross, and so testified. The testimony for the commonwealth tends to show that while the deceased was working in his cornfield the accused shot him in the back. There is no pretense or claim that the shooting was done in self-defense; neither was the slightest evidence offered, or a circumstance proven, to indicate that such was the case. The court did not give, and should not have given, an instruction on the law of self-defense. It instructed the jury on the subjects of murder and reasonable doubt, which were all the instructions that should have been given.

To prove that the deceased was laboring under a sense of impending dissolution when he made the statements claimed to be a dying declaration, John Gross, his father, was introduced as a witness. He testified that: "When I first went to him, he said: 'Pap, I am killed this time. I want you to get George Bailey, and write my affidavit, but I am afraid you cannot get him here in time.'" He lived about five hours after he was shot. It is contended that the evidence does not sufficiently show that the deceased was laboring under a sense of impending dissolution, and therefore the statements were inadmissible as a dying declaration. He said that he was "killed," and wanted to make an affidavit, but was afraid that the amanuensis could not be procured in time to take his statement before he died. We think this testimony is sufficient to show that he had no hope of recovery, and felt that he must certainly die soon.

Isom Sullivan, who was present at the time of the fatal shooting, testified that the accused did it. The defendant filed an affidavit and moved the court for a continuance. It was stated that Jane Gross would testify that Sullivan came to the house where she was, apparently tired and excited, and said that some one had shot and killed Gross; that he saw some man run from where the shot was

fired, some distance away, but did not know him, and had no idea or knowledge who it was that shot the deceased. It was stated in the affidavit that Barbery Gross would prove the same facts. It is also stated in the affidavit that Adron Brown would prove that on a certain occasion, described in the affidavit, the accused did not state to James Brock that he had killed Gross, but, on the contrary, stated that he knew nothing about who had shot him. This testimony was manifestly desired for the purpose of contradicting Isom Sullivan and James Brock in the event they were introduced by the commonwealth and testified contrary to the statements of the affidavit. There are other witnesses referred to in the affidavit, to whom we will refer later. The commonwealth attorney agreed that such parts of the affidavit as were competent could be read to the jury "as the true statements of the witnesses in said affidavit set out." Thereupon the court overruled defendant's motion for a continuance. The affidavit was filed and the trial took place at the term during which the indictment was found. It is contended that the commonwealth attorney did not make such agreement as section 189 of the Criminal Code of Practice required he should have made, to authorize the court to overrule the motion for a new trial. On the trial of the case the commonwealth introduced Isom Sullivan, who admitted that he had told the Gross women and Matt Gross that he did not know, at the time mentioned in the affidavit, who killed the deceased. He gave as his reason for so stating that he was afraid at that time to give his knowledge as to who had done it. This witness had admitted all to be true. The fact which it was proposed to prove by the Gross women was rendered incompetent, because it would not have contradicted Sullivan, as he admitted that he had made the statement to them which it was claimed they would prove. James Brock was introduced as a witness for the commonwealth, but did not make any statements which the accused supposed he would make, and to impeach which he desired the testimony of Adron Brown. The testimony of Brown was to be used in rebuttal, and the occasion did not arise for its use. William Toliver, who was another witness named in the affidavit as an absent witness, whose testimony the accused desired, appeared in court, and was introduced as a witness for the accused. The motion for a continuance was made at the same term at which the indictment was found; and, if the testimony of the absent witnesses was material and relevant, the court should have granted it, "unless the attorney for the commonwealth admitted upon the trial that the facts are true." That means that the commonwealth attorney cannot introduce any evidence on the trial of the case to contradict the statements contained in the affidavit. He was not required to admit that Sullivan did not see the person who did the shooting, but was simply prevented



from proving by Sullivan or any one else that Sullivan did not tell the Gross women that he did not know the party who did the shooting. Sullivan proved that he made the statement which the accused claimed that he had made with reference to the matter, and Brock never testified to any of the facts to which the accused supposed he would testify. Therefore the commonwealth attorney followed strictly the requirements of section 189, Code Cr. Prac., although the agreement which he made was not in the language which the section requires.

The evidence is abundant to establish the guilt of the accused, and, under proper instructions of the court, the jury found him guilty. We do not think that his substantial rights have been prejudiced by any error occurring at the trial. Therefore the judgment is affirmed.

#### HUMBOLT BLDG. ASS'N v. VOLMERING et al.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 22, 1898.)

##### MECHANICS' LIENS—PRIORITY OVER MORTGAGE.

Mechanics' liens of a contractor and subcontractor take precedence of the lien of a mortgagee who took his mortgage with actual notice of the contract for the improvements, which had progressed to a considerable extent at the time of the execution of the mortgage.

Appeal from circuit court, Kenton county.  
"Not to be officially reported."

Action by A. Volmering and others against Ellen Morrison and others to enforce mechanics' liens. Judgment giving priority to plaintiffs over a mortgage lien asserted by the Humbolt Building Association, and the Humbolt Building Association appeals. Affirmed.

Wright & Anderson, for appellant. Orlando P. Schmidt and Harvey Myers, for appellees.

GUFFY, J. Ellen Morrison was the owner of certain lots in South Covington (now Milldale), and in 1893 (perhaps in the month of May) employed Otis Breden & Co. to build for her on said property a certain building, to cost \$5,000, if not more, there being some controversy as to the amount. The said Breden & Co. employed the appellees herein as subcontractors, and, after the building had progressed to a considerable extent, the said Morrison executed to the appellant a mortgage upon the property, to secure the payment of, as is alleged, \$5,000. It appears that the original contractors did not, in fact, complete their contract, and that it would probably cost \$800 to complete the same. Appellees served notice on said Morrison, and also filed their claims, as required by law, for the purpose of obtaining mechanics' liens upon the property in question, to secure the payment of the several sums due them. Suit to enforce the

said liens was instituted. The said Morrison also made an assignment, and her assignee instituted suit for a settlement of the assigned estate. The appellant, by proper pleadings, asserted its mortgage lien upon the property, and claimed that it had a superior lien to that of the other parties, which was controverted by the subcontractors. After the issues were made up and proof taken, the court adjudged in favor of the appellees, and ordered a sale of the property, which was bought by the appellant at a sum not sufficient to pay all the lienholders; and, upon final hearing, the court ordered the commissioner to pay the several appellees the sum adjudged to them respectively, holding that their liens were superior to the mortgage lien of appellant; and from that judgment appellant appeals.

There is some contention that the appellant undertook to appropriate the \$5,000 secured by the mortgage to the payment of the claims for improvements, but it is not necessary to decide whether there was or not any such enforceable agreement. The main question presented for decision is whether or not the appellees acquired mechanics' liens upon the property in question superior to that of appellant's mortgage lien. It seems evident that, at the time of the execution of the mortgage, appellant had actual notice of the contract for improvements, and that the work had progressed to a considerable extent at the time of the execution of the mortgage. It therefore follows that the lien of the original contractor, as well as the liens accruing to the subcontractors, mechanics, and material men, takes precedence of the mortgage lien of appellant; hence the judgment appealed from is in accordance with the law in force at the time of the transaction. The judgment is therefore affirmed, with damages.

#### KRANKEL'S EX'X v. KRANKEL.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 23, 1898.)

##### TRUSTS—CREATION BY PAROL DECLARATIONS—REVOCATION OF TRUST.

1. Where the father and mother received the amount of a policy of insurance on the life of their son, made payable to them before his marriage, and the father paid his share to the widow of the insured, and the mother invested hers as a special interest-bearing deposit, and regularly turned over the interest for the support of the only child of the insured, declaring to the widow, in response to her request for the money, that it belonged to the boy, and had been invested for him, a trust was created in favor of the grandson, enforceable against the grandmother's executrix.

2. One who has, by parol declarations, created a trust in favor of another, cannot revoke it without the consent of the donee.

Appeal from circuit court, Jefferson county.  
"To be officially reported."

Action by Charles C. Krankel against Magdalena Krankel's executrix to enforce a trust.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Judgment for plaintiff, and defendant appeals. Affirmed.

C. B. Seymour and P. A. Gartner, for appellant. Samuel B. Kirby, for appellee.

BURNAM, J. The executrix of Magdalena Krankel prosecutes this appeal from a judgment holding that \$1,000, which had been received by her from a policy of insurance on the life of her son Charles, was subject to a trust in favor of her grandson, the appellee. In 1884 Charles Krankel, at that time a bachelor, residing with his father and mother, took out a policy of insurance on his life for \$2,000 in the Knights of Honor, which he had made payable to them. He regularly paid the dues on this policy until he died, in 1892, leaving a widow and a son, Charles C. Krankel, the present appellee. The testimony shows that after his marriage Charles Krankel desired to have the policy of insurance changed, and his wife and children made the payees therein, and that his mother prevented this from being done by refusing to surrender the original policy for cancellation by the company; that in October, after the death of Charles Krankel, the insurance money was paid over to his father and mother; that, as soon as his father collected his \$1,000 due upon the policy, he paid it over to the widow of his dead son; and that his wife, after collecting her part of the policy, placed it as a special time deposit, in the Western Bank, with an agreement that it should bear interest, first at the rate of 4 per cent. per annum, and subsequently at the rate of  $3\frac{1}{2}$  per cent. This investment of the fund was never changed by her during her lifetime, and all the interest accruing thereon was paid over by her to the mother of appellee, for his maintenance and support. The grandmother died in December, 1895; and this suit was brought by her grandson, the appellee, to enforce an alleged voluntary trust on her part of this money in his favor. It is claimed that the grandmother, after she collected the money, recognized that it belonged to appellee, and that she set it aside for his use, and treated it as his property, during her lifetime. The executrix of Magdalena Krankel resists the claim, alleging that there was no consideration to uphold the alleged voluntary trust; that it had never been executed; that, when the fund in question was collected by her testatrix, she had at once mixed it with her other money; and that no trust could be created in the fund, because at the time of the alleged creation thereof there was no specific, separate chose to which the trust could attach.

The question raised is one which has been the subject of careful consideration by this court and the text writers, and the general doctrine is well settled that a completed parol voluntary trust is enforceable, and, in order to render such a trust valid and enforceable, the donor need not use any technical words or language in express terms

creating or declaring the trust, but must employ language which shows unequivocally an intention on his part to create or declare a trust in himself for the donee. It is not essential that the donor should part with the possession in cases where a trust is thus created or declared. If there is a mere intention to create a trust, or a mere voluntary agreement to do so, and the donor contemplates some further act to be done by him to give it effect, the trust is not perfect, and equity will not lend its aid to enforce it. See 2 Pom. Eq. Jur. § 997; *Barkley v. Lane*, 6 Bush, 589; *Williamson v. Yager*, 91 Ky. 282, 15 S. W. 660; and *Roche v. George's Ex'r*, 93 Ky. 609, 20 S. W. 1039. Mr. Perry, in section 99 of his work on Trusts, says: "Whether the trust is perfectly created or not, is a question of fact in each case; and the court determining the fact will give effect to the situation and relation of the parties, the nature and situation of the property, and the purposes or objects which the settlor had in view in making the disposition." At the time Charles Krankel took out the policy of insurance, he had nobody dependent upon him for support. He was 38 years old, residing with his father and mother, and it was natural that he should have made the policy payable to them. But after his marriage, and the birth of his child, there was both a legal and moral obligation on him to make provision for them; and it is evident from the testimony that he recognized this fact, and desired the surrender of the old policy, in order that he might have it changed, and have his wife and children made the beneficiaries thereof, as he had the legal right to do. And there is testimony in the record which conduces to show that he was induced to forego this purpose by assurances from his father and mother that in the event of his death his wife and child should have the benefit of the insurance, although this testimony is not as conclusive as it might be. But it is evident that, upon his sudden taking off, his father and mother both recognized the obligation resting upon them to use the proceeds arising from this policy for the benefit of his wife and child, whom he had left entirely destitute. The father immediately paid over his part of the policy to the widow, and the mother, on the second day after the death of her son, and while his body lay unburied in her presence, informed Mrs. Weber that "Charles, while he was single, had made his insurance policy to them, but that she did not want it, and that his widow should have it." Her son Jacob Krankel, Jr., who was the agent of the insurance company which issued the policy, and who collected the greater part of the premiums thereon from his deceased brother, testifies that he had a number of conversations with his mother about this \$1,000; that on several occasions she told him that she had the money in bank, and that she had been paying the interest accruing thereon to the widow for the support of the child,

and that she held the \$1,000 in trust for her grandson, and would secure it to him after her death. The mother of appellee testifies that she had several conversations with Mrs. Krankel after the death of her husband, in which she urged her to turn over the \$1,000 to her, as the husband had done, but that the old lady invariably responded, "No; that the money was the boy's, and that it would stay for the boy; that she had invested it for the boy, and that it would be the boy's;" and that up to the death of Mrs. Krankel the interest on the \$1,000 was regularly paid over to her for the support of appellee. The cashier of the Western Bank testifies that on October 31, 1892, his bank borrowed this \$1,000 from the old lady, and issued to her a time certificate of deposit, bearing interest, which was renewed from time to time; that the rate of interest paid by the bank was first 4 per cent., and afterwards 3½ per cent., per annum; that this investment was never changed or disturbed by the old lady in any way during her lifetime, except to collect the interest as it accrued, but that the fund had been checked out, after her death, by the appellant. It is evident from this testimony that the old grandmother recognized the obligation resting upon her to apply this \$1,000 for the benefit of her grandson, and that she set apart the fund for his benefit. This is shown by her declarations, but even more strongly by her acts in investing the money as a special interest-bearing deposit, and regularly turning over the entire interest thereon for the support and maintenance of appellee. It may be that the old lady, with characteristic German prudence, thought this the best way to secure to her grandson the full benefit of the money which had come by reason of the death of his father. She and the children of her deceased husband were amply provided for by his will, as he left a good estate; and while the draftsman of her will testifies to facts which tend to show that shortly before her death she contemplated withdrawing the gift in favor of her grandson, and asserted a right to dispose of the fund in another way, yet this was after she had declared a trust in favor of appellee, and after the title to the \$1,000 had vested under the trust. And, having created a complete trust, it was beyond the power of decedent thereafter to have revoked it, without the consent of the donee. For the reasons indicated the judgment is affirmed.

#### EXTERKAMP v. COVINGTON HARBOR CO. et al.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 29, 1898.)

#### DEDICATION OF STREET—WHARVES—INJUNCTION.

1. The dedication as a street of ground never improved or used as such by the city is not shown by the fact that the owner, in designat-

ing the ground as one of the boundaries in a lease executed by him, described it as "a proposed street, known as 'Ferry Street,'" or by the fact that the city engineer laid it down as a street in a map of that subdivision of the city made by him from some other map, there being nothing to show who made the original map.

2. The fact that the city has built a retaining wall partially across a strip of ground does not show an acceptance of the alleged dedication of the ground as a street.

3. The owners of land fronting on the Ohio river used by them as a wharf for hire may enjoin another from mooring his barge to their property, though it may have been dedicated by them as a street.

Appeal from circuit court, Kenton county.

"Not to be officially reported."

Action by the Covington Harbor Company and W. S. and A. S. Ludlow to enjoin George Exterkamp from mooring his barge to their property. Judgment for plaintiffs, and defendant appeals, plaintiffs prosecuting the cross appeal. Affirmed on original, and reversed on cross, appeal.

Harvey Myers, for plaintiffs. J. M. Dial, for defendant.

BURNAM, J. This action was instituted by the Covington Harbor Company and W. S. and A. S. Ludlow to enjoin appellant from mooring his barge to their property. The petition alleges that the harbor company, as lessee of W. S. and A. S. Ludlow, the owners thereof, is in possession of a strip of land in the city of Covington fronting on the Ohio river, about 1,000 feet, which it is using as a harbor for the holding, wharfing, and care of coal boats and other water craft for hire; that the defendant had, without authority, anchored his barge to their property, by entering upon and making fast ropes, lines, and cables thereto; that, by reason thereof, they were deprived of that portion of their land occupied by his barge; and that the location thereof interfered with the operation of their business in putting in and taking out barges committed to their custody. The defendant, by way of answer, denies the title of the Ludlows to the property along which his boat is moored, and alleges that it is the north end of Ferry street which belongs to the city of Covington, and that he is in possession thereof by authority and consent of the city. Upon the trial, the chancellor decided that Ferry street had been dedicated to the public from Second street to the Ohio river, but that the owners of the land over which the street ran parted with no right to the land included within the boundary of the street, except the right to the public to use it as a highway to the edge of the river, and that the wharf and the right to its use remained in the owners of the soil; and adjudged that the defendant be perpetually enjoined and restrained from mooring his float in the Ohio river at the foot of the alleged street; and from that judgment both parties appeal.

Two questions are presented for our determination: First. Was there ever a dedication by the Ludlows of what is called "Ferry

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Street"? And, second, if there was such dedication to the public, does that dedication carry with it the easement of wharfage on the river front?

Upon the first question the testimony shows that Israel Ludlow, the ancestor of the present appellees, many years ago owned a tract of land which embraced the land in question, which he afterwards laid out into streets and lots, and which has become a part of the city of Covington; that Second street was laid off so as to run parallel with the river, very close to the top of the river bank, and that part of the farm lying between Second street and the river was not subdivided, but remained altogether an open common; that, for more than 30 years before the institution of this suit, Israel Ludlow and his heirs and devisees have maintained a coal harbor and wharf along the river front binding upon this property, which extends across the alleged Ferry street, and which they have leased during that period to different persons. No question is made as to their title to any part of the property, except the land in front of the alleged street, which is claimed to be the property of the city by reason of the dedication.

The main proof on which appellant relies to support his claim of dedication is that in a lease made by appellees W. S. and A. S. Ludlow of a part of this property, March 15, 1872, it was described as "bounded by Second street, Bullock street, and a proposed street, known as Ferry street"; and the testimony of the chief engineer of the city of Covington, who says that "he thinks Ferry street was dedicated to public use, because it is laid down in a map of the Ludlow subdivision of the city of Covington, which was made by him from the original plot of this subdivision"; but upon cross-examination he says that "he did not know who made the original map, nor where it was recorded; that his copy was made about twenty-five years ago; that he could not state positively that the copy made by him was taken from the original plot, but that he was positive that he had copied it from some other map." He also testifies that this ground had never been used as a street; that it had never been graded, curbed, or metaled, but that the city council had laid a 2-foot trough along the center of the alleged street, about 100 feet from Second street, and had built a stone wall about 15 feet high and about 30 feet long, which extended partially across the alleged street, as a retaining wall for the water trough. On the other hand, W. S. Ludlow testifies that he is familiar with all the maps of the Ludlow subdivision; that the original plot of that subdivision was made by his father, "and is recorded in Alexandria"; and that neither the original nor any authoritative copy thereof shows any street in the place where it is claimed Ferry street now is. It is evident from all the testimony in the case that no street has ever been built at this point, and that there has been nothing done

by the city thereon except to build across the "street," without objection from the proprietors of the land, a stone wall, used as a supporting wall for a trough or drain, to carry off surplus water which collects there from Second street. This is the only evidence of acceptance of this street by the city. It is not graded, paved, or macadamized, has never been used as a public highway, and no lots have ever been sold on either side of the street to private individuals; and it appears that the retaining wall is about 15 feet high, extends only partially across the alleged street, and that on the south side of this wall the ground is nearly level with the top of it, while on the north side there is an abrupt descent of about 15 feet. This wall cannot be considered as any use of the alleged street as a public highway, as, if the city were to attempt to grade it, the wall would have to be torn down, because it would be only an obstruction; and the lease which is referred to and relied on does not mention Ferry street as actually in existence, but only as a "proposed" street. It is evident from this language that the owners of this property reserved this plat of land with the idea that it might at some time be opened in connection with a ferry which they might desire to establish, but which has never been done. The mere fact that the city engineer laid off this street in a plat of the city is not sufficient evidence to support the alleged dedication; and, in our opinion, there has been neither a dedication of this property as a street by the owners thereof, nor an acceptance of it as such by the city.

In view of the conclusion reached by us on the question of dedication, it is unnecessary to enter into any elaborate discussion of the other question presented. It is sufficient to say that the conclusion reached by the chancellor on that question is in accord with former adjudications of this court. See *Berry v. Snyder*, 3 Bush, 288, and *Boom Co. v. Smith*, 83 Ky. 373, 1 S. W. 765. For the reasons indicated, the judgment appealed from is affirmed upon the original appeal of George Exterkamp, and reversed upon the cross appeal of the Ludlows; and the cause is remanded, with instructions to perpetuate the injunction.

SMITH v. MEISENHEIMER et ux.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 23, 1898.)

BANKRUPTCY—STAY OF PROCEEDINGS ON APPEAL.

1. Under the United States bankrupt law, a suit to fix or enforce a lien must have been commenced within four months before filing of the petition in bankruptcy, in order that the adjudication in bankruptcy may operate as a dissolution of the lien; and therefore, where such suit is commenced more than four months be-

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

fore filing of the petition in bankruptcy, the court will not stay proceedings on appeal from a judgment denying the relief sought, as the bankrupt act does not apply.

2. The court will not, pending application for a discharge in bankruptcy, stay proceedings on appeal from a judgment dismissing an action seeking to subject, to the payment of a judgment against the debtor, property claimed by his wife, but alleged to belong to him.

Appeal from circuit court, Daviess county.  
"To be officially reported."

Action by Jacob Smith against George P. Meisenheimer and Mary Meisenheimer to enforce a judgment. Judgment for defendants, and plaintiff appeals. Appellee George P. Meisenheimer moves to stay proceedings. Motion denied.

Walker & Slack, for appellant. Robert S. Todd, for appellees.

LEWIS, J. Appellee George P. Meisenheimer moves that all proceedings in this action be stayed for a period of 12 months from October 14, 1898, or until he has been granted a discharge in bankruptcy, and then that this appeal be dismissed. The ground of his motion is that October 14, 1898, he filed in the district court of the United States, for the district of Kentucky, a petition to be adjudged a bankrupt, and on the same day it was adjudged he had become a bankrupt, in meaning of "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898. The action in which the judgment appealed from was rendered was brought by appellant, Smith, May 24, 1897, jointly against George P. Meisenheimer and his wife, Mary Meisenheimer, to subject to the satisfaction of a personal judgment against him, for various sums of money, certain property claimed by her, but alleged in the petition to really belong to him, and to be liable for said debt. An attachment was also asked to be levied on said property. By the judgment appealed from, the action was dismissed, which was tantamount to a refusal of the lower court to subject the property of Mary Meisenheimer to satisfaction of appellant's debts, though the validity of the previous judgment was not denied or put in issue.

The only provisions of the act of congress establishing a uniform system of bankruptcy throughout the United States under which the proceedings in the appeal before this court could or should be stayed, as asked by appellee George P. Meisenheimer, are contained in section 67 of that act. It is there provided that a lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon meane process, or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt. There are recited in that section several conditions

upon which application of that provision are made to depend. But it is necessary that only one of them be referred to, viz. that one which prescribes four months before filing of the petition in bankruptcy as the period within which a suit or proceeding to fix or enforce a lien must have been commenced in order that adjudication in bankruptcy may operate as a dissolution of the lien. Neither the action to subject the property in question was begun, nor the judgment appealed from rendered, within four months before filing of the petition in bankruptcy by appellee George P. Meisenheimer. Consequently, the bankrupt act does not apply in this case. Besides, the property upon which the attachment lien was in the present action sought to be fixed and enforced was not claimed by, or adjudged by the lower court to belong to, George P. Meisenheimer, but to his wife, Mary Meisenheimer. And, while that judgment remains unreversed by this court, the property in litigation cannot be made subject to the payment of the debt of appellant, however just may be his claim, nor even reached by the assignee in bankruptcy. Therefore, to stay proceeding on this appeal, and ultimately dismiss it, as asked by appellee, would result in preventing final and complete adjudication of the claim of appellant, and be practically a denial of justice. Wherefore the motion is overruled.

#### THOMPSON v. THOMPSON.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 30, 1898.)

GUARDIAN AND WARD—TESTAMENTARY GUARDIAN—RIGHT TO POSSESSION OF LAND.

1. One who obtained possession of land as testamentary guardian cannot refuse to surrender possession to the statutory guardian appointed to succeed him, though he has a small, undivided interest in the land; his remedy being an action for division.

2. The order appointing a guardian is not void by reason of the fact that the ward, who was over 14 years of age, was overpersuaded to select the person appointed.

3. A testamentary guardian, who was never appointed by the county court, or executed bond, was not entitled to possession of the land belonging to the ward.

Appeal from circuit court, Marion county.

"Not to be officially reported."

Action by William Thompson against James A. Thompson for a settlement of the accounts of defendant as guardian of plaintiff, and also for the possession of certain lands. Judgment for plaintiff, and defendant appeals. Affirmed.

H. W. & R. C. Rives, for appellant. H. P. Cooper, for appellee.

WHITE, J. This action was brought by appellee, by his statutory guardian, against appellant, a former testamentary guardian un-

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

der the will of the mother of appellee, for a settlement of the accounts of appellant as guardian, and also for the possession of certain lands in Marion, the homestead of both the parents of appellee. The appellant filed answer and tendered issue on the settlement branch of the action, and that part of the case is now before us. The answer admits that Charles Thompson, the father of appellee, occupied the farm described in the petition, at the time of his death, although he only owned six-sevenths of same; that after the death of Charles Thompson, the father, Elizabeth Thompson, the mother, of appellee, occupied the farm as a homestead, and after the death of Charles Thompson, she bought a one-fourteenth interest in the farm, and that appellant purchased the remaining one-fourteenth undivided interest; that thereafter Elizabeth Thompson, the mother of appellee, died, leaving a will, which was probated. The terms of this will are not stated, except it is stated in the answer, "by the terms of which she requested defendant, who was brother of her deceased husband, and the husband of her sister, to raise her children, and use the personal property and the homestead for their benefit." It is admitted by the answer that, after the death of Elizabeth Thompson, the appellant, acting, under the will, as testamentary guardian of the children then living of Charles and Elizabeth Thompson, took possession of this farm, and used, occupied, or rented it ever since. It is admitted that the appellee, William, is under 21 years of age; the other children being over that age. Upon the filing of this answer, without reply or demurrer, the court, upon motion, adjudged that appellee was entitled to the possession of the land,—it being conceded to be worth less than \$1,000,—and awarded a writ of possession therefor. The court adds in its judgment, "This order shall in no way prejudice or affect the rights of the defendants to any interest or claim, if any they may have, against said land." From that judgment this appeal is prosecuted.

Counsel for appellant contends that the judgment is erroneous for the reason that the uncontroverted answer shows that appellant is the owner of one-fourteenth undivided interest in the land, and that he cannot be dispossessed by appellee, a co-tenant, without an allotment, and that appellant, being a testamentary guardian, was not removed for cause when the statutory guardian was appointed, and this appointment, being made without notice to him, or charges being brought against him, is null and void, and that he is entitled to hold the land as testamentary guardian. The only question before us on this appeal is the right of possession of the land, and we refrain from any reference to the questions of settlement. We are of opinion that the appellee, by his statutory guardian, was entitled to the possession of the land, as the court adjudged. The land was the homestead of appellee's father and mother, and he, being un-

der 21 years of age, is by the statute entitled to the exclusive use of this homestead till he arrives of age; the other children having reached that age. The fact that appellant owns an undivided one-fourteenth of the tract does not entitle him to hold possession of the whole, for the reason that he obtained possession, as his answer shows, by reason of the guardianship under the will of appellee's mother. But for this guardianship, appellant would not have been in possession at all, and his rights would have been an action for division to allot to him his interest in kind. This right he still has, by the reservation in the judgment. When appellant ceased to be the guardian, the possession he held under that right should have been surrendered to his successor. This the judgment compels him to do; nothing more.

The pleadings show that appellee is over 14 years of age, and chose his statutory guardian, and the county court appointed the person whom he chose. This is permitted by statute, and the fact that appellee was over-persuaded to select this person, his brother-in-law, is no reason why the order making the appointment is void. Moreover, as the answer alleges that appellant was testamentary guardian, and does not allege that he was ever appointed by the county court, it does not appear that he ever was entitled to the possession of the land, but, being testamentary only, was a guardian for nurture and education only. He never executed bond, as the statute expressly required he should do, to become entitled to the property. There appears no error in the judgment, and the same is affirmed.

#### PHOENIX INS. CO. OF HARTFORD, CONN., v. PEAK.<sup>1</sup>

(Court of Appeals of Kentucky. Dec. 3, 1898.)

FIRE INSURANCE — VALUED POLICY LAW — CONTRACT LIMITING LIABILITY.

Under Ky. St. § 700, providing that insurance companies taking fire risks on real property shall, in case of total loss, be liable for the full value fixed in the face of the policy, the insurer cannot escape liability for the full amount of the policy by limiting its liability to three-fourths of the value of the property insured.

Appeal from circuit court, Trimble county.

"Not to be officially reported."

Action by W. O. Peak against the Phoenix Insurance Company of Hartford, Conn., on a policy of fire insurance. Judgment for plaintiff, and defendant appeals. Affirmed.

Gaunt & Downs, for appellant. R. F. Peak and J. W. McCain, for appellee.

HAZELRIGG, J. In this suit by appellee against appellant on a policy of fire insurance, the only defense necessary to be considered here is the one relying on the provi-

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

sion of the policy known as the "three-fourths claim," by which the company seeks to limit its liability in case of loss to three-fourths only of the value of the property destroyed, in spite of the statute fixing its liability, when there has been a total loss, to the extent of the full estimated value of the property insured, as fixed in the face of the policy. Since this appeal was taken, this court has settled the question involved, and upheld the statute. *Insurance Co. v. Cooke*, 41 S. W. 279. On the authority of that case, the judgment below is affirmed.

### GOODING v. GOODING.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 25, 1898.)

#### DIVORCE AND ALIMONY—EXCESSIVE ALLOWANCE.

1. Where the estate of the husband, after making provision for his debts, amounted to about \$19,000, consisting of agricultural lands worth \$75 per acre, and there were others dependent upon him, an allowance to the wife of \$75 per month as alimony, and for the support and education of the infant child of the marriage, was excessive, the proper allowance for the present being \$325 per annum as alimony, and \$175 per annum for the maintenance and education of the infant.

2. While an allowance to the wife of a lump sum in full settlement of her claim for alimony is desirable, it cannot be made in the absence of proof as to her age and expectation of life.

Appeal from circuit court, Kenton county.

"To be officially reported."

Action by Mattie Gooding against Addison P. Gooding for divorce and alimony. Judgment for plaintiff, and defendant appeals. Reversed.

El L. Worthington and J. W. Bryan, for appellant. M. L. Harbeson, for appellee.

BURNAM, J. Appellee instituted this action against her husband for divorce and alimony, and asked that the custody of their infant daughter be awarded to her, and that provision for her support and education be made out of appellant's estate. Upon final hearing, the court adjudged appellee entitled to divorce, and that she be allowed \$75 per month as alimony, and for the maintenance and support of the child, which was placed in her custody, and required appellant to pay the costs of the suit, including a fee of \$250 to her attorney. We are asked to reverse the judgment allowing alimony, and awarding to appellee the custody of the infant, on the ground that she was not entitled to divorce under the proof, and that, consequently, no allowance could legally be made for her support; and it is further insisted that, even if alimony were proper, the sum awarded is excessive. This court has no revisory power over a judgment for divorce, and it is unnecessary to review the voluminous testimony

bearing upon this question. It is enough to say that, after a careful reading of the record, we do not feel that we would be justified in holding that the judgment of the chancellor, decreeing a divorce, and awarding to the mother the custody of the infant, was unauthorized by the proof.

The only question here to be considered is as to the reasonableness of the amount allowed by way of alimony, and for the maintenance and education of the infant. The agreed statement of facts filed in the record shows that the estate of appellant consists of 439 acres of land, which is estimated to be worth \$32,925 (or \$75 per acre); 16 acres, estimated at \$200; and personalty of the value of \$1,150,—making his entire estate aggregate \$34,600, while his liabilities are fixed at the sum of \$15,550, nearly all of which is for borrowed money, which is bearing interest. It further appears that the father of appellant's first wife paid \$9,000 of the purchase price of the land owned by appellant; and that the present family of appellant consists of himself, his son, and a grandson, 11 years of age, and two daughters by his first wife, both of whom are married, one of them having married since the institution of this suit; and that appellee is substantially without property. The record fails to disclose the age of the parties, and is equally silent as to the annual income realized by appellant from his farming operations; but it sufficiently appears that the net estate of appellant, after making provision for the payment of his outstanding debts, is about \$19,000, which is represented by agricultural lands estimated to be worth \$75 per acre. It is a matter of common information that this species of property yields comparatively small returns, and, if appellant realizes the legal rate of interest on this amount, he would have an income of about \$1,140 a year, out of which he must first pay, as fixed charges, taxes, insurance, and repairs.

Mr. Bishop, in the recent edition of his work on Marriage and Divorce (volume 2, § 1029), says: "The dissolution of a marriage by divorce is analogous to its dissolution by death. \* \* \* In a sort of general way, with variations after which it is not needful here to inquire, the common law gives the widow on the death of her husband one-third of his estate. So that, looking at this sort of analogy, if one-third of the husband's income will leave the wife on divorce as well off pecuniarily as though the cohabitation continued, with something in compensation for her injury, such, when not reduced by a separate income of her own, may well be regarded as a sort of common, matter of course proportion. And it has been said that, in England, 'one-third of the husband's income is the usual rate at which permanent alimony will be allotted.' And this appears to be indicated by various English cases. We have American ones, perhaps, a little like these; but, on the whole, there is not hither-

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

to any sufficient ground for saying that we have any matter of course rule of any sort. In both countries alike, the proportion may be greater than one-third, or it may be less." Section 1034: "In a case where no part of the property came from the wife, Sir John Nicholl deemed one-third a liberal allotment."

There has been no fixed rule laid down in this state for determining the amount of alimony which should be allowed; but it seems plain, from the agreed facts as to appellant's financial condition, that if he is compelled to pay the costs of this proceeding, and \$75 per month as alimony and for the maintenance of the infant, in addition to his other pecuniary burdens, he will have nothing left from his income for his own support or that of others dependent upon him, and that he will soon be a bankrupt. The allowance made is excessive. It would be better for both appellant and appellee if a lump sum could be awarded to appellee in full settlement of her claim for alimony. Appellant would then know precisely what he had to pay, and appellee would be relieved from the financial vicissitudes which are likely to overtake appellant. But, in the entire absence of proof as to appellee's age and expectation of life, such a sum cannot be intelligently determined. For the present the allowance to her should be fixed at \$325, and the additional sum of \$175 per annum, to be paid quarterly, in equal installments, for the maintenance and education of the infant; and the final judgment should reserve the right to change or alter these amounts as the future situation of the parties and their interests require. For the reasons indicated, the judgment is reversed, and the cause is remanded for proceedings consistent with this opinion.

GRANT v. SOUTHERN CONTRACT CO. et al. MASON GOOCH & HOGUE CO. v. SAME. WADDY et al. v. SAME. JACKSON & SHARP CO. v. SAME.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 29, 1898.)

**CORPORATIONS — RIGHT OF CREDITORS TO COMPEL STOCKHOLDERS TO REFUND DIVIDENDS.**

1. Stockholders to whom all the assets of the corporation have been distributed as dividends may be compelled to refund to creditors of the corporation.

2. A railroad, desiring to extend its line, agreed to turn over to a contract company, to which it was already indebted in the sum of \$300,000, its bonds, secured by mortgage on the proposed extension, to the amount of \$1,500,000, the bonds to be delivered as the work progressed, except that \$150,000 of them were to be delivered at once in discharge of the existing indebtedness of the railroad company to the contract company. It was understood that the contract company and its stockholders would place at least \$500,000 of the extension bonds, and it did sell bonds to the extent of \$640,000, of which the stockholders of the contract company took \$423,000. The bonds for \$150,000 imme-

diately delivered were distributed among the stockholders of the contract company, the orders and resolutions relating thereto reciting that this amount was a dividend of 120 per cent. Subsequently, judgment creditors of the contract company, having executions returned "No property found," sued the stockholders to compel them to refund this dividend, and answers were filed making various defenses, but all admitting that the amount of the bonds was distributed as a dividend. After two years, amended answers were filed by some of the stockholders, alleging that the bonds thus distributed were never assets of the contract company, but were distributed to the stockholders as a bonus by the railway company, in pursuance of a contract, to the effect that the stockholders of the contract company would subscribe for \$500,000 of the extension bonds. Held, that the defense, in view of the delay in asserting it, and of all of the circumstances, is not sustained by the evidence.

Appeals from circuit court, Jefferson county. "To be officially reported."

Actions by Mason Gooch & Hoge Co. and by others against the Southern Contract Company and others to enforce certain judgments. Judgments for defendants, and plaintiffs appeal. Reversed.

Wm. Lindsay, George Weissenger Smith, and Stone & Sudduth, for appellants Mason Gooch & Hoge Co., Geo. W. Waddy and others, and Jackson & Sharp Co. Richard, Baskin & Ronald, for appellants Jackson & Sharp Co. Wm. Marshall Bullitt, St. John Boyle, and Bullitt & Shield, for appellant W. T. Grant. Swager Sherly, W. S. Pryor, Arthur Peter, and Strother & Gordon, for appellees.

HAZELRIGG, J. The Southern Contract Company was incorporated under the laws of Kentucky, with power and authority to construct railways in the state, and receive in payment thereon the stocks and bonds of such railroad companies. Its capital stock was only \$125,000, and the shares of \$100 each were owned by some 100 persons. Its chief means to carry out the purpose of its incorporation consisted necessarily in the proceeds of the stock and bonds of the railroads to be built by it. Under contract with the Louisville Railroad Company, by which it obtained possession of the mortgage bonds and certain stocks of the company, the contract company built the Louisville Southern Railroad, from Louisville to Burgin, in Mercer county, completing the work during the summer of 1888. Subsequently it furnished certain moneys for repairs on the road, and, in the latter part of the year named, the railroad company was in debt to the contract company in the sum of about \$300,000. The contract company at this time was indebted to various contractors for work on the line thus completed. While matters were in this condition, it was determined to extend the road from Lawrenceburg on to Lexington, Ky.; and the railroad company agreed to turn over to the contract company its bonds, secured by mortgage on the proposed extension, to the amount of \$1,500,000, and of its capital stock to the extent of \$1,000,000. The bonds were to be delivered

<sup>1</sup> Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.



as the work progressed, except that \$150,000 of them were to be delivered at once, as shown by the ninth clause of the contract, which reads as follows: "On account of the existing indebtedness of the railroad company to the contract company, the latter should be entitled at once to receive delivery of \$150,000 of the bonds of the said railroad company." And it was further provided that the contract company should then release the railroad company of all its indebtedness against it. In accordance with the contract, the bonds were delivered to the contract company as the work progressed, and were, in turn, pledged or sold by the contract company, to raise the money for building the extension; but, in accordance with what seems to have been the understanding among all the parties, the bonds for immediate delivery were so delivered to the contract company, and at once distributed among the stockholders of the contract company as a dividend of 120 per cent. on the capital stock of that company.

As the cost of the extension was estimated at \$900,000, it is clear that all the parties interested expected the contract company to make a large profit; and it was believed the company might safely declare, not only this dividend of 120 per cent., but, as expressed by one of the best-informed witnesses, it was expected that the company would be able to declare an additional dividend of 100 per cent. in a short time. The initiatory step, however, to insure success, was to place the bonds of the railroad company, and it was understood that the contract company and its stockholders would place at least \$500,000 of these bonds. It did sell bonds to the extent of \$640,000, of which amount the stockholders of the contract company took \$423,000, and \$217,000 of them were taken by outsiders. The terms of subscription for these bonds were that the subscriber got a \$1,000 bond and \$850 of stock for the sum of \$850, payable in installments. The remaining bonds were pledged to various financial institutions of the country, and large sums realized, by means of which the extension was pushed to completion. In the meantime, the debts due to certain contractors for work on the completed line remained unpaid; and in July, 1892, the Mason Gooch & Hoge Company, after judgment against the contract company and a return of "No property found," instituted its action in equity to compel the stockholders of the contract company to refund the dividend they had received; its principal averment being that, after the debts upon which said judgment in its favor was rendered were created, the stockholders in said corporation (contract company) withdrew, and divided among themselves the capital stock and assets of said corporation in a larger amount than the plaintiff's said debts, and it avers it has a right to have said stock and assets of said corporation applied to the payment of its judgment aforesaid. Other suits of a

similar character followed; and these complaining creditors of the contract company are the appellants in this court, the chancellor having denied them any relief, upon grounds to be considered presently.

At the outset, we are to keep in mind that under the general law, nowhere more clearly recognized than in this state, the contract company, whether solvent or insolvent, could not distribute among its stockholders the full amount of its capital stock, and entire assets, to the detriment of its creditors. In *Gratz v. Redd*, 4 B. Mon. 178, it was held that the capital stock of a corporation was a fund set apart by the charter for the specific purposes of the incorporation, and all creditors have the right to look to this fund for the payment of their debts. The court said the creditors "have an interest in and claim upon the fund set apart by law for their payment, and may follow it into the hands of the distributees, who hold it as volunteer recipients, having no rightful claim upon it." We assume it to be well-settled law that the stockholders of a corporation cannot pay up their stock, and then appropriate to themselves an equal amount of the assets of the corporation, without making provision for the payment of the corporate debts. Whatever may have been the views of the stockholders at the time of this declaration of dividend and receipt of it by them, and at the time they filed their original answers in these suits, as to these general principles of the law, they do not now seem to seriously call them in question; but they rest their defense chiefly on the contention that the bonds thus distributed were never, in fact, assets of the contract company, but were distributed to the stockholders as a bonus by the railway company in consideration of the fact, and in pursuance of a contract to the effect, that the stockholders of the contract company would subscribe for \$500,000 of the extension bonds of the railroad company. Manifestly, if such was the consideration of the distribution of these bonds among these stockholders, the distribution ought not to have been called, as it is called in every order and resolution connected with the subject, a "dividend." There could be no greater abuse of the use of ordinarily well understood terms than to call that a dividend among the stockholders of a corporation which was in fact a distribution for a valuable consideration of assets and bonds of a totally different company; but, if we waive this misuse of the words employed to turn over to these stockholders the bonds of the railroad company, we should at least expect to find some written evidence of so important a transaction, or some unequivocal resolution of the governing authorities of the railway corporation or the contract company acting on behalf of its stockholders; and least of all should we expect to find, in the deliberate and carefully prepared contract between the contract company and the rail-

road company, stipulations with respect to these bonds to be immediately delivered, which are wholly inconsistent with the present contention of the stockholders that these bonds were distributed as a bonus to them, and because of their pledge to subscribe for other bonds of the railroad. We do find, however, that the purpose of this immediate delivery of the bonds in dispute is distinctly set up in the contract between the contract and railroad companies, and that purpose is not different from and inconsistent with the present contention of the stockholders; but, as will be observed, the delivery of these bonds canceled in express terms a debt due the contract company from the railroad company of some \$300,000, and thus the creditors of the contract company were deprived of an asset due their debtor, and with which their debts might have been paid. It may be the asset was supposed to be worthless; still, even the chance of collecting it was cut off by its cancellation and release. We do not doubt that it was good business sagacity to thus cancel the debt against the railroad company, but only because the contract company received bonds of value therefor, and these bonds stood in the place of the debt the railroad company owed the contract company, and these proceeds ought to have gone to pay the debts of the contract company. Moreover, if this important transaction, involving the distribution of these bonds among the stockholders of this company, was had for the reasons now assigned, we should expect to find substantial unanimity among the stockholders themselves respecting the controlling reasons which induced the distribution; and especially would we expect to find the stockholders, when sued for the dividend thus declared by the contract company and received by them, promptly and consistently asserting the defense that the distribution was not in fact a dividend or distribution of assets belonging to the contract company.

The facts are, however, that when sued, in July, 1892, the various stockholders began filing separate answers, in which it was distinctly admitted that the contract company had declared a dividend of 120 per cent. on its capital stock, and the same had been distributed among the stockholders, not in cash, but in the form of first mortgage bonds of the Louisville Southern Railroad Company. Some of these defendants averred that the contract company was entirely solvent at the time, and had the right to declare and pay this dividend. Others admitted substantially the claim of the plaintiffs, and took steps to bring all the stockholders before the court, to the end that all might bear the loss ratably. Still others set up that the stockholders had become bound as indorsers and otherwise on certain paper of the contract company, and had paid off the debt, and the company owed them more than the dividend. Among the stockholders whose answers in expressed terms admitted that the distribution of these bonds was a

dividend declared on its capital stock by the contract company are to be found those principally interested in the railroad company and in the contract company, and whose holdings of stock were the largest, and who were most active and prominent in the promotion of the enterprise. And in none of these answers are we informed of what is now conceded to be the real and only defense to these suits. Not until 1894, by their amended answers, are we given a hint of this important claim that the stockholders were induced to subscribe for the extension bonds by reason of the gift to them by the railroad of the bonds in dispute. It may be noticed here, too, that, if the railroad was making such a gift for the purpose of inducing such subscription, the gift would naturally have been made only to such stockholders as would, in fact, subscribe for the new bonds, and somewhat in proportion to their subscriptions; whereas we find that 17 persons, holding but \$20,350 of the stock in the contract company, subscribed for \$231,000 of bonds, one-half the amount taken by the stockholders; and two persons, holding \$24,250 of stock in the contract company, did not subscribe for any bonds at all, although they received one-fifth of the entire \$150,000 of bonds. And persons who held no stock at all subscribed, as we have seen, for \$217,000 of bonds. Further inconsistencies might be pointed out in the various pleadings by the different defendants. It is true that some of the defendant stockholders may be interested in ignoring the defense asserted by others. When they have paid out for the company a greater sum than the dividend received, they might get more if the plaintiffs succeed than if they fail. This, however, is problematical, and we cannot attribute the differences in the various answers to such a motive; and, at any rate this does not account for the long delay in setting up the defense we have considered by those who were not bound on any of the company's paper, and who set up pleas wholly inconsistent with such defense. These pleas, as we have seen, for nearly two years of the litigation, quite freely admitted that these bonds were distributed by the contract company as a dividend among its stockholders. But this is not all. Even in 1895, and after the defense that the distribution had been made as a bonus had been set up, the appellees, among other things, said: "Defendants, and each of them, say that, immediately before the bonds were distributed among the stockholders of the contract company, the board of directors and stockholders of said company made a thorough and careful examination of the financial condition of said company and said road, and said stockholders found thereby, as they believed and declared, that said company was perfectly solvent, and that it would have a large surplus of capital stock and assets over all liabilities after said distribution should be made; and, on ascertaining these facts, the Southern Contract Company, by its stockholders, at a meeting thereof regularly called and held just prior to said pay-

ment and distribution of said bonds as aforesaid, at which nearly all its members attended, and at which a large preponderance of the stock was represented, by an almost unanimous vote, authorized and directed the directors to pay and distribute said funds as and for the purpose and for the consideration aforesaid. Wherefore these defendants plead and rely on said act of the stockholders of said company in authorizing and directing said payment and distribution of said bonds by said directors in bar of plaintiff's rights, as assignee of said company, to recover against these defendants," etc. These allegations were admitted by the appellants, were relied on by appellees as a defense on the previous appeal, and, only after this court held it unavailing as a defense, did they rely on the other alleged defense. 37 S. W. 263. They are repeated even more explicitly to the effect that the bonds were assets of the contract company in an amended answer.

If these bonds were acquired by appellees in pursuance of a contract with the railroad company, by which their possession was obtained in view of an agreement to subscribe for the new bonds, there would have been no occasion for an examination into the condition of the contract company, as the solvency or insolvency of the company would have been wholly immaterial. Again, the defense now relied on is unreasonable in another respect. The scheme would, in effect, be that the railroad company sold to these stockholders \$500,000 of its bonds, at the price of 85 cents so far as the public was to understand, but at only about 50 cents in fact, by reason of a rebate or gift to them of \$150,000. And the sale of the rest of the bonds was to be boosted by this trick on the part of men whose reputations and business capacity were so high as to make the bonds "go" on the general market. We do not believe these appellees were parties to such a scheme. These stockholders, as well as all the parties to this enterprise, had faith in its successful issue, and believed there were large gains to be had in the purchase of these bonds at 85 cents. It is true, they were promised by the directory of the contract company indirectly, if not in expressed terms, that, if they would take hold of the railroad bonds to the extent of \$500,000, the success of the scheme would be assured, and the contract company would then be able to declare a dividend of 120 per cent. on its capital stock, and in a short time even more than that. But at no time or place, nor at any meeting of the directory or stockholders, was this distribution called anything else than a dividend to the stock of the contract company.

At the first and most important meeting of the stockholders, and when the plan of extension was first unfolded, the minutes show as follows: "Col. Bennett H. Young stated that he was now neither a director nor an officer of the company, but had been asked

to explain the condition of the company and the plans for an extension to Lexington by issuing \$1,500,000 of bonds and \$1,000,000 of stock on this new road; that in this way it would be possible for the railroad company to repay to this company the large sums advanced to it by the company; that, if the plan was carried out, the directors believed they could pay a dividend of 120 per cent. in the new bonds, and have from 450 to 600 per cent. in stock," etc. Later on, at a meeting of the directors of the contract company, it was resolved as follows: "Whereas, it was understood at the stockholders' meeting, held on December 13, 1888, that in consideration that the amount of \$500,000 be subscribed to the bonds of the Louisville Southern Railroad, Lexington extension, a dividend of bonds shall be declared to the amount of \$150,000 to the stock of the Southern Contract Company: Therefore, be it resolved, that the directors of the Louisville Southern Railroad be requested to order the trustee to deliver to the Southern Contract Company \$150,000 in bonds at par value, in order that the Southern Contract Company may carry out the understanding at said meeting of stockholders." The understanding that a dividend would be declared in the bonds immediately delivered to the contract company was common to all the stockholders, and was founded on the promises made by the directors of the contract company, and which, in turn, were founded on the reasonable belief that the company was financially able to declare such a dividend. This promise or understanding is very far from indicating a contract with the railroad company, and is, at last, only such an understanding as is had when any corporation declares a dividend on its stock, and the stockholders accept it. There is necessarily an agreement between the directors and the stockholders. There is no evidence, however, that the railroad company undertook to demand, or even suggest, that the contract company declare a dividend on its stock. This was a matter wholly foreign to its authority. The contract was to pay over these bonds in discharge of its indebtedness to the contract company; and this was plainly and unequivocally set up in the written contract.

We are of opinion that the plaintiffs ought to recover; but the question of amount against each stockholder has not been submitted to or tried out by the chancellor. The question of priority of lien by creditors is not discussed, and it is sufficient to say, in answer to suggestion of counsel that this question be settled, that we see nothing to prevent the application of the ordinary and usual rules for determining the priorities of the liens of the attaching creditors. The judgments dismissing the petitions are reversed, and judgment will be entered for the plaintiffs, in accordance with the principles of this opinion.

## FURNISH v. BURGE.

(Supreme Court of Tennessee. Nov. 28, 1898.)

## ACTION ON NOTE—PLEADING—NON EST FACTUM—TENDER OF ISSUES.

1. A plea that a note sued on was not executed by defendant, or by any one authorized to bind him, is a good plea of non est factum.

2. Defendant pleaded as a defense to a note that it was not executed by him. Under direction of the court, issues were made as to whether defendant signed the note himself, or authorized it to be signed. *Held*, that the issues were not equivalent to the plea, since a party, by ratification, might be held to have executed an instrument which he never signed, or authorized to be signed.

Appeal from chancery court, Hamilton county; T. M. McConnell, Chancellor.

Bill by J. G. Furnish against J. G. Burge. From a decree in favor of defendant, plaintiff appealed to the court of chancery appeals, and from a decree of reversal defendant appeals. Reversed.

E. Y. Chapin and E. M. Dodson, for appellant. W. S. Schoolfield and F. O. West, for appellee.

SNODGRASS, C. J. The bill in this cause was filed to collect a note given by defendant to J. K. Lassing, and by Lassing indorsed to complainant. It averred merely the making and indorsing of the note, the credits to which it was entitled, and the balance due, with interest, and prayed for decree. The statements of the bill were as direct and concise as a declaration, and might very well have been filed as such in a court of law. It made no further or broader question than such a declaration would have done. The defense, and only defense, was a plea of non est factum. It was in the code form, and as follows: "The respondent, J. G. Burge, for plea to the bill filed against him in this case, says that the note sued on was not executed by him, or by any one authorized to bind him in the premises; and demands a jury to try the issue here tendered." The plea was properly verified on oath. Complainant joined issue on the plea. The record then discloses that respondent moved the court for a jury, and tendered his issue as follows: "In this cause a jury is demanded to try the only issue now presented in the suit, to wit, the plea of non est factum." This motion the chancellor overruled, "being of opinion that there was no proper issue tendered." A further demand for a jury was made, as follows: "In this cause a jury is demanded to try the issue of fact, to wit, did or not the defendant, Burge, sign the note sued on, and the deed of trust given to secure the same?" Upon this demand a jury was ordered, and "the following issues of fact were thereupon made up by the parties under the direction of the court": (1) Did or not the defendant, J. G. Burge, sign the note sued on in this cause? (2) Or was or not said note signed by any oth-

er person authorized to bind said J. G. Burge in the premises? The case upon the issue of the plea thus formulated and divided was tried, and the jury found for defendant. Decree was pronounced, and plaintiff appealed, and assigned errors. The court of chancery appeals reversed the chancellor, and decreed in favor of the plaintiff, as that court says the chancellor should have done, notwithstanding the verdict, upon a motion which plaintiff made after verdict, "for decree overruling the plea notwithstanding the verdict of the jury," which motion the court of chancery appeals treats as intended to be, and as equivalent to, a motion for judgment notwithstanding the verdict. The defendant appealed to this court, and assigns errors.

In its opinion the court of chancery appeals, finding that the chancellor had refused to charge the jury on the subject of ratification of the note by defendant (there being evidence tending to show this), held that such refusal was proper, because no such issue was tendered. That court then held that the issues tendered were equivalent to the plea, but the plea itself was not a complete and entire defense, and said that a plea should only be adopted or allowed when it presents a single issue of fact or matter of defense, and that matter should be a full, and in all respects a complete, defense. And the court continues: "Treating it [the plea] as the parties did,—as an answer,—we find that it did not constitute a complete and entire defense, because, although the note sued on may not have been signed by the defendant, nor by any one authorized to represent him, still the defendant may have been—as we think he was—liable on it on the ground of estoppel and of ratification. \* \* \* On the facts developed, it appears that the plea of non est factum did not offer a complete and thorough defense." That court said further: "The form of defense adopted is not the proper practice in chancery, and other issues were presented by complainant's bill, which he was authorized to prove, and did prove, and on which he is entitled to a decree notwithstanding the verdict." The court treated the issues tendered as all right, and as though they covered defendant's plea, but the plea itself as not presenting a complete defense. In all this, we think, there is error. The plea was, in a case like this, which was a plain suit on a note, proper under chancery practice, and does present a full and complete defense. Nor could a verdict, if rested on it, be disregarded. But we are further of opinion that the issues which the parties were required to make up under the direction of the court were not issues authorized under the plea. They, at most, but present issues as to facts, which are relevant on such a plea, but not conclusive. The plea is that the note sued upon was not executed by defendant, etc. The issue made up was that it was not signed by him, etc. This is not the equivalent of the plea. A party may, in the sense of the rule,

execute an instrument which he never signed, or authorized to be signed. He might deliver such an instrument, or ratify it afterwards, or so act as to make it his deed by estoppel, when another sought to charge him with it. It is settled upon authority that an averment that one did not sign or authorize another to sign is not a good plea of non est factum. *State v. Roberts*, 11 Humph. 541. The issues submitted were not, therefore, the real issues made by the plea. Had they been so, the defense would have been presented fully and completely, as the plea was a full and complete defense. Under it defendant would have had the right to prove what he might have done under the common-law plea, as the Code form is its equivalent, and includes all special defenses, and every special plea; that is, that the note, when the plea is filed, is not then the act and deed of defendant. Shannon's Code, § 4661; *Id.* p. 1154, and notes under plea of non est factum; *Johl v. Fernberger*, 10 Heisk. 37-40; *State v. Roberts*, 11 Humph. 541. Under the common-law plea of non est factum, the defendant may prove that the deed was delivered and still remains in escrow; or he may take advantage of any material variance between the deed as set forth by the plaintiff and the deed produced at the trial; or may give any evidence showing that the deed either (1) was originally void, or (2) was made void by matter subsequent to its execution, and before the time of pleading, for it is to the time of pleading that the averment relates. Thus the defendant may show, under this issue, that the deed is a forgery; that it was obtained by fraud, or was executed while defendant was insane, or so intoxicated as not to know what he was about; or that it was made by a feme covert, or to her, but her husband disagreed to it; or that it was delivered to a stranger for the use of the plaintiff, who refused it; or that it was never delivered at all. Or he may show that since its execution it became void by being materially altered or canceled by tearing off the seal. But matters which do not impeach the execution of the deed, but go to show it voidable by common law or by statute,—such as usury, infancy, duress, or gaming, or that it was given for ease and favor, or the like,—must be especially pleaded. 2 Greenl. Ev. § 300. These are sufficient citations to show what defendant may prove. Of course, what he may prove, plaintiff may controvert, and thus all these are issues on such a plea. They go to the time of pleading, when, of course, there may have supervened since date of instrument sued on both ratification and estoppel. Ratification would have made the note his own before suit (*McElroy v. Melear*, 7 Cold. 140), and estoppel would have prevented his denying it, even though in fact it were not. The decree of the court of chancery appeals is reversed, and case remanded to chancery court for trial before a jury on the plea of non est factum. Costs of appeal will be paid by defendant, Burge.

## SOUTHERN RY. CO. v. HARRIS.

(Supreme Court of Tennessee. Nov. 22, 1898.)  
DEPOSITION—EXCEPTION—LIMITATIONS—PLEADING.

1. Shannon's Code, §§ 5661, 5662, requiring all exceptions to depositions for causes going to their admissibility to be disposed of before the trial, they first going to the clerk and then by appeal to the court, surprise at the offering at the trial of a deposition of which defendant had no notice or knowledge does not authorize his objection to the court as to its admissibility, but merely a withdrawal of the case from the jury, and a continuance, that a statutory exception may be made.

2. Plaintiff in his declaration having admitted that the injury complained of occurred more than a year before bringing of the suit, but having alleged facts which, under Shannon's Code, § 4446, relieved him of the bar, and which were not denied by defendant, the plea that the cause of action arose more than a year before the bringing of the suit presented an immaterial issue.

Appeal from circuit court, Hamilton county; Floyd Estill, Judge.

Action by John Harris against the Southern Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Cook, Swaney & Cook, for appellant. Rutledge & Murray, for appellee.

BEARD, J. This record is before us on assignments of error to the action of the trial judge. During the progress of the trial in the court below, the plaintiff, over the objection of the defendant, was permitted to read to the jury a deposition which had been taken by the plaintiff without notice, and of the existence of which the defendant and its attorneys were without knowledge until it was offered as a part of the plaintiff's case. It is now insisted that the trial judge was in error in overruling the objection, and permitting the deposition to go to the jury. While it is clear that this deposition, taken, as it was, without notice or consent, was subject to exclusion upon exception properly made, yet the court below cannot be placed in error for overruling the objection at the time and in the form presented. The statute is imperative that "all exceptions to depositions for want of notice, because not filed in reasonable time, or for other causes going to the admissibility, \* \* \* shall be made and disposed of before the commencement of the hearing or trial, otherwise they will be considered as waived." Shannon's Code, § 5661. Such an exception goes first to the clerk, and it is his duty to act upon it forthwith, "and from his decision an appeal lies to the chancellor or judge to be disposed of before the cause is heard or tried." *Id.* § 5662. It is apparent that the trial judge, in the absence of an exception acted upon by the clerk and carried up by appeal, was without jurisdiction to entertain the motion to exclude the deposition in question, grounded as it was upon a fact going to its admissibility. The surprise

of the defendant company at the sudden discovery of this deposition, if an application had then been made to the court, would have afforded sufficient reason for a withdrawal of the case from the jury, and for its continuance, in order that a statutory exception might be made; yet it is not sufficient to authorize us to reverse the cause, when the objection came at a time and in a manner not authorized by the statute.

2. Another assignment of error is that the trial judge declined two special requests with regard to the plea of the statute of limitations. To make clear this assignment, it is necessary that a brief statement of the pleadings in the cause should be given. This suit was brought by Harris to recover damages for a personal injury resulting, as was alleged, from the negligence of the railroad company. In his declaration, after averring that the injury occurred on the 19th of December, 1894, it was alleged that shortly thereafter, "to wit, about the — May, 1895," plaintiff "brought suit for same in the circuit court of Hamilton county, Tennessee, against the said defendants, for the sum of \$25,000; that on the — day of —, 1895, the said defendant, through its attorneys, removed said suit to the circuit court of the United States for the Eastern district of Tennessee, at Chattanooga, where and when, on the 10th of April, 1896, the plaintiff was called out, in default of appearance, and the said suit was dismissed on defendants' motion; \* \* \* that the cause was not tried on its merits" in either of said courts. The present suit was instituted just 16 days after this order of dismissal. To this declaration the pleas of not guilty and of the statute of limitations were filed, the latter being in the following words: "And for further plea defendant says that the cause of action arose more than one year before the bringing of this suit." This was the state of the pleadings when, on the trial of the case, the circuit judge was requested by the defendant to say to the jury that the defendant had pleaded that the cause of action had accrued more than one year next before the bringing of this suit, and upon this plea the plaintiff had joined issue; so that, if they found that the accident which caused the injury did occur more than one year before the commencement of this suit, then they must find for the defendant. The same view, embodied in somewhat different form, was submitted in another and subsequent request. Both requests were declined, and it is now insisted that there was error upon the part of the trial judge in so doing. In the state of the pleadings, we do not think so. The plaintiff, in his declaration, anticipating the plea of the statute by the defendant, had seen proper specifically to set out these allegations of facts which, if true, relieved him from its bar, by bringing his case within the saving of section 4446 of Shannon's Code. It is true that he might

have contented himself with a statement of his cause of action in his declaration, reserving these facts for a replication, to the plea of the statute; but we know of no authority which holds that it was essential that he should do so, or that, in pursuing the course he did, the plaintiff violated the rules of good pleading. The averment thus made was not traversed by the defendant. If true, it was immaterial, as was alleged in the plea, that the cause of action occurred more than one year before the institution of the suit; and that it was true was conclusively admitted, "for all the purposes of that issue," by the defendant, when it failed to make a denial by plea. Shannon's Code, § 4631. We have, then, a case where the plaintiff admits in his declaration that the injury of which he complains occurred more than one year before the bringing of the present suit, and yet coupling this admission with allegations which, if true, relieve him from the statutory bar, and which the defendant, by its failure to deny, admits to be true. In this condition of the record, we think it apparent that the plea presented an immaterial issue, and the circuit judge is not to be put in error for declining to submit it, as specially requested, to the jury. But it is insisted this conclusion is in the face of *Graham v. McReynolds*, 88 Tenn. 240, 12 S. W. 547. That was an action for seduction and breach of marriage promise. The plaintiff in her declaration averred, in substance, that she reached her majority within twelve months before the institution of her suit; fixing the date of reaching her majority as the 26th of October, 1887. To this declaration a number of pleas were put in,—one being the statute of limitations of one year; and another, that the plaintiff attained her majority more than 12 months before the suit was brought. Under the erroneous conception that this latter plea, taken in connection with, and as a traverse of, the averment in the declaration as to the time of the plaintiff's attaining her majority, made an issue upon the statute of limitations, the plea setting up the bar of the statute, on motion of the plaintiff, was stricken out by the circuit judge. This was assigned for, and held by this court to be, error. The controlling reason for this holding is found in the paragraph of the opinion which is as follows: "The sole issue presented by this plea was whether or not the plaintiff had attained her majority within twelve months before suit brought. It is clear that, except in reply to a plea of the statute, the right of the plaintiff to recover could not be affected by the fact that she had attained her majority more than twelve months before the suit was brought. In the absence of the plea of the statute, her right to recover would be as complete at fifty years of age as at twenty-one; and though she should admit on the witness stand that she attained her majority more than three

years before suit brought, and the jury should so find the fact, nevertheless the court would be compelled to pronounce judgment in her favor, in case the jury should find for her on the merits of the case." This was the exact point in question and decided, and whatever else was said in the opinion is to be taken with reference to, and controlled by, it. Certainly, we think, the authority of that case does not militate against the conclusion reached in this. Judgment affirmed.

### CAMP v. RISTINE.

(Supreme Court of Tennessee. Nov. 22, 1898.)

#### OPINION EVIDENCE — VALUE OF PHYSICIAN'S SERVICES.

Physicians may give opinion evidence as to value of a physician's services.

Error to circuit court, Knox county; J. W. Sneed, Judge.

Action by C. E. Ristine against E. O. Camp. Judgment for plaintiff. Defendant brings error. Affirmed.

Washburn, Pickle & Turner, Lucky, Sanford & Tyson, and Welcker & Parker, for plaintiff in error. Webb & McClung and E. Fred. Mynatt, for defendant in error.

BEARD, J. This suit was instituted by the defendant in error, a physician, to recover from the plaintiff in error a bill for professional services. During the progress of the trial below the defendant in error offered, and there was admitted to the jury, over the objection of plaintiff in error, the expert testimony of certain physicians to show the value of the service for which he sought a recovery, and this action of the circuit judge is complained of in this appeal.

In this there was no error. It is a matter of common practice in our own courts, and, so far as we know, universally regarded as a sound practice, to permit lawyers to testify as to the value of legal services, without question as to the admissibility of such evidence (1 Whart. Ev. § 442; Head v. Hargrave, 105 U. S. 45); and this rule of competency has been extended to a great variety of cases. For instance, it has been held that a merchant may swear to the value of goods (Buckley v. U. S., 4 How. 251); a dealer in clocks as to the value of a clock (Whiton v. Snyder, 88 N. Y. 299); a trader as to the value of land (Bearss v. Copley, 10 N. Y. 93); and a physician as to the value of a nurse's services (Reynolds v. Robinson, 64 N. Y. 589). This well-recognized exception to the general rule which excludes opinion testimony rests upon the ground that the question of value involves skill, or service, or training which the ordinary run of men do not have. 1 Whart. Ev. § 440; 7 Am. & Eng. Enc. Law (Old Ed.) 494. But it is said that Bruce v. Beall, 99 Tenn. 303, 41 S. W. 445, holds otherwise. This is a mistake. In that case the question at

issue was, had the master been prudent or negligent in continuing the use of an elevator cable for a long series of years? The contention of the plaintiff was that he had been negligent, and, as a result, the plaintiff had sustained the injury for which he sued. This was denied by the defendant. With the issue thus made, an expert was put on the witness stand, who testified that the life of an elevator cable employed as the one in controversy was six or seven years, and he was then permitted, over objection, to state that it would not be prudent to use it for a longer time. In this last statement it was held that the witness had gone beyond the limit of expert testimony, and had invaded the province of the jury. In that case it was clearly competent for the witness to state, as he did, the average life of a cable used as that was; also to testify that after such use crystallization would set in, and the smaller particles of the wire would twist and break off like glass,—for these opinions or conclusions were those of special knowledge, and beyond the capacity of the common observer. But when the witness undertook to say, upon these expert deductions or conclusions of his, that such use continued beyond the limit he had fixed for the natural life of the cable was imprudent or negligent, he exceeded the license of an expert, and settled a question the jury was sworn to try. This was the extent of the court's holding in that case. While recognizing that matters of skill, experience, and science were the subjects of expert testimony, yet the ruling there rested upon the fact that a question involving prudence or negligence was within the compass of an ordinary intelligence, and must be determined by the jury. It certainly cannot be invoked as authority against the holdings of the trial court in the present case. There is no error in the record save in the amount of the judgment, which will be corrected as indicated by a memorandum accompanying this opinion, and, as corrected, it is affirmed.

### STATE, to Use of KNOX COUNTY, v. MURPHY et al.

(Supreme Court of Tennessee. Nov. 19, 1898.)

#### BACK TAXES — COLLECTION — FEES — STATUTES — SETTLEMENT WITH STATE COMPTROLLER.

1. Under Acts 1895, c. 120, § 87, fixing the compensation of the back-tax attorney at 10 per cent. on all taxes collected by him, whether with or without sale, and providing, in case of sale by him, there shall, "out of the proceeds," be paid all fees, costs, taxes, and interest, etc.; and section 96, providing that where there is no bid sufficient to discharge taxes, costs, etc., he shall bid the full amount thereof, and empowering him thereafter to sell the property at private sale at the amount of such bid; and section 96, declaring that, if he fail to effect within two years such sale of property so bid in, he shall file a bill for the enforcement of the lien for taxes, costs, etc.—fees of such attorney in sales where the property is bid in by him under section 95 can only be paid from funds obtained by a subsequent private sale, or

by a bill filed at the end of two years, and not from money collected by him for other taxes.

2. Acts 1897, c. 1, abolishing the office of back-tax attorney, and, by section 87, abrogating all sales by back-tax attorneys under Acts 1895, c. 120, at which the state had become the purchaser, does not, by section 43, give such attorney a right to retain fees for such sales from money collected for other taxes; such section providing for keeping alive all taxes and all liens for taxes under former laws existing at the passage of the act, and for continuance to final determination of all suits and proceedings then pending for collection of taxes under former laws, "provided that the amount of fees due the back-tax attorneys shall be allowed them as credits in their final settlements \* \* \*, said amounts to be fixed by the courts in which bills are filed"; this having reference to fees earned by such an attorney in a court proceeding instituted by him, and therefore to proceedings under acts prior to Act 1895; the sales under Act 1895, at which the state became the purchaser, having been abrogated before the expiration of the two years, at the end of which section 96 of said act authorized him to file a bill on account thereof; so that the only relief such attorney has is under Act 1897, § 85, subsec. 6, providing that "in respect of all delinquent taxes, \* \* \* now in the hands of said back-tax attorney [appointed under Act 1895], and here directed to be turned over to the county trustee for collection, the said county trustee will, in addition to all penalties, interest, and costs, also collect the fees thereon provided by the said act," and "said fees shall be equitably distributed as between said county trustee and said back-tax attorney."

3. The fact that the state comptroller, on a final settlement made with him by a back-tax attorney, permitted him to retain a certain amount, erroneously assuming that under the statute certain fees had accrued, and that they could be retained out of the money then in the hands of such attorney, does not prevent a different construction of the statute by the court.

Appeal from chancery court, Knox county; H. B. Lindsey, Judge.

Bill by the state, for the use of Knox county, against J. P. Murphy and others. From a decree for complainant, defendants appeal. Affirmed.

Comfort & Spilman, for appellants. G. W. Winstead, for appellee.

BEARD, J. The defendant Murphy was appointed back-tax attorney for the county of Knox by the comptroller of the state, under the provisions of chapter 120 of the Acts of the Legislature of 1895. Having qualified himself as required by that act, he set about the discharge of his duties; and during his incumbency he collected large sums of money from delinquent taxpayers, all of which he paid over to the financial officers of the state and county, except the sum of \$5,488.67, which he claimed the right to retain from the county as compensation for services which he rendered, as such attorney, in making sales of delinquent realty, under section 96 of that act, from which nothing was realized by him. Disputing his right of retention, the bill in this cause was filed to recover from him this sum. The section referred to provided that, in all cases where no bid was received by the back-tax attorney, at the

sales he was authorized to make, sufficient to discharge all taxes, costs, etc., upon property offered by him at public outcry, then he should bid the full amount of delinquent taxes, costs, etc., on such property, for the use of the state, county, and municipality, respectively; and he was thereafter empowered subsequently to sell said property, at the amount of such bid, at private sale, but subject to redemption as in other cases. The office of back-tax attorney was abolished by chapter 1 of the Acts of 1897, and by section 87 of the same act all sales of real property which had been made by back-tax attorneys under the authority of chapter 120 of the Acts of 1895, and at which the state had become the purchaser, were abrogated. This included and annulled the sale in regard to which the claim of defendant was set up. The question then presented in this record is, can one who, as back-tax attorney, acting under the authority conferred by chapter 120 of the Acts of 1895, collected money in discharge of delinquent taxes, retain this money to satisfy or pay his claim for commissions and costs attending the sale of the lands of other delinquents, where these lands were bid in by him as provided by section 96 of that act?

It is the settled policy of this state, fixed by statute and enforced by the decisions of this court, that no public officer shall "receive fees or other compensation for any service, further than is expressly provided by law." Shannon's Code, § 6352; *Johnson v. State*, 94 Tenn. 499, 29 S. W. 963. So, in *State v. Spurgeon*, 99 Tenn. 659, 47 S. W. 235, where attorneys, representing the state by appointment of the comptroller, instituted and brought to a successful termination a suit to recover moneys due the state's revenue, and sought to burden the decree for recovery with the declaration of a lien, among the reasons given for rejecting this demand, this court said that these attorneys must look alone to the acts under which they were appointed, to ascertain their right to compensation; adding that: "Compensation depends upon a collection. Until this is made, they have no claim." In view of this inflexible rule of policy, we think there is no difficulty in answering the question just propounded. By section 87 of the Acts of 1895 the compensation of the back-tax attorney was fixed at 10 per cent. on all taxes collected by him, whether the payment was made by delinquents voluntarily, without sale, or the collection was enforced by sale. In the event a sale of delinquent property was necessary, it was provided that, after an advertisement for 30 days, at the time and place fixed in the same, the attorney should sell at public outcry the property advertised, to the highest bidder, and out of the proceeds of sale there should be paid all fees, costs, taxes, and interest, etc. There can be no mistake in the construction of this section, and a well-defined purpose is there expressed that, in any case covered by



its terms, the back-tax attorney should look for his compensation, etc., alone to his collections. It is equally clear that the acts contemplated, in all sales made by him in which property was bid off by him for the state, county, etc., that he should look for compensation, etc., alone to his ultimate recovery of proceeds from those sales. Section 95 (under which the sales in question were made) and section 96 (providing, in the event the back-tax attorney failed to effect a public sale of the property so bid in within two years, then that he should file a bill for the enforcement of the lien for taxes, costs, etc.), when taken together, leave no room for doubt on this question, so far as that act was concerned.

But it is insisted for defendant that by necessary implication his right to retain is secured in the last proviso to section 43 of chapter 1, Acts 1897. That section provides for keeping alive "all taxes and all liens for taxes, and all penalties and any right to redeem from tax sales accrued under former laws and existing at the time of the passage of the" act of 1897, and also that "all suits and proceedings" then "pending for collection of taxes under former existing laws shall be continued to a final determination," as if that act "had not been passed." A number of provisos follow this general provision, which are not material to the present controversy. The proviso relied upon as giving the right now claimed by the defendant is in the these words: "Provided that the amount of fees due the back-tax attorneys shall be allowed them as credits in their final settlements with the state, city, and county, said amounts to be fixed by the courts in which bills are filed." In answer to this contention it may be said that this proviso neither determines the amount due, nor when it would be due, so that it might avail the back-tax attorney as a credit in his settlement, nor does the act anywhere else settle this matter for him. So far as such attorney, acting under the provisions of the act of 1895, is concerned, his compensation, as has been pointed out, could only come out of the proceeds of his collections, however made, and was not due until these were made. Again, it is evident that the fees covered by this proviso were those earned by the back-tax attorney in some court proceeding instituted by him. By its express terms, these "fees" were "to be fixed by the courts in which bills are filed." Thus, instead of including, we think it necessarily excluded, the defendant's present claims; for under section 95 of the act of 1895 the defendant could not file bills to enforce liens for taxes, costs, etc., accrued on the delinquent property he knocked off to the state, until the expiration of two years from the time of his sales. No bills were filed by him, and none could have been, because these sales were all abrogated

by the act of 1897, less than two years after the passage of the act under authority of which he made them. Then to what class of back-tax attorneys did this proviso apply? We think, beyond doubt, it applied to those appointed under acts passed prior to 1895, who had filed bills to enforce tax liens on delinquent property, which were then pending, unaffected by chapter 120 of the Acts of 1895. *Reinhardt v. Nealls*, 100 Tenn. — 46 S. W. 446. While this proviso clearly does not affect the back-tax attorney who had been acting under the act of 1895, yet such services as the defendant now seeks compensation for were not left altogether uncared for by this later act of 1897. Subsection 5 of section 85 of that act provides that the back-tax attorneys appointed under chapter 120 of the Acts of 1895 shall turn over "all books, papers and documents whatsoever in their hands relating to delinquent taxes" to the county trustees of their respective counties for collection, while subsection 6 provides, "In respect of all delinquent taxes, whether state, county or municipal, now in the hands of said back-tax attorney, and here directed to be turned over to the county trustee for collection, the said county trustee will, in addition to all penalties, interest, and costs, also collect the fees thereon provided by the said act" (chapter 120, Acts 1895), and that "the said fees shall be equitably distributed as between said county trustees and said back-tax attorneys." From what fund shall this equitable distribution be made? Unquestionably, from the proceeds of these delinquent taxes, when collections are made by the county trustee. This may fail to compensate defendant as fully as he would have been, but for the repeal of the act of 1895, and in this way a hardship may be enforced against him; yet the courts cannot go beyond the limits prescribed by the legislature, and grant relief for him.

But it is urged, if not as an entire defense to the claim of complainants, at least as a strongly persuasive reason why the complainant should not be permitted to press its present demand, that, in a final settlement made by the defendant with the comptroller of the state, that officer allowed him as a credit in his settlement, and permitted him to retain out of moneys collected by him for the state, the sum of \$1,334.69; that being agreed between them as the state's proportion of commissions, costs, etc., which it was assumed had accrued to defendant from making the sales of delinquent property now in question. To this we can only say that the construction of acts of the legislature by the fiscal officers of the state, or by any one of them, cannot be allowed to control the courts when they are called upon to construe the same acts. The result is, the decree of the court of chancery appeals is affirmed, with costs.

**EVANS v. VAN VALKENBURG et al.**  
(Court of Chancery Appeals of Tennessee.  
Aug. 23, 1898.)

**FORECLOSURE — ALLOWANCE OF HOMESTEAD—  
PLEADING.**

Complainant filed a bill to cancel a note and deed of trust for want of consideration, and enjoin a sale thereunder. On a cross bill by the holder of the note, a sale was decreed. The bill did not claim a homestead, nor did the cross bill or evidence raise the question of complainant's rights thereto. It appeared that complainant had a son 39 years old, but there was no allegation that complainant was the head of a family, or that she did not have ample property outside of that in the deed of trust, which waived homestead. *Held*, that a refusal to allow a homestead was not error.

Appeal from chancery court, Hamilton county; T. M. McConnell, Chancellor.

Bill by Elizabeth C. Evans against J. E. Van Valkenburg and another. A petition was filed by Mary C. S. Bradley, a new party, as a cross bill. From the decree rendered the complainant appeals. Affirmed.

John A. Hood and S. P. Stover, for appellant. Stephens & Carswell, for appellees.

**WILSON, J.** The original papers in this case were destroyed, in the destruction by fire of the Richardson Building, in Chattanooga, and, by agreement of parties, all material parts of the file were supplied. The following facts appearing in the record are all that need to be stated to present the case as it is before us: The complainant, December 1, 1892, executed a note to the Georgia Loan & Trust Company for \$500, and, to secure the same, made a deed of trust to defendant Van Valkenburg, covering two lots in the Seventeenth civil district of Hamilton county. Her bills avers that she did not receive from the defendants (the loan and trust company being one) the sum evidenced by the note, and secured by the trust deed; that Van Valkenburg was the agent of the loan and trust company, and that he did not pay her one cent of the \$500; but that, as trustee, he had her lots advertised for sale for cash, and in bar of the equity of redemption to satisfy the note; and she prays for an injunction to restrain said sale, and for the cancellation of the note and deed of trust. An injunction issued under the prayer of the bill. Van Valkenburg and the Georgia Loan & Trust Company answered, and therein denied the averment that complainant did not receive the money secured by the deed of trust. They admit that Van Valkenburg, as trustee, had the lots advertised for sale, and aver that he did so because complainant failed and refused to pay the note when it matured. It is further alleged in this answer that the loan and trust company, before the note fell due, sold and transferred it for value to one Mary C. S. Bradley, and that it was her property; and it appears that she was permitted by petition to become a party to the suit for the purpose of having the deed of trust fore-

closed for her benefit, as the innocent holder of the note for value. Her petition was treated as a cross bill for this purpose, and was answered as such. In her answer to it, as a cross bill, the complainant denies that Mary C. S. Bradley was the owner of the note, as an innocent holder thereof for value; and it is charged, in effect, that she was a convenient dummy, ostensibly of the state of Connecticut, behind whom or which the loan and trust company was seeking to shield itself from the results of its illegal and usurious conduct in connection with this transaction. The deed of trust is in the record, and, among other numerous provisions not necessary to mention, contains a clause waiving homestead, dower, and equity of redemption, and also one obligating the maker, in case of sale under the trust, to pay an attorney's fee of 10 per cent. of the amount secured thereby. The depositions of Van Valkenburg and one H. M. Knapp appear to have been taken by the defendant and cross complainant to sustain the note and deed of trust, as the property of Mary C. S. Bradley. But, as we read the record, their depositions were excepted to, and the exceptions sustained. The complainant took her own deposition, and that of her son, R. L. Evans, in support of her contention. Her insistence, in her answer to the cross bill of Mrs. or Miss Bradley, and in her evidence, is, in substance, that she told Van Valkenburg to apply \$275 of the loan to the payment of a note she owed one Mr. Dayton, and \$100 to the payment of a note she owed one Mr. Alexander, and that she would call at his office and receive the balance of the loan, but that, when she called to get this balance, Van Valkenburg informed her that there was no balance coming to her. If we could look to the deposition of Van Valkenburg, which is in the record, we find his explanation to be that he paid Dayton and Alexander, and \$15 to one Turnley for complainant, and a surveyor's fee for \$5, and \$7.50 to a title guaranty company, and retained \$60 to cover his fees and commissions. He claims that he paid \$32 in satisfaction of the Dayton claim against complainant, which was in a judgment before a justice of the peace. We further infer, from the statements in his deposition, that \$45 of the \$60 reserved as commissions and fees belonged to and was retained by the loan and trust company. The complainant and her son both deny that any fees or commissions were to be deducted from the sum borrowed, or that they ordered or authorized Van Valkenburg to pay Turnley \$15, or to pay any surveyor's fee, or any fee to any title company. The chancellor heard the cause, October 6, 1897. He gave Mary C. S. Bradley a decree on her cross bill against complainant for \$588.74, the principal and interest of the note, and for \$35, attorney's fees, and the costs of the cause incident to the filing of the cross bill; and he ordered the property conveyed in the deed of trust to be sold to pay these sums. He further found

that complainant only received from Van Valkenburg and the Georgia Loan & Trust Company the sum of \$419.50 on the \$500 loan, and thereupon gave her a decree against the loan and trust company for \$80.50, with interest, making together the sum of \$103.91; Van Valkenburg being, under this decree, made liable for \$45.18 of this sum. He taxed Van Valkenburg and the loan and trust company with the cost incident to the original bill. The lots conveyed in the deed of trust were sold by the master, and were bid in by the Georgia Loan & Trust Company at the price of \$100; and this sale was confirmed, no exceptions being filed thereto. The complainant has appealed the case, and assigned errors.

The statement of the case preceding the error assigned by appellant is that "this is a suit to have an account, and set up homestead in the property described in the bill, and that the chancellor allowed the account, but refused the prayer for homestead"; and the error assigned is that "the court erred in refusing to allow complainant a homestead in the property." In support of the error assigned, the Code providing a homestead for the heads of families is cited and copied. It need only be said in reply to this assignment of error, treating it as in form in compliance with the rule of court governing assignments of errors, that no claim to homestead is set up for complainant in her original bill, nor is the question of homestead raised in her answer to the cross bill, nor in her evidence. It is nowhere alleged in the pleadings that she is the head of a family, although it does appear in the evidence that she has a son 39 years of age, but whether legitimate or otherwise does not appear. Moreover, it is not anywhere intimated, in the pleadings or evidence, that she does not own and possess an abundance of real estate outside of that conveyed in the deed of trust, on which she lives. Besides, homestead is not reserved in her deed of trust. The assignment of error is not well taken, and is overruled, and the decree of the chancellor is affirmed, with costs. The other judges concur.

Affirmed orally by supreme court, September 22, 1898.

### THIRD NAT. BANK OF CHATTANOOGA v. SMITH et al.

(Court of Chancery Appeals of Tennessee.  
Sept. 3, 1898.)

#### FEMALE NOTARIES — ACKNOWLEDGMENT OF DEED.

A deed acknowledged before a woman acting under a commission from the governor as a notary public is valid.

Appeal from chancery court, Hamilton county; T. M. McConnell, Chancellor.

Bill by the Third National Bank of Chattanooga against C. E. Smith and others. Decree for defendants, and plaintiff appeals. Affirmed.

White & Martin, for appellant. Thomas & Thomas, J. A. Caldwell, and Tomlinson Fort, for appellees.

WILSON, J. The original bill in this cause was filed February 24, 1894, for the purpose of setting aside an assignment for fraud, and for other purposes, which it is not necessary to recite, in view of the status of the case before us. The only question before us is as to the validity of an instrument acknowledged before a female notary public, and the insistence is that she was not competent to take the acknowledgment, and that, therefore, the instrument conveying the real estate in question was not properly the subject of registration, under our laws, and, hence, that the property conveyed therein was open to attachment by creditors. All other questions in the case, except the sole question as to the right of a female notary public to take an acknowledgment of deeds and other instruments conveying real estate, have been eliminated from the case by the agreement of the parties. We had this question before us last winter, at Nashville, in the thoroughly considered case of *Stokes v. Acklen*, 46 S. W. 316; and, after a full review of all the authorities, we held that a deed or conveyance of real estate acknowledged before a female notary public was not void for that reason, and that a good title was acquired under such conveyance. Our opinion in that case was affirmed by the supreme court. We have been impressed with the force of the argument made by able counsel in this case, in which we are requested to make a modification of the doctrine announced in the opinion in the case referred to. We think, however, that our opinion in that case was well grounded in the authorities; and, having been affirmed by the supreme court so recently, we think it is conclusive of this case. In this state there is no constitutional inhibition against a female holding the office of a notary public. All that is needed to enable one to be a de jure female notary public is an enabling act of the legislature. She is, manifestly, when acting under a commission from the governor of the state as a notary public, based upon her election to the office, or an appointment thereto, in accordance with the law, a de facto officer, and her acts as such are binding upon third parties. The argument is pressed upon us that people dealing with a female notary public are bound to take knowledge of the fact that she is not a legal incumbent of the office, and therefore, acting with the knowledge of her de facto character as such officer, can claim no rights by virtue of an acceptance of her service in such capacity. We think this argument fails to give proper weight and force to the great commission of the state of Tennessee, issued under its seal. It is next insisted in this case that there is no proof that the female in this case was in fact a notary public, acting as such under a legal election thereto, and a

commission of the governor of the state based thereon. An examination of the pleadings in this case shows that the female was elected as a notary public, and commissioned as such. In fact, the pleadings practically admit this. This admission, practically appearing in the pleadings, obviates the necessity for any proof showing that she had acted as a notary for such a length of time as to justify an acquiescence on the part of the public in the belief that she had been duly elected and commissioned as a notary, and, therefore, that her acts were binding, as those of a *de facto* officer, on account of the public notoriety of her official conduct, and the length of time she had exercised her public function. While we fully appreciate the force and plausibility of the argument advanced by the learned counsel of appellant, we feel constrained to hold, in view of our own decision on the precise question affirmed by the supreme court, that there is no error in the decree of the chancellor, and it will be affirmed. The appellants will pay the costs of the appeal. The other judges concur.

Affirmed orally by supreme court, October 8, 1898.

#### STATE v. STONG et al.

(Court of Chancery Appeals of Tennessee.  
Oct. 8, 1897.)

#### RECORDER'S COURT — LITIGATION TAX — FORFEITURES—PLEADING—RECORDER'S LIABILITY.

1. Under Act April 5, 1889, levying a state tax on each case before a recorder's court where it can be collected in money, a city cannot apply all the amount collected in such court to payment of fines, and turn it into the treasury, but it is liable for such tax in all cases where it collects sufficient to pay it.

2. Under Act April 5, 1889, levying a state tax on each case before a recorder's court, provided it can be collected in money, the city is liable for such tax on all cases where fines were collected in money and turned over to the city; and this, though the fines might have been worked out.

3. Under Act April 5, 1889, levying a state tax on each case before a recorder's court where the tax can be collected in money, the city is liable for such tax on all cases where money was deposited by persons arrested as security for appearance, but was forfeited and covered into the city treasury without trial of those arrested.

4. A recorder is not liable for the state tax on litigation before him provided for by Act April 5, 1889, where none of the money collected came into his hands, but was collected by the clerk of his court, an official appointed by the city without his assistance, and whom he had no power to remove, under an ordinance authorizing such clerk to keep the records, issue processes, and perform all the clerical work.

5. Where a suit is for money alleged to have been collected by the recorder, a recovery cannot be had on a showing that it was his duty to collect it, but he did not do so.

6. Act April 5, 1889, levying a state tax on each case before a recorder's court where the tax can be collected in money, does not impose on the recorder the duty of collecting the tax, but the city has the power to create a

clerk for the recorder, and prescribe such collection as one of his duties.

Appeal from chancery court, Hamilton county; T. M. McConnell, Chancellor.

Bill by the state against A. A. Stong and others. There was a decree for defendants, and plaintiff appeals. Modified.

J. T. Hill, Richmond, Chambers & Head, and G. W. Pickle, Atty. Gen., for the State. C. R. Evans and Cooke, Swaney & Cooke, for appellee Stong. Cantrell & McReynolds, for appellee mayor and aldermen.

BARTON, J. This bill was filed on behalf of the state against A. A. Stong and the mayor and aldermen of the city of Chattanooga. Stong had been recorder of the city from January 1, 1891, to December 31, 1892, having been elected to that position by the mayor and aldermen of the city; and this bill is filed to collect from him the sum of \$1,243.80, alleged to have been collected as taxes on litigation before him, and from the mayor and aldermen of the city of Chattanooga the sum of \$1,054.25, it being alleged that that amount of the sum previously mentioned had been collected by Stong, as recorder, and paid into the treasury of the city of Chattanooga. The remainder of the sum of \$1,243.80, alleged to have been collected by Stong, it is averred, was still in Stong's possession and unaccounted for. The suit is based on the revenue act passed April 5, 1889, entitled "An act to provide revenue for the state of Tennessee and the counties thereof," in which it was provided, among other things, that taxes should be levied as follows: On "each case before a mayor's or recorder's court, or before any police court having jurisdiction of offenses in any taxing district in the state, provided that such tax can be collected in money, one dollar." Now, it is alleged in the bill that during the term of office of Stong, as recorder of the city of Chattanooga, he collected, on cases brought before him as such recorder, said sum of \$1,243.80, for which this suit is brought. The defendants deny their liability for any of the sums sued for; and, in addition, the defendant Stong insists that he should not be held liable, because the money was collected and paid over to the mayor and aldermen, or withheld by the clerk in his office, who was elected under an ordinance of the city, and over whom, as he insists, he had no control. The mayor and aldermen deny the receipt of any money collected as taxes from Stong, and deny that they owe the state anything on this account. A reference has been made to the master, whereupon an agreed statement as to the facts of the case was entered into by the counsel and attorneys for both parties. From this statement we find as follows: Stong was elected recorder, and served from January 1, 1891, to December 31, 1892. During this time, one E. F. Horne, who had been elected by the

same body,—the mayor and aldermen of said city,—acted as clerk of the recorder's court. The agreement shows that defendant Stong had nothing to do with electing Horne to the position, nor had he the power to remove him from the position. The material parts of the ordinance which created the office of clerk of recorder's court, so far as pertinent to the issues now before us, were as follows: Section 1: "The office of the clerk of recorder's court is hereby established, which shall be filled after the first election at the same time and in the same manner as the office of recorder, and the clerk shall hold for one year, or until his successor is elected and qualified." Section 2: "Be it further ordained that the duties of said clerk shall be in the name of the recorder to keep the records, issue all process, and perform all the clerical work which by the existing charter of Chattanooga or by the statutes of Tennessee it may be necessary for the recorder to perform. This section shall in any event be so construed as to authorize the clerk to sign the name of the recorder to any process, record or document." It is further agreed that, during the whole time Stong was recorder, Horne, as clerk, collected all money paid into court in fines, cost, and taxes, kept the records of all, and the cash books, but that the judgments on the court dockets were in each and every case signed by the recorder himself; that, each day, Horne made a cash account report to the tax collector and treasurer of the city of Chattanooga. A copy of one of these reports is filed in the record, which simply shows the number of the case, the date when judgment was rendered, the name of the defendant, and the amount of money collected. It is further agreed that the city authorities made no objection to this method of doing business, and, in fact, it appears to have been done at their instance. Now, on April 15, 1890, an ordinance was passed directing daily reports and settlements to be made. It is further agreed that, during the time Stong was recorder, the docket books and records of the court, kept by Horne, show that \$4,313.30 was collected in money on 4,314 cases of violation of city ordinances disposed of by the recorder as state tax, provided that, in all cases in which any money was collected, the first dollar or part thereof collected was to be paid over to the state of Tennessee as a tax on litigation; that, of these amounts, Stong received from Horne the sum of \$3,069.50, which, it is admitted, has been paid into the hands of the proper officers of the state of Tennessee. In this number of cases, both the fine and state tax were collected and accounted for. It is further agreed that of the amount of \$4,313.30, above mentioned, the further sum of \$1,054.25, in 1,061 cases set out and mentioned in Exhibit A to the original bill, in all of which, except 15 cases, \$1 or more was collected in money, had been paid by Horne

into the hands of the tax collector and treasurer of the mayor and aldermen of the city of Chattanooga; that the remainder, or \$189.55, in the 192 cases set out and mentioned in Exhibit B to complainant's bill, and in all of which cases, except five, \$1 or more was collected in money, is unaccounted for; that said Stong never received it in person from Horne or any one else; and that the books show that Horne never accounted for said sum of \$189.55, to either the complainant, the mayor and aldermen, or to Stong. It is further agreed that on the docket of the record, where the judgment in each case is entered up and signed, the words and figures, "State tax, \$1," are printed. It is further agreed that no state tax, as such, was paid into the city treasury, and that in no case did the city receive more than the amount of the fine or forfeiture assessed on the recorder's docket, but the money was paid over to the city treasurer, as by reports, of which Exhibit A to the agreement is a specimen, the substance of which is above set out. It is further agreed that, during the time Stong was recorder, 554 cases were docketed as forfeiture cases; that these were cases in which parties had been arrested for violation of city ordinances, and deposited money with the chief of police of the city of Chattanooga as pledge or security for their appearance before the recorder; but that they afterwards failed to appear, and forfeiture was taken before the recorder against said parties without trial, and the money thus deposited was forfeited and turned over by the recorder's clerk to the city of Chattanooga. In these cases all the forfeiture money was turned over to the treasurer of the city of Chattanooga, and, in consequence, \$554 of the \$1,054.25 mentioned above is so-called "forfeiture money." It is further agreed that in 209 of the 554 forfeiture cases it appeared that the recorder, A. A. Stong, who was at the time an actual justice of the peace of Hamilton county, did, on the same day, for the same offense, try a defendant of the same name, who pleaded guilty in a state case, and submitted and was fined under the small offense law; that these state cases were tried before Stong, not in his capacity as an ex officio justice of the peace, but as a bona fide, actual justice of the peace of Hamilton county, which office he held at that time. It is further agreed that these parties were never present when the forfeiture was taken against them in the city cases, but that, when the state cases were called, they either pleaded guilty in person, or by an attorney, more frequently the latter; that the city and state cases were not tried at the same time, but that the city cases were tried first, and, after the city cases were all tried, the state cases were taken up for final disposition. It was further agreed that the balance of the \$1,054.25 claimed by the state arises in some

507 cases, where all the money shown by the books to have been collected in each case was reported and paid to the city treasurer; that in none of said 507 cases did the amount collected exceed the amount of fine assessed; and that in most of the cases the amount collected was less than the amount of the fine; and that in each and all of these cases the amount collected was less than the amount of the fine and tax. It was further agreed that, during the incumbency of Stong, the mayor and aldermen had an ordinance in force requiring defendants fined by him to work out the fine and cost on the city chain gang, unless the same were paid or secured.

The chancellor heard the cause, and dismissed the complainant's bill, from which the state appealed, and errors are assigned on its behalf. In this state of the record, the contentions of the parties are substantially as follows: On behalf of the mayor and aldermen, it is insisted that they did not receive any money belonging to the state, nor any state tax paid into the treasury as such; that they only received the amount collected on the fine and cost; and that the state tax, as a matter of fact, was not paid, but that they had a right to appropriate the moneys thus received and collected in satisfaction of the fine. And, relying on the cases of *State v. Davidson Co.*, 96 Tenn. 178, 33 S. W. 924, and *State v. Sibley*, 4 Lea, 741, it is also insisted that the state tax in these cases could not have been collected by causing the same to be worked out as the fine could have been, but that it could collect its fine or compel payment of the fine, and that, therefore, it is not liable. In this connection we may say that the proof nowhere shows that any of the money collected was collected by compelling the prisoners to work out the fines and cost. On the contrary, it appears that this amount of money was paid into the hands of the recorder's clerk, and \$1,054.25 of it was paid into the city treasury. It does not appear whether the defendants were solvent or insolvent. It is further insisted that, of the \$504 collected in the so-called "forfeiture cases," the state tax did not accrue on such cases. In addition to these grounds, it is insisted on behalf of the defendant Stong that he is not liable, because he had nothing to do with the collection of these funds, and that it was not his duty to collect them, as he was only the judge or judicial officer of the recorder's court, and that it was made the duty of the recorder's clerk, by ordinance of the board of mayor and aldermen, to collect these funds, and that he did collect them.

As to the first insistence of the board of mayor and aldermen above set out, it is unnecessary for us to discuss the reasons for or against this contention. While the case has not been reported, exactly similar questions were before the supreme court, as we understand, in the case of *State v. City of Memphis*, decided at

the last term of the supreme court, at Jackson,<sup>1</sup> and in that case it was held that the municipal authorities could not be allowed to collect money from defendants in cases before its police court, and apply all of the amount collected to the payment of the fine, and turn the same into the city treasury without paying the state tax, but that, if a sufficient amount of money was collected, the state tax must be paid out of it, and that in all such cases the city would be liable where a sufficient amount was collected to pay the tax. It was also held in that case that where such suits had been begun and cases docketed, where parties arrested had put up money as security for their appearance, which money was forfeited by reason of the failure of the defendants to appear, and was turned into the city treasury, the state would be entitled to the payment of its tax therefrom. These holdings, in our opinion, settle this case so far as the defendant board of mayor and aldermen is concerned.

As to the defendant Stong, we are of the opinion that, under the facts as agreed on, he is not liable. It appears that not a dollar of this money went into his hands, nor was it collected by him. It further appears that all the money that was collected, was collected by an officer created by the board of mayor and aldermen, known as the "recorder's clerk." It is urged, however, that it was the duty of the recorder to collect this money, and that, if it was collected by the clerk, the clerk would be held to be the agent of the recorder. But it does not appear, in the first place, that the bill in this case was framed to meet a case of this character. The suit is for money alleged to have been collected by the recorder, and not for money it is said it was his duty to collect, and which he did not. But if it be said that, under the facts stated in the bill, the complainant would be entitled to the relief as against the recorder for failure on his part to perform his duty or for the default of Horne, we reply that it does not appear that the recorder directed or even ratified the conduct of Horne in collecting this money. In fact, it affirmatively appears that, by an ordinance of the mayor and aldermen, it was made the duty of this recorder's clerk to do all the clerical work, and this, we think, would include the collection of fines, taxes, and cost, and accounting for all moneys so collected. This would be clerical work. But it may be insisted that the duty was imposed by law of the state upon the recorder, but we do not so find. The tax, as we have shown, was on each case before the mayor's or recorder's court. Now, the recorder's court at Chattanooga, at this time, as the record shows, consisted of a recorder or officer whose duties were purely judicial, and of a clerk to the recorder. We think the board of mayor and aldermen had

<sup>1</sup> Without opinion.

the power, under the charter of the city and the laws of the land, to legislate on this subject, and to create a clerk for the recorder, and to prescribe his duties. It did this, and placed this particular duty of collecting upon the clerk, and not the recorder. This was the construction actually placed upon this legislation by the recorder and the mayor and aldermen, and it was the construction acted on.

We are therefore of the opinion that, it not appearing that any of this state tax or money collected went into the hands of the recorder, and it not appearing to be the duty of the recorder to collect these funds, we think the chancellor correctly discharged him from liability. But the chancellor's decree dismissing the bill as to the board of mayor and aldermen of Chattanooga should be reversed, and a decree entered here for the sum of \$1,054.25, which is shown to have gone into the hands of the city. Inasmuch as the balance of the amount shown to have been collected by the recorder's clerk was collected by him as an officer of the city, we are of the opinion that the city would also be liable for that amount if a recovery had been sought in the bill; but the bill only sues for the sum of \$1,054.25, for which a decree will be accordingly rendered. The state will pay the cost incident to making defendant Stong a party, and the balance of the cost, including the cost of the appeal, will be paid by the defendant mayor and aldermen of the city of Chattanooga.

WILSON, J., concurs.

Affirmed orally by the supreme court, October 25, 1898.

#### STEWART et ux. v. HAMILTON BUILDING & LOAN ASS'N.

(Court of Chancery Appeals of Tennessee.  
Aug. 27, 1898.)

**BUILDING ASSOCIATIONS — SALES UNDER TRUST DEED — FRAUD — COMPETITIVE BIDDING — USURY.**

1. A building and loan association, through its treasurer as trustee of a trust deed, on default of the grantor, purposely advertised the sale in an obscure weekly paper, according to its practice for some time, so as to escape the observation of attorneys who, according to the association, made a practice of getting members to bring injunction suits against it. The general custom was to advertise such sales in the daily papers of a city where the property to be sold was located. The owners were not present at the sale, and knew nothing about it. The property was bid in by the association at a third of its value. *Held*, that the sale should be set aside for fraud.

2. A building and loan association loaned money by offering it to the highest bidder. If such bidder did not want all the money offered, such sums as the other bidders desired were knocked off to them at the same price. *Held* not to show a want of competitive bidding, so as to constitute usury in the loan.

Appeal from chancery court, Hamilton county; T. M. McConnell, Chancellor.

Bill in chancery by R. C. Stewart and wife against the Hamilton Building & Loan Association. From a decree for complainants, defendant appeals. Modified and affirmed.

E. Y. Chapin and E. M. Dodson, for appellant. T. Paul and G. W. Chamler, for appellees.

NEIL, J. The bill in this case is filed for the purpose of setting aside a sale of the complainants' property under a trust deed, made to secure a sum of money borrowed from the defendant association, and also charging that the loan contained usury, and asking that the amount of usury be ascertained and allowed to the complainants. The answer denies all fraud, and also denies the charge of usury. The chancellor sustained both charges of the bill, and the defendant has appealed and assigned errors.

The facts are as follows: In April, 1891, the complainants, R. C. Stewart and wife, borrowed from the defendant association the sum of \$1,800, under the rules of said association. Out of this a premium of 34½ per cent. was taken, and the rest was paid to the complainants in cash. At the time the loan was made, shares of stock were taken out by the complainant Mrs. M. R. Stewart, and they were pledged for the security of the loan. Likewise, a trust deed was executed upon the property described in the bill. In March, 1894, the trust deed was foreclosed, and also the pledge of the shares of stock. The real estate was purchased by the defendant association, at the sum of \$500. Shortly after this time, the parties came together, and settled this matter, by the execution of a note by the complainants to the association for the balance due, on the basis of the original loan, this balance amounting to \$1,345. The association made a deed back to the complainants, and they executed a trust deed to the treasurer of the association, to secure the new loan. \$100 was paid in cash, and 78 notes, of \$16 each, were executed to cover the balance of the debt. There was a provision in the trust deed that, if any installment should not be paid, the trust deed might be foreclosed. After the complainants had fallen in arrears, within the terms of the contract, upon that subject, the property was again advertised and sold, and was purchased by the defendant association, at the price of \$1,250.51.

Now, the charge of fraud is that the property was purposely advertised in an obscure paper, so as to escape observation, and then purchased in by the defendant association, at far less than its value. We think the proof sustains this charge. Instead of advertising the property in one of the daily papers in Chattanooga (as the custom was), the defendant association caused the property to be advertised in the Weekly News, which had a large circulation in the country, but a very small circulation in the city of Chattanooga.

where purchasers were likely to be found for this property, the property being in the suburbs of Chattanooga. It is proven by Mr. Dickey, and admitted by the secretary in his deposition, that the advertisements about this time were placed in this obscure paper in order to escape observation, for the reason that certain injunction suits had followed upon the advertisements in the Daily News. The secretary said that there were certain lawyers in Chattanooga who watched the daily papers, and, on seeing advertisements, would hunt up persons who owed the defendant company, and cause them to institute injunction suits. For this reason the new system of publishing in an obscure paper was adopted. The complainants were not present at the sale, and knew nothing of it. The property brought not more than a third of its value, and, as stated, was sold by the treasurer of the defendant association, acting as trustee, and purchased by the defendant association itself. Taking all these facts together, we think the fraud is made out, and that the sale should be set aside. *Coffee v. Ruffin*, 4 Cold. 487, 508, 509; *Wright v. Wilson*, 2 Yerg. 294; *White v. Flora*, 2 Tenn. 426; *Birdsong v. Birdsong*, 2 Head, 290; *Insurance Co. v. Hamilton*, 3 Tenn. Ch. 228, 231, 232. Under several of the authorities above referred to, the fact that the property brought only one-third of its value, and was purchased in by the beneficiary, would of itself be sufficient to authorize us in setting aside the sale. In some of the cases, indeed, the sale was set aside because the property brought only half of its value. See authorities cited in the cases we have referred to. When we add to this the further fact that the advertisement was placed in a paper specially selected because of its small circulation in the city, with a view to escape publicity as much as possible, and the further fact that the complainants were in straitened and oppressed financial circumstances, a clear case of fraud and oppression is made out. The proof does not, indeed, show that the advertisement under this special trust deed was made for the purpose of defrauding these particular persons,—the complainants,—but rather in the course of a general policy to make publication in apparent compliance with the law, and avoid the effect contemplated by the law. To the complainants the result was the same, and the consequences visited upon the defendant company should be the same. It was practically a case of collusion between the trustee and the beneficiary to obtain the property for less than its value. Such conduct cannot be tolerated in a court of equity. The obligation of good faith rests upon the trustee and the beneficiary in enforcing the trust deed. Any substantial departure from good faith would necessitate the setting aside of the sale by a court of equity.

The charge of usury is based upon the allegation in the bill that there was no competitive bidding. The weight of proof is

against this charge. It is said that the method of bidding set forth in the deposition of Mr. Chapin shows that there was no competitive bidding. It is as follows: "I will explain the method of selling money so that it may be fully understood. We generally had a great many more bidders than we could supply. The money would be offered; they would bid against each other until the privilege would be knocked down to one of them. If he did not take all the money on hand at his bid, the other bidders present were allowed to take any sum remaining at the same bid, the money being formally knocked down to them at that figure. That is how the minutes show that a number of bidders got money the same evening at the same bid." We think this was a case of competitive bidding, and the proof shows that the complainants got their money under this form of bidding. The substance of the transaction was that all persons present bid against each other for the money that the association had for loan at a given meeting, and it was knocked off to the highest bidder. If he did not wish it all, such sums as the others desired to take were knocked off to them at the same price. The minutes show the result of that evening's sale as follows: "Sale of money was then proceeded with, and two shares sold to Fayette Murdock, 5 shares to Mrs. Sillard, two shares to J. E. Cleage, one share to John T. Edwards, and eight shares to M. R. Stewart, all at a premium of 34½ per cent." Mr. Chapin, in his deposition, says that he is unable to say which one of the borrowers made the bid at 34½ per cent. first, but that all made it before the transaction was over. He says: "I cannot say whether they received the privilege in the order named in the minutes or not. The minutes were not intended to show the order in which the bids were received or approved." The substance of the matter was that the price of the money was fixed in good faith, by competitive bidding, and during the same evening all persons present who had bid were allowed to take so much of the money as they desired at the highest bid, after the one who had made the highest bid had taken the portion desired by him; that is, they were allowed the balance at the same amount which the highest bidder had offered. This is not a case of peddling a bid. We held in a former case that one person could not bid off an amount of money, and, upon his failure to comply with the terms of purchase, consent, out of a meeting of the association, that his bid be transferred to some other person, and that other person comply with the terms and secure the money. We said that, where a bidder had refused to comply, the money fell back into the association, and it became its duty to put it up again, so that the members might have an opportunity of purchasing; that the peddling of a bid outside of the association was not only in violation of the



principles of building and loan law, but was open to great abuse, as a device to cover usury, because it would encourage a habit of making colorable bids with no intention of ever complying, so as to have on hand at all times the means of lending money without complying with the requirements of having competitive bids. If such a device should be allowed or encouraged, the rule against fixed premiums would at once become obsolete. The present case, however, does not fall within the authority above referred to. Here the whole transaction occurs on the same evening; all persons participate in the bidding; the highest bidder takes so much as he desires, and to the others the amounts they desire are knocked off at the same price. In this proceeding all members of the association have due notice, and all have the same opportunity, and the transaction is closed at once. The result is the decree of the chancellor will be so modified, and a decree will be entered under the original bill, setting aside the sale, and disallowing the claim of usury, and the cross bill will be dismissed. The costs of this court and of the court below will be equally divided between the complainants and the defendant. All the judges concur.

Affirmed orally by supreme court, October 12, 1898.

#### WHITESIDE v. FIRST NAT. BANK OF CHATTANOOGA.

#### SAME v. MONTAGUE.

(Court of Chancery Appeals of Tennessee.

May 28, 1898.)

#### NEGOTIABLE INSTRUMENTS—PURCHASERS FOR VALUE—STOLEN PROPERTY—NOTICE.

1. The purchaser, for value, before maturity, and in due course of trade, of negotiable paper indorsed by the payee in blank, from one who has stolen it, acquires a title good even against the owner.

2. Negotiable paper, taken without notice, before maturity, as collateral security for a loan made at the time, is held by the taker as an innocent holder.

3. Where stolen negotiable paper was transferred to an innocent holder as collateral security, the court will not, for the purpose of defeating his title, presume that the loan secured by it was usurious, even where the lender testified that he did not remember the rate of interest.

4. Where one whose reputation in the community was good, who had theretofore held a responsible public office, negotiated paper of one who was a surety on his official bond, and with whose sons he shared the same office, the fact that such person was insolvent and indebted to the transferee bank, of which the other transferee was president, and wherein the borrower's paper had been protested, was not sufficient to put the transferees on inquiry as to his title.

Appeals from chancery court, Hamilton county; T. M. McConnell, Chancellor.

Two suits in replevin by Mrs. H. L. Whiteside against the First National Bank of Chattanooga and T. G. Montague, respectively.

There were decrees for defendants, and complainant appeals. Affirmed.

Thomas & Thomas, for appellant. Wheeler & McDermott, for appellees.

WILSON, J. These two cases were heard together in the court below and in this court. They are both of the same nature, involve the same facts, and are controlled by the same rules of law. They are replevin suits, and the bills seek to recover possession of some bonds, the property of Mrs. Whiteside, which were stolen from her, and by the thief hypothecated with the defendants as collaterals to secure loans of money made at the time of their hypothecation. It is conceded that the bonds in question, three in number (two of \$1,000 each, and the other for \$5,000), were the property of Mrs. H. L. Whiteside, that they were stolen by one H. C. Young, and that he borrowed money on them from the defendants, depositing them as collaterals to secure the loans made to him. The bonds were ordinary mortgage coupons bonds, and were indorsed in blank by the original payees. The averments of the bill, after stating the ownership of the bonds by Mrs. Whiteside, and their theft, may be thus summarized: (1) That the defendants were not innocent purchasers of the bonds; (2) that H. C. Young's possession of the bonds was criminal; (3) that their negotiation by him to defendants was also criminal; (4) that defendants obtained no right or title to the bonds by virtue of their deposit as collaterals with them to secure the loans made to Young at the time of the loans; (5) that the defendants came into possession of the bonds affected with notice of the defective title of Young, or that the circumstances surrounding their negotiation by Young were such as to put them upon inquiry, which, if properly pursued, would have disclosed to them the fact that Young had no title. The essential defense of the defendants is that they are innocent purchasers of the bonds, for value, before their maturity, advanced at the time, and, being so, they are protected in their possession. Proof was adduced by the parties, and the chancellor heard the cases on the 22d and 28th days of October, 1897. He held that the complainant was not entitled to maintain her bills as replevin bills, and dismissed them, with costs, but without prejudice to her right to recover any surplus arising from the bonds after satisfying the loans made by the defendants, to secure which they were deposited as collaterals. From this decree complainant appealed, and assigns the following errors: First. The bonds were stolen property in the hands of Young, and the chancellor erred in refusing to decree their possession to Mrs. Whiteside, their rightful owner. Second. He erred in not holding that the theft of the bonds from complainant, and their negotiation to the defendants by the thief, were crimes, and prohibited by law, and that, this being so, the

defendants were not, and could not be, innocent purchasers, in the sense of the law. Third. He erred in not holding that the evidence failed to show that defendants were innocent purchasers and holders of the bonds in due course of business, and for this reason in not decreeing in favor of complainant. Fourth. He erred in not finding and decreeing that the defendants knew or ought to have known, and were bound under the law to know, and by the exercise of ordinary prudence and caution would have known, that these bonds did not belong to Young, and that he did not have the right to pledge them as security for an individual loan, and that the defendants, under the facts and circumstances attending the transaction by which they became possessed of them, were put upon notice and inquiry, and hence were not innocent purchasers, entitled to hold them against the complainant, as their true owner. Fifth. He erred, in any event, in not referring the cause to the master for a report as to the actual value in dollars paid or advanced by the defendants on the faith of the bonds, and as to whether the transactions between defendants and Young were usurious or otherwise. Sixth. He erred in refusing complainant's decrees in the cases, and in dismissing her bill.

If it be ascertained from the evidence in the record that the defendants are innocent purchasers of these bonds, for value given at the time they got them, the settled principles of law, we think, control the determination of the cases. These bonds were the property of Mrs. Whiteside. This is not disputed. They were stolen by Young. This is not disputed. He borrowed money from the defendants, and deposited the bonds as collaterals to secure the loans made to him. This is not disputed. The defendants took the bonds as collateral security upon the assumption that they were his property, and that he had the right to hypothecate them to secure the loans. This is not, and cannot be, seriously disputed, under the evidence in the record. In other words, the defendants had no actual notice that he had stolen the bonds, or that any one else had any title or claim to them. Assuming for the present that the defendants were innocent purchasers of the bonds, for value, before their maturity, in the meaning of the law, the first question arising under the assignment of errors is, does the fact that they got them from a party who stole them defeat their right to hold them against the claim of the true owner? We think not. The holder of a genuine bill or note, or negotiable paper, regular on the face of it, although he has stolen it or holds it wrongfully, or in parting with it is guilty of a fraud, can negotiate it and communicate a good title to a party who takes it in due course of business, before maturity, as a bona fide holder without notice. The authorities in support of this rule of law are simply overwhelming, and, indeed, we know of none to the contrary. We cite some from other states and the United States,

as well as our own state, to which we have had access: *Land Co. v. Dennis* (Ala.) 5 South. 317; *Ridgway v. Bank* (Pa.) 14 Am. Dec. 681; *Sims v. Lyles* (S. C.) 26 Am. Dec. 155; *Sweetzer v. French* (Mass.) 48 Am. Dec. 666; *Hughes v. McAllister* (Mo.) 55 Am. Dec. 143; *Bank v. Watson* (N. Y.) 1 Am. Rep. 573; *Tucker v. Bank* (N. H.) 42 Am. Rep. 580; *Wilson v. Denton* (Tex. Sup.) 18 S. W. 620; *Ditch v. Bank* (Md.) 29 Atl. 72; *Russell v. Haddock* (Ill.) 44 Am. Dec. 693; *Marsh v. Small* (La.) 48 Am. Dec. 452; *Bunting v. Ricks* (N. C.) 32 Am. Dec. 699; *Ormsbee v. Howe* (Vt.) 41 Am. Rep. 841; *Credit Co. v. Howe Mach. Co.* (Conn.) 8 Atl. 472; *Richards v. Monroe* (Iowa) 52 N. W. 339; *Breckenridge v. Lewis* (Me.) 24 Atl. 864; *Miller v. Finley* (Mich.) 12 Am. Rep. 306; *Bank v. Hanson* (Minn.) 21 N. W. 849; *Rublee v. Davis* (Neb.) 51 N. W. 135; *Boyd v. Kennedy* (N. C.) 20 Am. Rep. 376; *Kitchen v. Loudenback* (Ohio Sup.) 26 N. E. 979; *Kelley v. Whitney* (Wis.) 30 Am. Rep. 697; *Hunt v. Sanford*, 6 Yerg. 387; *Van Wyck v. Norvell*, 2 Humph. 195; *Ryland v. Brown*, 2 Head, 270; *Merritt v. Duncan*, 7 Helsk. 156; *Daniel, Neg. Inst.* §§ 770, 775; *Swift v. Tyson*, 16 Pet. 1; *Goodman v. Simonds*, 20 How. 343; *Bank v. Neal*, 22 How. 96; *Murray v. Lardner*, 2 Wall. 110. Doubtless many other cases could be cited in support of the rule. It is believed that those cited are sufficient. It follows that if the defendants took the bonds as innocent purchasers before their maturity, for value, in due course of trade, the fact that the party from whom they received them had stolen them does not defeat their title. This settles one point raised by the assignment of errors. It is due, however, to the learned counsel representing the appellant, to state that this proposition was not seriously controverted by him in the argument.

It is also an established rule of law that negotiable paper taken before its maturity as collateral security for a loan made at the time, without notice of any defect in the title of the transferee, is held by the taker as an innocent holder, and his possession will be protected. *Koehler v. Dodge* (Neb.) 28 Am. St. Rep. 518, cases cited, and note, with cases (s. c. 47 N. W. 913); *Smith v. Bibber* (Me.) 19 Atl. 89; *Ruddick v. Lloyd* (Iowa) 83 Am. Dec. 423; *Depeau v. Waddington* (Pa.) 36 Am. Dec. 216; *Cullum v. Bank* (Ala.) 37 Am. Dec. 725; *Coddington v. Bay* (N. Y.) 11 Am. Dec. 342; *Richardson v. Rice*, 9 Baxt. 290; *Craighead v. Wells*, 8 Baxt. 38. It follows that taking the bonds as collateral security does not defeat the claim of defendants, although the bonds were deposited by a thief, if the defendants received them in good faith, and without notice of any defect in the title of the party hypothecating them.

The sole remaining question in the case is one largely of fact, and it is, did the defendants know of Young's want of title, or were the circumstances attending the negotiation of the paper by him such as to arouse the suspicion of a prudent man, and put him on

inquiry, which inquiry, if properly pursued, would have disclosed the truth in relation to his fraudulent or felonious possession of it? We have examined the evidence bearing upon the point with the closest scrutiny, and after such examination we feel constrained to come to the conclusion that the defendants took these bonds in good faith, and without suspicion of any defect in the title of Young, or his right to hypothecate them as collaterals to secure the loans he secured. This is the conclusion of fact reached from all the evidence, and as it is decisive of the case, we might dismiss further consideration of it, without going into a review of the numerous cases relating to the question as to who is a "bona fide holder" of negotiable paper. Chief Justice Abbot, afterwards Lord Tenterden, as early as 1824 held that, although a holder of a bill had given full value for it, yet, if he took it under circumstances calculated to excite the suspicion of a prudent and careful man, he was not entitled to the protection accorded to a bona fide holder. *Gill v. Cubitt*, 3 Barn. & C. 466. In case a bill of exchange was stolen during the night, and was taken early next morning to a broker and discounted. It seems from the report of the case that the broker knew the features of the man, but did not know his name. The broker, being satisfied with the acceptor of the bill, discounted it, according to his usual practice, without any inquiry of the person who brought it. This broker brought suit against the acceptor, and his lordship instructed the jury that they should consider whether the plaintiff took the bill under circumstances which ought to have excited the suspicion of a prudent and careful man. "If," said the learned judge to the jury, "they thought that he had taken the bill under such circumstances, then, notwithstanding he had given the full value for it, they ought to find a verdict for the defendant." In giving this instruction he recognized the fact that it was a wide departure from the previous rule announced by Lord Kenyon in the case of *Lawson v. Weston*, 4 Esp. 56. In this case a bill had been lost, and was advertised by the owner afterwards. It was discounted by a banker, who brought suit upon it. The defendants insisted that the banker should have used diligence to inquire as to the circumstances, as well respecting the bill as of the person who offered it for discount. Lord Kenyon repudiated this doctrine, saying, in substance, that to adopt the doctrine in full contended for by the defendants "would paralyze the circulation of all paper in the country, and with it all its makers. The circumstances," observed his lordship, "of the bill having been lost, might have been material, if they could bring knowledge of that fact home to the plaintiff. The plaintiff might or might not have seen the advertisement, and it would be going great length to say that a banker was bound to make inquiry concerning every bill brought to him to discount." The rule announced,

however, in *Gill v. Cubitt*, supra, by Lord Tenterden, continued in force as long as he remained on the bench, although it created great dissatisfaction in mercantile and commercial circles. It was materially modified in the case of *Crook v. Jadis*, 5 Barn. & Adol. 909. In this latter case the action was brought by the indorser of a bill against the drawer, and it was held that it was no defense that the plaintiff took the bill under circumstances which ought to have excited the suspicions of a prudent man that it had not been fairly obtained; and it was held that the defendant, in order to defeat the action of the plaintiff, must show that he was guilty of gross negligence. This case was affirmed in the case of *Backhouse v. Harrison*, 5 Barn. & Adol. 1098. Later the case of *Gill v. Cubitt* was utterly repudiated in the case of *Goodman v. Harvey*, 4 Adol. & E. 870. Lord Denman, speaking for the whole court of king's bench, used the following language: "I believe that we are all of opinion that gross negligence only would not be a sufficient answer, where the party has given a consideration for the bill. Gross negligence may be evidence of mala fides, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title." We may observe that a majority of the states of the United States and the federal courts follow substantially the same rule announced in *Goodman v. Harvey*, supra, and hold that a party taking a note before due, for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world. In other words, suspicion of defective title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part. *Swift v. Tyson*, 16 Pet. 1; *Murray v. Lardner*, 2 Wall. 110; *Magee v. Badger* (N. Y.) 90 Am. Dec. 691; *Phelan v. Moss* (Pa.) 5 Am. Rep. 402; *Lake v. Reed* (Iowa) 4 Am. Rep. 209; *Miller v. Finley* (Mich.) 12 Am. Rep. 306; *Farrell v. Lovett* (Me.) 28 Am. Rep. 59; *Kelley v. Whitney* (Wis.) 30 Am. Rep. 697. Other authorities will be found collated in the notes to 4 Am. & Eng. Enc. Law (2d Ed.) pp. 300-302. The rule in this state, as established by the authorities, is that, where the holder takes a paper under circumstances sufficient to put him upon inquiry, he is affected with notice of what the inquiry would have disclosed. *Merritt v. Duncan*, 7 Heisk. 156. Our court recognized the different rule prevailing in the courts of the United States and in England, and declined to follow the rule in this case. In this case Chief Justice Nicholson referred to and adopted the rule announced by Judge Green in *Van Wyck v. Norvell*, 2 Humph. 195. Judge Green in that

case said: "It is settled, as a general rule, that a holder coming fairly by a note or bill has nothing to do with the transaction between the original parties, and if negotiable paper is transferred, for a valuable consideration, without notice of any fraud, the right of the holder shall prevail, as against the true owner. This principle is an exception to the general rule of law, which is that the true owner is entitled to his property wherever he may find it; but, with a view to favor the credit and circulation of commercial paper, it has been deemed consistent with sound policy to adopt, in relation to such paper, this rule."

It is argued in this case that, it being conceded that these bonds were stolen from Mrs. Whiteside, it is incumbent on the defendants to show that they were bona fide purchasers without notice. Such is the holding of a number of courts, and especially the courts of New York. In *Bank v. Diefendorf*, 123 N. Y. 191, 206, 25 N. E. 402, 406, the chief justice, in delivering the opinion of the court, said: "The burden of making out good faith is always upon the party asserting his title as a bona fide holder, in a case where the proof shows that the paper has been fraudulently, feloniously, or illegally obtained from its maker or owner. Such a party makes out his title by presumption, until it is impeached by evidence showing the paper had a fraudulent inception; and when this is done the plaintiff can no longer rest upon the presumption, but must show affirmatively his good faith." See, also, *Vosburgh v. Diefendorf*, 119 N. Y. 357, 364, 23 N. E. 801; *Grant v. Walsh*, 145 N. Y. 502, 40 N. E. 209, and cases cited. We do not controvert, for the purposes of this case, the correctness of this rule. Assuming it to be a sound and correct statement of the law, the question arises, did the defendants show affirmatively their good faith in the taking of these bonds? It is argued that they are not innocent holders, because it does not appear that in accepting them as collateral security an illegal rate of interest was not charged in the loans which they had taken to secure. The proof in the record is silent as to the rate of interest charged Young for the loans, to secure which these bonds were taken as collateral. Mr. Montague is asked what rate of interest was charged, and he says, in substance, in reply, that he did not remember. No other questions were asked. The insistence of complainant is that in this state of the evidence, and in view of the nature of the case, we should presume that a usurious rate of interest was charged. We do not think so. It is, moreover, insisted that Mr. Montague and the bank knew, or ought to have known, that Young was not the legal owner of these bonds, because he was insolvent. This argument is rested upon the fact that several years ago Young failed in business, and many judgments were obtained against him, and some of his paper was protested in the bank of which Mr. Montague

was the president, and by a notary public who was a clerk in said bank. It is also urged, as a significant fact going to show that the defendants were affected with notice, that Young was indebted to the bank in the sum of some \$600, and had been for several years, and no notice was taken of this indebtedness when the loans were made and the bonds taken as collateral security therefor. We do not think these circumstances were sufficient, under the facts in the case, to arouse the suspicion of the defendants. Mr. Young, it appears from the record, was a man who was reputed to be an honest man at the time he hypothecated these bonds. He was a real-estate dealer, and engaged in business as a broker, at the time. He occupied an office with the sons of this complainant, and seems to have had their entire confidence. He had a short while before filled the lucrative office of back-tax collector of Hamilton county, and the complainant was on his bond for the faithful performance of his duties as such officer. After an examination of all the evidence in the record, we are unable to see, in view of the nature of the transaction, and the status of Young in the community, anything to arouse a just suspicion in the minds of the defendants at the time they took these bonds. This finding of fact is conclusive of this aspect of the case. We are of opinion that there is no error in the decree of the chancellor, and that his decree should be affirmed, with costs.

Before closing the opinion, however, it is proper that we should notice one other point; and that is the complaint that the chancellor should have referred the cause to the master, to ascertain the actual amount loaned by the defendants to Young, so as to limit their rights to the proceeds of the bonds to that sum, with legal interest. It is only necessary to say that the bills are not framed with reference to this object. They are purely *replevin* bills. There is nothing in the decree of the chancellor to preclude the complainant from asserting the matter suggested in this complaint by an appropriate proceeding for that purpose. The decree of the chancellor will be affirmed, with costs. The other judges concur.

Affirmed orally by supreme court, October 12, 1898.

#### LATNER v. LONG et al.

(Court of Chancery Appeals of Tennessee.  
June 18, 1898.)

#### MARRIED WOMEN—CHattel MORTGAGES—FRAUD—INSANITY—EVIDENCE.

1. A married woman, together with her husband, signed a deed of trust covering all their household goods. She admitted that her husband told her before its execution that it was to cover a part of the goods, but testified that she did not know its contents until immediately after her acknowledgment of it, and that she then read the deed, but did not agree to it. She gave it up, however, without protest.

*Held* not to show fraud in the execution of the deed.

2. In a suit by a married woman to enjoin the enforcement of a deed of trust executed by her husband and herself, an amended bill filed a year after the original bill set up as a new ground the insanity of the husband at the time of the execution of the deed. The wife's testimony was that she knew he was not in his right mind at the time, because of his peculiar actions, but she did not give the details, and she executed the deed at his request. Two other witnesses testified that he was nervous and restless, and that he acted somewhat strange on certain occasions, but they expressed no opinion as to his sanity. *Held* not to show insanity.

Appeal from chancery court, Hamilton county; T. M. McConnell, Chancellor.

Bill in chancery by Fanny L. Latner, by next friend, against J. M. Long and others. From a decree dismissing the bill, complainant appeals. Affirmed.

Dodson & Dodson, for appellant. Elder & Milligan, for appellees.

BARTON, J. This is an attempt to enjoin the enforcement of a deed of trust given on a lot of personal property by the complainant and her husband to secure a certain debt to the defendant Long. We find in the record an original and amended bill. In the original bill the grounds of relief stated are as follows: It is said that the complainant joined with her husband, the defendant J. S. Latner, in the execution of a chattel mortgage on certain personal property, by which the property was conveyed to the defendant Milligan, as trustee, to secure a prior existing debt claimed to be due from her husband to the defendant Long; that no new consideration was given for the execution of the deed. It was further alleged that the paper was not read to her, nor its contents explained, and that she did not understand it when she signed and acknowledged it. She avers that part of the goods conveyed were exempt, and part of them were her own separate estate, not liable for the debts of her husband; avers that she never voluntarily and understandingly parted with the title to her goods; and prays for an injunction to prevent the enforcement of the trust. Defendant Long and the trustee, Milligan, answered, and denied the allegations of the bill to the effect that the complainant did not understand what was in the deed when she acknowledged it. It is averred that her acknowledgment was duly taken, and it is denied that the deed of trust was given to secure a past-due indebtedness, without any new consideration passing. It is averred that the husband, J. S. Latner, was indebted, and that he was granted further time on condition that he would give security, which he agreed to do, and that new notes were made in pursuance of this contract, and the deed of trust in question executed to secure them. The deed of trust and the notes are filed. The deed covers a lot of personal property consisting of pictures, household goods, etc., and shows that it was made to secure some 10 notes, for \$30 each, due in 1, 2, 3,

4, 5, 6, 7, 8, 9, and 10 months after the date of the deed, and one additional note, due in 11 months after date, for \$7.50. There is annexed to the deed a certificate, in proper form, for the acknowledgment of a married woman taken by a notary public. The deed was properly registered. The notes are filed, and correspond with the recitals of the deed and the statements of the answer. Some proof was taken, and on October 29, 1895, the complainant, by leave of the court, filed an amended bill, in which she averred, by way of amendment, that at the time of the execution of the deed of trust by her husband, J. S. Latner, he was insane, and incapable of binding himself by contract of any kind. This amended bill was answered, and its allegations denied. The chancellor, on the hearing, dismissed the bill, and the complainant has appealed and assigns errors.

Three principal questions are raised in the argument on behalf of complainant. It is said that the acknowledgment was not properly taken, but was obtained through fraud; that the deed was not read over and explained to the complainant by the notary public, or by any one else, before signing. The sole evidence upon this subject is about as follows: The complainant, in her examination in chief, testifies that the paper was not read to her, nor by her until after she acknowledged it. She says: "I knew it was a paper I was to sign. I thought it was only for a part of the household goods." On cross-examination she testified as follows: "Who read the deed of trust over to you, and when?" "No one; I read a part of it after I acknowledged it." "What part of it did you read, and how came you to read it over to yourself?" "I read only one or two pages, because I asked to see it." Being then asked what part of it she read, she says: "I read to where I signed. I did not read any more. I began with the first, and continued down to the place I signed." It was at the same time and place, but after her acknowledgment had been taken. She says her husband had spoken to her about the paper,—that is, about making the deed of trust,—a few days before she signed it. When she read the deed of trust, she found it different from what she had expected, in that she had understood only a part of the household goods was to be included, but, when she read the deed of trust, she found other things included. She says that after this she did not agree to the deed; but it was given up, and no pretense is made that she made any protest. One P. F. Bryan says the paper was brought in and signed by Mrs. Latner without her reading it before, and then was signed by her husband, Mr. Latner. This is all the evidence upon the obtaining of this signature by fraud. And it is evident from this that there is nothing on which an attack on such a deed can be sustained. We have the certificate of the notary public of the proper examination. She was told some days beforehand by her husband that he wished her to execute a deed of trust, and

the only thing that the paper contained that was not as he had stated was that more of the personal property and household goods were conveyed than she had understood were to be. But after signing and acknowledging the paper, according to her statement, she calls for it, and reads it over, and makes no protest. It is evident from her own testimony that this act was contemporaneous with the acknowledgment; and whether made before she signed it or afterwards, or before her assent or afterwards, if, while the matter was still pending, she took the deed, ascertained its contents, and then did not withdraw her assent given, all grounds of complaint would be removed; and it is evident, and we find, that the deed was duly and properly acknowledged by her in the manner required by law; and we find no evidence in the record whatever on which the charge of fraud in the obtaining of the execution of the deed can be based.

It is next insisted that the deed is void on account of the incapacity of the husband. It is to be remembered, in the first place, that the original bill in this case was filed on December 21, 1894, at which time it does not seem to have been recalled to the complainant or her counsel that her husband was insane at the time of the execution of her deed, and not until nearly a year afterwards, October 29, 1895, was this important issue brought into the case. This of itself would largely discredit this ground of attack. Aside from this, the evidence on this point is as follows: The complainant was asked what was Mr. Latner's condition as to sanity at the time he gave the deed of trust (an exhibit to Mr. Long's answer), and answered, "I know he was not in his right mind, by his peculiar actions." Now, she shows that her husband had spoken to her about executing this deed of trust; and it is certainly remarkable, if she then knew that he was insane, that she would proceed with its execution. The other evidence upon this subject is that of the witness Dowler and the witness Bryan. Dowler simply testifies that he was acquainted with Latner about this time, and that he applied to the Nashville, Chattanooga & St. Louis Railroad office for a position, and was given one the same day. After working a short while, he left, and stated that he would soon return, but did not do so until the next morning. He again worked a short while, and left, and said that he did not think he could do the work; that he was relieved, and on the next day returned, and asked for a position again, but, Mr. Dowler thinking his conduct was strange, his request was refused. Dowler gives no further details, and expresses no opinion as to his sanity. Bryan's testimony is that he was present at the time Latner signed the deed of trust; that he appeared to be nervous and restless, and it appeared that something was worrying him, and he appeared to be in a big hurry to have the paper signed, and he seemed to be nervous when doing so. This is his entire evidence. He gives no further details, and expresses no opinion as to sanity.

It is clear that this is not sufficient evidence on which to base a finding of insanity. There is practically nothing in the evidence of Dowler and Bryan. Complainant simply expresses the opinion that her husband was not in his right mind on account of the way he did, without giving any details or facts. We cannot believe that she thought so at the time, or that, if she had, she would have executed the deed at the instance of an insane husband. We feel sure that her present judgment is warped by the unfortunate stress of circumstances in which she is placed. So, we are compelled to find as a fact that the husband was not insane, and was not mentally incapable of executing the deed of trust in question.

Again, it is said that there was no consideration for the execution of this deed of trust, and that it is therefore invalid. Without discussion of the legal question thus raised as to whether the deed would not be valid, even if executed to secure a past debt without further consideration, it is sufficient to say the attack is made by the complainant, and it is averred that there was no new consideration. The answer denies this, and avers that there was consideration of additional time. The deed of trust and notes filed support the averments of the answer, and there is no further proof upon the subject. We therefore find this issue of fact in favor of the defendants.

This virtually disposes of all the points raised, and is conclusive of the case. The decree of the chancellor will have to be affirmed, with cost.

WILSON and NEIL, JJ., concur.

Affirmed orally by supreme court, October 1, 1896.

## MEMORANDUM DECISIONS.

GERMANIA INS. CO. v. BRIANT et al. (Supreme Court of Arkansas. July 9, 1898.) Appeal from circuit court, Hempstead county; Rufus D. Hearn, Judge. Action by Briant Bros. against the Germania Insurance Company. From a judgment for plaintiffs, defendant appeals. Reversed. Williams & Arnold, for appellant. J. H. McCollum, for appellees.

BATTLE, J. This case was, by agreement, submitted upon the briefs filed in Insurance Co. v. Dudley (decided at the present term of this court) 45 S. W. 539. The judgment in the former is controlled by the opinion in the latter case.

The judgment in the former, for reasons given in the latter case, is reversed, and the cause is remanded for a new trial.

HOT SPRINGS ST. RY. CO. v. HILL. (Supreme Court of Arkansas. Nov. 12, 1898.) Appeal from circuit court, Garland county; Alexander M. Duffie, Judge. Action by E. D. Hill against the Hot Springs Street-Railway Company. There was a judgment for plaintiff, and defendant appeals. Reversed. E. W. Rector, for appellant. Wood & Henderson, for appellee.

**WIGGINS, J.** The error occurred in some of the instructions that the injury to plaintiff was caused by the failure of the person in charge of the car to stop same. Upon the evidence, this should have been left for the jury to determine upon proper instructions. Under the facts of this case it was also proper for the court to submit to the jury the question as to whether or not the plaintiff was guilty of contributory negligence. This was done, but not upon proper instructions, according to the decision of this court in *Johnson v. Stewart*, 62 Ark. 144, 24 S. W. 554; *Railway Co. v. Leathers*, 62 Ark. 225, 25 S. W. 219; *Railway Co. v. Livingston*, 62 Ark. 245, 25 S. W. 219; *Railway Co. v. Taylor* (Ark.), 42 S. W. 521; *Railway Co. v. Johnson*, 64 Ark. 420, 42 S. W. 872. The judgment is therefore reversed, and the cause is remanded for new trial.

**LITTLE ROCK & FT. S. BY. CO. v. SPENCER.** (Supreme Court of Arkansas, July 9, 1898.) Appeal from circuit court, Crawford county; Joseph H. Evans, Judge. Suit by John Spencer against the Little Rock & Ft. Smith Railway Company. From a judgment for plaintiff, defendant appeals. Reversed in part. Nami R. Allen and Dodge & Johnson, for appellant. John Spencer, pro se.

**BATTLE, J.** The facts in this case are similar to those in *Railway Co. v. Wiggins* (decided at the present term of this court) 46 S. W. 731. The difference, so far as it affects the judgment in this action, is immaterial. The opinion in the *Wiggins* case controls the judgment in this.

The judgment of the circuit court is therefore affirmed as to all payments made, except as to the last two, which were collected before they were due; and as to them the judgment is reversed and the cause is remanded, with instructions to the court to foreclose the lien of appellant on the land to secure the payment of the same, in accordance with the opinion in the *Wiggins* case.

**SHERWOOD et al. v. GRAHAM et al.** (Supreme Court of Arkansas, Oct. 22, 1898.) Appeal from circuit court, Monroe county; James S. Thomas, Judge. Bill by J. K. O. Sherwood, trustee, and others, against J. H. Graham's heirs. From a decree for defendants, complainants appeal. Affirmed. Norton & Prewett, for appellants.

**WOOD, J.** The questions presented by this appeal are ruled by the decisions of this court in *Sherwood v. Swift*, 65 Ark. —, 43 S. W. 507, and *Lanier v. Trust Co.*, 64 Ark. 89, 40 S. W. 400, according to which the decree of the trial court is erroneous, and must be reversed. It is so ordered, and the cause is remanded, with directions to proceed to foreclose the deed of trust, and for such other proceedings not inconsistent with this opinion as may be necessary.

**COMMONWEALTH v. LOUISVILLE & N. R. CO.** (Court of Appeals of Kentucky, Sept. 28, 1898.) Appeal from circuit court, Marion county. "Not to be officially reported." Action by the commonwealth against the Louisville & Nashville Railroad Company. Judgment for defendant. The commonwealth appeals. Affirmed. H. W. Rives, for the Commonwealth. Lisle & McChord, H. W. Bruce, and W. C. McChord, for appellee.

**HAZELRIGG, J.** This case was to have been heard with a case of the same style, but was overlooked. The questions involved were settled in that case, the opinion in which was delivered at the April term, 1898, of this court.

See *Com. v. Louisville & N. R. Co.*, 45 S. W. 264, and *Louisville & N. R. Co. v. Com.*, 28 S. W. 624. Affirmed.

**GAINS v. HARTFORD INS. CO.** (Court of Appeals of Kentucky, Nov. 1898.) Appeal from circuit court, Henry county. "Not to be officially reported." Action by W. T. Gains against the Hartford Insurance Company for libel. Judgment dismissing petition as demurrer, and plaintiff appeals. Affirmed. J. Harding, W. S. Pryor, W. B. Mundy, and H. K. Bourne, for appellant. J. Barbour and J. D. Carroll, for appellee.

**WHITE, J.** This case is identical with the case of *Gains v. Insurance Co.*, 44 S. W. 564, with which it was heard and tried. The opinion in that case is decisive of all questions here presented. For the reasons stated in the opinion above, the judgment is affirmed.

**GAINS v. ROYAL INS. CO.** (Court of Appeals of Kentucky, Nov. 18, 1898.) Appeal from circuit court, Henry county. "Not to be officially reported." Action by W. T. Gains against the Royal Insurance Company for libel. Judgment dismissing petition as demurrer, and plaintiff appeals. Affirmed. J. Harding, W. S. Pryor, W. B. Moody, and H. K. Bourne, for appellant. J. Barbour and J. D. Carroll, for appellee.

**WHITE, J.** The questions presented in this case are identical with the case of *The Appellant v. Aetna Ins. Co.* (this day decided), 47 S. W. 884. The cases were heard as one case, and the opinion rendered in that case is decisive of this one. Judgment affirmed.

**JOHN CHURCH CO. v. ROUSE.** (Court of Appeals of Kentucky, Oct. 6, 1898.) Appeal from circuit court, Kenton county. "Not to be officially reported." Action by the John Church Company against L. N. Rouse. From the judgment, plaintiff appeals. Affirmed. D. A. Glenn, for appellant. W. M. Fenley, for appellee.

**HAZELRIGG, J.** Appellee contends that he took certain pianos and organs consigned to him by the appellant, and sold them as its agent, getting for his commission all he could sell the goods for over and above a certain sum at which they were billed to him; that he was to bear no part of the cost of collecting the purchase money. Appellant contends that it sold the goods outright to the appellee, and he was to account for interest on the purchase price, after a given time, and be charged with the cost of collections. The contract was a verbal one, and only appellant's president, who made the contract, and the appellee, testify as to its terms. On a settlement of the mutual accounts of the parties on the basis adopted by the trial court, appellee was entitled to the amount allowed him by the judgment; and the finding is fully supported by the evidence. Affirmed.

**LOUISVILLE & N. R. CO. v. BORDERS.** (Court of Appeals of Kentucky, Nov. 28, 1898.) Appeal from circuit court, Bullitt county. "Not to be officially reported." Action by Susie Borders, by guardian, against the Louisville & Nashville Railroad Company, to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed. Fairleigh & Straus and Edward W. Hines, for appellant. Charles Carroll, for appellee.

**WHITE, J.** The facts in this case are identical with the case of *Railroad Co. v. Keller* (this day decided) 47 S. W. 1072. The judgment rendered was for \$225. The instructions

given by the court were the same as in the Keller Case. For the reasons given in the Keller Case, *supra*, the judgment herein is affirmed, with damages.

**MUTUAL RESERVE FUND LIFE ASS'N v. GUYALS' ADM'R** (two cases). (Court of Appeals of Kentucky. Nov. 19, 1898.) Appeals from circuit court, Jefferson county. "Not to be officially reported." Actions by Sidney L. Guyals' administrator against the Mutual Reserve Fund Life Association on certain policies of insurance. Judgments for plaintiff, and defendant appeals. Affirmed. Pirtle & Trabue, for appellant. Samuel Avritt, for appellee.

**PAYNTER, J.** We perceive no error in this record which entitles the appellant to a reversal of the judgments; therefore they are affirmed.

**SMITH v. FENNACY et al.** (Court of Appeals of Kentucky. Nov. 22, 1898.) Appeal from circuit court, Carter county. "Not to be officially reported." Action by H. G. Fennacy and others against H. F. Smith to quiet title to land. Judgment for plaintiffs, and defendant appeals. Affirmed. Thos. D. Theobald, for appellant. E. B. Wilhoit, for appellees.

**WHITE, J.** This action was brought by appellees, in the Carter circuit court, against John Griffith, in equity, seeking to quiet title to a certain tract of land described. The petition alleges title and possession, and that the defendant, Griffith, claims certain parts thereof; and a prayer for judgment quieting appellees' title. To this petition defendant, Griffith, filed answer, and denied being in possession or claiming any land within the Isgrigg patent (appellees' source of title); but he claimed the land embraced in the patent to Griffith, and joined in the prayer of appellees, asking judgment locating the line between the Isgrigg and Griffith patents. Pending this action the appellant, Smith, bought of Griffith the land claimed by him, and thereupon Smith filed answer for himself, by permission of the court; and in Smith's answer he denies that the land claimed by appellees is embraced in the Isgrigg patent at all, or that the calls of the Isgrigg patent will include the land of appellees; that, if the entry under the patent was in fact made where appellees claim, it was outside the patent calls; and he therefore denied appellees' title. On this issue as to the location of the Isgrigg patent much proof was taken, and the court adjudged the appellees' title perfect, as against appellant's claim; and from that judgment this appeal is taken. The patent calls to begin at 11 sugar trees and 1 hickory on the creek, corner to John Tompkins; thence west 500 poles to two white oaks and poplar on Tompkins' line; thence N., 26 deg. W., 355 poles, to 3 white oaks; thence east 576 poles to a stake on the bank of the creek; thence up the creek, with its meanders, certain courses and distances, to the beginning. By the proof it is shown that at the beginning corner, as claimed by appellees, there stood 11 sugar trees and 1 hickory, marked, and, starting from there, the first line and second line come out at stumps that correspond with the calls, but that the third line, where the 576 poles are run, does not reach the creek, but falls short some 40 poles. The calls as of meanders of the creek to the beginning are not shown to have been run. However, it is shown that the creek has at one place changed its bed something near one-fourth of a mile. We are not informed what errors the appellant relies on for reversal, as no brief has been filed for him. After a careful investigation of the record, we fail to discover any error in the judgment.

Probably counsel for appellant reached the same conclusion; hence his silence. Wherefore the judgment is affirmed.

**STATE v. HARVEY.** (Supreme Court of Missouri, Division No. 2. Nov. 21, 1898.) Appeal from St. Louis circuit court; William Zachritz, Judge. Joseph Harvey was convicted of robbery in the first degree, and appealed. Affirmed. C. O. Bishop, for appellant. The Attorney General and Sam B. Jeffries, for the State.

**SHERWOOD, J.** "Guilty of robbery in the first degree, and 12 years in the penitentiary," was the verdict of the jury. William Donald was the victim who was "held up" by three footpads; that method being a *la mode* now in the city of St. Louis. The evidence was amply sufficient, and the instruction covered all questions of law necessary for the information of the jury in giving their verdict. Defendant excepted to the giving of the instruction, and also excepted to the failure of the court to fully instruct the jury on all questions, etc. But, as the jury was properly and fully instructed, the exceptions taken fall to the ground. The defense relied on was an alibi, but it is evident that the jury entertained a view not favorable to that theory. As the record is free from error, judgment affirmed. All concur.

**J. B. WATHEN & BRO. CO. v. CARNEY et al.** (Court of Chancery Appeals of Tennessee. Feb. 11, 1898.) Appeal from chancery court, Montgomery county; C. W. Tyler, Chancellor. Suit by the J. B. Wathen & Bro. Company against N. L. Carney, administrator, and others. Decree for plaintiffs, and the administrator appeals. Affirmed. Burney & Bailey, for appellant. Leech & Savage and B. L. Rice, for appellees.

**WILSON, J.** This is another case, from Montgomery county, in which creditors of the firm of J. J. Crusman seek to hold the estate of Bryce Stewart, deceased, liable for their claims. It is similar in all respects to the cases of *Ussery v. Crusman* (Tenn. Ch.) 47 S. W. 567, and *Elliot v. Carney, Id.*, except in one particular. The particular fact differentiating this case from those mentioned is that the debts sued for—being three notes—were for goods bought by J. J. Crusman after the death of Bryce Stewart. The notes sued on are three: One for \$239.80, dated September 25, 1895, and due in 3 months; one for \$239.82, dated October 25, 1895, due in 90 days; and the other for \$429.67, dated November 25, 1895, and due in 15 days. As stated in the opinion in the previous consolidated cases mentioned, J. J. Crusman and Bryce Stewart entered into partnership May 1, 1891, to conduct a general grocery produce and whisky business in Clarksville, Tenn. Under the terms of the partnership, it was to continue for five years, and the business was to be conducted under the firm name of J. J. Crusman. It purported on its face to be a limited partnership, and to the capital of which Bryce Stewart, as a special partner, contributed \$65,000. This contribution consisted of the stock of goods and income of the previous partnership between these parties. As a matter of fact, Bryce Stewart did not contribute \$65,000 in cash to the partnership at the time it was formed, May 1, 1891. In addition to this, the property and assets contributed by him were not of the cash value of \$65,000. The actual value of the assets contributed by him did not exceed \$40,000. Bryce Stewart died testate January 13, 1894. In his will he named J. L. Glenn and F. P. Gracey as his executors. Glenn declined the trust. Gracey qualified, and thereafter died. After his death, defendant N. L. Carney was appointed his administrator with the will



annexed, and was engaged in settling up the estate when this bill was filed. The will of Stewart contains the following clause: "The amount I have invested as a limited partner in the grocery house of J. J. Crusman, I wish to remain in said business for the time said limited partnership, according to the articles thereof, has to run; and my executors will collect the yearly profits arising therefrom, as any other debt due my estate, and they will give their supervision of said investment and protect the interests of my estate therein as I would do, if living." Crusman, it appears, carried on the business, after the death of Stewart, as it was conducted before, with the knowledge and assent of the representatives of Stewart. In December, 1895, Crusman, acting for himself and for what was known as the firm of J. J. Crusman, made a general assignment, naming therein Messrs. Savage and Payne as assignees. It appears that the assets of the firm will not pay the debts, and the effort of this bill is to hold the estate of Stewart liable for the debts sued on. The main insistence is that the articles of partnership did not state the facts, and that, the articles not being in compliance with our statutes regulating limited partnerships, Stewart became a general partner, and hence was liable as such. In this connection it is insisted that at all events his estate is liable, with respect to creditors, to make good the difference between the sum actually contributed by him to the capital of the firm and the sum which the articles of partnership recited had been contributed. We need not discuss this question at any length. We refer to and adopt the opinion of this court in the consolidated cases of *Ussery v. Crusman* and *Elliot v. Carney*. We hold here, as there, that Stewart, as to third parties dealing with the firm, was a general partner, and liable as such, because the provisions of our law regulating limited partnerships, and the liabilities of limited partners therein, were not complied with. It is insisted on behalf of defendant that the death of Stewart dissolved the partnership, and hence that the surviving partner, Crusman, had no right to bind the estate of Stewart by contracts entered into after the death of his partner. We readily concede the proposition that the death of one partner dissolves the partnership, and that the surviving partner has no right to bind the estate of his deceased partner by contracts entered into, in the pursuit of the business of the firm, after the death. The question here is, in this aspect of the case, whether, under the will of Stewart, the partnership was continued, with power in Crusman to carry on the business as it was carried on before his death. We held in the consolidated cases above referred to that, as to the general public, Stewart was a general partner in the business conducted under the firm name of J. J. Crusman, and that this business, under the terms of his will, was to continue until the expiration of the articles of partnership. We also held that, as a matter of law, it continued just as if Stewart were living, in so far as the rights of creditors were concerned. We think our holding in those cases is correct. The chancellor heard the cause November 20, 1897. He gave a decree in favor of the complainants for the sum of the three notes, with interest, amounting to \$1,021.60, against N. L. Carney, administrator with the will annexed of Stewart, to be satisfied out of the assets of Stewart in his hands to be administered. He also taxed him with the costs. He adjudged that this claim or judgment should be credited with any sums that had been paid, or that might thereafter be paid, out of the assets of the firm by the assignees thereof, Messrs. Savage and Payne. The chancellor found as a fact that if Stewart had contributed the \$65,000 to the capital of the firm, which the articles of partnership recited had been paid by him, there would have been no necessity for the firm of J. J. Crusman to make

an assignment. We think this finding of fact is well sustained by the evidence. From this decree, Carney, administrator, prayed an appeal to the supreme court, and assigned errors. The errors assigned are precisely similar to those assigned in the Cases of *Ussery* and *Elliot*, above referred to. We need not set them out here in detail, nor state our conclusions, further than is stated in our opinion in said cases. We refer to what we said in our opinion in those cases, and the authorities there cited. There is no error in the decree of the chancellor, and it will be affirmed, with costs. The cause is remanded for further proceedings in conformity to this opinion. The other judges concur.

Affirmed orally by supreme court, March 5, 1898.

**STATE v. DYER et al.** (Court of Chancery Appeals of Tennessee. Oct. 8, 1897.) Appeal from chancery court, Hamilton county; T. M. McConnell, Chancellor. Bill by the state against Charles E. Dyer and others. There was a decree for defendants, and plaintiff appeals. Reversed. J. T. Hill, Richmond, Chambers & Head, and G. W. Pickle, Atty. Gen., for the State. O. R. Evans and Cooke, Swaney & Cooke, for appellee Dyer. Cantrell & McReynolds, for appellees M., A., and J. B. Nicklin.

**BARTON, J.** This is a bill filed to collect the sum of \$1,783.22, alleged to be due the state for taxes on litigation which had been had before the defendant Charles E. Dyer during his term as recorder of the city of Chattanooga from May 20 to December 31, 1890; the allegations of the bill being that Dyer had been recorder during this time, and that in cases brought and pending before him during this term there had accrued to the state, and had been collected as taxes on litigation under the act passed April 5, 1889, said sum of \$1,783.22, no part of which Dyer, as required by law, had paid to the clerk of the court of Hamilton county. It is further charged in the bill that the defendant Dyer, of this sum, had paid into the treasury of the defendants mayor and aldermen of Chattanooga, Tenn., out of money so collected as taxes on litigation before him, the sum of \$531.22, which the mayor and aldermen illegally detained and held; that a part of the amount collected by him he had wrongfully turned over to the trustee of the defendant Hamilton county, but that no part of it had been paid over to the clerk of the county court, or into the treasury of the state, as required by law. For this reason the county and city were sued. The suit was also brought against Prosper Lazard, J. B. Nicklin, and Henry Schwartz, as securities on the official bond of Dyer as recorder. All the defendants answered, denying their liability. An agreed state of facts was signed by the parties or their counsel, on which the case was heard, and decided by the chancellor, from which it appears, and we find, as follows: That the defendant Dyer was the recorder of the city of Chattanooga from May 23, 1890, to December 31, 1890, elected to this position by the mayor and aldermen of the city of Chattanooga; that during all the time Dyer was recorder one E. F. Horne was clerk of the recorder's court, elected to that position by the board of mayor and aldermen of Chattanooga; that defendant Dyer had nothing to do with his election, and had no power to remove him from this position; that Horne had been elected and appointed to the position as clerk of the recorder under an ordinance passed on November 19, 1889, which, so far as necessary to recite, provided as follows: That the office of the clerk of recorder's court was established to be filled by an election of the board of mayor and aldermen, and that the clerk should hold for one year, or until his successor was elected and qualified. "The duties of said clerk shall be

in the name of the recorder to keep the records, issue all process, and perform all the clerical work which by the existing charter of the city of Chattanooga, or by the statute of Tennessee it may be necessary for the recorder to perform; that this section shall not be construed so as to authorize the clerk to sign the name of the recorder to any process, record or document," etc. It is further agreed that during the whole time Dyer was recorder Horne was clerk of the recorder's court, collected all the money of the recorder's court in fines, costs, and taxes, kept all the records of every kind and description and the cash books, but that the judgments on the court dockets were in each and every case signed by the recorder himself; that each day said Horne made a daily cash account report to the tax collector and treasurer of the mayor and aldermen of the city of Chattanooga, a copy of which is made an exhibit to this agreement. This report or exhibit shows simply the number of the case, the date of the judgment rendered, the name of the party, and the amount paid the city, and in some instances—though in few—the amount of the state tax, with an aggregate of the amount paid the city. No objection was made to this method of business. In fact it was required by the city. It is further agreed that during the time Dyer was recorder the dockets, books, and records of his court, as kept by the clerk, Horne, show that, as provided in all cases in which money was collected, the first dollar or part thereof collected should be paid over to the state of Tennessee as a tax on litigation; that \$1,762.22 had been collected in money on 1,787 cases of violations of city ordinances disposed of by the recorder; that of this amount \$478.55 in 481 cases set out and mentioned in the exhibit to complainant's bill was paid over by Horne into the hands of the tax collector and treasurer of the mayor and aldermen of the city of Chattanooga; that the remainder—\$1,283.67—so collected on the other cases mentioned in the Exhibit A was unaccounted for; that said Dyer never received it in person from said Horne, or any one else, and that Horne never accounted for \$1,283.67, either to the mayor and aldermen or to Dyer; that the defendant mayor and aldermen of Chattanooga had an ordinance in force during the whole term of Dyer whereby it imprisoned in the city jail or workhouse all defendants who failed to pay or secure their fines, but that they were released at any time upon paying or securing such fine; that on the dockets of the recorder, where the judgments in each of the cases was entered up and signed, the words and figures "State tax, \$1," were printed; that no state tax as such was paid into the city treasury, and that in no case did the city receive more than the amount of the fine or forfeiture assessed on the recorder's docket, but that the money was paid over to the city treasurer as per the reports, the substance of one of which we have above recited; that during the term that Dyer was recorder, 215 cases were docketed as forfeiture cases,—that is, cases in which parties had been arrested for violation of city ordinances, and deposited money with the chief of police of the city of Chattanooga for their appearances before the recorder, but afterwards failed to appear, and forfeiture was taken before the recorder against said parties without trial, and the money deposited forfeited and turned over by the recorder's clerk to the city of Chattanooga; that in these cases all the forfeiture money was turned over to the treasurer of the city of Chattanooga, and that, in consequence, \$215 of the \$478.55 above mentioned was called forfeiture money; that in 174 cases of the 215 forfeiture cases it appeared that on the same day, for the same offense, a defendant of the same name pleaded guilty in a state case before the said Dyer as ex officio justice of the peace, and submitted and was fined under the small offense

law; that these parties were never present when the forfeiture was taken against them in the city cases, but when the state cases were called they either pleaded guilty in person or by attorney,—more frequently the latter; that the state cases were not tried at the same time, but the city cases were tried first, and, after the city cases were tried, the state cases were taken up for final disposition; that the balance of \$478.55 claimed by the state arising in some 267 cases was all the money shown by the books to have been collected in each case, was applied on fines, and reported and paid to the city treasurer; that in none of the cases did the amount collected exceed the amount of fine assessed, and that in most of the cases the amount collected was less than the amount of the fine, and that in each and all the cases the amount collected was less than the amount of the fine attached. This agreement is signed by the solicitors for the complainant, for Dyer, for the mayor and aldermen, and for the bondsmen. For the reasons stated in the written opinion handed down and filed simultaneously with this in the case of *State v. Strong*, 47 S. W. 1108, which case was tried with this, and involved the same questions, we find and hold: That, the defendant Dyer not having collected or received any of the money sued for, he is not liable to the state for anything, and the decree of the chancellor dismissing the bill as to him was correct. Second. That the defendant mayor and aldermen is, in our opinion, liable to the state for the full amount of \$1,762.22, shown to have gone into the hands of the clerk of the recorder's court; but, inasmuch as the bill in this case only seeks to recover the amount that was actually paid over to the treasurer, which is \$478.55, a decree will be rendered here in favor of the state against the defendant mayor and aldermen for that amount. The holding above necessarily is conclusive against the relief sought against Dyer as recorder, and also as against that sought against his sureties. But, in view of an appeal, as pertinent to the rights of the sureties, we find as a fact that it is not shown that the defendants Prosper Lazard, John B. Nicklin, and Henry Schwartz, who are sued as the sureties of Dyer on a bond alleged to have been given by him for the faithful discharge of the duties of the recorder, ever signed or executed such a bond. The nearest approach to any proof on this subject is taken from an account published in the *Chattanooga Times*, wherein the statement was made that these defendants were his sureties on his bond. Of course, this was no proof or evidence of this fact. Hamilton county, and B. F. Craig, of the county, were also sued in this case on the ground that Dyer had wrongfully paid over some of the money collected as state tax to Craig as county trustee and treasurer. The proof wholly fails to show that any part of the taxes sued for was so paid over. Craig shows in his answer that he received a certain amount of taxes on justice of the peace cases from Dyer, but these amounts were evidently received on other causes, and not on the ones involved in this litigation. A decree will be entered in favor of the state against the defendant mayor and aldermen for the \$478.55 above mentioned, with interest. As to the other defendants, the bill will be dismissed. The state will pay the costs incident to making all the defendants except the mayor and aldermen parties. The defendant mayor and aldermen will pay the balance of the costs, including the costs of the appeal. WILSON, J., concurs.

Affirmed orally by supreme court, October 26, 1898.

Ex parte ELLIS. (Court of Criminal Appeals of Texas. Oct. 19, 1898.) Appeal from Ellis county court; J. C. Smith, Judge. Andy Ellis

was convicted of a violation of a city ordinance. He petitioned for habeas corpus, and was remanded to custody, and he appeals. Reversed. J. D. Kemble, for relator. Mann Trice, for the State.

**DAVIDSON, J.** Relator was convicted of a violation of a city ordinance. The city ordinance denounces the same act as the state law. It is conceded by the attorney representing the city that the judgment of the county judge remanding relator to custody is in violation of the decision of this court in *Coombs v. State* (Tex. Cr. App.) 44 S. W. 854. In an elaborate and able argument, the city attorney combats the reasoning in the *Coombs* Case, but we see no reason to change our views as therein enunciated. The judgment is reversed, and the relator discharged. **HURT, P. J.,** absent.

**GARVIN v. STATE.** (Court of Criminal Appeals of Texas. Oct. 12, 1898.) Appeal from district court, Bexar county; I. L. Martin, Judge. J. W. Garvin was convicted of burglary, and he appeals. Affirmed. Mann Trice, for the State.

**DAVIDSON, J.** Appellant was convicted of burglary, and appeals. This is a companion case to cause No. 1,828, *Wagner v. State* (Just decided) 47 S. W. 372. The questions are the same, and upon the authority of that case the judgment is affirmed.

**JENKINS v. STATE.** (Court of Criminal Appeals of Texas. Oct. 12, 1898.) Appeal from district court, Robertson county; W. G. Taliaferro, Judge. Granville Jenkins was convicted of murder, and he appeals. Affirmed. Mann Trice, for the State.

**DAVIDSON, J.** Appellant was convicted of murder in the first degree, and his punishment assessed at death. The only question presented on the motion for a new trial is that the verdict was contrary to the law and the evidence. The evidence incorporated in the record presents a case in which the jury were authorized to find the verdict of murder in the first degree. We deem it unnecessary to review or sum up the testimony. The judgment is affirmed.

**Ex parte WILLIAMS** (No. 1,872). (Court of Criminal Appeals of Texas. Nov. 2, 1898.) Appeal from district court, Erath county; J. S. Straughan, Judge. Habeas corpus proceedings by Harry Williams to secure bail. From a judgment holding the charge nonbailable, he appeals. Reversed. Martin & George, for relator. W. J. Oxford, Nugent & Kearby, and Mann Trice, for the State.

**DAVIDSON, J.** Relator was arrested upon the charge of murder, and resorted to the writ of habeas corpus for the purpose of securing bail. Upon the trial under said habeas corpus proceedings the charge against him was held nonbailable. We have carefully examined the record, and are of opinion that the judgment was erroneous, and that relator is entitled to bail. While we refrain from a discussion of the evidence, after a careful examination of the same we have arrived at the conclusion above stated. We therefore fix the amount of bail at \$3,000. Upon the execution of a bond by relator in said amount, in the terms and under the requirements of the law, the officer holding relator will release him. The judgment is reversed, and bail fixed at \$3,000. **HURT, P. J.,** absent.

**Ex parte WILLIAMS.** (Court of Criminal Appeals of Texas. Nov. 2, 1898.) Appeal from district court, Erath county; J. S. Straughan, Judge. Habeas corpus proceedings by Annie S. Williams to secure bail. From a judgment

holding the charge nonbailable, she appeals. Reversed. Martin & George, for relatrix. W. J. Oxford, Nugent & Kearby, and Mann Trice, for the State.

**HENDERSON J.** This is a companion case to *Ex parte Williams* (just decided) supra. Relatrix is the wife of Harry Williams, and was arrested under a charge of murder; being the same homicide charged against her husband. Without discussing either the facts or any phases of the law we might apply to the wife under the given state of case, we are of opinion that under the testimony she is entitled to bail. The trial court under the habeas corpus proceeding having refused relatrix bail, we think this was error. Wherefore the judgment is reversed, and her bail fixed at \$2,000. Upon entering into a bond for that amount, in the terms and under the requirements of the law, she will be released by the officer having her in custody; and it is accordingly so ordered. **HURT, P. J.,** absent.

**Ex parte WILLIAMS.** (Court of Criminal Appeals of Texas. Oct. 19, 1898.) Appeal from district court, Erath county; J. S. Straughan, Judge. Annie S. Williams, being in custody, petitioned for habeas corpus, and, on being remanded, appeals. Dismissed. Martin & George and J. B. Keith, for relatrix. W. J. Oxford, Nugent & Kearby, and Mann Trice, for the State.

**DAVIDSON, J.** This is a companion case to cause No. 1,872, *Ex parte Williams* (just decided) supra. The relatrix herein was arrested, charged with the same offense as her husband, Harry Williams. The trial was had before the same judge, and under the same circumstances. For the reasons stated in that case the appeal herein is dismissed. **HURT, P. J.,** absent.

**WISDOM v. STATE.** (Court of Criminal Appeals of Texas. Nov. 9, 1898.) Appeal from district court, Denton county; D. E. Barrett, Judge. C. H. Wisdom was convicted of selling mortgaged property with intent to defraud, and he appeals. Affirmed. Mann Trice, for the State.

**DAVIDSON, J.** Appellant was convicted of selling mortgaged property with intent to defraud John P. London, and given two years in the penitentiary; hence this appeal. The record does not contain an assignment of error, and the only ground of the motion for a new trial is based upon the supposed insufficiency of the evidence to support the verdict and judgment. It is undisputed that the defendant bought a buggy and harness from London for \$80, and gave him a mortgage upon said buggy and harness for that amount. This mortgage was executed on May 6, 1898, and was due on the 1st of the following August. It is also undisputed that he disposed of the buggy on the 20th of May, 1898. Roark, the purchaser of the buggy from the defendant, testified that, at the time he purchased it, appellant told him that he had paid \$80 in cash for it. Letters written by the defendant were also introduced in evidence, and the statements therein were shown to be false, and all statements and conduct of the defendant showed evidently a purpose to defraud. He denied making the statement to Roark that he had paid \$80 in cash for the buggy; but still it is unquestioned that he bought the buggy and harness, and executed the mortgage upon it, due on the 1st of August, and that on the 20th of May, within three weeks from the date of his purchase, he disposed of the property. And the evidence further places it beyond question that it was done for the purpose of defrauding. The judgment is affirmed. **HURT, P. J.,** absent.

**BONNER v. FREEDMAN et al.**<sup>1</sup> (Court of Civil Appeals of Texas. May 21, 1898.) Appeal from district court, Navarro county; L. B. Cobb, Judge. Trespass to try title by R. Freedman & Co. and others against J. I. Bonner. Defendant joined Mrs. E. F. Huckaby as a party. From a judgment for plaintiffs, defendant Bonner appeals. Affirmed. J. M. Blanding and Callicutt & Call, for appellant. Simkins & Mays, for appellees.

**FINLEY, C. J.** This suit was instituted in form of trespass to try title, and involves about 34½ acres of land,—a strip of land 1,444 varas long and 135 varas wide. It is in fact a controversy over boundaries between owners of adjoining surveys. The plaintiffs claim that the land is embraced within the Dunnagan survey, while the defendant Bonner claims that it is located in the Little Wilson Reed survey. The defendant also claims by limitation of 10 years, and further sets up claim for valuable improvements made in good faith. The defendant Bonner joined Mrs. E. F. Huckaby in the suit, claiming that he and she formerly held lands in common, and that in partitioning their lands the Little Wilson Reed tract of 411 acres, supposed to include the land in controversy, was allotted to him at the valuation of \$10 per acre. He prayed, in case a recovery was had against him, that he recover over against Mrs. Huckaby. Plaintiffs, by the verdict of the jury, recovered all the land, except about 8 acres, which was awarded to Bonner under his plea of limitations. Bonner was given \$225 for his improvements, and this amount was offset by a recovery of the same sum by plaintiffs on account of use and occupation. All the land was found to be in the Dunnagan survey, and no recovery was given against Mrs. Huckaby in favor of Bonner. From the judgment entered upon this verdict, Bonner has appealed. This is the second appeal in this case. Our decision upon the former appeal will be found reported in 40 S. W. 47. The issues involved upon the trial were these: (1) Is the land in controversy embraced in the G. W. Dunnagan survey? This issue involves the true location of the south line of the Little Wilson Reed survey, and the north line of the G. W. Dunnagan survey. (2) Appellant's claim of limitation by virtue of ten years' adverse possession. (3) Appellant's right to a recovery over against Mrs. Huckaby. The assignments of error presented and insisted upon are quite numerous, and we deem it impracticable to undertake to discuss them. We have considered them all carefully, and have reached the conclusion that no reversible error was committed upon the trial. The evidence justifies these conclusions of fact: (1) The land sued for is embraced in the Dunnagan survey, and is not in the Little Wilson Reed survey. (2) The appellant and those under whom he claims had 10 years' exclusive, adverse possession, next before the institution of this suit, of only that portion of the tract awarded to him by the verdict and judgment. (3) The evidence fairly showed that the amount to which the defendant was entitled for im-

provements in good faith did not exceed the sum which plaintiffs were entitled to recover for use and occupation, and the jury properly set off one with the other. (4) The evidence does not show that, in the judicial partition of the lands between appellant, Bonner, and Mrs. Huckaby, the commissioners based their action in the partition upon the erroneous assumption that the land here sued for was in the Little Wilson Reed survey, set apart to Bonner. The commissioners were told that there was a little more than 400 acres in the tract. They did not attempt to make a full and accurate survey of it. The surveyor, who was one of the commissioners, at the time they were making the partition told Bonner that he had about 40 acres of the Freedman land in his pasture, and Bonner told him he would hold it by limitation. It does not appear that the partition was inequitable and unjust by reason of the Little Wilson Reed survey not embracing this land; and it does not appear that the commissioners would have made any different division, had they known that this land was not within said survey. It is fairly shown that they estimated the tract to contain about 411 acres, while in fact it contains a little less than 400 acres; but it is not shown that the exact number of acres controlled in the estimation of value placed upon the tract by them. Under these conditions, appellant was not entitled to a recovery against Mrs. Huckaby. We think the jury reached a just and proper verdict in the case, and we find no error committed upon the trial which we think should cause a reversal of the judgment. Judgment affirmed.

**DENISON & P. SUBURBAN RY. CO. v. PASTORA.**<sup>1</sup> (Court of Civil Appeals of Texas. May 14, 1898.) Appeal from district court, Grayson county; D. A. Bliss, Judge. Action by Rock Pastora against the Denison & Pacific Suburban Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed. T. J. Freeman, for appellant. Head, Dillard & Muse, for appellee.

**RAINEY, J.** Appellee sued appellant railway company to recover damages alleged to have been caused to the land described in plaintiff's petition by the construction of defendant's railroad adjacent thereto. The evidence shows that the plaintiff owned the property, and that defendant's railroad was constructed on Travis avenue, within 125 feet of plaintiff's property, on which was situated three houses. Along and next to said property the embankment on Travis avenue is 18 or 20 feet high; and said embankment is so high and wide that the passage from and to plaintiff's property is entirely cut off, and it cannot be reached except by passing over private property. Said property was damaged to the extent of the amount found by the verdict of the jury. There are several assignments of error presented, but none we consider of any special merit, and therefore deem it unnecessary to discuss same. We find no error in the rulings of the court. The judgment is supported by the evidence, and the same is therefore affirmed.

<sup>1</sup> Writ of error dismissed for want of jurisdiction.

<sup>1</sup> Writ of error denied by supreme court.



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**§ 15. — Discretion of lower court.**

A refusal to grant a continuance will be sustained, unless the court has abused its discretion.—*Purcell Mill & Elevator Co. v. Kirkland* (Ind. T.) 311.

Submission of issue to the jury in chancery being discretionary, error cannot be based thereon.—*Hall v. Harris* (Mo.) 506.

A chancellor's action in setting aside an order pro confesso, and permitting an answer, *held* not reversible unless palpable injustice was done.—*Edwards v. Turner* (Tenn. Ch. App.) 144; *Turner v. Edwards*, *id.*

Motion based on unavoidable absence of counsel *held* to be addressed to court's discretion, and not reviewable unless abused.—*Hoefling v. Courtney* (Tex. Civ. App.) 686.

**§ 16. — Questions of fact, verdicts, and findings.**

A verdict on conflicting evidence will not be disturbed.—*Purcell Mill & Elevator Co. v. Kirkland* (Ind. T.) 311.

A finding, on a motion for a continuance, that movant was lacking in diligence, will not be disturbed, if there is any evidence to sustain it.—*Purcell Mill & Elevator Co. v. Kirkland* (Ind. T.) 311.

The preponderance of the evidence showing that plaintiff's judgment is for too much, it is reversed.—*Kremer v. Murphy* (Ky.) 230.

The chancellor's findings of fact are not entitled to the weight of a verdict of a jury.—*Wooley's Ex'rs v. Greenwade's Heirs* (Ky.) 335.

Where an issue of fact ordered to be tried out of chancery is by consent submitted to the court, its finding is entitled to the weight of the verdict of a properly instructed jury, and will not be set aside unless palpably against the evidence.—*Callis v. Garrett's Ex'rs* (Ky.) 595.

Under Ky. St. § 4850, providing that the same effect shall be given to the verdict of a jury in a will case as in any other civil proceeding, where the evidence as to manual capacity of the testator is conflicting, a verdict rejecting the will will not be disturbed.—*Lischy v. Schrader* (Ky.) 611.

Chancellor's findings of fact on conflicting evidence will not be disturbed.—*George v. Reams* (Ky.) 758.

A verdict found on conflicting evidence sufficient to support a verdict for either party will not be disturbed on appeal.—*Sharpe v. McCreery* (Ky.) 1075.

Where a verdict is supported by substantial evidence, and was approved by the trial court, it will not be reversed for being excessive.—*Chicago, R. I. & P. Ry. Co. v. George* (Mo.) 11.

Verdict in chancery being advisory, error cannot be predicated on it as against the law and evidence.—*Hall v. Harris* (Mo.) 506.

Error cannot be predicated on instructions to jury in chancery case.—*Hall v. Harris* (Mo.) 506.

Rejection of evidence cannot be complained of where the court states that in making its findings it considered it as competent.—*Kimbrow v. Continental Ins. Co.* (Tenn. Sup.) 413.

Finding by court of chancery appeals that transfer is fraudulent and void *held* conclusive on supreme court.—*McQuade v. Williams* (Tenn. Sup.) 427.

Where incompetent evidence has been allowed in favor of the prevailing party, to sustain the judgment it must appear to have had no effect on the verdict prejudicial to the loser.—*Griffin v. Payne* (Tex. Sup.) 973.

A judgment on conflicting evidence *held* not reversible, though the preponderating evidence favors appellant.—*Houston & T. C. R. Co. v. Laskowski* (Tex. Civ. App.) 59.

A finding of court will be sustained if there is evidence sufficient to sustain it, though the weight of all the evidence is against it.—*Koehler v. Cochran* (Tex. Civ. App.) 394.

A verdict based on conflicting evidence will not be disturbed.—*Galveston, H. & S. A. Ry. Co. v. Patterson* (Tex. Civ. App.) 686.

A trial court's findings of fact will not be disturbed where there is evidence in the record to sustain them.—*Abeel v. Tasker* (Tex. Civ. App.) 738.

Where the jury and court have agreed on the sufficiency of evidence to support a finding of fact, the finding will rarely be reversed.—*Therriault v. Compere* (Tex. Civ. App.) 750.

An assignment of error that the court erred in not holding that certain testimony showed fraud *held* unavailable where the cause was tried by a jury.—*Hillboldt v. Waugh* (Tex. Civ. App.) 829.

Findings as to contributory negligence on sufficient evidence cannot be disturbed.—*San Antonio & A. P. Ry. Co. v. Hammon* (Tex. Civ. App.) 1025.

When evidence is conflicting, and there is sufficient to sustain verdict, it will not be disturbed.—*City Ry. Co. v. Thompson* (Tex. Civ. App.) 1038.

Finding as to whether there had been ratification of agent's acts is conclusive, where there is no statement of facts.—*Greer v. First Nat. Bank of Marble Falls* (Tex. Civ. App.) 1045.

In order to authorize appellate court to set aside verdict as excessive, it must appear that jury was influenced by prejudice or passion.—*Galveston, H. & H. R. Co. v. Bohan* (Tex. Civ. App.) 1060.

**§ 17. — Harmless error.**

Admission of evidence of a new promise to take a debt out of the statute of limitations is harmless, where the debt is not barred.—*Sparks v. Childers* (Ind. T.) 316.

To require the jury to find "willful" negligence in order to give punitive damages is harmless error.—*Louisville & N. R. Co. v. Chism* (Ky.) 251.

It is harmless error to sustain demurrer to plea of contributory negligence where the evidence shows that plaintiff was of such tender years he could not be guilty of contributory negligence.—*South Covington & C. St. Ry. Co. v. Herrklots* (Ky.) 265.

There will be no reversal where the judgment as a whole is more favorable than appellant was entitled to have.—*Worsham v. Lancaster* (Ky.) 448.

A judgment will not be reversed for technical objections, where appellant was not prejudiced.—*Chicago, R. I. & P. Ry. Co. v. George* (Mo.) 11.

A ruling favorable to plaintiff, which did not affect the judgment in favor of defendant, will not be considered on plaintiff's appeal.—*King v. Texas County* (Mo.) 920.

Parties cannot complain of a decree because unduly favorable to them.—*Bramell v. Adams* (Mo.) 931; *Same v. Cole*, *Id.*; *Same v. Collins*, *Id.*

When court treats defense made as that of res judicata, and finds against defendant, erroneous finding that previous action was pending at time held harmless error.—*McQuade v. Williams* (Tenn. Sup.) 427.

Where the record contains no statement of facts, the submission of a plea of privilege in connection with the main case, instead of separately, will not be treated as reversible error.—*Caswell v. Hopson* (Tex. Civ. App.) 54.

The admission of certain evidence held error, but not prejudicial, so as to warrant a reversal.—*Missouri, K. & T. Ry. Co. of Texas v. Wright* (Tex. Civ. App.) 56.

Error in instructing that depreciation in rental value may be allowed as part of the damages, where the measure of damages was the depreciation in the value of the property itself, held harmless.—*City of Houston v. Parr* (Tex. Civ. App.) 393.

Exclusion of evidence that a person ought to have known something which the person testifies he did know is harmless.—*Waco Artesian Water Co. v. Cauble* (Tex. Civ. App.) 538.

A party cannot assign as error a submission of an issue to the jury at his own request.—*Texas & P. Ry. Co. v. Bigham* (Tex. Civ. App.) 814.

When answer to question improperly calling for conclusion is, if anything, favorable to party objecting, the error is harmless.—*Galveston, H. & H. R. Co. v. Bohan* (Tex. Civ. App.) 1050.

Admission of opinion as to self-evident fact held harmless error.—*Galveston, H. & H. R. Co. v. Bohan* (Tex. Civ. App.) 1050.

#### § 18. — Subsequent appeals.

On a second appeal, the court will not go behind the first decision, and decide a question which was or could have been raised on the first appeal, unless the question was expressly left open for future litigation.—*Bean v. Meguiar* (Ky.) 771.

#### § 19. Determination and disposition of cause.

Defendant cannot make new defenses after reversal.—*Ficener v. Bott* (Ky.) 251.

On the affirmance of a judgment directing the payment of money into court, damages will be awarded.—*Louisville & N. R. Co. v. Schmidt* (Ky.) 583.

A judgment establishing a public road over land belonging to different defendants is an entirety, and if erroneous as to any one of defendants must be reversed as to all.—*Jewell v. Kirk* (Ky.) 766.

On appeal to the circuit court from an order of the county court establishing a public road, it is proper to dismiss the case, if all the parties were not properly before the court.—*Jewell v. Kirk* (Ky.) 766.

Shannon's Code, § 4905, held not to authorize remanding of cause for new trial on ground that solicitors believed until after trial that certain necessary proof was in supplied record,

and were taken by surprise.—*Casey & Hedges Mfg. Co. v. Weatherly* (Tenn. Sup.) 432.

On reversal of judgment for defendant in an action for damages tried to a jury, where the evidence is clear that only nominal damages were sustained, judgment will be entered without remanding the case.—*Jones v. Western Union Tel. Co.* (Tenn. Sup.) 699.

A judgment of dismissal on a fundamental defect in cause of action cannot be affirmed because of defect in pleadings curable by amendment.—*Shotwell v. McCardell* (Tex. Civ. App.) 39.

Where appellant fails to file transcript in time, appellee is entitled, under Rev. St. 1895, art. 1016, to affirmance on certificate, notwithstanding appellant has brought error.—*San Antonio & A. P. Ry. Co. v. Ray* (Tex. Civ. App.) 477.

#### § 20. Liabilities on bonds and undertakings.

Execution for costs may issue against sureties on bond, where a mandate directs them to pay costs, though proceeds of an execution sale, insufficient to pay the judgment, had been applied on such costs.—*Akes v. Sanford* (Tex. Civ. App.) 671.

### APPEARANCE.

An attorney requesting a clerk to place his name on the docket, as representing a litigant, does not make an appearance for him in proceedings to try right of property under execution.—*Stevens v. Perrin* (Tex. Civ. App.) 802.

### APPOINTMENT.

Of guardian, see "Guardian and Ward," § 1.  
Of receiver, see "Receivers," § 2.

### ARBITRATION AND AWARD.

See "Reference."

### ARREST.

See "Bail."

### ARREST OF JUDGMENT.

In criminal prosecutions, see "Criminal Law," § 8.

### ARSON.

Indictment under Rev. St. 1889, § 3511, must charge that jail alleged to have been burned was dwelling house.—*State v. Whitmore* (Mo.) 1063.

Ownership of jail alleged to have been burned must be laid in sheriff having charge and living in it.—*State v. Whitmore* (Mo.) 1063.

Indictment for burning jail must allege ownership.—*State v. Whitmore* (Mo.) 1063.

After conviction of arson in first degree under defective indictment, state cannot treat it as charging third degree of arson.—*State v. Whitmore* (Mo.) 1063.

Where building was in part destroyed by dynamite explosion, and some of the fragments were burned, held not to constitute arson, where the house did not take fire, and the prosecution was not under Pen. Code 1895, art. 761.—*Landers v. State* (Tex. Cr. App.) 1008.

Evidence held insufficient to sustain conviction.—*Landers v. State* (Tex. Cr. App.) 1008.

### ASSAULT AND BATTERY.

Assault with intent to kill, see "Homicide," § 3.

#### § 1. Civil liability.

Evidence that plaintiff sent an insulting message to defendant's wife held admissible, in

an action for an assault and battery, under an issue of exemplary damages.—*Shapiro v. Michelson* (Tex. Civ. App.) 746.

Without pleading the facts constituting an assault, recovery cannot be had therefor.—*Shapiro v. Michelson* (Tex. Civ. App.) 746.

Pleading an assault and battery does not warrant recovery for an assault, on the ground that assault and battery includes it.—*Shapiro v. Michelson* (Tex. Civ. App.) 746.

## § 2. Criminal responsibility.

It was error to admit in evidence a club as that with which the wounding charged was done, when it was not identified as the one used.—*Parrott v. Commonwealth* (Ky.) 452.

The court should have required the jury to find, in order to convict defendant of malicious wounding, that the weapon used was, as used, a deadly weapon.—*Parrott v. Commonwealth* (Ky.) 452.

Under indictment for aggravated assault, conviction for simple assault may be had.—*Keeling v. State* (Tex. Cr. App.) 372.

An omission to charge the jury in a prosecution for aggravated assault *held* not error, under the statute making it unnecessary to charge in misdemeanor cases unless requested.—*Black v. State* (Tex. Cr. App.) 992.

## ASSESSMENT.

Of damages, see "Damages," § 4.

## ASSIGNMENT OF ERRORS.

See "Appeal and Error," § 8.

## ASSIGNMENTS.

For benefit of creditors, see "Assignments for Benefit of Creditors."

Fraud as to creditors, see "Fraudulent Conveyances."

## ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See, also, "Bankruptcy."

### § 1. Requisites and validity.

A mortgage to creditors ostensibly as security, but in fact in payment of their claims, *held* not an assignment for the benefit of creditors.—*Turner Hardware Co. v. Reynolds* (Ind. T.) 307.

An answer denying merely that a mortgage attacked as a preference "was made in contemplation of insolvency, or with the design to prefer one or more creditors," is not good.—*Aulick v. Reed* (Ky.) 331.

A judgment suffered by an insolvent debtor in contemplation of insolvency, and with design to prefer the plaintiff, operates as an assignment for the benefit of creditors.—*Laughlin v. First Nat. Bank* (Ky.) 623.

A conveyance executed to a creditor *held* to have been made in contemplation of insolvency, and to operate as an assignment for the benefit of all of the grantor's creditors.—*Allen v. Dillingham's Assignee* (Ky.) 1076.

A guarantor is a debtor, within Ky. St. § 1910, providing that every act done by a debtor in contemplation of insolvency, and with the design to prefer one or more creditors, to the exclusion of others, shall operate as an assignment of all the debtor's property.—*Allen v. Dillingham's Assignee* (Ky.) 1076.

Insufficient assignment is not cured by delivery to assignee.—*Forshee v. Willis* (Tenn. Sup.) 703.

Schedule attached to assignment *held* insufficient.—*Forshee v. Willis* (Tenn. Sup.) 703.

Assignment *held* void for insufficient description.—*Forshee v. Willis* (Tenn. Sup.) 703.

## § 2. Construction and operation in general.

Where a deed executed to a creditor is declared to be a preference, and to operate as an assignment for the benefit of creditors, the grantee is entitled to the benefit of the grantors' homestead exemption in the property conveyed.—*Allen v. Dillingham's Assignee* (Ky.) 1076.

## § 3. Accounting, settlement, and discharge of assignee.

The claim of an assignee for the wages of clerks whom he had employed pending the suit for settlement, without application to the court for authority, was properly disallowed.—*Hall v. Tarvin* (Ky.) 434.

## ASSOCIATIONS.

See "Beneficial Associations"; "Building and Loan Associations."

## ATTACHMENT.

See, also, "Execution"; "Garnishment."

### § 1. Nature and grounds.

Where defendant, who had made promises at various times to pay plaintiff's debt, was about to ship to another warehouse some tobacco he had promised to ship to plaintiff's warehouse, an attachment was authorized.—*Rice v. Tolbert* (Ky.) 323.

Misleading statements made to an officer by defendant's creditor to prevent the service of summons on defendant in suits by other creditors are not sufficient to authorize an attachment on the ground that defendant so conceals himself that summons cannot be served.—*Johnson v. Kaufman* (Ky.) 324.

### § 2. Proceedings to procure.

Verification of affidavit by the vice president of plaintiff corporation is *prima facie* sufficient.—*Kentucky Jeans Clothing Co. v. Bohn* (Ky.) 250.

It is too late on final hearing to object that the officer of plaintiff corporation who verified the affidavit was not the chief officer in the county.—*Kentucky Jeans Clothing Co. v. Bohn* (Ky.) 250.

Plaintiff need not first attempt to have a summons served on defendant to authorize an attachment on the ground that defendant so conceals himself that summons cannot be served.—*Johnson v. Kaufman* (Ky.) 324.

A variance in the petition and the affidavit for attachment in the amount claimed, though small, is fatal to the writ.—*Sanger v. Texas Gin & Compress Co.* (Tex. Civ. App.) 740.

On motion to quash the writ for variance between the petition and affidavit for attachment, the variance cannot be corrected by evidence.—*Sanger v. Texas Gin & Compress Co.* (Tex. Civ. App.) 740.

### § 3. Levy, lien, and custody and disposition of property.

The giving of a forthcoming bond to the attachment creditor does not prevent a subsequent judgment creditor from levying on the property to satisfy an execution against the attachment debtor, unless another forthcoming bond is given, under Sand. & H. Dig. § 3088.—*Harris v. Stewart* (Ark.) 634.

The lien of a judgment creditor by levy of attachment is not lost by a failure to sell the property within a year from rendition of the judgment.—*Campbell v. Atwood* (Tenn. Ch. App.) 168.

#### § 4. Claims by third persons.

One who, after sale of attached goods, filed interplea, is not estopped by judgment in the original suit discharging the attachment and giving defendant damages.—*De Loach Mill & Manufacturing Co. v. Little Rock Mill & Elevator Co. (Ark.)* 113.

An interpleader in attachment *held* to have waived error in submitting the issues to a master.—*Walsh v. Tyler (Ind. T.)* 308.

A contract showing an abandonment by the claimant of attached property of his claim is admissible as evidence.—*Henderson v. Baker (Ky.)* 211.

The fact that an indemnifying bond was executed to the sheriff before the levying of an attachment does not preclude claimants of the property from asserting their claims.—*Gevedon v. Branham (Ky.)* 589.

#### § 5. Liabilities on bonds or undertakings.

Where claimant of attached property resorts to claimant's oath and bond, and, assisted by his sureties, obtains possession of property as personally, the latter are estopped from claiming immunity on bond on ground that it is realty.—*Bull v. Jones (Tex. Civ. App.)* 474.

Where claimant's bond is quashed, and another substituted, the sureties on latter cannot escape liability because bond was executed after delivery of property.—*Bull v. Jones (Tex. Civ. App.)* 474.

### ATTORNEY AND CLIENT.

Attorneys as public officers, see "District and Prosecuting Attorneys."

A conveyance by an administrator to his attorney's partner will not be set aside unless fraud is clearly shown, where the partners kept their business separate, and the purchaser had had no dealings with the administrator.—*Gibson v. Gosson (Ark.)* 237.

The chancellor's finding that a fee of \$450 already collected by plaintiff was ample compensation for his services will not be disturbed.—*Fryer v. Dicken (Ky.)* 341.

Attorney for plaintiff in a suit to settle a partnership has no lien on plaintiff's interest in partnership funds adjudged to defendant as a payment on a judgment in his favor against plaintiff.—*Wathen v. Russell (Ky.)* 437.

Attorney appointed by state comptroller to prosecute suit against defaulting officials can have no lien on a judgment secured.—*State v. Spurgeon (Tenn. Sup.)* 235.

### BAIL.

One indicted for a capital felony, who proves that he has property of the value of \$500, is entitled to be admitted to such bail as would require his presence at his trial.—*Ex parte Arthur (Tex. Cr. App.)* 365.

Laws 1881, p. 21, § 1, is tantamount to Laws 1893, p. 177, § 1; and hence a criminal bond reciting the offense in the substantial terms of the former act is valid under the latter.—*Lewis v. State (Tex. Cr. App.)* 988.

### BAILMENT.

See "Carriers," § 2; "Pledges."

### BANKRUPTCY.

See, also, "Assignments for Benefit of Creditors."

Where suit to fix a lien is commenced more than four months before filing of the defend-

ant's petition in bankruptcy, the court will not stay proceedings on appeal from a judgment denying the relief sought, as the bankrupt act does not apply.—*Smith v. Meisenheimer (Ky.)* 1087.

The court will not, pending application for a discharge in bankruptcy, stay proceedings on appeal from a judgment dismissing an action seeking to subject, to the payment of a judgment against the debtor, property claimed by his wife, but alleged to belong to him.—*Smith v. Meisenheimer (Ky.)* 1087.

### BANKS AND BANKING.

#### § 1. Banking corporations and associations.

Evidence of ratification of cashier's act *held* not sufficient to go to the jury.—*Iron City Nat. Bank v. Fifth Nat. Bank (Tex. Civ. App.)* 533.

Failure to repudiate act of cashier *held* not to amount to estoppel.—*Iron City Nat. Bank v. Fifth Nat. Bank (Tex. Civ. App.)* 533.

#### § 2. Functions and dealings.

Liability of bank for proceeds of corporate note made payable to its president, who is an officer of the corporation, and negotiates it in the bank's name, determined.—*City Electric St. Ry. Co. v. First Nat. Bank (Ark.)* 855.

A bank accepting a forged check as a deposit is liable to the true owner, though it act in good faith and without knowledge of the forgery.—*Farmer v. People's Bank (Tenn. Sup.)* 234.

Where a forged check is cashed by a bank, suit by the payee against the bank makes the proceeds his, though he never had the check.—*Farmer v. People's Bank (Tenn. Sup.)* 234.

Notice to cashier *held* notice to bank.—*Merchants' & Planters' Bank v. Penland (Tenn. Sup.)* 693.

#### § 3. National banks.

A debt due a national bank may be purged of usury under the state statute.—*Farrow v. First Nat. Bank (Ky.)* 594.

### BAR.

Of action by former adjudication, see "Judgment," § 5.

### BATTERY.

See "Assault and Battery."

### BAWDY HOUSE.

See "Disorderly House."

### BENEFICIAL ASSOCIATIONS.

Building or loan associations, see "Building and Loan Associations."

Officers of supreme lodge of benevolent association *held* to have right to waive by-laws suspending a subordinate lodge for failure to promptly remit assessments.—*Supreme Lodge Nat. Reserve Ass'n v. Turner (Tex. Civ. App.)* 44.

The suspension of a subordinate lodge of a benevolent association *held* not to suspend its members.—*Supreme Lodge Nat. Reserve Ass'n v. Turner (Tex. Civ. App.)* 44.

Where an application for reinstatement by a member of a benevolent association, as required by the association, was without authority, statements in such application are nudum pactum.—*Supreme Lodge Nat. Reserve Ass'n v. Turner (Tex. Civ. App.)* 44.

The acceptance of subsequent assessments by the supreme lodge of a benevolent association from a subordinate lodge *held* to estop the supreme lodge from setting up suspension to defeat a recovery by a member of said lodge.—*Supreme Lodge Nat. Reserve Ass'n v. Turner* (Tex. Civ. App.) 44.

## BEQUESTS.

See "Wills."

## BETTING.

See "Gaming."

## BIAS.

Of witness, see "Witnesses," §§ 1, 2.

## BILL OF EXCEPTIONS.

See "Exceptions, Bill of."

## BILL OF EXCHANGE.

See "Bills and Notes."

## BILLS AND NOTES.

### § 1. Requisites and validity.

Notes given for the price of goods purchased in pursuance of a contract illegal because a conspiracy against trade, within Act March 30, 1889, *held* not enforceable.—*Columbia Carriage Co. v. Hatch* (Tex. Civ. App.) 288.

A signer of a note on the agreement that it should not be binding until he procure the signatures of others *held* liable where he delivered the note without procuring the signatures, and the note was accepted.—*McGregor v. Skinner* (Tex. Civ. App.) 398.

The cancellation of a note made by her deceased husband is sufficient consideration for the widow's note, given while executrix of her husband.—*Reuter v. Sullivan* (Tex. Civ. App.) 683.

### § 2. Construction and operation.

The holder of a note *held* not entitled to recover the attorney's fee provided therein, where usurious interest was claimed.—*Tyler v. Walker* (Tenn. Sup.) 424.

Two persons concurrently signing as accommodation indorsers before delivery are, as between themselves, equally liable.—*Logan v. Ogden* (Tenn. Sup.) 489.

Attorneys' fees provided for in note in case of collection by suit may be recovered against the payee in an action by an indorsee.—*Smith v. Richardson Lumber Co.* (Tex. Civ. App.) 386.

### § 3. Negotiability and transfer.

A note payable "on or before" a certain date is negotiable.—*Gill v. First Nat. Bank* (Tex. Civ. App.) 751.

### § 4. Rights and liabilities on indorsement or transfer.

Where, pending action by assignee of note, he reassigns, the fact can be set up by supplemental pleading.—*Gunn v. Strong* (Ky.) 339.

Indorsers before delivery to payee are liable, even though it be a renewal note, and, had an accounting been had between maker and payee, there would have been nothing due.—*National Exchange Bank v. Cumberland Lumber Co.* (Tenn. Sup.) 85.

Bona fide purchaser with knowledge *held* not chargeable with equities afterwards arising.—*Merchants' & Planters' Bank v. Penland* (Tenn. Sup.) 693.

The purchaser for value, before maturity, and in due course of trade, of negotiable pa-

per indorsed by the payee in blank from one who has stolen it, acquires a title good, even against the owner.—*Whiteside v. First Nat. Bank of Chattanooga* (Tenn. Ch. App.) 1108; *Same v. Montague*, *Id.*

Purchasers of paper indorsed in blank *held* not put on inquiry as to the holder's title by knowledge of his insolvency, and of a former dishonor of his paper.—*Whiteside v. First Nat. Bank of Chattanooga* (Tenn. Ch. App.) 1108; *Same v. Montague*, *Id.*

Taking negotiable paper as collateral security is a taking for value, entitling the purchaser to protection as an innocent holder.—*Whiteside v. First Nat. Bank of Chattanooga* (Tenn. Ch. App.) 1108; *Same v. Montague*, *Id.*

One suing on a negotiable note under a written indorsement purporting to have been executed prior to maturity is presumed to be a bona fide holder.—*Mulberger v. Morgan* (Tex. Civ. App.) 379.

A purchaser before maturity of a negotiable instrument, though having notice of facts sufficient to put a man of ordinary prudence on inquiry, *held* an innocent holder.—*Mulberger v. Morgan* (Tex. Civ. App.) 379.

Default in payment of one of a series of notes *held* not notice to an assignee of failure of consideration of those not due, where they did not appear to have been given for the same consideration.—*Alexander v. Bank of Lebanon* (Tex. Civ. App.) 840.

The holder of a note acquired before maturity as security for a pre-existing debt *held* to be protected as an innocent holder, unless he had notice of equities existing between the maker and payee.—*Alexander v. Bank of Lebanon* (Tex. Civ. App.) 840.

One receiving draft from indorser thereof need not inquire concerning genuineness of preceding indorsements.—*Wells, Fargo & Co. v. Simpson Nat. Bank* (Tex. Civ. App.) 1024.

### § 5. Presentment, demand, notice, and protest.

Indorsers of a promissory note before delivery to payee are liable as makers, without demand or notice of nonpayment.—*National Exchange Bank v. Cumberland Lumber Co.* (Tenn. Sup.) 85.

Protest *held* unnecessary to hold prior indorser of draft, where it is discovered that indorsement in the name of drawee was a forgery.—*Wells, Fargo & Co. v. Simpson Nat. Bank* (Tex. Civ. App.) 1024.

### § 6. Actions.

One may recover on notes assigned for collateral, and not in his possession, where they are returned by the assignee, and filed for cancellation, when decree is taken.—*City Electric St. Ry. Co. v. First Nat. Bank* (Ark.) 855.

Deposit of money with bank, with orders to pay a note held for collection, *held* insufficient to show such payment, where the agent fails to remit.—*Ripley Nat. Bank v. Connecticut Mut. Life Ins. Co.* (Mo.) 1.

A plea that a note was not executed by defendant, or by any one authorized to bind him, *held* a good plea of non est factum.—*Furnish v. Burge* (Tenn. Sup.) 1095.

Issue whether defendant signed or authorized the signing of a note *held* not the equivalent of a plea of non est factum.—*Furnish v. Burge* (Tenn. Sup.) 1095.

The burden of proof *held* to rest on the maker of a note to show that no value was paid by an assignee suing thereon, where his defense was failure of consideration between himself and the original payee.—*Mulberger v. Morgan* (Tex. Civ. App.) 738.

Burden of proof *held* to rest on the holder, suing on a note, to show that he paid value for it where it was obtained, or put in circulation by fraud.—*Mulberger v. Morgan* (Tex. Civ. App.) 738.

Where a note was given to secure a line of credit, on an agreement that the first moneys paid on account should be applied on the note, *held* that, on an issue as to the payment of the note, it was immaterial whether payments on account had been actually applied by the payee on the note.—*Merrick v. Rogers* (Tex. Civ. App.) 801.

## BONA FIDE PURCHASERS.

Of goods, see "Sales," § 2.

Of land, see "Vendor and Purchaser," § 5.

## BONDS.

Sureties on bonds, see "Principal and Surety."

*Bonds for performance of duties of trust or office.*

See "Guardian and Ward," § 6; "Trusts," § 4.

*Bonds in legal proceedings.*

See "Appeal and Error," § 20; "Attachment," § 5; "Bail"; "Recognizances."

Bond payable in gold coin is a money obligation and not an obligation for delivery of a specific article.—*Winston v. City of Ft. Worth* (Tex. Civ. App.) 740.

## BOUNDARIES.

### § 1. Description.

Where a boundary stream shifts from one channel to another the line remains where it was at the time of the conveyance.—*Vaughn v. Foster* (Ky.) 333.

Distance in the line of a survey *held* to give way to an established object.—*Warden v. Harris* (Tex. Civ. App.) 834.

Where the call for the corner of a certain survey and the distance were correct, *held* to control a call for another object, which was incorrect.—*Warden v. Harris* (Tex. Civ. App.) 834.

Facts *held* to establish that it was intended by a call in a survey to go to a designated corner.—*Warden v. Harris* (Tex. Civ. App.) 834.

Where a call reads "south to beginning," to reach which it was necessary to go north, *held*, that "south" should be read "north."—*Warden v. Harris* (Tex. Civ. App.) 834.

### § 2. Evidence, ascertainment, and establishment.

The meanders of a creek called for in a deed, and not the courses and distances, must be followed where they conflict.—*Vaughn v. Foster* (Ky.) 333.

Grant of island construed, and boundaries determined.—*Petrucio v. Gross* (Tex. Civ. App.) 43.

In suit to establish boundary, certificate of commissioner of land office *held* admissible, though a portion was but the opinion of the commissioner.—*Petrucio v. Gross* (Tex. Civ. App.) 43.

Field notes of surveyor *held* admissible in an action to determine boundaries.—*Petrucio v. Gross* (Tex. Civ. App.) 43.

Where adjoining surveys are simultaneously made by the same person for the same owner, the field notes of one may be considered in determining the boundaries of the other.—*Bell v. Preston* (Tex. Civ. App.) 375.

Where calls of adjoining surveys made simultaneously by a person for the same owner

are conflicting, the question which are mistaken is for the jury.—*Bell v. Preston* (Tex. Civ. App.) 375.

Where the survey is copied from others, marked trees and lines described in it do not control calls for courses and distances.—*Bell v. Preston* (Tex. Civ. App.) 375.

Statements as to boundaries of land, made by one having no interest therein, are inadmissible against him subsequent to his acquiring title.—*Bell v. Preston* (Tex. Civ. App.) 375.

## BREACH.

Of contract, see "Contracts," § 2; "Vendor and Purchaser," § 4.

Of warranty, see "Sales," § 3.

## BRIEFS.

On appeal or writ of error, see "Appeal and Error," § 9.

## BROKERS.

See, also, "Factors"; "Principal and Agent."

Insurance brokers, see "Insurance," § 1.

Note brokers are not personally liable for loss on a forged note sold by them, where they advised the vendee, at the sale, that they were acting as agents, and disclosed their principal.—*Bailey v. Galbreath* (Tenn. Sup.) 84.

## BUILDING AND LOAN ASSOCIATIONS.

Under articles of building associations, *held* they could not be amended without notice given even at a regular meeting.—*Kelly v. People's Building, Loan & Saving Ass'n* (Ark.) 756.

Amendment of articles taking away member's right of withdrawal without notice, as required by the articles, *held* void as to such member.—*Kelly v. People's Building, Loan & Saving Ass'n* (Ark.) 756.

Member presumed to have assented to amendment of article of building association, where it was for his benefit, though he had no notice thereof, as required by the articles.—*Kelly v. People's Building, Loan & Saving Ass'n* (Ark.) 756.

Where a loan was made with reference to the law of a foreign state, and was to be accepted, and the mortgage delivered and made payable, there, and all the proceedings were to be approved there, it will be construed by the laws of the foreign state.—*United States Saving & Loan Co. v. Miller* (Tenn. Ch. App.) 17; *Peck v. Same, Id.*

Evidence *held* not to show a want of competitive bidding in making a loan so as to constitute usury.—*Stewart v. Hamilton Building & Loan Ass'n* (Tenn. Ch. App.) 1108.

Borrower from loan association *held* liable for attorney's fees on suit brought to cancel the mortgage.—*Crenshaw v. Hedrick* (Tex. Civ. App.) 71.

The association is not entitled to recover fines imposed after a member has availed himself of the withdrawal privilege.—*Crenshaw v. Hedrick* (Tex. Civ. App.) 71.

A member *held* not entitled to have the sum paid for membership fees applied on his debt.—*Crenshaw v. Hedrick* (Tex. Civ. App.) 71.

A borrowing member *held* entitled to have usurious interest paid and stock payments credited on his loan, thus entitling him to a cancellation of the debt and the security on payment of the balance, within a withdrawal clause in the by-laws.—*Crenshaw v. Hedrick* (Tex. Civ. App.) 71.

A foreign loan association, doing business in Texas under a permit from the state, by making a loan contract showing that both parties intended it should be performed in Texas, subjects the contract to the usury laws of Texas.—*Orenshaw v. Hedrick* (Tex. Civ. App.) 71.

Objections by defendant, sued by a building and loan association to foreclose a mechanic's lien, to credits allowed him and a disposition made of his stock, must be set out in his pleadings.—*Bringhurst v. Mutual Building & Loan Ass'n* (Tex. Civ. App.) 831.

Under the by-laws of an association, *held* that, on default of a loan secured by a mechanic's lien, the amount due was to be found by crediting the borrower with dues paid, and the withdrawal value of his stock.—*Bringhurst v. Mutual Building & Loan Ass'n* (Tex. Civ. App.) 831.

## BURDEN OF PROOF.

In civil actions, see "Evidence," § 3.

## BURGLARY.

### § 1. Offenses, and responsibility therefor.

An indictment that accused feloniously, burglariously, and forcibly broke and entered into a building with intent to steal property therein sufficiently charges burglary in the second degree.—*State v. Carr* (Mo.) 790.

Evidence *held* insufficient to show that an assault with intent to rob had been committed, by virtue of an agreement between the person assaulting and defendant.—*State v. Tate* (Mo.) 792.

Evidence *held* insufficient to sustain a conviction for an assault with intent to rob.—*State v. Tate* (Mo.) 792.

When burglary is committed in nighttime, opening of a closed door is sufficient, without actual breaking.—*Wagner v. State* (Tex. Cr. App.) 372.

### § 2. Prosecution and punishment.

Where accused, having been convicted of burglary before, was seen in the immediate vicinity of the burglarized premises, and, on seeing officers, broke and fled, a conviction of an attempt to commit burglary was warranted.—*State v. Carr* (Mo.) 790.

Though the taking of goods be also charged, there need not be a conviction of larceny in addition to a conviction of burglary.—*State v. Burdett* (Mo.) 796.

An indictment that accused burglarized a certain person's building, situate within the curtilage of such person's dwelling, but not forming a part thereof, *held* sufficient, under Rev. St. 1889, § 3526.—*State v. Burdett* (Mo.) 796.

Evidence that defendant committed other similar burglaries *held* inadmissible.—*Long v. State* (Tex. Cr. App.) 363.

Evidence as to ownership *held* sufficient.—*Runnels v. State* (Tex. Cr. App.) 470.

Evidence tending to identify a pistol taken from the house alleged to have been burglarized, and found in the possession of one of defendants, *held* admissible against the others.—*Terry v. State* (Tex. Cr. App.) 654.

## CANCELLATION OF INSTRUMENTS.

See, also, "Reformation of Instruments."

Rescission of contracts, see "Sales," § 1; "Vendor and Purchaser," § 3.

Setting aside fraudulent conveyances, see "Fraudulent Conveyances," § 3.

A deed conveying three sisters' interests as heirs of decedent to a brother *held* not to be

set aside if there was a full disclosure by the brother of the condition and value of decedent's estate, and if a fair price was paid.—*Goar v. Thompson* (Tex. Civ. App.) 61.

A deed by the married sisters of decedent, conveying their interest as heirs of his estate to the brothers, procured on their representations, is not *prima facie* procured by fraud from the fact that the parties are near relatives.—*Goar v. Thompson* (Tex. Civ. App.) 61.

## CARNAL KNOWLEDGE.

See "Rape."

## CARRIERS.

### § 1. Control and regulation of common carriers.

The action of the railroad commission in refusing to grant relief from the operation of Const. Ky. § 218, prohibiting common carriers from charging more for a short than a long haul, cannot be reviewed by the courts.—*Louisville & N. R. Co. v. Commonwealth* (Ky.) 598.

### § 2. Carriage of goods.

A receipt given by the carrier to a transfer company, to whom consignor had delivered the goods, is sufficient to show a delivery by the consignor to the carrier.—*New York & T. S. S. Co. v. Weiss* (Tex. Civ. App.) 674.

Giving Rev. St. 1896, arts. 331a, 331b, in a charge, was not error, where freight was billed through, via a junction, to a point reached only by defendant connecting carrier's line.—*Texas & P. Ry. Co. v. Bigham* (Tex. Civ. App.) 814.

### § 3. Carriage of live stock.

The court having charged on negligence in failing to transport freight within a reasonable time, there was no need of instructing the jury to find for the shipper if the carrier was negligent in not getting the car out on a certain day.—*Belcher v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 384.

In an action for damages for delay in transportation of freight, instructions were *held* proper.—*Belcher v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 384.

A carrier is not liable for injuries to stock by reason of delay in transportation of feed, unless at the time of making the contract of shipment it had notice that the shipper had immediate need of the feed.—*Belcher v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 384.

### § 4. Carriage of passengers.

A railroad company is not bound to rescue a passenger who has fallen from its train without its fault, unless it can be done with safety to other passengers.—*Reed v. Louisville & N. R. Co.* (Ky.) 591.

Where the evidence tended to show that a passenger in a sleeping car was injured by the falling of a headboard which separated two berths, it was error to give a peremptory instruction for defendants, though the porter testified, without contradiction, that he had securely fastened the plank.—*Jenkins v. Louisville & N. R. Co.* (Ky.) 761.

A passenger leaving a train at a station is entitled to shelter in the waiting room, and to an unobstructed way thereto.—*Louisville & N. R. Co. v. Keller* (Ky.) 1072.

A verdict for \$260 for injuries to a passenger from exposure to a rainstorm in leaving a train is not excessive.—*Louisville & N. R. Co. v. Keller* (Ky.) 1072.

Where a passenger, being exposed to a rainstorm after leaving his train, because the way to the waiting room was obstructed, was laughed at by the employés on the train, an instruc-



tion as to punitive damages was proper.—*Louisville & N. R. Co. v. Keller* (Ky.) 1072.

A passenger who was ejected *held* not entitled to exemplary damages, and a verdict for \$300 was hence excessive.—*Louisville & N. R. Co. v. Turner* (Tenn. Sup.) 223.

Posting of notice in waiting rooms of a condition in local tickets *held* insufficient as against persons paying the usual price for such tickets.—*Louisville & N. R. Co. v. Turner* (Tenn. Sup.) 223.

One who purchases a general passenger ticket, paying the usual price, is entitled to a passage unlimited as to time.—*Louisville & N. R. Co. v. Turner* (Tenn. Sup.) 223.

A local ticket can be made conditional only by express agreement, the mere stamping of a limitation thereon not being sufficient in the absence of notice and assent.—*Louisville & N. R. Co. v. Turner* (Tenn. Sup.) 223.

Evidence *held* to tend to show that notice of plaintiff's intention to alight from train after going aboard might be inferred from circumstances.—*International & G. N. R. Co. v. Satterwhite* (Tex. Civ. App.) 41.

Reasons for attempting to alight from moving train *held* material on question of contributory negligence.—*International & G. N. R. Co. v. Satterwhite* (Tex. Civ. App.) 41.

In an action for injury to escort of passenger occasioned by negligence in starting a train, an instruction as to brakeman's statements inducing plaintiff to alight while it was in motion was properly refused, as irrelevant to the issues.—*International & G. N. R. Co. v. Satterwhite* (Tex. Civ. App.) 41.

Refusal of instructions on contributory negligence *held* harmless, as being fully covered by general charge.—*International & G. N. R. Co. v. Satterwhite* (Tex. Civ. App.) 41.

One who alights from a moving train is not always guilty of contributory negligence as a matter of law.—*International & G. N. R. Co. v. Satterwhite* (Tex. Civ. App.) 41.

Where plaintiff alleged that he was injured by a shock caused by the wreck of defendant's train, but the rear coach in which he was a passenger was not derailed or overturned, *held*, that evidence was admissible that persons riding in the other coaches were injured.—*Missouri, K. & T. Ry. Co. of Texas v. Wright* (Tex. Civ. App.) 56.

The sufficiency of an allegation that a passenger's alighting from a train at an intermediate station was for a temporary purpose, *held* not raised by a demurrer.—*Missouri, K. & T. Ry. Co. of Texas v. Overfield* (Tex. Civ. App.) 684.

A complaint charging injuries to a passenger as the result of stated acts of the carrier's servants, *held* to charge such acts as negligence.—*Missouri, K. & T. Ry. Co. of Texas v. Overfield* (Tex. Civ. App.) 684.

A passenger may alight from the train at intermediate points for the time it stops there for any purpose not inconsistent with his character as such.—*Missouri, K. & T. Ry. Co. of Texas v. Overfield* (Tex. Civ. App.) 684.

Where a passenger stepped off depot platform, which he could not see because of darkness, the question of the railroad company's negligence in failing to light it was for the jury.—*Gulf, C. & S. F. Ry. Co. v. Barnett* (Tex. Civ. App.) 1039.

Rev. St. 1895, art. 4521, requiring depots and passenger houses to be lighted, warmed, and kept open, does not apply to depot platforms or places for boarding or alighting from trains.—*Gulf, C. & S. F. Ry. Co. v. Barnett* (Tex. Civ. App.) 1039.

Where the injury was received by stepping off a platform, the end of which could not be seen because of darkness, it is error to submit the issue of the platform's sufficiency to the jury.—*Gulf, C. & S. F. Ry. Co. v. Barnett* (Tex. Civ. App.) 1039.

## CATTLE.

See "Animals."

## CAUSE OF ACTION.

See "Action."

## CERTIFICATE.

Certified copies, see "Evidence," § 8.

## CERTIORARI.

Review of proceedings before justices of the peace, see "Justices of the Peace," § 1.

### § 1. Nature and grounds.

Under Mansf. Dig. § 1263, the court of appeals for the Indian Territory cannot issue a writ of certiorari to take the place of an appeal or writ of error to set aside a judgment for want of service.—*Walker v. Wantland* (Ind. T.) 354.

The circuit court may require a city council to send up for revision the record of proceedings had on the removal of one of its members.—*Hayden v. City Council of Memphis* (Tenn. Sup.) 182.

## CHANCERY.

See "Equity."

## CHARGE.

To jury in civil actions, see "Trial," § 5.

## CHATTEL MORTGAGES.

See, also, "Pledges."

### § 1. Requisites and validity.

In an action to enjoin the enforcement of a trust deed on the ground of grantor's insanity, evidence *held* insufficient to show the insanity.—*Latner v. Long* (Tenn. Ch. App.) 1111.

A trust deed executed by a married woman and her husband *held* not fraudulent, on the ground that the former did not know its contents until immediately after her acknowledgment of it.—*Latner v. Long* (Tenn. Ch. App.) 1111.

### § 2. Rights and liabilities of parties.

The rule that where a mortgagor is allowed to remain in possession, and sell the goods, mortgagee cannot look to the purchaser for the application of the proceeds, *held* not applicable to a purchase under a mortgage expressly subject to the prior mortgage.—*Godair v. Tillar* (Tex. Civ. App.) 553.

Where a mortgage was expressly subject to a prior mortgage on the same chattels, *held*, that junior mortgagee could not claim that senior mortgagee had, by his acts, warranted a conclusion that mortgagor had the right to sell without restriction.—*Godair v. Tillar* (Tex. Civ. App.) 553.

## CHATELS.

See "Property."

## CHEAT.

See "False Pretenses."

## CHECKS.

See "Bills and Notes."

**CHILD.**

See "Guardian and Ward"; "Infants."

**CHURCH.**

See "Religious Societies."

**CITATION.**

See "Process."

**CITIES.**

See "Municipal Corporations."

**CITIZENS.**

See "Indians."

**CIVIL RIGHTS.**

A "separate coach" law will be construed as applying only to transportation within the state if necessary to do so in order to uphold it.—*Ohio Val. Ry.'s Receiver v. Lander* (Ky.) 344; Id. 382.

Railroad companies may make reasonable regulations for the separation of white and colored passengers.—*Ohio Val. Ry.'s Receiver v. Lander* (Ky.) 344; Id. 382.

The "separate coach" law of Kentucky is not a violation of the fourteenth amendment to the constitution of the United States.—*Ohio Val. Ry.'s Receiver v. Lander* (Ky.) 344; Id. 382.

**CLAIM AND DELIVERY.**

See "Replevin."

**CLERKS OF COURTS.**

Clerk of circuit court *held* not entitled to fee for certifying bill of costs.—*State v. Wilbur* (Tenn. Sup.) 411; *Same v. Martin*, Id.; *Walker v. State*, Id.

Clerk of circuit court *held* not entitled to fee for entering bill of costs.—*State v. Wilbur* (Tenn. Sup.) 411; *Same v. Martin*, Id.; *Walker v. State*, Id.

**CLIENTS.**

See "Attorney and Client."

**COLLATERAL SECURITY.**

See "Pledges."

**COLOR OF TITLE.**

See "Adverse Possession."

**COMBINATIONS.**

See "Conspiracy."

**COMITY.**

Between courts, see "Courts," §§ 4, 5.

**COMMERCE.**

Carriage of goods and passengers, see "Carriers."

§ 1. Power to regulate in general. *Sayles' Rev. Civ. St. 1897*, art. 5243i, *held* unconstitutional in so far as it attempts to lay a tax on interstate commerce.—*Woessner v. H. T. Cottam & Co.* (Tex. Civ. App.) 678.

An action on a note executed for goods sold to the maker in Texas by the payee in Louisiana, where they were manufactured, relates to interstate commerce.—*Woessner v. H. T. Cottam & Co.* (Tex. Civ. App.) 678.

**COMMISSION.**

To take testimony, see "Depositions."

**COMMISSION MERCHANTS.**

See "Factors."

**COMMISSIONS.**

Of receiver, see "Receivers," § 5.

**COMMON CARRIERS.**

See "Carriers."

**COMMON SCHOOLS.**

See "Schools and School Districts," § 1.

**COMMUNITY PROPERTY.**

See "Husband and Wife," § 5.

**COMPENSATION.**

Of receiver, see "Receivers," § 5.

Of sheriff or constable, see "Sheriffs and Constables," § 1.

**COMPETENCY.**

Of experts as witnesses, see "Evidence," § 9.

Of witnesses in general, see "Witnesses," § 1.

**COMPLAINT.**

In civil actions, see "Pleading," § 1.

In criminal prosecutions, see "Indictment and Information."

**COMPOSITIONS WITH CREDITORS.**

See "Compromise and Settlement."

**COMPROMISE AND SETTLEMENT.**

See, also, "Payment"; "Release."

Acceptance of sum tendered on condition that it be received in full of an unliquidated claim *held* not affected by the fact that, when accepted, a written protest was filed, stating that balance would be insisted on.—*H. C. Pollman & Bros. Coal & Sprinkling Co. v. City of St. Louis* (Mo.) 563.

Claim *held* unliquidated so as to be the subject of compromise.—*H. C. Pollman & Bros. Coal & Sprinkling Co. v. City of St. Louis* (Mo.) 563.

**CONCLUSION.**

Of witness, see "Evidence," § 9.

**CONCURRENT JURISDICTION.**

Of courts, see "Courts," §§ 4, 5.

**CONDEMNATION.**

Taking property for public use, see "Eminent Domain."

## CONDITIONS.

In mortgages, see "Mortgages," § 3.

## CONFESSION.

Admissibility in evidence, see "Criminal Law," § 5.

## CONFLICT OF LAWS.

Conflicting jurisdiction of courts, see "Courts," §§ 4, 5.

## CONSIGNMENT.

See "Factors."

## CONSPIRACY.

Evidence of acts and declarations of conspirators, see "Criminal Law," § 5.

An instruction requiring knowledge by one defendant of the other defendant's fraud in order to establish it against the former is not erroneous where the complaint charges a conspiracy to defraud.—*First Nat. Bank v. Stephens* (Tex. Civ. App.) 832.

## CONSTABLES.

See "Sheriffs and Constables."

## CONSTITUTIONAL LAW.

Protection of civil rights, see "Civil Rights."

*Provisions relating to particular subjects.*

See "Commerce," § 1; "Jury," § 1.

Enactment and validity of statutes, see "Statutes," § 1.

Special or local laws, see "Statutes," § 2.

### § 1. Construction, operation, and enforcement of constitutional provisions.

Where statutes have been repeatedly enforced by the supreme court as valid, and vast property interests have been based on these decisions, the court of chancery appeals will not inquire into their constitutionality.—*United States Saving & Loan Co. v. Miller* (Tenn. Ch. App.) 17; *Peck v. Same, Id.*

### § 2. Distribution of governmental powers and functions.

A statute making it the duty of the circuit judge to levy a tax is unconstitutional, as conferring legislative powers.—*Fleming v. Dyer* (Ky.) 444.

The power to elect officers does not necessarily belong to the executive department, and may therefore be conferred on the legislature.—*Commissioners of Sinking Fund v. George* (Ky.) 779.

Ky. St. § 3665, empowering the circuit court to investigate and adjudge whether the facts existed to authorize an ordinance of a town of the sixth class enlarging the boundaries of the town is not unconstitutional, as conferring legislative power on the court.—*Lewis v. Town of Brandenburg* (Ky.) 862.

### § 3. Vested rights.

Shannon's Code, §§ 1748-1757, giving turnpike commissioners power to throw open toll gates where the road is in poor repair, does not give such officers power to suspend vested rights without due process of law.—*Allen v. Smith* (Tenn. Ch. App.) 206.

### § 4. Obligation of contracts.

Certain services and supplies held not presumptively furnished to a county on the faith of a since overruled decision; and hence the overruling of it was not an impairment of contract as to warrants in excess of the limit.—

*Mountain Grove Bank v. Douglas County* (Mo.) 944.

An act making valid a mortgage invalid for failure to comply with requirements of the law does not impair the obligation of the contract of one whose rights were junior to the mortgage.—*United States Savings & Loan Co. v. Miller* (Tenn. Ch. App.) 17; *Peck v. Same, Id.*

Rev. St. 1895, arts. 831a, 331b, making connecting carriers liable for all damages to through billed freight, is not an invasion of the right of contract, because of articles 4535 to 4539, in view of Const. art. 10, § 1, and of the common law.—*Texas & P. Ry. Co. v. Bigham* (Tex. Civ. App.) 814.

### § 5. Retrospective and ex post facto laws.

Under the General Statutes, the husband, on the birth of issue of the marriage, acquired a vested right to a life estate in the wife's land, which could not be divested by the married woman's act of 1894.—*Mitchell v. Violet* (Ky.) 195.

Act May 4, 1895, providing that the death of plaintiff in a personal injury suit shall not abate the action, *held* not retrospective merely because the cause of action accrued before the passage of the act, where the death of plaintiff did not occur until after.—*Missouri, K. & T. Ry. Co. of Texas v. Settle* (Tex. Civ. App.) 825.

## CONTINUANCE.

In criminal prosecution, see "Criminal Law," § 6.

Refusal to grant a continuance because of the filing of an amended complaint eight days before trial *held* not error.—*Purcell Mill & Elevator Co. v. Kirkland* (Ind. T.) 311.

It was not error to refuse a continuance asked by the publisher of a newspaper on the ground that prejudice then existed against it because of its attitude during a recent political campaign.—*Courier-Journal Co. v. Sallee* (Ky.) 226.

Evidence *held* to show that the discretion of the trial court was not abused in refusing to grant a continuance.—*Missouri, K. & T. Ry. Co. of Texas v. Wright* (Tex. Civ. App.) 56.

Postponement of trial is in the discretion of the court.—*McGregor v. Skinner* (Tex. Civ. App.) 398.

Continuance for surprise in exclusion of incorrect copy of deed, denied.—*Mattfield v. Cotton* (Tex. Civ. App.) 549.

## CONTRACTS.

Agreements within statute of frauds, see "Frauds, Statute of."

Impairing obligation, see "Constitutional Law," § 4.

Operation and effect of customs or usages, see "Customs and Usages."

— of usury laws, see "Usury," § 1.

Reformation, see "Reformation of Instruments."

Subrogation to rights or remedies of creditors, see "Subrogation."

*Contracts of particular classes of parties.*

See "Counties," § 3; "Master and Servant"; "States," § 2.

*Particular classes of express contracts.*

See "Bills and Notes"; "Bonds"; "Covenants"; "Exchange of Property"; "Landlord and Tenant"; "Liens"; "Principal and Agent"; "Principal and Surety"; "Sales"; "Vendor and Purchaser."

Employment, see "Master and Servant."

Stipulations in actions, see "Stipulations."

*Particular modes of discharging contracts.*

See "Compromise and Settlement"; "Payment"

**§ 1. Requisites and validity.**

A contract granting an exclusive right to sell certain goods *held* a contract of sale, and not of agency, and hence void as a conspiracy against trade, within Act March 30, 1889.—*Columbia Carriage Co. v. Hatch* (Tex. Civ. App.) 288.

**§ 2. Performance or breach.**

Wife's occupation of house with her husband *held* not to estop her from urging that the house was not substantially such as was contracted for.—*Paschall v. Pioneer Savings & Loan Co.* (Tex. Civ. App.) 98.

Wife's acquiescence in diversion of money previously agreed to be used in erecting a certain building *held* not to estop her from requiring erection of the building substantially as agreed.—*Paschall v. Pioneer Savings & Loan Co.* (Tex. Civ. App.) 98.

Facts *held* to establish assumption of a vendor's lien note by purchaser of the land.—*Clayton v. Watkins* (Tex. Civ. App.) 810.

**CONVERSION.**

See "Trover and Conversion," § 1.

Wrongful conversion of personal property, see "Trover and Conversion."

**CONVEYANCES.**

In fraud of creditors, see "Fraudulent Conveyances."

In trust, see "Trusts," § 1.

*Conveyances by or to particular classes of parties.*

Sheriffs, see "Execution," § 3.

*Conveyances of particular species of property.*  
See "Easements."

*Particular classes of conveyances.*

See "Assignments for Benefit of Creditors"; "Chattel Mortgages"; "Deeds"; "Mortgages." Partition deeds, see "Partition," § 1.

**CONVICTS.**

A person released from custody on a convict bond is not entitled to habeas corpus.—*Ex parte Chestnutt* (Tex. Cr. App.) 649.

**CORONERS.**

Under Sand & H. Dig. §§ 751-764, it is the duty of the coroner to hold an inquest where a person was killed during a quarrel in the presence of witnesses.—*Jefferson County v. Cook* (Ark.) 562.

**CORPORATIONS.**

See, also, "Banks and Banking," § 1; "Beneficial Associations"; "Building and Loan Associations"; "Municipal Corporations"; "Railroads," § 1; "Religious Societies"; "Turnpikes and Toll Roads," § 1.

**§ 1. Corporate existence and franchise.**

Person conveying land to a corporation, and receiving the purchase price, *held* estopped to deny its corporate existence.—*White Oak Grove Benev. Soc. v. Murray* (Mo.) 501.

**§ 2. Members and stockholders.**

Certain railroad bonds distributed to the stockholders of a contract company *held* to have been distributed as dividends, and not as a bonus by the railroad company, and the stockholders are required to refund the amount to the creditors of the corporation to satisfy judgment on which executions have been re-

turned "No property found."—*Grant v. Southern Contract Co. (Ky.)* 1091; *Mason Gooch & Hoge Co. v. Same, Id.*; *Waddy v. Same, Id.*; *Jackson & Sharp Co. v. Same, Id.*

Stockholders to whom all the assets of the corporation have been distributed as dividends may be compelled to refund to creditors of the corporation.—*Grant v. Southern Contract Co. (Ky.)* 1091; *Mason Gooch & Hoge Co. v. Same, Id.*; *Waddy v. Same, Id.*; *Jackson & Sharp Co. v. Same, Id.*

**§ 3. Officers and agents.**

That a promoter's sale of land to a corporation was not fraudulent as to some of the stockholders *held* not a bar to the corporation suit therefor.—*Exter v. Sawyer* (Mo.) 951.

A stockholder *held* entitled to sue in his own behalf, and in behalf of all other stockholders, for a fraudulent sale of land made to the corporation by a promoter.—*Exter v. Sawyer* (Mo.) 951.

A promoter *held* liable to a corporation for the profits of a sale of land he had made to it.—*Exter v. Sawyer* (Mo.) 951.

**§ 4. Corporate powers and liabilities.**

A vendor conveying land to an alleged corporation *held* estopped to question the corporate character of the purchaser, after he had received and retained the price.—*White Oak Grove Benev. Soc. v. Murray* (Mo.) 501.

By-law requiring contract for more than three months to be approved by directors does not affect one making lease to corporation without knowledge thereof.—*Barnes v. Black Diamond Coal Co. (Tenn. Sup.)* 498.

A corporation *held* liable for a purchase made in its behalf by one acting for a promoter.—*Lancaster Gin & Compress Co. v. Murray Ginning-System Co.* (Tex. Civ. App.) 387.

Notwithstanding a regulation by a corporation that goods should not be sold on its account except on a written order, it is liable for goods delivered without an order, if its president promised payment therefor.—*American Cotton Bale Improvement Co. v. Forsgard* (Tex. Civ. App.) 475.

An officer of a corporation having authority to make a regulation has authority to waive it.—*American Cotton Bale Improvement Co. v. Forsgard* (Tex. Civ. App.) 475.

Allegation of incorporation *held* sufficient.—*Gill v. First Nat. Bank* (Tex. Civ. App.) 751.

**§ 5. Insolvency and receivers.**

A director may, by attachment and levy, gain a preference over other creditors of his insolvent corporation while it is yet a going concern, for a debt incurred to him in good faith.—*A. B. Frank Co. v. Berwind* (Tex. Civ. App.) 681.

**§ 6. Foreign corporations.**

A foreign corporation appointing agents to effect loans, and loaning money in a state, does business therein in the sense of its foreign corporation laws.—*United States Saving & Loan Co. v. Miller* (Tenn. Ch. App.) 17; *Peck v. Same, Id.*

Act 1895, c. 81, requiring a foreign corporation to file a copy of its charter with the secretary of state, is complied with where the charter had been on file for some years prior to the passage of the act.—*United States Saving & Loan Co. v. Miller* (Tenn. Ch. App.) 17; *Peck v. Same, Id.*

**CORRECTION.**

Of irregularities and errors at trial, see "Criminal Law," § 7.

Of judgment, see "Judgment," § 2.

## COSTS.

### § 1. Nature, grounds, and extent of right in general.

On a decree for the foreclosure of a trust deed, the holder *held* not entitled to costs, where usurious interest was claimed.—*Tyler v. Walker* (Tenn. Sup.) 424.

Under Rev. St. 1895, art. 763, providing that, in case of counterclaim, party recovering judgment shall have costs, one failing to establish set-off equal to the original demand is properly chargeable with all the costs.—*Brown v. Montgomery* (Tex. Civ. App.) 803.

### § 2. Persons, property, and funds liable.

Plaintiff suing on two causes of action *held* not liable to costs, where the one decided against him, being incident to the other, on which he recovered, necessitated no additional costs.—*Caffey's Ex'rs v. Cooksey* (Tex. Civ. App.) 65.

### § 3. Amount, rate, and items.

The statute giving the court a discretion as to costs, in suits for the settlement of partnerships, has no application to extraordinary costs.—*Wathen v. Russell* (Ky.) 437.

### § 4. Taxation.

Under Shannon's Code, § 673, county judge *held* not required to move for a retaxation of illegal costs in criminal cases against a county at the first term after their allowance.—*State v. Walker* (Tenn. Sup.) 417.

A motion by a county judge to retax costs as provided by Shannon's Code, § 673, is not too late because of the bill of costs being certified by the trial judge and the attorney general.—*Henderson v. Walker* (Tenn. Sup.) 430.

Under Shannon's Code, § 495, providing that suit for use of county against delinquent officers shall be brought in the name of the state, does not apply to motions for retaxation by county in habeas corpus.—*Henderson v. Walker* (Tenn. Sup.) 430.

Under Shannon's Code, § 673, authorizing the county court to move the circuit court for correction of bill of costs, and section 4954, authorizing motion for retaxation, such motion in habeas corpus cases should be in name of county and county judge.—*Henderson v. Walker* (Tenn. Sup.) 430.

Facts *held* to authorize taxing costs in a lump.—*Rogers v. Rogers* (Tenn. Sup.) 701.

### § 5. On appeal or error, and on new trial or motion therefor.

Where an appeal is taken for delay, 10 per cent. damages will be allowed.—*Limberger v. Engle* (Tex. Civ. App.) 1025.

Rev. St. 1895, art. 1401, providing for the trial of an issue as to the ability of plaintiff in error to pay costs of an appeal, *held* to give jurisdiction to the court in which the cause was tried, to determine the issue after the term when judgment was rendered.—*Cox v. Hightower* (Tex. Civ. App.) 1048.

### § 6. In criminal prosecutions.

Where one indicted for a felony is convicted of only a misdemeanor, the state must pay the costs incurred in attempting to make out the felony.—*State v. Arnold* (Tenn. Sup.) 221.

## CO-TENANCY.

See "Tenancy in Common."

## COUNTERCLAIM.

See "Set-Off and Counterclaim."

## COUNTERFEITING.

See "Forgery."

## COUNTIES.

See, also, "Municipal Corporations."

County attorneys, see "District and Prosecuting Attorneys."

### § 1. Creation, alteration, existence, and political functions.

In action by parent county to recover from defendant county its share of the parent county's debt, defendant was not entitled to credit for back taxes collected in the territory after the organization of the new county.—*Hardeman County v. Foard County* (Tex. Civ. App.) 30.

In action by parent county against new county to recover its portion of the debt, the new county is entitled to credit for back taxes collected by parent county in territory of the new county after organization.—*Hardeman County v. Foard County* (Tex. Civ. App.) 536.

### § 2. Government and officers.

Under section 31 of the act of 1891, relating to the fees of county clerks, *held*, that the salary of a clerk of the county court for the year 1896 was fixed by the votes cast in his county at the presidential election of 1892, regardless of the election occurring in November of that year.—*King v. Texas County* (Mo.) 920.

A member of a county court *held* not entitled to compensation for services rendered as chairman of a building committee appointed to superintend improvements made on the court house and jail.—*Hope v. Hamilton County* (Tenn. Sup.) 487.

A member of the county court *held* unable to contract with such court to render extra services in the administration of the affairs of the county.—*Hope v. Hamilton County* (Tenn. Sup.) 487.

### § 3. Property, contracts, and liabilities.

County judge or county court has no authority to engage person to examine bills of costs paid by the court to clerk of circuit court and district attorney.—*Holtzclaw v. Hamilton County* (Tenn. Sup.) 421.

### § 4. Fiscal management, public debt, and securities.

A vote by the people of a county in favor of "free turnpikes" is not a vote to increase the indebtedness of the county beyond the constitutional restriction.—*Maysville & L. Turnpike Road Co. v. Wiggins* (Ky.) 434.

To enable the court to determine whether a county has become indebted in any year in an amount exceeding the income and revenue provided for the year the facts as to the total indebtedness, the levy, and the value of the taxable property must appear.—*Maysville & L. Turnpike Road Co. v. Wiggins* (Ky.) 434.

The remission of county taxes by the fiscal court, whether authorized or not, will exonerate the sheriff from liability for failure to collect them.—*Montgomery County Court v. Chenault* (Ky.) 457.

Act Oct. 17, 1892, creating a fiscal court in the several counties, did not repeal Ky. St. § 1884, providing for the execution of a county levy bond by the sheriff.—*Fidelity & Deposit Co. v. Commonwealth* (Ky.) 579.

The fiscal court may, by consent of the holders of old bonds, substitute new bonds therefor before maturity.—*Smith v. Mercer County* (Ky.) 596.

Under Act 1888 incorporating the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, that company had authority to receive subscriptions of stock by counties through which its road passes, and such counties had

authority to issue bonds to pay such subscriptions.—*Richmond Cemetery Co. v. Sullivan (Ky.)* 1079.

The fiscal court of a county has power to issue new bonds to the full amount of old bonds called in, though purchasers have contracted to pay a premium therefor, as there will be cost of issuing and selling the new bonds, about the necessity for and amount of which the fiscal court is the proper judge.—*Richmond Cemetery Co. v. Sullivan (Ky.)* 1079.

Ky. St. § 1852, empowering the fiscal court of the several counties to call in outstanding bonds and issue new bonds in lieu thereof, is valid, not being prohibited by the provision of the constitution relating to the tax rate of counties, or to the creation of original indebtedness by them.—*Richmond Cemetery Co. v. Sullivan (Ky.)* 1079.

Road taxes are county taxes, within Const. art. 10, § 11, providing that for county purposes the annual rate on property in counties having \$6,000,000 or less shall not exceed 50 cents on the \$100 valuation.—*State ex rel. Burgess v. Kansas City, St. J. & C. B. R. Co. (Mo.)* 500.

A county is liable on warrants representing items furnished before the fund became exhausted, though the limit of indebtedness has been reached and all the money paid out on subsequent warrants.—*Mountain Grove Bank v. Douglas County (Mo.)* 944.

A new warrant for undisputed items held properly refused while the original warrant covering such items, together with improper ones, was surrendered.—*State v. Walker (Tenn. Sup.)* 417.

Inadvertent issuance by the county judge of a warrant for district attorney fees held not to preclude him from withholding payment until it can be purged of illegal items.—*State v. Walker (Tenn. Sup.)* 417.

County bonds in excess of the limit authorized by Sayles' Rev. St. 1888, art. 988b, are void.—*Hardeman County v. Foard County (Tex. Civ. App.)* 30.

County bonds described in their registration as payable to the state of Texas were payable to bearer. Held not to invalidate them.—*Hardeman County v. Foard County (Tex. Civ. App.)* 30.

County bonds held valid, though commissioners' court in issuing them failed to provide for their payment.—*Hardeman County v. Foard County (Tex. Civ. App.)* 30.

#### § 5. Actions.

In an action on county warrants, burden of proving the date when the debt was contracted held, under the pleadings, to be on plaintiff to make a prima facie case, then to shift.—*Mountain Grove Bank v. Douglas County (Mo.)* 944.

Answer held sufficient to raise question whether county judge could make contract for county.—*Holtzclaw v. Hamilton County (Tenn. Sup.)* 421.

In action by county against a new county created out of it to recover proportionate part of the original county's debt, taxpayers of the new county are not necessary parties.—*Hardeman County v. Foard County (Tex. Civ. App.)* 30.

In action by county to recover of another created from it its proportion of the debt of the original county, held, the tax rolls were not conclusive, where it appeared on their face that the same property had been twice listed therein.—*Hardeman County v. Foard County (Tex. Civ. App.)* 30.

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## COURTS.

Clerks, see "Clerks of Courts."

Judges, see "Judges."

Justices' courts, see "Justices of the Peace."

Removal of action from state court to United

States court, see "Removal of Causes."

Review of decisions, see "Appeal and Error."

Right to trial by jury, see "Jury," § 1.

#### § 1. Nature, extent, and exercise of jurisdiction in general.

Action against nonresident for rescission of contract relating to land is local, and not transitory.—*Todd v. Lancaster (Ky.)* 838.

#### § 1a. Establishment, organization, and procedure in general.

Where a question involving important public interests has been passed upon on a single occasion, the court will review the former decision, and overrule it if incorrect.—*Montgomery County Fiscal Court v. Trimble (Ky.)* 773.

#### § 2. Courts of general original jurisdiction.

Under Const. art. 7, § 40, denying justices of the peace jurisdiction where a lien on land is involved, the circuit court has jurisdiction of an action for breach of covenant of warranty, notwithstanding the amount claimed is less than \$100.—*Sanders v. Brown (Ark.)* 461.

The criminal division of the Jefferson circuit court has jurisdiction of inquests of lunacy.—*Taylor v. Barker (Ky.)* 217.

Where one sues in the district court on a debt less than \$500 (the minimum amount to confer jurisdiction), and to enforce a lien on land, the suit will be dismissed for want of jurisdiction when it is found that no lien exists.—*Storrie v. Woessner (Tex. Civ. App.)* 837.

Where the amount sued for is within the jurisdiction of the court, that the amount recovered is reduced by limitation to a less amount does not defeat the jurisdiction.—*Harrell v. Storrie (Tex. Civ. App.)* 838.

#### § 3. Courts of appellate jurisdiction.

Trespass to recover for removing trees from plaintiff's land, where the title to the land is a collateral issue, does not involve "the title to the real estate," within Const. art. 6, § 12, so as to give the supreme court jurisdiction of an appeal.—*Rothrock v. Cordes-Fisher Lumber Co. (Mo.)* 907.

An action to impeach title to real estate, and change defendant's apparent fee-simple title to an equitable one in trust, held within the appellate jurisdiction of the supreme court.—*McGregor-Noe Hardware Co. v. Horn (Mo.)* 957.

Under Const. art. 5, § 8, the justices of the supreme court have power to issue mandamus in vacation.—*Hines v. Morse (Tex. Sup.)* 593.

A motion in a court of civil appeals to affirm a judgment on certificate held not transferable, under Gen. Laws 1895, p. 79, directing the supreme court to transfer cases from one court of civil appeals to another.—*Taber v. Chapman (Tex. Sup.)* 710.

#### §§ 4, 5. Concurrent and conflicting jurisdiction, and comity.

Courts of Texas held not bound to accept decisions of those of Tennessee as to matters of commercial law.—*Alexander v. Bank of Lebanon (Tex. Civ. App.)* 840.

## COVENANTS.

Where grantee is in possession, a covenant of warranty is not broken until there is an eviction.—*Thompson v. Brazile (Ark.)* 299.

A municipal assessment is not a tax, within the exception of a covenant of warranty.—*Sanders v. Brown (Ark.)* 461.

A purchaser's knowledge of a passway across the land when he purchased does not estop him from objecting to it as an incumbrance, where he did not know that it was a right of way.—*Perry v. Williamson* (Tenn. Ch. App.) 189.

## COVERTURE.

See "Husband and Wife."

## CREDIBILITY.

Of witness, see "Witnesses," § 3.

## CREDITORS.

See "Assignments for Benefits of Creditors"; "Bankruptcy"; "Creditors' Suit"; "Fraudulent Conveyances."

Subrogation to rights of creditor, see "Subrogation."

## CREDITORS' SUIT.

Remedies in cases of fraudulent conveyances, see "Fraudulent Conveyances," § 3.

Fees of complainants' attorneys should not be paid out of the proceeds of the debtor's real estate, which is insufficient to pay its first mortgage bonds, though one of the holders of such bonds joined as complainant as a general creditor.—*Kelly v. Mountain City Club* (Tenn. Sup.) 426.

## CRIMINAL LAW.

Bail, see "Bail."

Conviction of offense included in that charged, see "Indictment and Information," § 7.

Convicts, see "Convicts."

Costs in criminal prosecutions, see "Costs," § 6. Indictment, information, or complaint, see "Indictment and Information."

Prisons, see "Prisons."

Prosecuting officers, see "District and Prosecuting Attorneys."

*Offenses by particular classes of parties.*

See "Insane Persons," § 2.

*Particular offenses.*

See "Arson"; "Assault and Battery," § 2; "Burglary"; "Disorderly House"; "False Pretenses"; "Forgery"; "Gaming," § 1; "Incest"; "Intoxicating Liquors," § 4; "Larceny"; "Libel and Slander," § 4; "Perjury"; "Rape"; "Robbery"; "Sodomy."

### § 1. Nature and elements of crime and defenses in general.

On trial of an indictment for burglary and larceny, under Rev. St. 1889, § 3529, providing for the prosecution of both in one indictment, *held* the jury should be instructed that they might convict of burglary and acquit of larceny, or vice versa.—*State v. Brinkley* (Mo.) 793.

### § 2. Parties to offenses.

Under Pen. Code, art. 75, persons committing an offense as principals may be guilty of different degrees of the offense.—*Red v. State* (Tex. Cr. App.) 1003.

A charge that the act of another in stealing cattle subsequently received by defendant would be defendant's act if the stealing was done pursuant to a conspiracy *held* erroneous, as not following the statutory definition of principals.—*Bell v. State* (Tex. Cr. App.) 1010.

### § 3. Venue.

Laying of venue for theft in the county into which the stolen property had been transported is proper.—*State v. Williams* (Mo.) 891.

### § 4. Former jeopardy.

An acquittal of the offense of breaking a storehouse with intent to steal and stealing therefrom is not a bar to an indictment for receiving the stolen goods.—*Commonwealth v. Bragg* (Ky.) 212.

A conviction of defendant for shooting J. cannot be pleaded in bar of his prosecution for shooting at F. on the same occasion.—*Baker v. Commonwealth* (Ky.) 864.

In a prosecution for assault with intent to murder, defendant cannot plead a former conviction before a justice based on a complaint for a simple assault, under Code Cr. Proc. 1895, art. 590.—*Davis v. State* (Tex. Cr. App.) 978.

### § 5. Evidence.

Accused, against whom testimony of a deceased witness in the criminal trial is offered, can make any objection that he could were the witness present and offered.—*Redd v. State* (Ark.) 119.

Where there is any evidence to support a judgment of conviction, it cannot be reversed on the evidence.—*Henry v. Commonwealth* (Ky.) 214.

Evidence that an offense was committed in "Rhea's wheat field," about 400 yards from a certain residence, is not sufficient proof of the venue.—*Wilkey v. Commonwealth* (Ky.) 219.

Admissions made by accused to a newspaper correspondent in jail are admissible, not being made under constraint.—*Portwood v. Commonwealth* (Ky.) 339.

It was error to permit physicians to give their opinions as to whether the person wounded was struck from in front or behind, without a description of the wounds.—*Parrott v. Commonwealth* (Ky.) 452.

A verdict finding defendant guilty of murder, alleged to have been committed by administering poison to his wife, will be set aside on appeal where the evidence shows that she took the poison with the avowed purpose of ending her life.—*Abbott v. Commonwealth* (Ky.) 576.

A verdict of guilty must be set aside on appeal where there is no evidence tending to show guilt.—*Abbott v. Commonwealth* (Ky.) 576.

Where one is indicted as an habitual criminal, evidence of his former conviction is admissible to discredit him as a witness, and to enable the jury, on conviction, to fix the punishment.—*State v. Carr* (Mo.) 790.

Flight by one accused of a crime, for the purpose of avoiding arrest and prosecution, raises a presumption of guilt.—*State v. Adler* (Mo.) 794.

An unsuccessful attempt to establish an alibi *held* a circumstance against the accused only where it appears to have been made in bad faith, manufactured, fabricated, or false.—*Ford v. State* (Tenn. Sup.) 703.

An alibi rendering very improbable the defendant's presence may be admitted and considered for what it is worth, and hence it was improper to charge that, if he could have been possibly at both places, its proof is of no value whatever.—*Ford v. State* (Tenn. Sup.) 703.

In a criminal case it is competent to establish a date by means of an affidavit.—*Roberts v. State* (Tex. Cr. App.) 358.

In a criminal case, where an affidavit is used to establish a date, only the portion bearing on the date is admissible.—*Roberts v. State* (Tex. Cr. App.) 358.

Evidence of the commission of similar offenses *held* inadmissible for the purpose of corroborating an accomplice.—*Long v. State* (Tex. Cr. App.) 363.

Declarations of defendant while confined in jail on one charge are admissible against him in a prosecution for an offense subsequently com-

mitted, though he was not cautioned in regard to his statements.—*Mathis v. State* (Tex. Cr. App.) 464.

A confession *held* voluntary, though made in answer to questions.—*Tidwell v. State* (Tex. Cr. App.) 466.

An accused's confession can be considered along with other testimony to establish the corpus delicti.—*Tidwell v. State* (Tex. Cr. App.) 466.

A refusal to instruct that the corpus delicti cannot be proved by confessions alone *held* proper, where evidence other than the confession was sufficient to establish it.—*Tidwell v. State* (Tex. Cr. App.) 466.

Evidence of statements of a third person that accused was his employé is inadmissible, because hearsay.—*Wash v. State* (Tex. Cr. App.) 469.

Defense of alibi *held* not established.—*Donaho v. State* (Tex. Cr. App.) 469.

Admission of irrelevant evidence *held* harmless error.—*Brooks v. State* (Tex. Cr. App.) 640.

In the trial of an accomplice, evidence which would be admissible against the principal is admissible.—*Hamlin v. State* (Tex. Cr. App.) 656.

Circumstantial evidence, in order to warrant a conviction, need not demonstrate the guilt of defendant beyond the possibility of his innocence.—*Hamlin v. State* (Tex. Cr. App.) 656.

Defendant must affirmatively show on appeal that the warning given to him by the officer was given so long before the confession as to have escaped his memory, in order to avail himself of that contention.—*Hamlin v. State* (Tex. Cr. App.) 656.

A confession, in order to be admissible in evidence, need not have been made to the person who had warned defendant.—*Hamlin v. State* (Tex. Cr. App.) 656.

In the prosecution of an accomplice for murder, the admission in evidence of the confessions of the principal solely to show her guilt, where so limited in the court's charge, is not error.—*Hamlin v. State* (Tex. Cr. App.) 656.

Evidence of a confession to one indicted and in jail for the same offense, but not on trial, is admissible, though the latter had not been warned.—*Hamlin v. State* (Tex. Cr. App.) 656.

A statement by defendant *held* not made under such duress as to make it absolutely inadmissible.—*Hamlin v. State* (Tex. Cr. App.) 656.

The question whether a witness is an accomplice is one of fact for the jury.—*Hankins v. State* (Tex. Cr. App.) 992.

#### § 6. Time of trial and continuance.

Where an indictment for the murder of "John Bruce" found at a former term was remanded to the grand jury, and an indictment returned for the murder of "N. K. Bruce," as the latter indictment charged a new offense, a motion for a continuance made at the term at which it was found is governed by Cr. Code, § 189, though that section applies only to a motion for continuance made at the term at which the indictment was found.—*Wiggins v. Commonwealth* (Ky.) 1073.

Where a witness for the prosecution admitted that he had made statements out of court inconsistent with his testimony, defendant was not prejudiced by the refusal to grant a continuance asked on account of the absence of witnesses who would have testified as to such statements.—*Toliver v. Commonwealth* (Ky.) 1082.

The accused was not entitled to a continuance where the commonwealth agreed that the competent parts of the affidavit might be read to the jury "as the true statements" of the absent

witnesses, where such statements related merely to declarations of witnesses for the prosecution.—*Toliver v. Commonwealth* (Ky.) 1082.

Application for continuance *held* defective.—*State v. Clark* (Mo.) 886.

Sickness of attorney who had supervised the case *held* not to warrant a postponement of trial, where his partner also employed was present and represented accused.—*Self v. State* (Tex. Cr. App.) 26.

Application for continuance for witnesses to prove an alibi *held* too general.—*Leslie v. State* (Tex. Cr. App.) 367.

The refusal of a continuance for absence of witnesses whose testimony was merely cumulative, and not controverted, is proper.—*Bryant v. State* (Tex. Cr. App.) 373.

It was not error to refuse a continuance for absence of witnesses where process was not issued for them as soon as they were in default.—*Bryant v. State* (Tex. Cr. App.) 373.

Where a witness was in court before the argument commenced, and no request was made to place him on the stand, the previous denial of a continuance for his previous absence is not ground for reversal.—*Bryant v. State* (Tex. Cr. App.) 373.

A continuance because of absent witnesses is properly refused, where they will only testify to the title of the property, and defendant admits the possession in the person from whom the theft is charged, and does not connect himself with the title.—*Houston v. State* (Tex. Cr. App.) 468.

Evidence *held* to show diligence in procuring the attendance of witness authorizing a continuance.—*Hull v. State* (Tex. Cr. App.) 472.

Return "Not found" of process issued to other counties and the residence of absent witness *held* not sufficiently showing of diligence to entitle to continuance.—*Logan v. State* (Tex. Cr. App.) 645.

A continuance is properly refused where the absent witness and his whereabouts are unknown, and defendant's counsel is the only one professing an acquaintance with him.—*Byrd v. State* (Tex. Cr. App.) 721.

Failure of the state to produce a witness whom accused intended to use is no ground for a continuance, where defendant did not state his intention of using such witness.—*Byrd v. State* (Tex. Cr. App.) 721.

Absence of a witness is no ground for a continuance, where accused shows no diligence.—*Byrd v. State* (Tex. Cr. App.) 721.

The refusal of a continuance is not improper where the evidence of the absent witnesses would have served no useful purpose.—*Little v. State* (Tex. Cr. App.) 984.

It is not error to refuse a continuance, and proceed to trial at once, where there were no absent witnesses, and no injury is shown to have occurred thereby.—*Morse v. State* (Tex. Cr. App.) 989.

Motion for a continuance, based on the absence of witnesses, on the ground that process for them had been requested several months before the trial, *held* properly refused.—*Gaines v. State* (Tex. Cr. App.) 1012.

The overruling of an affidavit for a continuance, stating merely that certain witnesses would testify that they were present at the time of the assault, *held* not to warrant the appellate court in reversing the case and granting a new trial.—*Gaines v. State* (Tex. Cr. App.) 1012.

#### § 7. Trial.

Complaint that witness testified without being sworn will not be considered, where no objection was made.—*Redd v. State* (Ark.) 119.



Remarks of prosecuting attorney considered, and held no ground for reversal, though improper.—*Redd v. State* (Ark.) 119.

A verdict that accused is guilty, and that the jury leaves the punishment to the court, is sufficient, since the court in that event is authorized to assess the punishment. *Sand & H. Dig. § 2279.*—*Conrad v. State* (Ark.) 628.

It was a question for the jury whether certain "bitters" sold by defendant were spirituous liquors.—*Jones v. Commonwealth* (Ky.) 828.

On a plea of insanity, defendant is not entitled to an instruction requiring the jury, in order to convict, to believe to the exclusion of a reasonable doubt that he was of sound mind.—*Portwood v. Commonwealth* (Ky.) 339.

It was harmless error to permit a prosecuting attorney to comment inferentially on the defendant's failure to testify as a witness as to the truth of alleged false testimony, there being no doubt from the evidence that the testimony was false.—*Cope v. Commonwealth* (Ky.) 436.

Under an indictment for malicious wounding, the court should have instructed the jury as to assault and battery.—*Parrott v. Commonwealth* (Ky.) 452.

Where it does not appear in what connection statements of counsel in argument were used, it will be presumed they were made in reply to argument of opposing counsel, and were therefore proper.—*Parrott v. Commonwealth* (Ky.) 452.

The court should not permit the prosecuting attorney to comment on the failure of accused to testify on the examining trial.—*Parrott v. Commonwealth* (Ky.) 452.

It was error to permit the prosecuting attorney to comment in argument on what occurred at the examining trial, there being no evidence as to that matter.—*Parrott v. Commonwealth* (Ky.) 452.

New trial for prejudice of juror held properly refused.—*State v. South* (Mo.) 790.

Where an instruction which enlarges an instruction given, by calling attention to the law on a certain state of facts, is properly refused, because of its lack of clearness, it is equivalent to a request to instruct thereon.—*State v. Adler* (Mo.) 794.

Failure to instruct as to reasonable doubt is error.—*State v. Clark* (Mo.) 886.

The rule in capital cases against separation of jury applies only after they are duly impaneled, sworn, and charged with the case.—*State v. Todd* (Mo.) 923.

Newly-discovered evidence, which is merely for impeachment, is not ground for new trial.—*State v. Lucas* (Mo.) 1067.

Where a sentence practically equivalent to life can be given, a special charge on the identity of the accused should be given, where that is the chief issue.—*Ford v. State* (Tenn. Sup.) 703.

Failure to instruct that the jury are the judges of the law held not reversible error, unless it appears that defendant might have been prejudiced thereby.—*Ford v. State* (Tenn. Sup.) 703.

Const. art. 1, § 19, declaring the rights of the jury in libel as in other criminal cases, held to make the jury, and not the court, the judges of the law in criminal cases.—*Ford v. State* (Tenn. Sup.) 703.

The jury held not judges of the applicability of the law as given them in a charge to the facts of the case.—*Ford v. State* (Tenn. Sup.) 703.

The court is not compelled of its own motion to appoint counsel to defend a person indicted for a felony.—*Gutierrez v. State* (Tex. Cr. App.) 372.

It was held not error to limit number of witnesses to character of deceased on prosecutions for manslaughter, where matter was not controverted by state.—*Bryant v. State* (Tex. Cr. App.) 373.

Where time for argument is limited, defendant cannot complain that his counsel of their volition split up the time, and thus handicapped themselves.—*Bryant v. State* (Tex. Cr. App.) 373.

It is not reversible error to limit the time for argument in a case where the time allowed was sufficient to present all the salient features of the case and the law applicable thereto.—*Bryant v. State* (Tex. Cr. App.) 373.

Where the evidence tends to implicate accused and another, a charge on the law of principals is proper.—*Houston v. State* (Tex. Cr. App.) 468.

Failure to charge on circumstantial evidence held not error, where the defense was that the taking was lawful.—*Houston v. State* (Tex. Cr. App.) 468.

Where instruction in accordance with approved forms is given on defense of alibi, another requested instruction on same subject need not be given.—*Donaho v. State* (Tex. Cr. App.) 469.

Requested instructions as to particular defense need not be given, where there was no evidence as to such defense.—*Wash v. State* (Tex. Cr. App.) 469.

Remarks by the district attorney, in his argument to the jury, in regard to the absence from the court house of defendant's wife, held not objectionable as using the wife as a witness.—*Harris v. State* (Tex. Cr. App.) 648.

Accused is not entitled to a charge on circumstantial evidence, where the testimony shows a confession by him.—*Matthews v. State* (Tex. Cr. App.) 647.

Accused is not entitled to a charge on the competency of a confession elicited by himself on cross-examination of the state's witnesses without objection by the state.—*Luna v. State* (Tex. Cr. App.) 656.

A conviction will not be set aside for improper remarks of the prosecuting attorney, where no special instruction in reference thereto was asked.—*Byrd v. State* (Tex. Cr. App.) 721.

It is not error to refuse to instruct to acquit on the ground that the indictment had not been transferred from the district to the county court, since such question is one of law.—*Armstrong v. State* (Tex. Cr. App.) 981.

An objection that in a verdict the word "Guilty" was misspelled is without merit.—*Garza v. State* (Tex. Cr. App.) 983.

The court's action in having a witness reiterate his testimony to the jury is not improper, no new testimony being given.—*Little v. State* (Tex. Cr. App.) 984.

Where evidence against accused is positive, although testimony is that of accomplice, instruction on circumstantial evidence need not be given.—*Rios v. State* (Tex. Cr. App.) 987.

An instruction that a certain witness is an accomplice, according to his own testimony, is erroneous.—*Bell v. State* (Tex. Cr. App.) 1010.

An instruction not to find defendant guilty on uncorroborated accomplice's testimony is improper, as assuming the truth of the testimony.—*Bell v. State* (Tex. Cr. App.) 1010.

Where an attorney asked a witness on cross-examination whether he had not made a certain statement on his direct examination, held not error for the court to state to the attor-

say that the witness had so stated on his direct examination.—*Gaines v. State* (Tex. Cr. App.) 1012.

Where the prosecuting witness testified that defendant did not sell him the whisky, and a grand juror then testified that the witness had stated before the grand jury that he paid defendant for the whisky, *held* error to refuse to limit the latter evidence to the purpose of impeachment.—*Finley v. State* (Tex. Cr. App.) 1015.

### § 8. Motions for new trial and in arrest.

A motion in arrest of judgment will be overruled if the indictment charges a public offense.—*Parrott v. Commonwealth* (Ky.) 452.

Motion for new trial must be supported by affidavit of defendant, unless same excuse is shown for omission.—*State v. Lucas* (Mo.) 1067.

The failure of an indictment to contain a proper conclusion may be taken advantage of by motion in arrest.—*State v. Wade* (Mo.) 1070.

The fact that a juror was related to prosecutor without defendant's knowledge, *held* not to entitle him to a new trial.—*Hamilton v. State* (Tenn. Sup.) 695.

A new trial for newly-discovered evidence *held* properly denied because the evidence was cumulative.—*Austin v. State* (Tex. Cr. App.) 371.

That a person under 16 years of age, convicted of a felony, was sentenced to the penitentiary instead of to the reformatory, *held* no ground for a new trial, where no proof of his age was offered on the trial.—*Gutierrez v. State* (Tex. Cr. App.) 372.

A new trial on the ground of newly-discovered evidence will not be granted where the motion leaves the facts relied on in ambiguity.—*Bryant v. State* (Tex. Cr. App.) 378.

Affidavit on motion for new trial for newly-discovered evidence should show diligence.—*Sarvis v. State* (Tex. Cr. App.) 463.

A new trial will not be granted because of newly-discovered evidence, where defendant was not diligent in attempting to procure that evidence for the first trial.—*Houston v. State* (Tex. Cr. App.) 468.

New trial on ground of newly-discovered evidence *held* properly refused.—*Wash v. State* (Tex. Cr. App.) 469.

### § 9. Judgment, sentence, and final commitment.

Judgment by default cannot be rendered in a misdemeanor case, where there is a discretion as to the amount of the fine.—*Pursifull v. Commonwealth* (Ky.) 772.

A judgment of conviction cannot be set aside after the term at which it was rendered.—*State v. Williams* (Mo.) 891.

### § 10. Appeal and error, and certiorari.

Errors not assigned as ground for new trial cannot be considered on appeal.—*Baker v. Commonwealth* (Ky.) 864.

No appeal lies from a judgment quashing an information.—*State v. Van Brunt* (Mo.) 787.

Rulings of the circuit court will be reviewed only after having been brought to its attention by motion for a new trial.—*State v. Burdett* (Mo.) 796.

Where no exception is saved to ruling on objection, the question cannot be reviewed.—*State v. Clark* (Mo.) 886.

Remarks of counsel cannot be preserved for consideration on appeal in affidavits or motion for new trial.—*State v. Williams* (Mo.) 891.

The entry of notice of appeal *nunc pro tunc* at a subsequent term of court *held* not to confer jurisdiction.—*Morse v. State* (Tex. Cr. App.) 845.

Action of audience in court room, where made a ground for a motion for a new trial, but in no way shown to be true, *held* not reviewable on appeal.—*Sawyer v. State* (Tex. Cr. App.) 850.

Appellant's affidavit *held* insufficient to excuse his laches in not filing a statement of facts within 10 days from the adjournment of court.—*Davis v. State* (Tex. Cr. App.) 978.

Objection that two members of jury panel stated that they had formed opinion will not be sustained when it is not shown whether such jurors were taken, or that defendant had exhausted his challenges.—*Armstrong v. State* (Tex. Cr. App.) 1006.

### § 11. — Records and proceedings not in record.

A recital in the bill of exceptions *held* not a direction to the clerk to copy a motion for new trial into the record, within Rev. St. 1889, § 2304.—*State v. Revely* (Mo.) 787.

Where there is mistrial, followed by second trial, proceedings on the first trial should not be copied into transcript.—*State v. South* (Mo.) 790.

A motion for a new trial is not a part of the record proper, and is available only when made part of the bill of exceptions.—*State v. Burdett* (Mo.) 796.

Matters regarding exception to jury list, which are recited in record, instead of being brought up by bill of exceptions, cannot be considered on review.—*State v. Clark* (Mo.) 886.

Affidavits in support of exception to jury list are worthless on review, as such matters should be contained in bill of exceptions.—*State v. Clark* (Mo.) 886.

Exceptions cannot be inserted in a bill of exceptions after the term at which they were taken.—*State v. Williams* (Mo.) 891.

Where appellant relies on newly-discovered evidence the record should show enough of the testimony to enable the court to consider the probable effect of such evidence.—*Sarvis v. State* (Tex. Cr. App.) 463.

A statement of facts cannot be considered on appeal unless filed below.—*Strickland v. State* (Tex. Cr. App.) 470.

To raise question of competency of cross-examination of witness against her husband, the bill of exceptions must show the facts to which she testified in chief or a certificate of the judge as to the same.—*Hull v. State* (Tex. Cr. App.) 472.

A statement of facts signed, but not certified by the judge, *held* not part of the record.—*Morse v. State* (Tex. Cr. App.) 645.

It cannot be said on appeal that permitting the state to ask the prosecutrix leading questions was material error, where the bill of exceptions does not show the surrounding circumstances.—*Poyner v. State* (Tex. Cr. App.) 977.

In the absence of a statement of facts, where it cannot be said by the appellate tribunal what effect certain newly-discovered evidence would have, it is proper to refuse to grant a new trial.—*Davis v. State* (Tex. Cr. App.) 978.

A refusal of a continuance cannot be reviewed unless the ruling is presented by a bill of exceptions.—*Black v. State* (Tex. Cr. App.) 992.

Objections to a verdict as excessive and contrary to law cannot be heard unless the evidence adduced on trial is brought into the record.—*Black v. State* (Tex. Cr. App.) 992.

A statement of facts not filed within 10 days after the appeal will not be considered where no reason is shown for failure to file it within that time.—*Darling v. State* (Tex. Cr. App.) 1005.

In the absence of a statement of facts, objection that a verdict is contrary to law and evidence cannot be considered on appeal.—*Pulley v. State* (Tex. Cr. App.) 1005.

An objection to a remark by the prosecuting attorney cannot be considered on appeal, where it is contained only in an unverified motion for new trial, and no charge was asked with reference thereto, and no bill of exceptions was preserved.—*Darling v. State* (Tex. Cr. App.) 1005.

Error in denying a continuance cannot be considered where the record does not contain the application, and no bill of exceptions was preserved.—*Pulley v. State* (Tex. Cr. App.) 1005.

A conviction will not be reversed for the admission of alleged incompetent evidence which is not specifically pointed out in the bill of exceptions.—*Rucker v. State* (Tex. Cr. App.) 1014.

Where bill of exceptions only contains testimony, the record proper alone can be reviewed.—*State v. Copeland* (Mo.) 788.

#### § 12. — Dismissal.

Cause will be stricken from docket where no appeal has been granted by circuit court, nor writ of error issued by supreme court.—*State v. Miller* (Mo.) 907.

A motion to dismiss an appeal in the county court because the justice's transcript shows no giving of a notice of appeal cannot be met by a request for time to present a mandamus for the correction of the transcript.—*Perryman v. State* (Tex. Cr. App.) 364.

Appeal will be dismissed where record does not show recognizance nor that appellant is in custody.—*Sims v. State* (Tex. Cr. App.) 463.

Appeal from order remanding to custody under convict bond dismissed, where fine has been paid and appellant discharged.—*Ex parte Harrison* (Tex. Cr. App.) 471.

Briefs will be stricken, and the case on appeal dismissed, where the briefs were not filed in the trial court.—*Sparks v. State* (Tex. Cr. App.) 976.

Code Cr. Proc. art. 880, ousting jurisdiction of appellate court after escape of defendant, applies only where jurisdiction on appeal has attached.—*Carter v. State* (Tex. Cr. App.) 979.

#### § 13. — Review.

There can be no reversal for error in decisions or challenges to the panel or for cause.—*Rush v. Commonwealth* (Ky.) 586.

Where court instructs only on one of two counts, the other count will be presumed to have been abandoned.—*State v. Clark* (Mo.) 886.

Where, after discovery that in jury list of state the name of juror who had been challenged for cause had been substituted in place of another juror, the mistake is immediately corrected, error is harmless.—*State v. Clark* (Mo.) 886.

A finding of fact by the trial court as to jury list which was excepted to, being unauthorized, cannot be considered in reviewing question.—*State v. Clark* (Mo.) 886.

The court below presumed to have sustained a motion to quash an indictment on the ground that it was found without evidence, where the evidence in favor of the motion is not in the bill of exceptions.—*State v. Cole* (Mo.) 895.

Failure to deliver jury list to defendant held waived where delivery to his attorney was not objected to.—*State v. Todd* (Mo.) 923.

Discretion of trial court in ruling on motion to quash indictment cannot be reviewed.—*State v. Lucas* (Mo.) 1067.

Owing to imperfections in the judge's charge of the law, it was held that a failure to instruct that the jury were the judges of the law was reversible error.—*Ford v. State* (Tenn. Sup.) 703.

Counsel who failed to examine juror so as to develop that he had sat on grand jury, made cause for challenge by Code Cr. Proc. 1895, art. 673, held not entitled to complain on appeal.—*Self v. State* (Tex. Cr. App.) 26.

An instruction that a person merely present and agreeing to the commission of an offense is guilty held not error, though the evidence disclosed that, if defendant was guilty at all, he assisted in the commission of the offense.—*Tidwell v. State* (Tex. Cr. App.) 466.

Where the bill of exceptions does not contain the evidence on which the court refused to change venue, and accused did not demur to the contest of the motion on insufficiency, presumption is the court's action was justified.—*Logan v. State* (Tex. Cr. App.) 645.

Error in refusing to admit evidence to impeach a witness will not be considered on appeal, where the bill of exceptions does not show that such witness was a material one.—*Hamlin v. State* (Tex. Cr. App.) 656.

An objection to evidence as irrelevant and inadmissible will not be considered on appeal, unless the evidence is clearly inadmissible for any purpose.—*Armstrong v. State* (Tex. Cr. App.) 881.

#### § 14. Successive offenses and habitual criminals.

An indictment held sufficient as an indictment as an habitual criminal.—*State v. Carr* (Mo.) 790.

#### § 15. Punishment and prevention of crime.

A judgment of conviction cannot be reversed in order that the provision of a law passed since the judgment, mitigating the penalty for such offenses, may be applied.—*Jones v. Commonwealth* (Ky.) 328.

### CROPS.

Renting on shares, see "Landlord and Tenant," § 6.

### CROSS-EXAMINATION.

See "Witnesses," § 2.

### CUSTODY.

Of insane person, see "Insane Persons," § 1.  
Of jury, see "Trial," § 6.

### CUSTOMS AND USAGES.

In action against commission merchant on a contract for outright purchase of cattle made with defendant's agent, issue as to custom of commission merchants with reference to advance on shipments is immaterial.—*Greer v. First Nat. Bank of Marble Falls* (Tex. Civ. App.) 1045.

### DAMAGES.

See, also, "Nuisance," § 1; "Trespass," § 1.  
Breach by seller of contract for sale of goods, see "Sales," § 4.  
Compensation for property taken for public use, see "Eminent Domain," § 2.

#### § 1. Exemplary damages.

A charge on exemplary damages is properly refused where such damages are not sought in the action.—*Western Union Tel. Co. v. Walder* (Tex. Civ. App.) 396.

In an action for personal injuries, where plaintiff died after suit commenced, and his executrix then prosecuted the action, an instruction as to measure of damages *held* not objectionable.—Missouri, K. & T. Ry. Co. of Texas v. Settle (Tex. Civ. App.) 825.

### § 2. Measure of damages.

Measure of damages for injury to child is the difference between what he will earn after reaching his majority, and what he would have earned but for such injury.—South Covington & C. St. Ry. Co. v. Herrklots (Ky.) 265.

Measure of damages in action for wrongful sale of land by trustee determined.—Mixon v. Miles (Tex. Sup.) 966.

Measure of damages for breach of a contract to furnish artesian water for cattle is compensation for injury directly resulting to the cattle.—Waco Artesian Water Co. v. Cauble (Tex. Civ. App.) 538.

Where the owner of cattle, on failure of a water company to furnish them with water as per contract, constructed a fenceway to the river, so as to supply water, he was entitled to compensation for the expense.—Waco Artesian Water Co. v. Cauble (Tex. Civ. App.) 538.

On a breach of contract to supply water by a water company, *held*, that the other party was not chargeable for not making inquiries as to another company with a view to reduction of the loss.—Waco Artesian Water Co. v. Cauble (Tex. Civ. App.) 538.

The owner of cattle, on failure of a company to supply them with water as agreed, need not inquire whether another company can supply water in time to prevent injury, unless he knows facts which would put a prudent man on inquiry.—Waco Artesian Water Co. v. Cauble (Tex. Civ. App.) 538.

Failure to reduce the loss *held* not to preclude a recovery in all respects.—Waco Artesian Water Co. v. Cauble (Tex. Civ. App.) 538.

Measure of damages for breach of contract for the shipment of machinery *held* to be the difference between the contract price and market value of machinery when the breach occurred.—W. T. Adams Mach. Co. v. Looney (Tex. Civ. App.) 671.

Measure of damages under contract to bore a well and draw the casing, if no water was obtained, determined.—Classen v. Elmendorf (Tex. Civ. App.) 1023.

### § 3. Inadequate and excessive damages.

A verdict of \$12,500 for serious injury suffered by an employee *held* excessive, where he was 52 years old and unable to earn full wages.—Purcell Mill & Elevator Co. v. Kirkland (Ind. T.) 311.

A verdict for \$5,500 for injuries to a boy, resulting in the amputation of his arm and leg, is not excessive.—Louisville & N. R. Co. v. Chism (Ky.) 251.

\$14,000 for loss of an arm *held* not excessive.—Galveston, H. & H. R. Co. v. Bohan (Tex. Civ. App.) 1050.

### § 4. Pleading, evidence, and assessment.

The question of what care and means are to be used to supply water to a drove of cattle by the owner, so as to reduce injury, on failure of a water company to do so as per contract, is for the jury.—Waco Artesian Water Co. v. Cauble (Tex. Civ. App.) 538.

In an action for failure to deliver goods, evidence of their cost *held* admissible where there was no market value at the place of delivery.—New York & T. S. S. Co. v. Weiss (Tex. Civ. App.) 674.

Where plaintiff, in action for personal injuries, exhibits his wounds to the court, and

physicians testify that he could not wear artificial legs, defendant is entitled to examination by experts of its own selection.—Chicago, R. I. & T. Ry. Co. v. Langston (Tex. Civ. App.) 1027.

## DEATH.

### § 1. Actions for causing death.

In actions for death by wrongful act, plaintiff need not allege that the decedent, though defendant's servant, was not aware of the danger or risk, that being matter of defense.—Lexington & Carter County Min. Co. v. Stephens' Adm'r (Ky.) 321.

It is not error to instruct a jury to assess the damages for death of plaintiff's intestate at such sum as will reasonably compensate plaintiff for the loss sustained, and that in fixing the amount they may take into consideration the power of deceased to earn money.—Chesapeake & O. Ry. Co. v. Dixon's Adm'r (Ky.) 615.

A verdict for \$10,000 for the death of a man 70 years of age is not excessive.—Chesapeake & O. Ry. Co. v. Dixon's Adm'r (Ky.) 615.

Where one armed with a deadly weapon, and ready to fight, provokes an assault by insulting language, he has no right, when assaulted with a mere blow of the fist, to at once shoot his assailant.—Hollingsworth v. Warnock (Ky.) 770.

An answer denying that defendant, "not in his self-defense, carelessly and wantonly, or carelessly, or carelessly or wantonly, shot and killed the husband of the plaintiff with a pistol," pleads that the killing was done in self-defense.—Hollingsworth v. Warnock (Ky.) 770.

Where the evidence shows that the killing for which plaintiff seeks to recover damages was neither accidental nor in self-defense, a verdict for defendant should be set aside as against the evidence.—Hollingsworth v. Warnock (Ky.) 770.

In an action by the widow and children of the deceased for his death, the measure of damages was defined.—Louisiana Western Extension Ry. Co. v. Carstens (Tex. Civ. App.) 36.

## DEBTOR AND CREDITOR.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Creditors' Suit"; "Fraudulent Conveyances."

## DECEDENTS.

Estates, see "Descent and Distribution"; "Executors and Administrators."

Testimony as to transactions with persons since deceased, see "Witnesses," § 1.

## DECLARATION.

In pleading, see "Pleading," § 1.

## DECLARATIONS.

As evidence in civil actions, see "Evidence," § 6.

## DEDICATION.

### § 1. Nature and requisites.

The dedication of ground as a street is not shown by its designation as such in a lease executed by the owners, or by the fact that it appears on a map as a street, there being nothing to show that the map was made by the owner.—Exterkamp v. Covington Harbor Co. (Ky.) 1086.

The fact that the city has built a retaining wall partially across a strip of ground does

not show an acceptance of the alleged dedication of the ground as a street.—*Exterkamp v. Covington Harbor Co. (Ky.) 1068.*

Registration of a lot does not in general vest in the public the fee of the streets therein designated.—*Hamilton County v. Rape (Tenn. Sup.) 416.*

### § 2. Operation and effect.

Where there is a sale of lots with reference to a map designating streets, the purchaser of a lot bordering on a strip of ground designated as a street holds to the center of the strip thus described as a street.—*Bright v. Palmer (Ky.) 590.*

## DEEDS.

Cancellation, see "Cancellation of Instruments." Covenants in deeds, see "Covenants." In fraud of creditors, see "Fraudulent Conveyances."

In trust, see "Trusts," § 1.

Reformation, see "Reformation of Instruments."

*Deeds of particular species of property.*

See "Easements."

*Particular classes of deeds.*

Of trust, see "Mortgages."

Partition deeds, see "Partition," § 1.

Tax deeds, see "Taxation," § 8.

### § 1. Requisites and validity.

Where a grantor who is illiterate signs and delivers a deed upon the faith of its false reading to him by another, or a false representation as to what it contains, it is not his deed, whether or not the person who makes the false representation is the grantee's agent.—*Sibley v. Holcomb (Ky.) 765.*

One of several grantors in a deed is not liable on a warranty therein, where his signature and acknowledgment to the deed were procured by the false representation of the deputy clerk, as grantee's agent, that it was only a quitclaim deed.—*Sibley v. Holcomb (Ky.) 765.*

Rule that conveyance without a person capable of receiving is void, *held* not to apply to the equitable rights of the parties thereunder.—*White Oak Grove Benev. Soc. v. Murray (Mo.) 501.*

The court having submitted to the jury the question whether a deed was accepted or rejected, it need not grant a special instruction that acceptance or rejection may be shown.—*Smith v. Richardson Lumber Co. (Tex. Civ. App.) 386.*

### § 2. Construction and operation.

The fact that a school building has become out of repair, and that no school has been taught therein for a few years, does not amount to an abandonment of the property under a deed covenanting that it shall be used for school purposes.—*Carroll County Academy v. Trustees of Gallatin Academy (Ky.) 617.*

If it be doubtful whether a clause in a deed be a condition or a covenant, courts will incline to the latter construction.—*Carroll County Academy v. Trustees of Gallatin Academy (Ky.) 617.*

Under a deed conveying property on condition that same shall always be devoted to school purposes, the discontinuance of its use for such purposes does not work a forfeiture.—*Carroll County Academy v. Trustees of Gallatin Academy (Ky.) 617.*

A deed will be construed to convey whatever interest or estate the grantor may have in the land, unless it shows his intention to convey a less estate.—*Osborn v. Weldon (Mo.) 930.*

A deed to lots on the "west side" of a highway *held* not to imply that the owner did not

own the fee of the highway.—*Hamilton County v. Rape (Tenn. Sup.) 416.*

Where two parcels of land were of the same description, and the grantor had an interest in one only, her deed using the common description conveyed the parcel to which she had title.—*Huffman v. Eastham (Tex. Civ. App.) 35.*

A grantee retaining possession of land that he supposed the deed conveyed long enough to acquire title by limitations cannot assert title to other land mistakenly included in the description in the deed.—*Koehler v. Cochran (Tex. Civ. App.) 394.*

### § 3. Pleading and evidence.

On an issue whether an instrument was intended as a mortgage or a conditional deed, evidence is admissible that the property was worth nearly double the consideration named in the deed.—*Temple Nat. Bank v. Warner (Tex. Sup.) 515.*

Declaration of plaintiff on examining a deed *held* admissible as part of the *res gestae*.—*Smith v. Richardson Lumber Co. (Tex. Civ. App.) 386.*

## DEFAMATION.

See "Libel and Slander."

## DEMURRER.

In pleading, see "Pleading," § 4.  
To evidence, see "Trial," § 4.

## DEPOSITARIES.

See "Deposits in Court."

## DEPOSITIONS.

See, also, "Witnesses."

Depositions are not admissible against a defendant in a cross petition who was not a party thereto when they were taken.—*Smyser v. Franck (Ky.) 1071.*

Shannon's Code, §§ 5661, 5662, do not authorize objection by defendant to deposition of which he had no knowledge, but mere withdrawal of case from jury, and continuance, that statutory exception may be made.—*Southern Ry. Co. v. Harris (Tenn. Sup.) 1096.*

The filing of a plea of intervention, and the raising of new issues thereby, does not render previously taken depositions incompetent.—*Caffey's Ex'rs v. Cooksey (Tex. Civ. App.) 65.*

Acceptance of notice to take depositions, to be used on a new trial, *held* a waiver of objections to its taking before a mandate of reversal of a former judgment was filed.—*Caffey's Ex'rs v. Cooksey (Tex. Civ. App.) 65.*

## DEPOSITS IN COURT.

A surety on a note given to the clerk and master for a loan of funds may not deny that the clerk and master were authorized to make the loan.—*Weaver v. Ruhm (Tenn. Ch. App.) 171.*

A surety on a note for trust funds belonging to a pending case becomes a party to the case, and may not plead the statute to defeat collection of the note pending suit.—*Weaver v. Ruhm (Tenn. Ch. App.) 171.*

One borrowing a fund belonging to a particular case is estopped from showing that at the time of making the loan the fund was exhausted by previous loans.—*Weaver v. Ruhm (Tenn. Ch. App.) 171.*

**DESCENT AND DISTRIBUTION.**

See, also, "Wills."

The statute fixing the widow's interest in the deceased husband's personal estate did not repeal the provisions of the statute of descent and distribution setting apart to the widow certain articles as exempt.—*Welch v. Lewis* (Ky.) 454.

Under facts stated, *held*, that a man was acquired on real estate by proceedings instituted against a party on the day of the death of his ancestor, on the happening of which event his title was to become absolute.—*Campbell v. Atwood* (Tenn. Ch. App.) 162.

**DEVICES.**

See "Wills."

**DIRECTING VERDICT.**

In civil actions, see "Trial," § 4.

**DISMISSAL AND NONSUIT.**

Dismissal of appeal or writ of error, see "Criminal Law," § 12.

**DISORDERLY HOUSE.**

Evidence considered, and *held* not sufficient to sustain a conviction.—*Morse v. State* (Tex. Cr. App.) 989.

**DISSOLUTION.**

Of partnership, see "Partnership," § 5.

**DISTRICT AND PROSECUTING ATTORNEYS.**

Under Shannon's Code, §§ 6380, 6383, district attorney *held* not entitled to fees from the county on misdemeanors nolle prosequed after indictment or in bills ignored by the grand jury.—*State v. Walker* (Tenn. Sup.) 417.

**DIVERSE CITIZENSHIP.**

Ground of jurisdiction of United States courts, see "Removal of Causes," § 1.

**DIVORCE.****§ 1. Jurisdiction, proceedings, and relief.**

Provisions of Acts Cong. May 2, 1890, § 30, and March 1, 1895, § 7, that all civil suits shall be brought in the division or district in which defendants reside or may be found, do not apply to actions against a nonresident or prevent a divorce suit against a nonresident.—*White v. White* (Ind. T.) 355.

**§ 2. Alimony, allowances, and disposition of property.**

Where the estate of the husband, after making provision for his debts, amounted to about \$19,000, consisting of agricultural lands worth \$75 per acre, and there were others dependent upon him, the proper allowance was \$325 per annum as alimony, and \$175 per annum for the maintenance and education of the infant child of the marriage.—*Gooding v. Gooding* (Ky.) 1090.

While an allowance to the wife of a lump sum in full settlement of her claim for alimony is desirable, it cannot be made in the absence of proof as to her age and expectation of life.—*Gooding v. Gooding* (Ky.) 1090.

'There being no statutory provision for attorney's fees, proceedings to recover them of the husband *held* not ancillary to the main suit.—*Ceccato v. Deutschman* (Tex. Civ. App.) 739.

Husband *held* liable for attorney's fees of wife, where she has no separate property, and suit is dismissed by agreement of parties.—*Ceccato v. Deutschman* (Tex. Civ. App.) 739.

**DOCKETS.**

Of causes for trial, see "Trial," § 1.

**DOCKS.**

See "Wharves."

**DOCUMENTS.**

As evidence in civil actions, see "Evidence," § 2.

**DOMICILE.**

Of parties as affecting venue, see "Venue," § 2.

**EASEMENTS.**

One who purchases a lot with reference to a plat calling for a street in front of his lot has an easement in the street, though the street is never accepted by the city.—*Hoskins v. J. B. Wathen Bro. Co.* (Ky.) 595.

**EJECTMENT.**

See, also, "Trespass to Try Title."

**§ 1. Right of action and defenses.**

An action of ejectment is barred by adverse possession under a donation deed from the state for two years next preceding its commencement, under Sand. & H. Dig. § 4819.—*Newton v. Bateman* (Ark.) 110.

Ejectment cannot be maintained against a trespasser by one who is not possessed of the legal title, since it is a real action.—*Hubbard v. Godfrey* (Tenn. Sup.) 81.

**§ 2. Jurisdiction, parties, and process.**

Equity has no jurisdiction of ejectment suit, although question of priority of liens is involved.—*Cole v. Mettee* (Ark.) 407.

**§ 3. Pleading and evidence.**

Tax deed to plaintiff executed after commencement of action *held* inadmissible.—*Dickinson v. Thornton* (Ark.) 857.

The 30-years statute of limitations, in regard to the recovery of real estate, contained in Rev. St. 1889, § 6770, may be given in evidence under the general issue.—*Collins v. Pease* (Mo.) 925.

**§ 4. Trial, judgment, enforcement of judgment, and review.**

Evidence *held* to conclusively show plaintiff not entitled to recover.—*Dickinson v. Thornton* (Ark.) 857.

Where an appeal from a judgment in ejectment is remanded, with directions merely to enter up judgment for plaintiff for the premises, the trial court may include damages, rents, and profits in the judgment, as incidentals, under Rev. St. 1889, § 4641.—*Fanning v. Doan* (Mo.) 896.

**ELECTION OF REMEDIES.**

Between testamentary provisions and other rights, see "Wills," § 5.

**ELECTIONS.****§ 1. Conduct of election.**

Where C., at whose house the last election had been held, because the original voting

place had become unfit for the purpose, refused to allow the election to be held there, and it was held at the house of G., about one-half mile therefrom, notice of the change being posted prior to the election, the election was not void.—*Anderson v. Likens* (Ky.) 867.

Ballots stamped by the election officers without the electors being previously sworn as to their inability to read should be rejected.—*Anderson v. Likens* (Ky.) 867.

The temporary absence of officers of election does not render the election void, in the absence of evidence that any elector was thereby prevented from voting, or that such absence was voluntary.—*Anderson v. Likens* (Ky.) 867.

### § 2. Count of votes, returns, and canvass.

A local option law becomes operative on receiving a majority of all votes cast on that question.—*Jones v. Commonwealth* (Ky.) 328.

A majority of the votes cast on the question of selling liquor being against the sale a local option law became operative, a majority of all votes cast not being necessary.—*Rush v. Commonwealth* (Ky.) 588.

To authorize a county to incur a debt in excess of the limit prescribed by the constitution, the assent of two-thirds of the voters voting on that question is sufficient.—*Montgomery County Fiscal Court v. Trimble* (Ky.) 773.

The statement which is required to accompany doubtful ballots returned by the election officers must be made upon a separate paper signed by all of the officers of the election, and its relation to the particular ballot it refers to clearly shown by attaching them together, or in some other satisfactory manner, and then sealed up and returned to the county court clerk with the returns.—*Anderson v. Likens* (Ky.) 867.

### § 3. Contests.

As the statute requires ballots after being counted to be destroyed, oral testimony cannot be received as to how such ballots were stamped.—*Anderson v. Likens* (Ky.) 867.

The fact that the certificate of the officers required by statute to be made on the stub book was not signed by all of the officers does not authorize the rejection of the vote of the precinct, where there were duplicate certificates duly made out, and signed by all of the election officers.—*Anderson v. Likens* (Ky.) 867.

The vote of a precinct will not be rejected because the clerk has failed in several instances, as required by Ky. St. § 1471, to write his name on the back of the ballot before handing it to the elector, and in other instances his name was written by another officer, there being no evidence that either candidate was prejudiced thereby.—*Anderson v. Likens* (Ky.) 867.

The circuit court had not jurisdiction in a proceeding instituted by a candidate after he had given notice of contest to determine what ballots should be counted by the canvassing board, or how they should be counted.—*Anderson v. Likens* (Ky.) 867.

The issuance and delivery of triplicate certificates of election is the final action of the board of canvassers, within 10 days after which notice of contest of the election of a circuit court clerk must be given.—*Anderson v. Likens* (Ky.) 867.

An amended notice of contest giving the names of additional electors whose ballots had been stamped by the officers of election without the previous oath of the elector of his inability to read was properly rejected.—*Anderson v. Likens* (Ky.) 867.

After a candidate has given notice of contest, he does not forfeit his right to contest by applying for a writ of mandamus to compel the

canvassing board to reassemble and count certain ballots which have not been canvassed.—*Anderson v. Likens* (Ky.) 867.

## ELECTRICITY.

An electric light company is liable for injuries resulting from its failure to furnish perfect protection from electric currents at points where persons are likely to come in contact with its wires.—*Overall v. Louisville Electric Light Co.* (Ky.) 442.

## EMINENT DOMAIN.

Public improvements by municipalities, see "Municipal Corporations," § 5.

### § 1. Nature, extent, and delegation of power.

An abutting lot owner has an easement of access in the street, the taking or destruction of which by a change of grade of the street is a taking of property for public purposes.—*Hamilton County v. Rape* (Tenn. Sup.) 416.

Rev. St. arts. 721, 722, authorize channel companies to construct channels on land adjacent to bays as well as through the bays themselves.—*Cravy v. Port Arthur Channel & Dock Co.* (Tex. Sup.) 967.

### § 2. Compensation.

A charge in condemnation proceedings that damages should not be allowed for a pond not affected, though it extended upon the right of way, held not erroneous.—*Chicago, R. I. & P. Ry. Co. v. George* (Mo.) 11.

Const. art. 1, § 21, which forbids the taking of private property for public use without just compensation, does not require that compensation shall precede the taking.—*Saunders v. Memphis & R. S. R. Co.* (Tenn. Sup.) 155.

Special facts changing the rule that the measure of damages is the difference between the value of property just before and just after damage must be pleaded.—*Denison & P. Suburban Ry. Co. v. Smith* (Tex. Civ. App.) 278.

Held not necessary to allege difference in value of property just before and just after damages, to justify instruction that such is measure of damages.—*Denison & P. Suburban Ry. Co. v. Smith* (Tex. Civ. App.) 278.

In an action for damages sustained by the construction of a railroad in front of plaintiff's property, the amount due on the property should not be deducted from the damages, where defendant has not asked it in its pleadings.—*Denison & P. Suburban Ry. Co. v. Evans* (Tex. Civ. App.) 280.

### § 3. Proceedings to take property and assess compensation.

A reference in a charge in a condemnation proceeding to a "farm of defendant, of which the right of way forms a part," does not include a tract of land a quarter of a mile distant, also belonging to defendant.—*Chicago, R. I. & P. Ry. Co. v. George* (Mo.) 11.

Instruction held to properly state the rule that the measure of damages for a right of way is the value of the land actually taken therefor and the damage occasioned to the balance of the tract.—*Chicago, R. I. & P. Ry. Co. v. George* (Mo.) 11.

Damages from the depression of a street grade held for the jury, and not to be restricted to cost of a terrace or retaining wall on abutting lots.—*Hamilton County v. Rape* (Tenn. Sup.) 416.

Under Rev. St. art. 722, authorizing channel companies to construct channels so far inland as to reach safe places for docks, they need not show, to authorize condemnation, that

it is necessary to their reaching a safe place.—Crary v. Port Arthur Channel & Dock Co. (Tex. Sup.) 967.

A channel company before condemning land for a channel from the Gulf inland, under Rev. St. arts. 721, 722, need not show the secretary of war's consent to its construction.—Crary v. Port Arthur Channel & Dock Co. (Tex. Sup.) 967.

#### § 4. Remedies of owners of property.

Code, § 1342 (Mill. § V. Code, § 1566; Shannon's Code, § 1861), providing an appeal in condemnation proceedings, section 1347 (Mill. & V. Code, § 1571; Shannon's Code, § 1866), providing for an assessment of damages, and authorizing a suit for damages, where land is taken for railroad purposes without condemnation, and remedy provided by company's charter, are the exclusive legal remedies.—Saunders v. Memphis & R. S. R. Co. (Tenn. Sup.) 155.

Ejectment will not lie against a railroad company which is a good-faith purchaser of a right of way from one occupying same under a charter, but without previous condemnation.—Saunders v. Memphis & R. S. R. Co. (Tenn. Sup.) 155.

Where legal remedies open to one whose lands have been taken for railroad purposes without previous condemnation cannot be made available, he may have redress in equity.—Saunders v. Memphis & R. S. R. Co. (Tenn. Sup.) 155.

Where property damaged by a railroad is sufficient, after such damage, to secure a lien thereon, the lienholder is not necessary party to action against railroad company for damages.—Denison & P. Suburban Ry. Co. v. Smith (Tex. Civ. App.) 278.

Measure of damages for construction of a railroad in front of plaintiff's property *held* the difference in the values immediately before and immediately after the construction.—Denison & P. Suburban Ry. Co. v. Evans (Tex. Civ. App.) 280.

Where plaintiff did not claim damages for the construction of a bridge in front of his premises by defendant railroad company, defendant was not entitled to an instruction that no damages should be allowed therefor, in an action for damages for the construction of the road.—Denison & P. Suburban Ry. Co. v. Evans (Tex. Civ. App.) 280.

A judgment for plaintiff for the difference between the market value of his property before the construction of a railroad and its value thereafter *held* not supported by the pleadings.—Texarkana & Ft. S. Ry. Co. v. Collins (Tex. Civ. App.) 820.

## ENTRY, WRIT OF.

See "Ejectment."

## EQUITY.

Equitable estoppel, see "Estoppel," § 2.  
— set-off, see "Set-Off and Counterclaim."

Particular subjects of equitable jurisdiction and equitable remedies.

See "Cancellation of Instruments"; "Creditors' Suit"; "Fraudulent Conveyances"; "Injunction"; "Receivers"; "Reformation of Instruments"; "Trusts."

#### § 1. Jurisdiction, principles, and maxims.

Equity will not compel accounting between partners as to profits arising from a contract in violation of the anti-trust law of March 30, 1889.—Wiggins v. Bisso (Tex. Sup.) 637.

#### § 2. Laches and stale demands.

Plea of stale demand cannot be maintained against one asserting legal title.—Batcheller v. Besancon (Tex. Civ. App.) 296.

#### § 3. Pleading.

Where defendant answered to the merits, and submitted the whole matter for decision, it was a waiver of a former adjudication at law, and hence the chancery court, in passing on the case, did not err as by reviewing proceedings at law.—Cherry v. York (Tenn. Ch. App.) 184.

#### § 4. Decree, and enforcement thereof.

A judgment pro confesso will not be disturbed, in the absence of a showing of diligence, where the delay is based on inability of counsel to consult with parties in possession of necessary facts.—Campbell v. Atwood (Tenn. Ch. App.) 168.

## ESTABLISHMENT.

Of turnpikes or toll roads, see "Turnpikes and Toll Roads," § 1.  
Of will, see "Wills," § 3.

## ESTATES.

Created by will, see "Wills," § 4.  
Estates for years, see "Landlord and Tenant."  
Tenancy in common, see "Tenancy in Common."

Particular estates.

See "Life Estates."

## ESTOPPEL.

By judgment, see "Judgment," § 5.  
To avoid or forfeit insurance policy, see "Insurance," § 8.

#### § 1. By deed.

By accepting a deed to correct imperfections in his claim of title, a person becomes estopped from claiming any lands not included in the deed.—Doty v. Barnard (Tex. Sup.) 712.

Recital in partition deed *held* insufficient as an estoppel.—Illg v. Garcia (Tex. Sup.) 717.

#### § 2. Equitable estoppel.

Where one lot owner has permitted another, without protest, to erect buildings on a street on which their lots front, in which they have an easement, but which has never been accepted by the city, he cannot compel their removal, his remedy being an action for damages.—Hoskins v. J. B. Wathen Bro. Co. (Ky.) 595.

Remainder-men *held* not estopped to deny the particular tenant's power under a will to make an absolute disposition of the estate.—Bramell v. Adams (Mo.) 931; Same v. Cole, Id.; Same v. Collins, Id.

Where defendant stood by, and permitted complainant's grantor to survey the property and sell it to complainant, without asserting title, he was estopped to assert it afterwards.—Tennessee Coal, Iron & R. Co. v. McDowell (Tenn. Sup.) 158.

Written application by husband and wife for loan, stating it was not their homestead, *held* admissible to establish estoppel against claim of homestead.—Bowman v. Rutter (Tex. Civ. App.) 52.

Bank *held* estopped to deny its power to enter into partnership.—Gill v. First Nat. Bank (Tex. Civ. App.) 761.

## EVIDENCE.

See, also, "Depositions"; "Witnesses."

Admissibility of evidence under pleading, see "Pleading," § 7.  
Conformity of judgment to proofs, see "Judgment," § 1.



Questions of fact for jury, see "Trial," § 4.  
 Reception at trial, see "Criminal Law," § 7;  
 "Trial," § 2.  
 Verdict or findings contrary to evidence, see  
 "New Trial," § 2.

*As to particular facts or issues.*

See "Boundaries," § 2; "Damages," § 4.

*In particular civil actions or proceedings.*

See "Ejectment," § 3.

*In particular criminal prosecutions.*

See "Criminal Law," § 8; "Homicide," § 6.

#### § 1. Judicial notice.

Rev. St. U. S. §§ 905, 906, providing for the authentication of records of "other courts," do not apply to the records of the same court in different places in the same district.—*Behart v. Hull* (Ind. T.) 306.

#### § 2. Presumptions.

Evidence held to raise a presumption that a widow received a deed from an administrator at the time of her purchase at his sale.—*Osborn v. Weldon* (Mo.) 936.

A debt secured on land will be presumed to be for the sum named.—*Building & Loan Ass'n of Dakota v. Cunningham* (Tex. Sup.) 714.

#### § 3. Burden of proof.

A peremptory instruction having been given for the surety in the notes sued on, the burden of proof was on the principal, whose only defense was a counterclaim for damages by reason of fraudulent representations of plaintiff.—*Fitch v. Parker* (Ky.) 627.

#### § 4. Relevancy, materiality, and competency in general.

Witness is competent to testify as to condition of footboard on switch engine when evidence shows that its condition was same when witness examined it as it was on day of accident.—*Galveston, H. & H. R. Co. v. Bohan* (Tex. Civ. App.) 1050.

#### § 5. Best and secondary evidence.

A pardon cannot be proved by parol evidence.—*Redd v. State* (Ark.) 119.

Under Mansf. Dig. § 5353, providing that lost records may be restored by any legal mode, secondary evidence of the contents of a redelivery bond destroyed by fire is admissible.—*Bohart v. Hull* (Ind. T.) 306.

Secondary evidence of the contents of books of account held inadmissible.—*Garrett v. Garrett* (Tex. Civ. App.) 76.

One cannot, without accounting for nonproduction of a letter, testify to its contents.—*Cabaness v. Holland* (Tex. Civ. App.) 379.

Secondary evidence of the contents of papers is not admissible unless notice to the adverse party to produce the originals is given in time to enable him so to do.—*Ellis v. Sharp* (Tex. Civ. App.) 670.

Notice to adverse party to produce an instrument, the foundation of an action, held unnecessary in order to prove its contents by parol.—*Battaglia v. Stahl* (Tex. Civ. App.) 683.

#### § 6. Declarations.

In ejectment, declarations of plaintiff's intestate as to ownership made when he was out of possession are inadmissible.—*Dunlap v. Griffith* (Mo.) 917.

Declarations of an adverse claimant of lands while in possession are admissible to characterize his ownership.—*Dunlap v. Griffith* (Mo.) 917.

#### § 7. Hearsay.

Statement by constable to claimant of property after levy thereon held hearsay and inadmissible.—*Goldberg v. Bussey* (Tex. Civ. App.) 49.

What the messenger said to the manager after he delivered a telegram at the wrong place is not admissible in an action against the company for such negligence.—*Western Union Tel. Co. v. Sweetman* (Tex. Civ. App.) 676.

#### § 8. Documentary evidence.

Though will giving land to one was not probated, it is admissible to show that he did not take possession of land as tenant in common, but adversely.—*Illg v. Garcia* (Tex. Sup.) 717.

An abstract of land titles published under Gen. Laws 1873, c. 56, p. 71, is admissible, without further authentication.—*Huffman v. Eastham* (Tex. Civ. App.) 55.

The report of the master on a claim against a company in the hands of a receiver, stating that certain persons are primarily liable, held not evidence of said persons' liability in an action by claimant against them on the debt.—*San Antonio & G. S. Ry. Co. v. Ryan* (Tex. Civ. App.) 749.

Deed held inadmissible where a certificate of acknowledgment fails to show that the grantees were known.—*Hines v. Lumpkin* (Tex. Civ. App.) 818.

#### § 9. Opinion evidence.

The opinion of a witness as to time, space, or distance is admissible.—*International & G. N. R. Co. v. Satterwhite* (Tex. Civ. App.) 41.

A physician may testify that plaintiff, whom he examined for the purpose of testifying in the case, "was confined to his bed, and unable to walk without aid."—*Missouri, K. & T. Ry. Co. of Texas v. Wright* (Tex. Civ. App.) 56.

A physician who had examined plaintiff may testify as an expert that plaintiff could not very well have feigned his injuries, and could not have stood an operation which was performed, without chloroform.—*Missouri, K. & T. Ry. Co. of Texas v. Wright* (Tex. Civ. App.) 56.

Estimate as to the number of cattle in a stock running loose on a range which had never all been rounded up may be given by one familiar with the stock and their range.—*Cabaness v. Holland* (Tex. Civ. App.) 379.

One acquainted with the cattle business may give his opinion as to the number of cattle contained in a particular stock.—*Cabaness v. Holland* (Tex. Civ. App.) 379.

Opinion of expert in operation of railroads, as to whether track walker was necessary, is admissible.—*Galveston, H. & H. R. Co. v. Bohan* (Tex. Civ. App.) 1050.

Opinion of expert, as to whether it was as necessary that defendant have track walker in its freight yard on Sunday as on any other day, is admissible.—*Galveston, H. & H. R. Co. v. Bohan* (Tex. Civ. App.) 1050.

Witness testifying as expert may give his opinion upon very issue on trial.—*Galveston, H. & H. R. Co. v. Bohan* (Tex. Civ. App.) 1050.

Expert held competent to testify as to necessity of track walker.—*Galveston, H. & H. R. Co. v. Bohan* (Tex. Civ. App.) 1050.

#### § 10. Evidence at former trial or in other proceeding.

Stipulation that testimony recited in bill of exceptions for first appeal was testimony of witness since deceased construed, and held insufficient to establish the competency of the witness to testify.—*Redd v. State* (Ark.) 119.

#### § 11. Weight and sufficiency.

Copy of order for land grant held inadmissible to show when grantee came to state.—*Batcheller v. Besancon* (Tex. Civ. App.) 296.

### EXAMINATION.

Of witnesses in general, see "Witnesses," § 2.

## EXCEPTIONS.

To pleading, see "Pleading," § 4.

### EXCEPTIONS, BILL OF.

#### § 1. Settlement, signing, and filing.

An order reciting the signing of a bill tendered on a former day authorizes the presumption that the bill was tendered in time.—*Chism v. Barnes* (Ky.) 232.

### EXCHANGE OF PROPERTY.

There can be no recovery for a shortage in the exchange of lands, in the absence of evidence as to the value of the land omitted from the deed.—*Smyser v. Franck* (Ky.) 1071.

Plaintiff, a party to a tripartite exchange, *held* entitled to recover land conveyed to defendant by the other party, on rescinding for defendant's fraud, though title was never in plaintiff.—*Cabaness v. Holland* (Tex. Civ. App.) 879.

### EXCISE.

Regulation of traffic in intoxicating liquors, see "Intoxicating Liquors."

### EXCUSABLE HOMICIDE.

See "Homicide," § 4.

### EXECUTION.

See, also, "Attachment"; "Garnishment"; "Judicial Sales."

#### § 1. Property subject to execution.

One claiming to own personalty attached, who gives a forthcoming bond, *held* to have no right to retain the property as against a subsequent attachment creditor without giving another forthcoming bond.—*Harris v. Stewart* (Ark.) 634.

#### § 2. Issuance, form, and requisites of writ.

A constable's return of "Not satisfied" to an execution from a justice's court *held* insufficient to authorize the issuance of an execution on a transcript of the judgment, and a sale of real estate thereunder.—*Langford v. Few* (Mo.) 927.

A failure to comply with the requirements of Rev. St. § 6287, that, before issuing an execution on a transcript from a justice's judgment, a return of nulla bona shall be made to an execution thereon in the justice court, *held* not a mere irregularity, unassailable in a collateral action.—*Langford v. Few* (Mo.) 927.

From the issuance of an execution by a clerk of a circuit court on the transcript of a justice's judgment, *held*, there was no presumption that a return of nulla bona was made to an execution from the justice's judgment, as required by Rev. St. 1839, § 6287, before execution on the transcript may issue.—*Langford v. Few* (Mo.) 927.

Evidence *held* to establish that an execution that was lost followed the judgment, and was correctly issued.—*Turner v. Crane* (Tex. Civ. App.) 822.

#### § 3. Sale.

Where the execution plaintiff who had purchased mortgaged land at the execution sale afterwards became the purchaser at the foreclosure sale for the amount of the mortgage debt, his lien acquired by the execution purchase was extinguished.—*Worsham v. Lancaster* (Ky.) 446.

Real estate covered by description in levy, sale, and conveyance thereunder determined.—*Reeves v. Allen* (Tenn. Sup.) 495.

The rights of a cestui que trust *held* superior to those of an execution purchaser under a judgment against the trustee in whose name the property appeared as owner on the records.—*John B. Hood Camp Confederate Veterans v. De Cordova* (Tex. Sup.) 522.

A levy of execution on 200 acres off the S. end of 800 acres *held* to be sufficient.—*Turner v. Crane* (Tex. Civ. App.) 822.

A sheriff's deed not reciting in what county the land levied on was situated *held* sufficient when it recited that the levy was made by the sheriff of a certain county, and the sale was made therein.—*Turner v. Crane* (Tex. Civ. App.) 822.

Description in a sheriff's deed *held* not to vitiate his levy.—*Turner v. Crane* (Tex. Civ. App.) 822.

#### § 4. Supplementary proceedings.

Motion for restitution of property sold on execution or in default for damages, where after sale defendant has new trial and judgment, should state the purchaser.—*McCracken v. Paul* (Ark.) 854.

Liability of plaintiff on execution sale on judgment in absence of supersedeas, where new trial and judgment for defendant is had thereafter, determined.—*McCracken v. Paul* (Ark.) 854.

#### § 5. Wrongful execution.

The fact that a judgment against intervenor on his forthcoming bond was obtained by collusion *held* a defense to an action by intervenor against a subsequent execution creditor for a wrongful levy.—*Harris v. Stewart* (Ark.) 634.

A peremptory instruction should have been given to find for plaintiff the value of exempt property sold by defendant as sheriff under execution, less the excess of sale bond over the amount of execution.—*Whittington v. Pence's Adm'r* (Ky.) 877.

In an action to recover damages for the sale by defendant as sheriff of exempt property under execution, the testimony of a witness that he offered to lend plaintiff the money to pay off the execution, and take a bill of sale for the property, which plaintiff declined, saying that, if he did so, he would lose his action against the sheriff, was inadmissible.—*Whittington v. Pence's Adm'r* (Ky.) 877.

### EXECUTORS AND ADMINISTRATORS.

See, also, "Wills."

Testamentary trustees, see "Trusts."

Testimony as to transactions with decedents, see "Witnesses," § 1.

#### § 1. Appointment, qualification, and tenure.

By an appeal from the admission of a will to probate and the appointment of an executor, *held*, that the judgment was annulled, and that the executor could not act nor be sued pending the appeal.—*Garrett v. Garrett* (Tex. Civ. App.) 76.

#### § 2. Collection and management of estate.

Sand. & H. Dig. § 217, providing the compensation to be paid attorneys by administrators for the prosecution of suits, does not apply to a claim against the United States.—*Pike v. Thomas* (Ark.) 110.

Where the question was whether the estate should lose the entire claim or pay 50 per cent. for its collection, *held*, that the administrator properly had it collected on such commission.—*Pike v. Thomas* (Ark.) 110.

Where services were rendered the estate under contract with the administrator, *held*, that a suit would lie in equity to enforce payment

therefor out of the estate, the administrator being insolvent.—*Pike v. Thomas* (Ark.) 110.

Where it is not alleged or proved that an administrator is insolvent, plaintiff is not entitled to relief against the estate for services rendered it under a contract with the administrator.—*Pike v. Thomas* (Ark.) 110.

An administrator has, as a rule, no power to bind the estate by his contracts, and he is liable on them individually.—*Pike v. Thomas* (Ark.) 110.

Rent may be recovered from a decedent's estate for the use of land by the administrator for the benefit of the estate under a lease made to the decedent, though the lease was not binding, because not signed by the lessee.—*Pepper's Adm'r v. Harper* (Ky.) 620.

Temporary administrator *held* not authorized to compromise claim on insurance policy.—*Germania Life Ins. Co. v. Peetz* (Tex. Civ. App.) 687.

### § 3. Allowances to surviving wife, husband, or children.

Where all the exempt articles are on hand, the widow is entitled to all of them, but to nothing more, whatever may be their value.—*Welch v. Lewis* (Ky.) 454.

A voluntary release by heirs of their interest in the ancestor's estate, executed under a mistaken belief that the estate was insolvent, will be set aside.—*Welch v. Lewis* (Ky.) 454.

Heirs who have executed a release of their interest under mistake are not estopped to object to a settlement made by the administrator with the county court in accordance with that release, though they failed to appear and resist the settlement.—*Welch v. Lewis* (Ky.) 454.

### § 4. Allowance and payment of claims.

Ky. St. § 3884, providing that no interest accruing after his death shall be allowed on any claim against the decedent's estate unless the claim be demanded of the personal representative within one year after his appointment, does not apply to a claim not due until after the appointment of the administrator.—*Pepper's Adm'r v. Harper* (Ky.) 620.

A mortgage lien on the land of a decedent has priority over the lien of the administrator's attorney for his fee in a suit to settle the estate.—*Day's Adm'r v. Davis* (Ky.) 760; *Davis v. Day's Adm'r*, *Id.*

Administration Law, § 184, does not apply to an action of remainder-men to establish rights of ownership in funds derived from the sale of part of the inheritance by a deceased particular tenant.—*Bramell v. Adams* (Mo.) 931; *Same v. Cole*, *Id.*; *Same v. Collins*, *Id.*

### § 5. Distribution of estate.

Where an heir's interest was bought in by the estate to protect a debt he owed it, such interest should be distributed as personal assets.—*Rogers v. Rogers* (Tenn. Sup.) 701.

### § 6. Sales and conveyances under order of court.

The fact that a former judgment which was ignored fixed the terms and conditions of sale of decedent's land did not dispense with such conditions in the judgment under which sale was made.—*Underwood's Adm'r v. Cartwright* (Ky.) 580.

In an action to sell land to pay the debts of a decedent, it was error to adjudge a sale "subject" to a mortgage lien, but the judgment should have been for a sale to satisfy the lien.—*Underwood's Adm'r v. Cartwright* (Ky.) 580.

### § 7. Actions.

An administrator with the will annexed has all the powers of an executor, and, an executor

being entitled to hold possession of the estate, and to pay over to each devisee the income on his share, the administrator with the will annexed may sue for land belonging to the estate.—*De Haven v. De Haven's Adm'r* (Ky.) 597.

### § 8. Accounting and settlement.

A final settlement *held* not conclusive on remainder-men seeking to charge the estate of an executrix with a note not accounted for, as being a part of the estate which she, as particular tenant, did not turn over.—*Bramell v. Adams* (Mo.) 931; *Same v. Cole*, *Id.*; *Same v. Collins*, *Id.*

## EXEMPLARY DAMAGES.

See "Damages," § 1.

## EXPERT TESTIMONY.

In civil actions, see "Evidence," § 9.  
In criminal prosecutions, see "Criminal Law," § 5.

## EX POST FACTO LAWS.

Constitutional restrictions, see "Constitutional Law," § 5.

## FACTORS.

See, also, "Brokers"; "Perjury"; "Principal and Agent."

Evidence *held* to show an ordinary consignment on commission, and not on a guaranty by the factor of a certain price.—*Wise-Kottwitz Commission Co. v. Bond* (Tenn. Ch. App.) 174.

## FALSE PRETENSES.

An indictment for obtaining goods under false pretenses must allege that the person from whom they were obtained would not have parted with them but for the alleged false pretenses.—*Bryant v. Commonwealth* (Ky.) 578.

## FEES.

See "Jury," § 2; "Sheriffs and Constables," § 1.

## FILING.

Criminal information or complaint, see "Indictment and Information," § 2.

## FINDINGS.

Conformity of judgment, see "Judgment," § 1.

## FIRES.

See "Arson."

## FORCIBLE DEFILEMENT.

See "Rape."

## FORCIBLE ENTRY AND DETAINER.

### § 1. Civil liability.

In an action of unlawful detainer, evidence that plaintiff had conveyed an interest in land to which he makes no claim is irrelevant.—*Anderson v. Thomas* (Ind. T.) 301.

## FORECLOSURE.

Of lien, see "Mechanics' Liens," § 4.  
Of mortgage, see "Mortgages," §§ 4, 5.

## FOREIGN CORPORATIONS.

See "Corporations," § 6.

## FOREIGN JUDGMENTS.

See "Judgment," § 8.

## FORGERY.

The fact that accused might have been convicted under a statute defining forgery in the fourth degree does not necessarily prevent his conviction under the statute defining forgery in the first degree.—*State v. Mills* (Mo.) 938.

An indictment for forgery charging defendant with "selling and delivering" a forged deed *held* good, under Rev. St. 1889, § 3646, prohibiting the "passing, uttering, or publishing" of forged papers.—*State v. Mills* (Mo.) 938.

Rev. St. 1889, § 3644, defining the offense of forgery in the fourth degree, does not include the offense of uttering a forged instrument.—*State v. Mills* (Mo.) 938.

There is a variance between an indictment alleging a forgery of an instrument signed by J. N. Webb and proof of an instrument signed by N. Webb.—*Webb v. State* (Tex. Cr. App.) 356.

An indictment for forging a note, naming a bank as payee, need not state whether the bank is incorporated.—*Webb v. State* (Tex. Cr. App.) 356.

An allegation that a certain instrument was forged *held* sufficient to show that the signature purported to be the act of another.—*Webb v. State* (Tex. Cr. App.) 356.

One may be convicted of passing a forged instrument, though it be not in his handwriting.—*Leslie v. State* (Tex. Cr. App.) 367.

Evidence that defendant attempted to pass a forged instrument to witness *held* admissible to connect him with the crime, and to contradict him as to his whereabouts.—*Leslie v. State* (Tex. Cr. App.) 367.

Evidence that defendant attempted to pass a forged instrument to witness is admissible to show intent with which he afterwards passed it.—*Leslie v. State* (Tex. Cr. App.) 367.

An indictment alleging that the forged instrument passed purported to be the act of P. was not repugnant in setting out an indorsement by S., where the making of the instrument was the basis of the forgery.—*Leslie v. State* (Tex. Cr. App.) 367.

Indictment *held* insufficient.—*Beasley v. State* (Tex. Cr. App.) 991.

## FORMER ADJUDICATION.

See "Judgment," § 5.

## FORMER JEOPARDY.

Bar to prosecution, see "Criminal Law," § 4.

## FORMS OF ACTION.

See "Ejectment"; "Replevin"; "Trespass"; "Trove and Conversion."

## FORNICATION.

See "Incest."

## FRANCHISES.

Corporate franchises, see "Corporations," § 1.

Act April 9, 1895, providing for the sale of a franchise at public auction to the highest bid-

der, as a condition precedent to the consent of the municipality to the construction and use of the property, *held* void for indefiniteness.—*State ex rel. Crow v. West Side St. Ry. Co.* (Mo.) 959.

## FRAUDS, STATUTE OF.

§ 1. Promises to answer for debt, default, or miscarriage of another.

An agreement to pay, as a part of purchase price of land, notes executed by the vendor to another, is not a promise to pay the debt of another, within the statute of frauds.—*Daniels v. Gibson* (Ky.) 621.

An agreement to pay, as part of the consideration for land, a debt due by the vendor to another, is not a promise to pay the debt of another, within the statute of frauds.—*Mudd v. Carico* (Ky.) 1080.

§ 2. Agreements not to be performed within one year.

A parol agreement not to do a thing for a year from a future time is within Sand. & H. Dig. § 3469, subd. 6, prohibiting action on a parol contract not to be performed within a year.—*Higgins v. Gager* (Ark.) 848.

Sand. & H. Dig. § 3469, prohibiting action on a parol contract not to be performed within a year, does not apply to land leases.—*Higgins v. Gager* (Ark.) 848.

§ 3. Real property, and estates and interests therein.

Under Sand. & H. Dig. § 3469, subd. 5, prohibiting action on a parol lease of land exceeding a year, a parol lease for a year to commence in the future is valid.—*Higgins v. Gager* (Ark.) 848.

§ 4. Requisites and sufficiency of writing.

A contract for the sale of land which does not purport to be made for others binds only the individual interest of the person signing.—*Linville v. Langford* (Ky.) 248.

§ 5. Operation and effect of statute.

An indivisible contract *held* void where one of its substantial stipulations was void under the statute of frauds (Sand. & H. Dig. § 3469, subd. 6).—*Higgins v. Gager* (Ark.) 848.

Where defendant's intestate induced plaintiff to become his housekeeper, and take care of him, under promise to convey certain land, performance by plaintiff takes the case out of the statute.—*Hall v. Harris* (Mo.) 506.

§ 6. Pleading and evidence.

The statute of frauds is available, under answer clearly denying agreement set up in petition.—*Hillman v. Allen* (Mo.) 509.

The statute, to be available, must be pleaded.—*Barnes v. Black Diamond Coal Co.* (Tenn. Sup.) 498.

## FRAUDULENT CONVEYANCES.

§ 1. Transfers and transactions invalid.

Facts *held* insufficient to show actual fraud in the execution of a pledge.—*Blass v. Goodbar* (Ark.) 630.

The execution of certain conveyances *held* not to show an intention to make an assignment constructively fraudulent for preferring creditors.—*Blass v. Goodbar* (Ark.) 630.

An insolvent debtor may transfer his property to creditors in payment of their claims, where no more than necessary therefor is given.—*Turner Hardware Co. v. Reynolds* (Ind. T.) 307.

A conveyance to a husband, in trust for himself and his wife's children, *held* free from

fraud as to his creditors.—*Cook v. Jones* (Tenn. Ch. App.) 14.

Evidence held to support a finding that a transfer by a merchant of his stock in trade to a corporation organized by him was fraudulent, and that the corporation was a party to the fraud.—*Holloway Seed Co. v. City Nat. Bank* (Tex. Civ. App.) 77.

## § 2. Rights and liabilities of parties and purchasers.

Purchaser from insolvent will be protected unless he knew of fraudulent intent.—*Hillboldt v. Waugh* (Tex. Civ. App.) 829.

## § 3. Remedies of creditors.

If a mortgagee whose mortgage is attached as a preference wishes to rely on the fact that it was executed in good faith to secure a debt created simultaneously with the execution of the mortgage, he must aver that fact.—*Aulick v. Reed* (Ky.) 331.

A creditor may follow property conveyed in fraud of creditors rather than foreclose his lien on property taken in payment therefor.—*Holloway Seed Co. v. City Nat. Bank* (Tex. Civ. App.) 77.

For a gift to a wife by improvements on her separate property with community money to be reached on judgment against the husband and another, it must be shown that judgment creditor was his creditor at time of gift, that the debt exists, and that the gift was fraudulent, all the judgment debtors being insolvent, and remedies at law exhausted.—*Maddox v. Summerlin* (Tex. Civ. App.) 1020.

## GAMING.

### § 1. Criminal responsibility.

Evidence held sufficient to support a conviction.—*Aguar v. State* (Tex. Cr. App.) 464.

A conviction of keeping and exhibiting a gaming table held not warranted by evidence that accused was seen near a gaming table exhibited in a room of a building, a portion of which he occupied for a lawful business.—*Blum v. State* (Tex. Cr. App.) 1002.

## GARNISHMENT.

See, also, "Attachment"; "Execution."

### § 1. Persons and property subject to garnishment.

Property in possession of one who is merely a collecting agent is subject to garnishment in a suit against his principal.—*Austin Nat. Bank v. Bergen* (Tex. Civ. App.) 1037.

A real-estate broker's commission, though the amount thereof be not specifically agreed on, is susceptible of definite ascertainment, and hence may be the basis of garnishment.—*Austin Nat. Bank v. Bergen* (Tex. Civ. App.) 1037.

### § 2. Writ or summons and notice, service, and return.

Where all members of a firm are parties to the main action, personal service of the notice of garnishment on one of them is sufficient.—*Patterson v. Seeton* (Tex. Civ. App.) 732.

### § 3. Lien of garnishment and liability of garnishee.

Where a garnishee willfully mingled attached goods with others purchased by him with funds obtained by selling part of the attached property, the garnishment lien attached to the entire stock.—*Holloway Seed Co. v. City Nat. Bank* (Tex. Civ. App.) 77.

### § 4. Proceedings to support or enforce.

A finding that garnishee should deliver the stock of goods in his hands at the time of trial, where he had mixed them by purchases and sales after the service of the writ, is proper.

though no such facts are pleaded.—*Holloway Seed Co. v. City Nat. Bank* (Tex. Sup.) 95.

The facts warranting a money judgment against a garnishee must be pleaded under Rev. St. 1895, arts. 240, 241.—*Holloway Seed Co. v. City Nat. Bank* (Tex. Sup.) 95.

An affidavit in garnishment alleging only that garnishee is indebted to defendant does not preclude a trial as to whether garnishee has effects of defendant in his possession, under Rev. St. 1895, art. 220.—*Holloway Seed Co. v. City Nat. Bank* (Tex. Sup.) 95.

Under Rev. St. 1895, arts. 219-247, plaintiff in garnishment may controvert garnishee's answer as to any matter concerning which the writ required a disclosure, and is not confined to the ground set forth in his controverting affidavit.—*Holloway Seed Co. v. City Nat. Bank* (Tex. Civ. App.) 77.

Where the garnishee litigates his liability, he is not entitled to an attorney's fee.—*Patterson v. Seeton* (Tex. Civ. App.) 732.

By attaching property of a nonresident by garnishment, the court acquires jurisdiction to enter judgment against him to the extent of the property attached.—*Austin Nat. Bank v. Bergen* (Tex. Civ. App.) 1037.

## § 5. Operation and effect of garnishment, judgment, or payment.

The garnishee cannot attack a judgment in the principal suit for irregularities not rendering it void.—*Patterson v. Seeton* (Tex. Civ. App.) 732.

## GOOD FAITH.

Of purchaser, see "Sales," § 2; "Vendor and Purchaser," § 5.

## GRAND JURY.

See "Indictment and Information."

## GRANTS.

Of public lands, see "Public Lands."

## GUARANTY.

See "Principal and Surety."

## GUARDIAN AND WARD.

### § 1. Appointment, qualification, and tenure of guardian.

One who obtained possession of land as testamentary guardian cannot refuse to surrender possession to the statutory guardian appointed to succeed him, though he has a small undivided interest in the land, his remedy being an action for division.—*Thompson v. Thompson* (Ky.) 1088.

An order appointing a guardian is not void by reason of the fact that the ward, who was over 14 years of age, was overpersuaded to select the person appointed.—*Thompson v. Thompson* (Ky.) 1088.

### § 2. Custody and care of ward's person and estate.

Neither the ward nor his real estate is liable for the claim of a former guardian for his board and maintenance.—*Bates v. Hall* (Ky.) 216.

A testamentary guardian, who was never appointed by the county court or executed bond, was not entitled to possession of the land belonging to the ward.—*Thompson v. Thompson* (Ky.) 1088.

### § 3. Sales and conveyances under order of court.

Under Rev. St. arts. 2558, 1853, 2557, held, that orders allowing expenditures in excess of

income are void if not entered of record.—*Blackwood v. Blackwood's Estate* (Tex. Civ. App.) 483.

#### § 4. Actions.

The guardian having a life estate in a fund, and the wards the remainder, limitation did not run in favor of the surety in the guardian's bond during the life of the guardian.—*Brooks v. Troutman* (Ky.) 271.

#### § 5. Accounting and settlement.

Under Rev. St. 1895, arts. 2557, 2630, a guardianship account for expenditures exceeding income of estate *held* properly disallowed.—*Blackwood v. Blackwood's Estate* (Tex. Civ. App.) 483.

#### § 6. Liabilities on guardianship bonds.

It was error to render judgment against the surety in guardian's bond for full amount of fund in which guardian had life estate, without deducting the value of that life estate.—*Brooks v. Troutman* (Ky.) 271.

### HABEAS CORPUS.

#### § 1. Nature and grounds of remedy.

Habeas corpus cannot be resorted to for the purpose of discharging a prisoner on the ground of former jeopardy.—*Ex parte Crofford* (Tex. Cr. App.) 533.

#### § 2. Jurisdiction, proceedings, and relief.

Facts *held* to render judgments entered for costs in habeas corpus cases invalid.—*Henderson v. Walker* (Tenn. Sup.) 430.

Shannon's Code, §§ 7619-7621, requiring counties to pay costs in felony cases, where a *nolle pros.* is entered, the indictment ignored, the cause retired, or dismissed on preliminary hearing, do not apply to habeas corpus proceedings.—*Henderson v. Walker* (Tenn. Sup.) 430.

The clerk is not entitled to tax any sum for entering judgment in habeas corpus proceedings.—*Henderson v. Walker* (Tenn. Sup.) 430.

Under Shannon's Code, § 5543, providing that where accused is discharged on habeas corpus the costs shall be paid as in cases of acquittal, the costs in a felony case should be paid by the state.—*Henderson v. Walker* (Tenn. Sup.) 430.

Under Shannon's Code, §§ 5540-5543, providing that all the papers in habeas corpus proceedings shall be returned by the judge to his nearest court, the clerk may properly tax costs for the transcript.—*Henderson v. Walker* (Tenn. Sup.) 430.

Under Shannon's Code, § 5545, providing that in all habeas corpus proceedings where the crime is a misdemeanor the costs shall be allowed by the clerk as in other cases, the costs should be paid by the county.—*Henderson v. Walker* (Tenn. Sup.) 430.

Under Shannon's Code, § 6388, allowing clerks 25 cents for filing a petition, and section 5540, instructing him to tax costs on the papers in habeas corpus cases, a fee of 25 cents is taxable for filing petitions in such cases.—*Henderson v. Walker* (Tenn. Sup.) 430.

Under Shannon's Code, § 5542, providing that costs in habeas corpus shall be adjudged as the court thinks right, where one accused of a felony is not discharged, unless the costs are taxed to him, they should be paid by the state.—*Henderson v. Walker* (Tenn. Sup.) 430.

Under Shannon's Code, § 6388, subsec. 8, allowing clerks 25 cents for filing an affidavit to any pleading, such sum is properly taxable in habeas corpus proceedings.—*Henderson v. Walker* (Tenn. Sup.) 430.

Under Shannon's Code, § 6388, subsec. 10, allowing clerks 25 cents for each order or mo-

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tion or order thereon, costs are not taxable on the order to certify a bill of costs in habeas corpus proceedings.—*Henderson v. Walker* (Tenn. Sup.) 430.

Under Shannon's Code, § 7595, providing that clerks need not affix seals of their courts to their certificate to a bill of costs in criminal proceedings, no costs should be taxed for such seal in habeas corpus.—*Henderson v. Walker* (Tenn. Sup.) 430.

Under Shannon's Code, § 6388, subsec. 8, allowing clerks 50 cents for entering bill of costs, such sum is properly taxable in habeas corpus proceedings.—*Henderson v. Walker* (Tenn. Sup.) 430.

An appeal in habeas corpus proceedings heard in vacation will be dismissed where the record is not certified by the judge.—*Ex parte Williams* (Tex. Cr. App.) 365.

### HABITUAL CRIMINALS.

See "Criminal Law," § 14.

### HARMLESS ERROR.

See "Appeal and Error."

### HEARING.

On appeal or writ of error, see "Appeal and Error," § 11.

### HEIRS.

See "Descent and Distribution."

### HIGHWAYS.

See, also, "Turnpikes and Toll Roads."

#### § 1. Regulation and use for travel.

The circuit court has jurisdiction to try offense of obstructing public highway.—*Illinois Cent. R. Co. v. Commonwealth* (Ky.) 255; *Commonwealth v. Illinois Cent. R. Co.* (Ky.) 258.

The failure of a railroad company to restore, within a reasonable time, a bridge forming part of a highway, which it has removed to make repairs, is punishable only as a common-law nuisance.—*Commonwealth v. Illinois Cent. R. Co.* (Ky.) 258.

The delay of a railroad company to restore a bridge which it has removed from a highway in order to make repairs does not constitute an offense unless the delay is unreasonable.—*Commonwealth v. Illinois Cent. R. Co.* (Ky.) 258.

### HOMESTEAD.

#### § 1. Nature, acquisition, and extent.

Allotment of a homestead cannot be disturbed on account of a mistake of judgment by appraisers as to value.—*Gowdy v. Johnson* (Ky.) 624.

The allotment of a homestead on the ground of fraud cannot be disturbed after a lapse of 10 years.—*Gowdy v. Johnson* (Ky.) 624.

The fact that a homestead, after its allotment to the debtor, increases in value so as to exceed the limit of value prescribed in the statute, does not authorize a revaluation and reassignment, so as to allow creditors to subject the excess.—*Gowdy v. Johnson* (Ky.) 624.

A refusal on foreclosure to allow a homestead *held* not error.—*Evans v. Van Valkenburg* (Tenn. Ch. App.) 1101.

One who by his own fault fails to erect a house in conformity to his contract so to do does not acquire the right to a lien on the premises.—*Paschall v. Pioneer Savings & Loan Co.* (Tex. Civ. App.) 98.

One cannot at the same time have an urban and a rural homestead.—*Lauchheimer v. Saunders* (Tex. Civ. App.) 543.

Evidence *held* to show that certain premises were a homestead, notwithstanding there were two tenements thereon, one of which was rented.—*Storrie v. Woessner* (Tex. Civ. App.) 837.

**§ 2. Rights of surviving husband, wife, children, or heirs.**

A widow *held* entitled to select any 200 acres as her homestead out of land occupied by herself and husband.—*Shippey v. Hough* (Tex. Civ. App.) 672.

A widow *held* entitled to designate her homestead after partition by heirs was commenced.—*Shippey v. Hough* (Tex. Civ. App.) 672.

**§ 3. Abandonment, waiver, or forfeiture.**

The loss of a debtor's family after the allotment to him of a homestead does not deprive him of the exemption.—*Gowdy v. Johnson* (Ky.) 624.

Election of a shoemaker as a county treasurer *held* not to operate as an abandonment of his business homestead.—*Schoellkopf v. Cameron* (Tex. Civ. App.) 548.

## HOMICIDE.

**§ 1. Murder.**

Evidence *held* to sustain a verdict of murder in the second degree.—*State v. Revelly* (Mo.) 787.

The voluntary entering into a difficulty is not an ingredient of a homicidal act, unless done for the purpose of wreaking malice, or taking the antagonist's life, or doing him great bodily harm.—*State v. Adler* (Mo.) 794.

Evidence *held* not to establish defense of insanity.—*State v. Clark* (Mo.) 886.

Facts *held* to show that an instrument with which a stabbing was done was a deadly weapon.—*State v. Bowles* (Mo.) 892.

Facts *held* sufficient to justify a charge of murder in the second degree.—*State v. Bowles* (Mo.) 892.

Verdict of murder in the second degree *held* sustained by the evidence.—*State v. Todd* (Mo.) 923.

Evidence *held* to show that deceased was shot while retreating.—*Hamilton v. State* (Tenn. Sup.) 695.

On a trial for murder, *held* proper, under the evidence, to refuse to charge on murder in the second degree.—*Swan v. State* (Tex. Cr. App.) 362.

Refusal to charge as to murder in second degree and manslaughter *held* error.—*Guerrero v. State* (Tex. Cr. App.) 655.

A charge to find defendant guilty of murder in the first degree, if he encouraged another in committing a homicide, *held* error for not stating that he must have encouraged a felonious homicide.—*Red v. State* (Tex. Cr. App.) 1003.

**§ 2. Manslaughter.**

Question whether words of decedent caused a reasonable provocation reducing the crime to manslaughter *held* a question for the jury.—*State v. Grugin* (Mo.) 1058.

Accused *held* entitled to instruction on manslaughter.—*Morrison v. State* (Tex. Cr. App.) 369.

A killing in the manner stated *held* not manslaughter.—*Reddick v. State* (Tex. Cr. App.) 993.

Evidence *held* not to warrant an instruction on negligent homicide in the first degree.—*Reddick v. State* (Tex. Cr. App.) 993.

A killing, if done under stated circumstances, *held* to be negligent homicide in the second degree.—*Reddick v. State* (Tex. Cr. App.) 993.

Evidence *held* to justify a charge on manslaughter.—*Reddick v. State* (Tex. Cr. App.) 993.

**§ 3. Assault with intent to kill.**

A conviction of assault with intent to murder *held* warranted.—*Hanley v. State* (Tex. Cr. App.) 371.

In a prosecution for an assault with intent to murder, the giving of an instruction in regard to aggravated assault *held* error, as tending to mislead the jury.—*Mathis v. State* (Tex. Cr. App.) 464.

There need not be an intent to kill the specific person assaulted, to constitute an assault with intent to murder.—*Mathis v. State* (Tex. Cr. App.) 464.

Instruction as to intent *held* sufficient in prosecution for assault with intent to murder.—*Poe v. State* (Tex. Cr. App.) 471.

Verdict for assault with intent to murder *held* justified by evidence.—*Poe v. State* (Tex. Cr. App.) 471.

Evidence *held* to support a finding of assault with intent to murder.—*Lott v. State* (Tex. Cr. App.) 1006.

A conviction for an assault with intent to murder *held* proper, notwithstanding defendant might have killed prosecutor if he had had that intent.—*Gaines v. State* (Tex. Cr. App.) 1012.

A conviction for an assault with intent to murder *held* proper.—*Gaines v. State* (Tex. Cr. App.) 1012.

Evidence considered, and *held* sufficient to sustain a conviction of assault with intent to murder.—*Rucker v. State* (Tex. Cr. App.) 1014.

**§ 4. Excusable or justifiable homicide.**

A peace officer has no right to take human life in order to make an arrest for a breach of the peace.—*Stephens v. Commonwealth* (Ky.) 229.

One who abandons a conflict, but thereafter renews it, or voluntarily enters into it, to wreak his malice, cannot rely on self-defense.—*State v. Adler* (Mo.) 794.

If accused started quarrel with deceased for purpose of killing or injuring him, danger in which he found himself during altercation would not extenuate his offense.—*State v. Pennington* (Mo.) 799.

Instructions as to right of defendant to arrest deceased, and to go to his home for that purpose, *held* improperly refused, though defendant shot deceased in hot blood, because of aggravating language used by him at the time.—*State v. Grugin* (Mo.) 1058.

Evidence *held* to show that a murder was not committed in self-defense.—*Hamilton v. State* (Tenn. Sup.) 695.

Accused *held* entitled to instruction on justifiable homicide in slaying his wife's paramour.—*Morrison v. State* (Tex. Cr. App.) 369.

Though Pen. Code 1895, art. 675, permits homicide to prevent maiming, disfiguring, etc., as well as murder, an instruction on such defensive matter need not be given where there was no evidence that deceased assaulted defendant with intent to maim or disfigure.—*Bryant v. State* (Tex. Cr. App.) 373.

An instruction in accordance with Pen. Code, art. 677, relating to self-defense, *held* applicable to evidence that deceased was a powerful man, stronger than defendant, and that, in assaulting defendant at time of killing, he used no weapon.—*Bryant v. State* (Tex. Cr. App.) 373.

**§ 5. Indictment and information.**

Count charging assault on "Lizzie C.," and shooting "Lizzie H.," is bad.—*State v. Clark* (Mo.) 886.

Indictment for murder *held* insufficient.—*State v. Wade* (Mo.) 1070.

Indictment for first-degree murder without formal conclusion only charges manslaughter.—*State v. Wade* (Mo.) 1070.

An indictment charging an assault with intent to murder need not allege the means used.—*Mathis v. State* (Tex. Cr. App.) 464.

An indictment charging homicide by poisoning must also charge the premeditated malice.—*Hamlin v. State* (Tex. Cr. App.) 656.

An indictment for murder, charging an instantaneous killing, will admit of proof that a mortal wound was inflicted which resulted in death two or three months later.—*Reddick v. State* (Tex. Cr. App.) 993.

**§ 6. Evidence.**

The serious nature of the wound of deceased, and his repeated statement that he was going to die, made his statement admissible as his dying declaration.—*Stephens v. Commonwealth* (Ky.) 229.

That deceased pulled away from defendant, who was attempting to arrest him, and said, "Let's argue this thing," was admissible as evidence.—*Stephens v. Commonwealth* (Ky.) 229.

The error, if any, in admitting the declaration of deceased that he did not think defendant was going to shoot him, was harmless.—*Stephens v. Commonwealth* (Ky.) 229.

Where deceased, who lived about five hours after he was shot, said to his father, "I am killed this time," and requested that B. be sent for to write his affidavit, saying, "I am afraid you cannot get him here in time," his statements as to the killing were admissible as his dying declaration.—*Toliver v. Commonwealth* (Ky.) 1082.

Evidence of epileptic fits of accused *held* inadmissible.—*State v. Pennington* (Mo.) 799.

Facts *held* to establish that a stabbing occurring during a fist fight was not unintentional.—*State v. Bowles* (Mo.) 892.

Where the defense to a killing is self-defense, it is error to exclude evidence showing that accused was physically greatly inferior to deceased.—*State v. Bowles* (Mo.) 892.

Evidence *held* admissible to rebut accused's testimony that he had no hostile intent in going to deceased's house, and as showing animus.—*Self v. State* (Tex. Cr. App.) 26.

Defendant cannot show what happened between deceased and another before the homicide, where he had no knowledge thereof at the time of the killing.—*Goodall v. State* (Tex. Cr. App.) 359.

Evidence that, immediately after the killing, deceased's mother was shouting and praying, *held* harmless.—*Goodall v. State* (Tex. Cr. App.) 359.

It is not error to authorize the jury to consider, on the question of malice, the fact that defendant shot other persons immediately after he shot deceased.—*Goodall v. State* (Tex. Cr. App.) 359.

Evidence of a witness that deceased had tried to attack him a short time prior to the killing *held* inadmissible.—*Bybee v. State* (Tex. Cr. App.) 367.

Evidence *held* to show that the pistol with which an alleged assault was made was a deadly weapon.—*Austin v. State* (Tex. Cr. App.) 371.

Evidence on trial for manslaughter *held* sufficient proof of corpus delicti.—*Scott v. State* (Tex. Cr. App.) 531.

Circumstantial evidence *held* insufficient to warrant a conviction of an assault with intent to murder.—*Clifton v. State* (Tex. Cr. App.) 642.

Evidence in murder trial *held* not to establish express malice.—*Logan v. State* (Tex. Cr. App.) 645.

Evidence *held* to sufficiently identify a letter introduced in evidence.—*Hamlin v. State* (Tex. Cr. App.) 656.

Evidence of the conduct of accused after a homicide is competent to show the purpose for which the killing was done.—*Little v. State* (Tex. Cr. App.) 984.

The subsequent possession of goods and money of deceased by one accused of killing him tends to show that the killing was in perpetration of robbery and not in self-defense.—*Little v. State* (Tex. Cr. App.) 984.

Facts *held* to establish a killing in perpetration of a robbery.—*Little v. State* (Tex. Cr. App.) 984.

A statement made by deceased to the attending physician, two hours after receiving a mortal gunshot wound, as to the circumstances of the shooting, on request of the accused, is not part of the res gestæ.—*Reddick v. State* (Tex. Cr. App.) 993.

**§ 7. Trial.**

An instruction authorizing an acquittal on the ground of self-defense, only in the event there appeared to defendant no other safe means to avert the danger, is not objectionable.—*Stephens v. Commonwealth* (Ky.) 229.

On a plea of self-defense, a peremptory instruction could not be given.—*Baker v. Commonwealth* (Ky.) 864.

Where the only issue was as to whether defendant did the killing charged, an instruction as to self-defense was improper.—*Toliver v. Commonwealth* (Ky.) 1082.

In the absence of evidence warranting it, a charge on the law of manslaughter in the fourth degree is properly refused.—*State v. Brown* (Mo.) 789.

Under Rev. St. 1889, § 3469, a charge submitting the issue of manslaughter in the second degree, in the absence of evidence warranting it, is properly refused.—*State v. Brown* (Mo.) 789.

An instruction limiting defendant's right of self-defense to reasonable apprehensions of danger from deceased *held* erroneous, for not including apprehensions of danger from the crowd.—*State v. Adler* (Mo.) 794.

When an instruction as given fully covers law of self-defense, it is not error to refuse requests for other instructions on same point.—*State v. Pennington* (Mo.) 799.

Instruction as to self-defense *held* proper.—*State v. Pennington* (Mo.) 799.

A charge that the jury could not consider anything said by a companion of one committing a homicide, at the time of the occurrence, *held* properly refused.—*State v. Bowles* (Mo.) 892.

An instruction dictating to the jury, as a matter of law, what was a sufficient provocation and what was a sufficient cooling time, *held* erroneous.—*State v. Grugin* (Mo.) 1058.

On the evidence, *held* error to charge that jury should find defendant guilty of murder if it believed the evidence, as the effect of the evidence to reduce the crime from murder to manslaughter should have been submitted.—*State v. Grugin* (Mo.) 1058.



Instructions as to the effect of excitement or agitation on deliberation in murder in the first degree *held* erroneous.—State v. Grugin (Mo.) 1058.

An instruction stating that there were indications of brutality and atrocity attending a homicide *held* erroneous.—State v. Grugin (Mo.) 1058.

Where there is no evidence that deceased used a weapon in assault on defendant, who claims self-defense, the court need not charge on presumption from use of weapon, but merely on appearance of danger.—Bryant v. State (Tex. Cr. App.) 373.

An instruction that threats against the life of defendant by deceased were not justification for killing, unless at the time of the killing deceased manifested an intention to execute the threats, *held* sufficient.—Bryant v. State (Tex. Cr. App.) 373.

In a prosecution for an assault with intent to murder, *held* not error to refuse to instruct as to an aggravated assault, where, if the person assaulted had been killed, it would have been murder.—Harris v. State (Tex. Cr. App.) 643.

In a prosecution for an assault with intent to murder, *held* not error to refuse to charge as to an issue not raised by defendant's evidence.—Harris v. State (Tex. Cr. App.) 643.

The court should sift charge of witness being persuaded by friends of deceased to absent himself, though the proof was not adduced until after continuance on account of the witness' absence was refused.—Logan v. State (Tex. Cr. App.) 645.

Instruction as to duel *held* error.—Guerrero v. State (Tex. Cr. App.) 655.

An instruction to find defendant guilty of murder if he killed deceased "by poisoning," as charged in the indictment, is not objectionable on the ground that the indictment and proof showed only an arsenic poisoning, where there was no evidence of any other kind of poisoning.—Hamlin v. State (Tex. Cr. App.) 656.

An instruction as to circumstantial evidence *held* not calculated to mislead the jury.—Hamlin v. State (Tex. Cr. App.) 656.

A charge as to manslaughter *held* erroneous, as excluding a consideration of an assault committed on accused by deceased's wife, which deceased abetted.—Byrd v. State (Tex. Cr. App.) 721.

A charge on a murder trial, that if the jury has a reasonable doubt of accused's guilt to acquit him, applies to all degrees of murder.—Little v. State (Tex. Cr. App.) 984.

The state is not precluded by a confession of accused that he killed deceased in self-defense, and, where circumstances support its theory of murder in perpetration of robbery, a charge on murder is justified.—Little v. State (Tex. Cr. App.) 984.

Where the evidence shows that the killing was either in self-defense or in perpetration of robbery, a charge on manslaughter is properly refused.—Little v. State (Tex. Cr. App.) 984.

The use by the state's counsel of the bar in evidence with which a killing was done, to show that it could not have been done with one hand as claimed by accused, *held* permissible, though there was no proof of its weight.—Little v. State (Tex. Cr. App.) 984.

A charge on circumstantial evidence is not prejudicial, though the evidence takes the case out of the rules applicable thereto.—Little v. State (Tex. Cr. App.) 984.

An instruction as to use of force *held* unnecessary, where it had been already given in substance.—Rucker v. State (Tex. Cr. App.) 1014.

## § 8. New trial.

Testimony of absent witness *held* to justify new trial, under Code Cr. Proc. art. 597, subd. 6, providing for new trial where continuance is refused, and accused convicted, and the evidence appeared on the trial to be material, and probably true.—Logan v. State (Tex. Cr. App.) 645.

## § 9. Appeal and error.

The submission of the issue of justifiable homicide, without evidence to warrant it, is error in accused's favor, of which he cannot complain.—State v. Brown (Mo.) 789.

## HORSE RAILROADS.

See "Street Railroads."

## HOUSEBREAKING.

See "Burglary."

## HUSBAND AND WIFE.

See, also, "Divorce."

Rights of survivor, see "Descent and Distribution"; "Executors and Administrators," § 3; "Homestead," § 2.

### § 1. Mutual rights, duties, and liabilities.

Reasonable advances made by the husband to his children during the marriage will not be set aside at the wife's instance.—Cooke v. Fidelity Trust & Safety-Vault Co. (Ky.) 325; Fidelity Trust & Safety-Vault Co. v. Burnett, Id.; Cooke v. Cooke, Id.

Profits arising from land held by the husband as trustee for his wife and children, and on which he has not expended labor of greater value than the cost of his support, or than the amount he was bound to contribute to the support of his family, cannot be subjected to his debts.—Brown v. Brown's Adm'r (Ky.) 758.

A married woman is estopped to assert title to real estate deeded by her, on the ground that her privy examination was never taken, where she enforces a vendor's lien, and permits improvements to be made by purchasers.—Rawley v. Burris (Tenn. Ch. App.) 176.

### § 2. Conveyances, contracts, and other transactions between husband and wife.

Where land was paid for with separate means of husband and wife, and the deed taken in the wife's name, *held*, that the husband's interest, being held in trust, was subject to the payment of his debts.—McGregor-Noe Hardware Co. v. Horn (Mo.) 957.

### § 3. Wife's separate estate.

Crops raised by tenants on the wife's land, to which she is entitled as rent, are not subject to the husband's debts.—Bridges v. Hanna (Ky.) 218.

The words, "I hereby bind my separate estate," indorsed on the back of a promissory note by a married woman, *held* sufficient to charge her estate with the liability.—National Exchange Bank v. Cumberland Lumber Co. (Tenn. Sup.) 85.

A married woman may charge her separate estate for payment of a debt for which she is only liable as surety.—National Exchange Bank v. Cumberland Lumber Co. (Tenn. Sup.) 85.

A husband whose wife had no power to appoint an agent to manage certain property, deeded to her as security, *held* not liable for negligence of persons operating an elevator therein.—Collier v. Struby (Tenn. Sup.) 90.

Where the wife was not liable for a tort, *held*, that the husband was not liable, under the declaration.—Collier v. Struby (Tenn. Sup.) 90.

A married woman *held* not in such possession of property as to make her liable for the negligence of persons employed therein.—*Collier v. Struby* (Tenn. Sup.) 90.

An owner of property who conveyed the same to a married woman as security *held* to have no authority to appoint an agent for her to manage the property.—*Collier v. Struby* (Tenn. Sup.) 90.

A married woman's interest in property *held* not such as gave her the power to manage it, and hence she was not responsible for the negligence of an alleged agent.—*Collier v. Struby* (Tenn. Sup.) 90.

Circumstances *held* to raise a presumption that the husband had reduced the wife's property to possession.—*Tolley v. Wilson* (Tenn. Ch. App.) 156.

Where a father who held a note of his daughter's husband gave it to the daughter, *held*, that the transaction was a payment of the note; a purpose to exclude the husband's marital rights not having been expressed by the father when he made the gift.—*Tolley v. Wilson* (Tenn. Ch. App.) 156.

From the fact that a deed was taken in the wife's name, no presumption arises that property acquired during the marriage relationship was intended as a gift to her.—*Caffey's Ex'rs v. Cooksey* (Tex. Civ. App.) 65.

Under Rev. St. 1895, § 2971, providing that execution may be levied on either community property or separate property of the wife, execution may issue against wife's separate property, though the judgment does not so direct.—*Carson v. Taylor* (Tex. Civ. App.) 895.

An abandoned wife may herself dispose of her separate property.—*Therriault v. Compere* (Tex. Civ. App.) 750.

Without her consent, a wife's separate property cannot be appropriated by others with her husband's permission.—*Therriault v. Compere* (Tex. Civ. App.) 750.

#### § 4. Actions.

On an issue as to the quantity of estate taken by a wife, an instruction that a gift to her was presumed from taking a deed in her name *held* reversible error.—*Caffey's Ex'rs v. Cooksey* (Tex. Civ. App.) 65.

#### § 5. Community property.

The right to the proceeds of community property in another state is determined by the law of Kentucky, the state of the husband's residence.—*Cooke v. Fidelity Trust & Safety-Vault Co.* (Ky.) 325; *Fidelity Trust & Safety-Vault Co. v. Burnett, Id.*; *Cooke v. Cooke, Id.*

A wife is not a necessary party to an action involving the title to land purchased with community funds.—*Central Coal & Coke Co. v. Henry* (Tex. Civ. App.) 281.

On a husband's sale of community property to pay a community debt, the question whether the buyer was an innocent purchaser in paying for the property with a pre-existing debt did not arise.—*Therriault v. Compere* (Tex. Civ. App.) 750.

A married woman's recorded brand on cattle raises the presumption that they are community property, if acquired during coverture, unless the record shows contrary.—*Rhodes v. Alexander* (Tex. Civ. App.) 754.

## IMPAIRING OBLIGATION OF CONTRACT.

See "Constitutional Law," § 4.

## IMPEACHMENT.

Of witness, see "Witnesses," § 3.

## IMPRISONMENT.

See "Bail."

## IMPROVEMENTS.

Liens, see "Mechanics' Liens."

Public improvements, see "Municipal Corporations," § 5.

## INCEST.

In a prosecution for incest, the limiting the evidence of defendant's reputation to that for chastity cannot be said to have been prejudicial, in the absence of a statement of facts.—*Poyner v. State* (Tex. Cr. App.) 977.

## INCOMPETENT PERSONS.

See "Insane Persons."

## INDEMNITY.

See "Principal and Surety."

## INDIANS.

United States courts cannot interfere with proceedings of the courts of the Creek Nation for the punishment of the people of such nation.—*Ex parte Tiger* (Ind. T.) 304.

Failure of a prosecuting attorney to find an indictment against an offender against the laws of the Creek Nation *held* to be an informality curable by verdict.—*Ex parte Tiger* (Ind. T.) 304.

Const. Creek Nation, requiring the prosecuting attorney to indict all offenders, does not require the finding of an indictment through a grand jury.—*Ex parte Tiger* (Ind. T.) 304.

## INDICTMENT AND INFORMATION.

See, also, "Homicide," § 5.

### § 1. Formal requisites of indictment.

Each count of indictment must contain formal conclusion.—*State v. Wade* (Mo.) 1070.

Assistant district attorney general *held* to have no power to sign indictments.—*State v. Amos* (Tenn. Sup.) 410.

### § 2. Filing and formal requisites of information or complaint.

One is served with the true copy of an indictment, though it is plain, while the original shows a line across a figure.—*Leslie v. State* (Tex. Cr. App.) 367.

### § 3. Requisites and sufficiency of accusation.

Under Sand. & H. Dig. §§ 2075, 2076, 2081, 2090, an indictment in words of the past tense, charging the utterance of a slander at a future date, is sufficient, where defendant was not misled thereby.—*Conrand v. State* (Ark.) 628.

An indictment need not negative an exception embraced in a separate clause from that creating the offense.—*Commonwealth v. Risner* (Ky.) 213.

The use of the Christian names "Jennie" and "Jane" in different parts of an indictment in describing the person against whom the offense was committed is not a material variance.—*Wilkey v. Commonwealth* (Ky.) 219.

An indictment charging the sale of spirituous, vinous, and malt liquors charges but one offense.—*Jones v. Commonwealth* (Ky.) 328.

Under a statute imposing a penalty for failure to report to the auditor by a given time, and an additional penalty for each day the re-

port is not made thereafter, an indictment charging a failure to report by the time given, and a continued failure to report thereafter, charges but one offense.—*Louisville & J. Ferry Co. v. Commonwealth (Ky.) 877*; *Central Railway & Bridge Co. v. Same, Id.*

An indictment that in a certain county accused burglarized a building "there situate" sufficiently describes the place of the offense.—*State v. Burdett (Mo.) 796*.

It is sufficient to give defendant's name in an indictment as "L., alias S."—*Leslie v. State (Tex. Cr. App.) 367*.

A complaint held to sufficiently state the county in which the offense was committed.—*Aguar v. State (Tex. Cr. App.) 464*.

#### § 4. Joinder of parties, offenses, and counts, duplicity, and election.

One of two defendants jointly indicted for a misdemeanor cannot complain of the dismissal of the indictment as to the other.—*Rush v. Commonwealth (Ky.) 585*.

A refusal to require the state to elect to proceed either on a count of theft or for receiving stolen property is proper, where the evidence tends to support both counts.—*Houston v. State (Tex. Cr. App.) 468*.

#### § 5. Motion to quash or dismiss, and demurrer.

Irregularity in officer's return on summons or indictment is not ground for quashing process.—*Illinois Cent. R. Co. v. Commonwealth (Ky.) 255*.

Where it appears by competent evidence on a motion to quash that an indictment was found without evidence, the motion should be sustained.—*State v. Cole (Mo.) 895*.

That an indictment was found without evidence may be proved by the prosecuting attorney, on a motion to quash.—*State v. Cole (Mo.) 895*.

#### § 6. Issues, proof, and variance.

Allegation that obstruction of highway occurred near a town, and proof that it occurred within the town, constitutes a material variance.—*Illinois Cent. R. Co. v. Commonwealth (Ky.) 255*.

A variance between an indictment for false swearing and the proof as to the date of the trial on which defendant gave the alleged false testimony is not material.—*Cope v. Commonwealth (Ky.) 436*.

#### § 7. Conviction of offense included in charge.

Where indictment contains one good and one bad count, a general verdict will be held to be founded on good count.—*State v. Clark (Mo.) 886*.

#### § 8. Waiver of defects and objections, and aid by verdict.

That complaint charged one "Henry Peland" with larceny, while the information used the name of "Henry Piland," held no ground to arrest a judgment of conviction.—*Piland v. State (Tex. Cr. App.) 1007*.

### INFANTS.

See, also, "Guardian and Ward."

#### § 1. Actions.

Allowance to a guardian ad litem appointed on cross petition should be paid by plaintiff in cross petition, and not by plaintiff in principal action.—*Cooke v. Fidelity Trust & Safety-Vault Co. (Ky.) 325*; *Fidelity Trust & Safety Vault Co. v. Burnett, Id.*; *Cooke v. Cooke, Id.*

A guardian ad litem was not authorized to consent to a sale of his ward's real estate to

satisfy notes for purchase money before the maturity thereof.—*Melton v. Brown (Ky.) 764*.

It would have been erroneous to enter judgment establishing a public road as against an infant landowner, for whom no guardian ad litem had been appointed.—*Jewell v. Kirk (Ky.) 766*.

A judgment against an infant is voidable only, and is binding until set aside by a direct attack, even where he was sued and a guardian ad litem appointed for him under a wrong given name.—*McGhee v. Romatka (Tex. Civ. App.) 291*.

A judgment denying an application to vacate a judgment against an infant, made by the infant after his coming of age, is conclusive of his right to attack such judgment.—*McGhee v. Romatka (Tex. Civ. App.) 291*.

Minority cannot be set up in defense of a claim where not pleaded.—*Foster v. Boff (Tex. Civ. App.) 399*.

### INFORMATION.

Criminal accusation, see "Indictment and Information."

### INFRINGEMENT.

Of trade-mark, see "Trade-Marks and Trade-Names," § 1.

### INJUNCTION.

Injunction against the passage of an ordinance was granted on the ground of avoiding a multiplicity of suits.—*International Trading-Stamp Co. v. City of Memphis (Tenn. Sup.) 136*.

Injunction will lie to restrain a city council from passing an ordinance which, if enacted, would be ultra vires.—*International Trading-Stamp Co. v. City of Memphis (Tenn. Sup.) 136*.

### IN PAIS.

Estoppel, see "Estoppel," § 2.

### INQUEST.

Of coroner, see "Coroners."

### INSANE PERSONS.

Testimony as to transactions with persons subsequently incompetent, see "Witnesses," § 1.

#### § 1. Custody and support.

A pension collected from the United States government for a lunatic may be subjected in the hands of his committee to the payment of his board in a state lunatic asylum.—*Western Kentucky Asylum v. White (Ky.) 864*.

#### § 2. Crimes.

1 Rev. St. 1889, § 4247, does not require that the county court shall first find as to an insane convict's residence, lunacy, and insolvency before the county shall become liable for his keep in the insane asylum.—*Shields v. Johnson County (Mo.) 107*.

1 Rev. St. 1889, § 4247, making counties liable for the keeping of indigent insane convicts in the asylum, does not apply to convicts convicted before its passage.—*Shields v. Johnson County (Mo.) 107*.

### INSOLVENCY.

See "Assignments for Benefit of Creditors"; "Bankruptcy."

Of corporations, see "Corporations," § 5.

### INSTRUCTIONS.

In civil actions, see "Trial," § 5.

## INSURANCE.

## § 1. Insurance agents and brokers.

An agent collecting a premium *held* to be insurer's agent, where he was entitled to retain such premium as his fee.—*Mutual Reserve Fund Life Ass'n v. Farmer* (Ark.) 850.

The insured is not bound by a limitation of the agent's authority of which he had no notice.—*Travelers' Ins. Co. of Hartford v. Ebert* (Ky.) 865.

## § 2. Insurable interest.

Where the insurance is for the benefit of the estate of insured, it is immaterial that the person who took out the policy and paid the premiums had no insurable interest.—*Prudential Ins. Co. v. Leyden's Adm'r* (Ky.) 767.

## § 3. The contract in general.

Time of mailing a policy *held* to be the time of delivery.—*Mutual Reserve Fund Life Ass'n v. Farmer* (Ark.) 850.

Where an accident ticket was issued to a woman insuring her against loss of time and against death, with the exception "that this ticket insures females against death only," the company was bound for the indemnity for loss of time.—*Travelers' Ins. Co. of Hartford v. Ebert* (Ky.) 865.

That a policy covering loss of life from violent or accidental means also provides for indemnity for injuries not resulting in death does not make it other than a life policy.—*Logan v. Fidelity & Casualty Co. of New York* (Mo.) 948.

Statute as to forfeiture of policy is part of policy.—*Germania Life Ins. Co. v. Peetz* (Tex. Civ. App.) 687.

## § 4. Premiums, dues, and assessments.

A policy construed as to whether it continued in force after the date fixed for the payment of a premium note.—*Kimbrow v. Continental Ins. Co.* (Tenn. Sup.) 413.

Premium is due on the 1st day of March of each year, under a policy providing that the note of \$23.80 shall fall due as follows: "5.95 on the first days each of March, 1893, 4, 5, and 6."—*Kimbrow v. Continental Ins. Co.* (Tenn. Sup.) 413.

## § 5. Assignment or other transfer of policy.

Where a son received a consideration for having made a policy on his life payable to his mother, an assignment of the policy by the mother to the son's wife, procured by false representations, will be set aside.—*McKildin v. McKildin* (Ky.) 246.

Where, by its terms, a life policy became a term policy, insured cannot reinstate the original policy without consent of the beneficiary.—*Union Cent. Life Ins. Co. v. Wilkes* (Tex. Civ. App.) 546.

## § 6. Avoidance of policy for misrepresentation, fraud, or breach of warranty or condition.

An attempt to commit suicide *held* not to show that insured had a mental or nervous disease.—*Mutual Reserve Fund Life Ass'n v. Farmer* (Ark.) 850.

An insured is not bound by a statement in his application inserted by another without his knowledge or consent.—*Mutual Reserve Fund Life Ass'n v. Farmer* (Ark.) 850.

An insurer accepting an application in which all the questions are not answered cannot take advantage of the failure to answer.—*Mutual Reserve Fund Life Ass'n v. Farmer* (Ark.) 850.

A representation as to whether insured had been attended by a physician is made material by a stipulation in the policy to that effect.—

*Mutual Reserve Fund Life Ass'n v. Farmer* (Ark.) 850.

The fact that insured had once been insensible by taking chloroform does not show that he had an illness within a question in the application.—*Mutual Reserve Fund Life Ass'n v. Farmer* (Ark.) 850.

Questions as to sickness in an application do not refer to temporary disorders.—*Mutual Reserve Fund Life Ass'n v. Farmer* (Ark.) 850.

The statement that insured had never been sick *held* qualified by a succeeding statement that he had not been sick for 10 years.—*Mutual Reserve Fund Life Ass'n v. Farmer* (Ark.) 850.

False statements by the applicant as to his existing habits as to use of intoxicating liquors will invalidate the policy.—*Union Cent. Life Ins. Co. v. Lee* (Ky.) 614.

The false representation by a niece, who made application for insurance on the life of her aunt, that the insured had not had a certain disease, will not invalidate the policy; death not being caused by such disease.—*Prudential Ins. Co. v. Leyden's Adm'r* (Ky.) 767.

## § 7. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.

A levy under execution subject to an attachment levy, and dependent on a surplus after satisfaction of the attachment, does not divest the debtor of the title to the property, within the provisions of a policy.—*Herman v. Katz* (Tenn. Sup.) 86.

The levy of an attachment does not divest the debtor of the title to the property, within an insurance policy.—*Herman v. Katz* (Tenn. Sup.) 86.

Where the situation of personal property after levy was identical with that prior thereto, there was no increase in hazard by possession passing to the officer.—*Herman v. Katz* (Tenn. Sup.) 86.

The term "occupants" in an insurance policy refers to personalty as well as realty.—*Herman v. Katz* (Tenn. Sup.) 86.

Statutes cannot change rights of parties to policy executed under previous statutes.—*Germania Life Ins. Co. v. Peetz* (Tex. Civ. App.) 687.

Laws 1876, c. 341, § 1, forbidding forfeiture of policy without notice, applies to policies providing for semiannual premiums.—*Germania Life Ins. Co. v. Peetz* (Tex. Civ. App.) 687.

## § 8. Estoppel, waiver, or agreements affecting right to avoid or forfeit policy.

Where the payment of a premium is dispensed with pending negotiations for a change in the policy, and the premium is tendered as soon as the negotiations fail, the policy is not forfeited.—*Aetna Life Ins. Co. v. Curley's Adm'r* (Ky.) 585.

Acceptance after maturity of payment of premium notes, which provided that, if not paid at maturity, the policy was forfeited, is a waiver of the right to a forfeiture.—*Union Cent. Life Ins. Co. v. Wilkes* (Tex. Civ. App.) 546.

Recovery on life policy can be had though insured engaged in occupation rendering it void under its terms, where the general agents of the company received premiums with knowledge of change of occupation.—*Northwestern Mut. Life Ins. Co. v. Freeman* (Tex. Civ. App.) 1025.

Provision in application for life policy that no statements made shall be binding unless reduced to writing, and approved by the company's officers, *held* not to affect waiver of for-

feiture by receipt of premiums with knowledge of facts authorizing forfeiture.—*Northwestern Mut. Life Ins. Co. v. Freeman* (Tex. Civ. App.) 1025.

#### § 9. Risks and causes of loss.

Rev. St. 1889, § 5855, relating to suicide as a defense to a life insurance policy, *held* to apply to an accident policy.—*Logan v. Fidelity & Casualty Co. of New York* (Mo.) 948.

#### § 10. Extent of loss and liability of insurer.

Under the valued-policy law, the company cannot limit its liability to three-fourths of the value of the property.—*Phoenix Ins. Co. v. Peak* (Ky.) 1089.

#### § 11. Actions on policies.

Application, policy, and premium notes may be considered together, to arrive at a proper construction of an ambiguous policy.—*Kimbrow v. Continental Ins. Co.* (Tenn. Sup.) 413.

Petition in action on life policy, setting out its substance and facts showing company's liability, *held* sufficient.—*Northwestern Mut. Life Ins. Co. v. Freeman* (Tex. Civ. App.) 1025.

### INTEREST.

See "Usury."

Disqualification as witness, see "Witnesses," § 1.

### INTERROGATORIES.

To witnesses, see "Depositions."

### INTERSTATE COMMERCE.

Regulation, see "Commerce."

### INTERVENTION.

In actions in general, see "Parties," § 2.

In attachment proceedings, see "Attachment," § 4.

### INTOXICATING LIQUORS.

#### § 1. Local option.

Act May 5, 1880, providing for license to druggists in local option districts, has been repealed.—*Stornes v. Commonwealth* (Ky.) 262.

Druggists are exempt from the operation of the local option law unless the petition, notice, and order of election include them.—*Stornes v. Commonwealth* (Ky.) 262.

A statute fixing a penalty for the sale of intoxicating beverages in local option districts applies only to liquids not strictly spirituous, vinous, or malt liquors, and does not alter the penalty for selling such liquors.—*Rush v. Commonwealth* (Ky.) 586.

All local prohibitory liquor laws have been repealed by the general local option law as to the penalties imposed thereby.—*Pursifull v. Commonwealth* (Ky.) 772.

Question whether local option law is in force in a county is for jury.—*Strickland v. State* (Tex. Cr. App.) 470.

The local option law cannot be put into operation, unless the result of the election adopting it be published either in a newspaper or by posting notices thereof.—*Strickland v. State* (Tex. Cr. App.) 720.

An order of the commissioners' court declaring the result of a county election under the local option law need not show there was an election held in each of the election precincts of the county.—*Barker v. State* (Tex. Cr. App.) 980.

An order of the commissioners' court declaring the result of a county election under the

local option law need not set out the vote by voting or justice precincts.—*Barker v. State* (Tex. Cr. App.) 980.

An order of the commissioners' court declaring the result of a county election under the local option law is not vitiated by an erroneous reference to the year in which the local option law was passed.—*Barker v. State* (Tex. Cr. App.) 980.

Evidence other than the entry of the court as to the publication of the result of a local option election *held* inadmissible, where it was not shown whether such entry had been made, since such entry is *prima facie* evidence of the publication, under Rev. St. 1895, art. 3391.—*Armstrong v. State* (Tex. Cr. App.) 981.

Showing of publication of order declaring result of local option election *held* sufficient.—*Armstrong v. State* (Tex. Cr. App.) 1008.

Order declaring result of election on question of local option need not show vote by precincts.—*Armstrong v. State* (Tex. Cr. App.) 1006.

Order declaring result of election on question of local option need not contain exceptions authorizing sale of liquors.—*Armstrong v. State* (Tex. Cr. App.) 1008.

Order declaring result of local option election need not recite that local option was only to remain in force until another election might declare otherwise.—*Armstrong v. State* (Tex. Cr. App.) 1006.

#### § 2. Licenses and taxes.

License to druggist to sell liquor without payment of tax affords no protection.—*Stornes v. Commonwealth* (Ky.) 262.

The prohibitory liquor law applicable to Bell county was repealed as to the city of Pineville by the provision of the charter of cities of that class authorizing the city council to grant license to sell liquors.—*Pursifull v. Commonwealth* (Ky.) 772.

#### § 3. Regulations.

Ky. St. § 4224, does not authorize license to a brandy distiller to sell at his residence.—*Commonwealth v. Holland* (Ky.) 216.

Ky. St. § 4224, does not authorize the designation of the distiller's residence as the place of sale in a license to a brandy distiller.—*Commonwealth v. Asbury* (Ky.) 217.

#### § 4. Offenses.

A license to a distiller to sell at the distillery does not authorize him to sell at the warehouse, from 60 to 100 yards distant.—*Commonwealth v. Holland* (Ky.) 216.

A license to a brandy distiller to sell at his residence does not authorize him to sell at his warehouse, 75 yards from his distillery, though the statute fixes the distillery as the place of sale.—*Commonwealth v. Asbury* (Ky.) 217.

Defendant is not liable if he acted merely as agent in the purchase of the whisky for the prosecuting witness.—*Armstrong v. State* (Tex. Cr. App.) 981.

Evidence *held* to warrant a conviction for violating the local option law.—*Armstrong v. State* (Tex. Cr. App.) 981.

Transaction *held* to be sale in violation of local option law.—*Armstrong v. State* (Tex. Cr. App.) 1006.

Where defendant gave a person whisky, and the latter thereafter gave him money as a gift, the original transaction was not a sale, unless it was merely colorable.—*Finley v. State* (Tex. Cr. App.) 1015.

#### § 5. Criminal prosecutions.

Evidence that defendant sold "Dr. Anderson's Bitters," which "tasted or smelt like whisky," was sufficient to authorize a conviction.

tion for selling spirituous liquors without license.—*Rush v. Commonwealth (Ky.)* 585.

In a prosecution for selling intoxicating liquors, it is admissible to prove defendant's declaration that he kept a "blind tiger."—*Rush v. Commonwealth (Ky.)* 586.

Where the amount of a fine depended upon whether the offense was committed within or without a city, and it did not appear from the indictment where it was committed, it was error to render judgment by default without the intervention of a jury.—*Pursifull v. Commonwealth (Ky.)* 772.

Where accused refused to make a sale when requested, but offered to procure the liquor in another county, the question whether he was a bona fide agent of the buyer was for the jury.—*Strickland v. State (Tex. Cr. App.)* 720.

In a prosecution under the local option law, an objection to the introduction in evidence of the order of the commissioners' court declaring the result of the local option election, as immaterial, is too general.—*Barker v. State (Tex. Cr. App.)* 980.

Evidence that grape cider sold to boys caused them to become "dead to the world" *held* sufficient to show that the liquor was intoxicating.—*Barker v. State (Tex. Cr. App.)* 980.

A printed notice of the order of a county judge declaring the result of a local option election *held* not admissible because not a verbatim copy of the order entered by the commissioners' court declaring such result.—*Barker v. State (Tex. Cr. App.)* 980.

In a prosecution under the local option law, the burden is on the state to show that the order announcing the result of the election was legally published.—*Armstrong v. State (Tex. Cr. App.)* 981.

In a prosecution under the local option law, evidence that defendant had been a saloon keeper prior to the time of the law going into effect *held* not objectionable as misleading.—*Armstrong v. State (Tex. Cr. App.)* 981.

Prosecution for one sale of intoxicating liquors *held* not a bar to prosecution for another sale.—*Armstrong v. State (Tex. Cr. App.)* 1006.

## ISSUES.

In civil actions, see "Pleading," § 7.

In criminal prosecutions, see "Indictment and Information," § 6.

## JAILS.

See "Prisons."

## JEOPARDY.

Former jeopardy bar to prosecution, see "Criminal Law," § 4.

## JOINDER.

See "Action."

Of parties in civil actions, see "Parties," § 1.

## JOINT TENANCY.

See "Tenancy in Common."

## JUDGES.

See, also, "Courts"; "Justices of the Peace."

The judge's relationship to the garnishee does not disqualify him in the main action.—*Patterson v. Seeton (Tex. Civ. App.)* 732.

## JUDGMENT.

Enforcement by creditors' suit, see "Creditors' Suit."

Sales under judgment, see "Judicial Sales."

In particular civil actions or proceedings.

On appeal or writ of error, see "Appeal and Error," § 19.

Probate proceedings, see "Wills," § 3.

In particular criminal prosecutions.

See "Criminal Law," § 9.

### § 1. On trial of issues.

It is error to render judgment without submitting cause.—*Aulick v. Reed (Ky.)* 331.

Judgment *held* to show on its face that a defendant not served was a member of defendant firm.—*Glasscock v. Price (Tex. Sup.)* 965.

After dismissal as to one partner, judgment cannot be rendered against firm.—*Glasscock v. Price (Tex. Sup.)* 965.

### § 2. Amendment, correction, and review in same court.

A personal judgment against a nonresident of whom jurisdiction was acquired by publication may be corrected by restricting it to the fund attached by the garnishment.—*Austin Nat. Bank v. Bergen (Tex. Civ. App.)* 1037.

### § 3. Opening or vacating.

Evidence in relation to the entry of a decree, in the absence of defendant or his counsel, *held* not to show fraud.—*Edwards v. Turner (Tenn. Ch. App.)* 144; *Turner v. Edwards, Id.*

The validity of a decree, the terms of which had been agreed on, *held* not affected by its entry after the death of an attorney representing a party not knowing of the entry.—*Edwards v. Turner (Tenn. Ch. App.)* 144; *Turner v. Edwards, Id.*

Exceptions to a petition to vacate a judgment on the ground that petitioner was a stranger thereto *held* properly sustained.—*McGhee v. Romatka (Tex. Civ. App.)* 282.

### § 4. Collateral attack.

A judgment against a county for costs not authorized by statute is void, and hence open to collateral attack.—*State v. Walker (Tenn. Sup.)* 417.

A judgment against a feme covert cannot be assailed collaterally on that ground.—*Carsor v. Taylor (Tex. Civ. App.)* 395.

A judgment is none the less res judicata because of evidence of perjury in the action in which it was rendered.—*Maddox v. Summerlin (Tex. Civ. App.)* 1020.

### § 5. Merger and bar of causes of action and defenses.

A judgment enforcing a mortgage lien is barred by the lapse of more than 15 years since its rendition.—*Worsham v. Lancaster (Ky.)* 448.

A judgment taking a petition for confessed, and reciting that defendant had paid plaintiff certain sums, precluded defendant from showing that he had paid an additional sum.—*Kent v. Riley (Ky.)* 1082.

A decree setting aside levy and sale of corporate stock, under execution, on ground that stock is under pledge, *held* not a bar to subsequent suit to subject stock to attachment.—*McQuade v. Williams (Tenn. Sup.)* 427.

A complainant who sued a defendant for obstructing his right of way over defendant's land *held* estopped to invoke the right of the public in his behalf, by a decree entered in a previous suit between the same parties.—*Edwards v. Turner (Tenn. Ch. App.)* 144; *Turner v. Edwards, Id.*

A defense of res judicata *held* not established on a bill to establish a boundary, since the

Issues were not shown to be identical.—*Cherry v. York* (Tenn. Ch. App.) 184.

#### § 6. Conclusiveness of adjudication.

A judgment at law, adjudging that plaintiffs are entitled to the land in controversy, and transferring the case to equity to adjust the equities, is final and conclusive as to the right to the land.—*Worsham v. Lancaster* (Ky.) 448.

The fact that, in reviewing a judgment for defendant in trespass to try title, the appellate court stated that plaintiff was a mortgagee, did not enlarge the legal effect of the judgment, where it did not establish that fact otherwise.—*Morris v. Housley* (Tex. Civ. App.) 846.

Where plaintiff in trespass to try title asserted an absolute title, and defendant resisted on the ground that, if plaintiff had any interest, it was that of a mortgagee, *held*, that a judgment for defendant did not establish that plaintiff was a mortgagee.—*Morris v. Housley* (Tex. Civ. App.) 846.

#### § 7. Lien.

Judgment creditor *held* to acquire no lien where charge of fraud is not sustained.—*McClurg v. McSpadden* (Tenn. Sup.) 698.

#### § 8. Foreign judgments.

In action on foreign judgment, burden of proving lack of service in former action *held* to be on defendant.—*Russell v. Butler* (Tex. Civ. App.) 406.

#### § 9. Payment, satisfaction, merger, and discharge.

On a motion to set off one judgment against another, the party resisting the set-off cannot read as evidence his pleading in the former action.—*Bush v. Monroe* (Ky.) 215.

The defendant in a judgment may set off against it a judgment against the plaintiff, assigned to him by another.—*Bush v. Monroe* (Ky.) 215.

That judgment against husband had not been satisfied when suit to establish property of wife was begun *held* not established by production of an execution returned, "No property found."—*Maddox v. Summerlin* (Tex. Civ. App.) 1020.

### JUDICIAL NOTICE.

In criminal prosecutions, see "Criminal Law," § 5.

### JUDICIAL SALES.

Of property of decedent, see "Executors and Administrators," § 6.  
On execution, see "Execution," § 3.

One who has filed exceptions to a report of sale which have been overruled cannot thereafter maintain an action to have the sale set aside on other grounds without alleging that he had no knowledge or information as to such grounds at the time he filed his exceptions.—*Fishback v. Columbia Bldg. Ass'n* (Ky.) 575.

For irregularity in decree in failing to fix terms and conditions of sale, the sale should be set aside, the price being grossly inadequate.—*Underwood's Adm'r v. Cartwright* (Ky.) 580.

A sale of land will not be set aside on the ground that the deputy commissioner signed the report of sale in his own name, instead of in the name of the master commissioner by himself as deputy.—*Bean v. Megular* (Ky.) 771.

Sale under trust deed without order of court pending action to set aside conveyance *held* valid.—*McClurg v. McSpadden* (Tenn. Sup.) 698.

Taxes accruing between the sale of land and confirmation *held* properly paid out of proceeds under Shannon's Code, § 969.—*Rogers v. Rogers* (Tenn. Sup.) 701.

A purchaser who bids as a judgment creditor must be the owner of the judgment under which he seeks to have his bid satisfied.—*Campbell v. Atwood* (Tenn. Ch. App.) 168.

### JURISDICTION.

Effect of appearance, see "Appearance."

*Jurisdiction of particular actions or proceedings.* See "Divorce," § 1; "Ejectment," § 2; "Habeas Corpus," § 2; "Mandamus," § 2.

#### Special jurisdictions.

See "Equity," § 1.

Appellate jurisdiction, see "Appeal and Error," § 2; "Criminal Law," § 10.  
Particular courts, see "Courts."

### JURY.

Custody and conduct, see "Criminal Law," § 7; "Trial," § 6.

Grounds for reference instead of trial by jury, see "Reference," § 1.

Instructions in civil actions, see "Trial," § 5.

Questions for jury in criminal prosecutions, see "Criminal Law," § 7.

Taking case or question from jury at trial, see "Trial," § 4.

Verdict in civil actions, see "Trial," § 7.

#### § 1. Right to trial by jury.

Where, in ejectment, question of fact as to time of abandonment of homestead is involved, transfer of cause to equity court *held* prejudicial error.—*Cole v. Mettee* (Ark.) 407.

Right to a jury trial on interpleader in attachment *held* to have been waived.—*Walsh v. Tyler* (Ind. T.) 308.

#### § 2. Summoning, attendance, discharge, and compensation.

The court may excuse a juror, though he does not make his excuse known on the call for excuses, but only when called for purpose of being passed on by the parties.—*Goodall v. State* (Tex. Cr. App.) 359.

#### § 3. Competency of jurors, challenges, and objections.

Under Cr. Code, § 215, requiring each party to exhaust his challenges to each juror before the other begins, where a juror was accepted by the commonwealth, and not challenged by the defense, the defendant could not, after the panel was filled, peremptorily challenge such juror.—*Wiggins v. Commonwealth* (Ky.) 1073.

Under Shannon's Code, §§ 4687, 5824, 5840, the withdrawal of a juror on the trial of a civil cause, and the seating of another in his place, does not enlarge the right to peremptory challenges.—*Bruce v. Beall* (Tenn. Sup.) 204.

The statute disqualifies a juror related to a prosecuting witness in the sixth degree.—*Hamilton v. State* (Tenn. Sup.) 695.

It is no ground for challenge that defendant's counsel had been involved in litigation against a juror.—*Goodall v. State* (Tex. Cr. App.) 359.

Denying defendant's challenge to certain jurors *held* not prejudicial error where he afterwards peremptorily challenged them.—*Sawyer v. State* (Tex. Cr. App.) 650.

The examination of talesmen before all the special veniremen were found and examined, *held*, under the circumstances, not prejudicial error.—*Sawyer v. State* (Tex. Cr. App.) 650.

A juror, because of his statement as to conscientious scruples against inflicting the death

penalty, *held* disqualified to sit in a prosecution for rape.—*Sawyer v. State* (Tex. Cr. App.) 650.

Opinions as to guilt, expressed on the voir dire, *held* not to disqualify jurors.—*Sawyer v. State* (Tex. Cr. App.) 650.

A juror who had an opinion as to defendant's guilt, but stated he could give defendant an impartial trial, *held* competent.—*Hamlin v. State* (Tex. Cr. App.) 656.

Jurors who heard arguments of former prosecution of defendant *held* competent.—*Armstrong v. State* (Tex. Cr. App.) 1006.

#### § 4. Impaneling for trial and oath.

It was not error to require the trial to proceed before the regular panel of jurors, when the effort to secure a venire with special qualifications proved fruitless.—*Bruce v. Beall* (Tenn. Sup.) 204.

A panel is properly filled with talesmen where all the regular jury except seven are trying another case, and have been out considering it for a long time.—*Leslie v. State* (Tex. Cr. App.) 367.

## JUSTICES OF THE PEACE.

### § 1. Review of proceedings.

Demand for jury and continuance by consent in circuit court *held* to waive objection to irregularity in an appeal from justice.—*Lookout Mountain I. & L. Ry. Co. v. Flowers* (Tenn. Sup.) 485.

On appeal from a judgment of a justice, in an action for trespass on land, the circuit court cannot try the question of title, since the justice had no jurisdiction to do so.—*Cherry v. York* (Tenn. Ch. App.) 184.

Irregularity in entering a judgment does not affect the right of either party to appeal if the justice had jurisdiction of the case.—*American Cotton Bale Improvement Co. v. Forsgard* (Tex. Civ. App.) 475.

The plaintiff may appeal from a judgment in his favor without filing a bond.—*American Cotton Bale Improvement Co. v. Forsgard* (Tex. Civ. App.) 475.

A plaintiff seeking to recover less than \$20 may appeal from a judgment that he take nothing, and defendant go hence, where defendant's plea in reconvention was for \$90.—*Schneider v. Luckie* (Tex. Civ. App.) 685.

The district court's jurisdiction of an appeal, once acquired, is not defeated by the reduction of the amount in controversy to less than \$20 by defendant's withdrawal of his plea in reconvention.—*Schneider v. Luckie* (Tex. Civ. App.) 685.

Defendant does not abandon his plea in reconvention by failure to appeal from a judgment that plaintiff take nothing, even where the plea exceeds plaintiff's demand.—*Schneider v. Luckie* (Tex. Civ. App.) 685.

## JUSTIFICATION.

Of homicide, see "Homicide," § 4.

## LACHES.

Effect in equity, see "Equity," § 2.

## LANDLORD AND TENANT.

See, also, "Use and Occupation."

### § 1. Creation and existence of the relation.

Where a contract for the sale of land provided that, if the vendor could not make deed, the purchaser was to pay rent, the vendor

having failed to make deed within the time agreed, the relation of landlord and tenant existed, and the landlord was entitled to enforce restitution by writ of forcible detainer.—*Eaton v. Hunt* (Ky.) 763.

Under a contract to purchase land if the title is good, or pay rent for its use if the title fails, the tenant is not liable for rent until the failure of title is shown.—*Cross v. Freeman* (Tex. Civ. App.) 473.

### § 2. Tenancies from year to year and month to month.

Tenant from month to month must give 30 days' notice of intent to vacate.—*Stewart v. Murrell* (Ark.) 130.

### § 3. Premises, and enjoyment and use thereof.

In an action to evict a lessee for nonpayment of rent, where he alleged lessor had failed to put him in possession of all the property leased, *held*, that parol evidence concerning the occupancy of a house on the premises by the mother of lessor was admissible.—*Geary v. Parker* (Ark.) 238.

Under Mansf. Dig. § 3348, the tenant has a reasonable time after service of notice to quit to fulfill his contract or to vacate before suit is brought.—*Geary v. Parker* (Ark.) 238.

### § 4. Rent and advances.

Mechanics who have made improvements on the leased premises upon the faith of the landlord's agreement that they might be paid for by the tenant out of rent then due are entitled to priority over the landlord in the distribution of the proceeds of the tenant's property sold to satisfy the landlord's lien.—*Rubel v. Avritt* (Ky.) 460; *Lanham v. Same*, *Id.*

An agreement by a landlord that plaintiff should be paid out of rent for improvements on the leased premises did not entitle plaintiff to a personal judgment against the landlord.—*Rubel v. Avritt* (Ky.) 460; *Lanham v. Same*, *Id.*

Though an action cannot be maintained on a written lease of land for three years, because not signed by the lessee, rent may be recovered for the time the land was actually occupied.—*Pepper's Adm'x v. Harper* (Ky.) 620.

Though tenant abandons premises, action for installment of rent can be brought without bar to recovery for subsequent installments as they accrue.—*Barnes v. Black Diamond Coal Co.* (Tenn. Sup.) 498.

One must have not only an assignment of the arrears of rent, but a transfer of the reversion to distrain for the rent.—*Manis v. Flood* (Tex. Civ. App.) 1017.

### § 5. Re-entry and recovery of possession by landlord.

If the full amount of rent due be tendered the landlord before he sues as for unlawful detainer, though the tender be not made until he has demanded the premises for nonpayment of rent, his action must fail.—*Geary v. Parker* (Ark.) 238.

### § 6. Renting on shares.

Evidence *held* to show that certain items of an account between the landlord of a farm and the tenant had been already adjusted.—*Cunningham v. Davis* (Tenn. Ch. App.) 140.

Where the lessor agreed to stock the farm, and was to receive a certain portion of the increase, he was entitled to such portion, although the stock was not his own.—*Cunningham v. Davis* (Tenn. Ch. App.) 140.

Where the lessee of a farm sold property at or prior to a certain date belonging to the lessor, it was proper to allow the lessor interest on the charge from that date on an adjustment of accounts.—*Cunningham v. Davis* (Tenn. Ch. App.) 140.



A landlord *held* entitled to certain credits on an adjustment of accounts between him and his tenant under a farming lease.—*Cunningham v. Davis* (Tenn. Ch. App.) 140.

## LANDS.

See "Public Lands."

## LARCENY.

See, also, "False Pretenses"; "Robbery."

### § 1. Offenses, and responsibility therefor.

Copper boxes connected with a still by a pipe screwed into the still, though constructively a part of the freehold, are the subject of larceny.—*Clement v. Commonwealth* (Ky.) 450.

### § 2. Prosecution and punishment.

That the word "gilt," in indictment for hog-stealing, is spelled "guilt," does not vitiate indictment.—*State v. Lucas* (Mo.) 1087.

Testimony of witness' statement out of court regarding peculiarity of a rooster alleged to have been stolen, which peculiarity the rooster in question then manifested, *held* inadmissible.—*Roberts v. State* (Tex. Cr. App.) 358.

Evidence *held* to establish the corpus delicti.—*Tidwell v. State* (Tex. Cr. App.) 468.

On trial for theft and for receiving stolen property, an instruction to acquit if the property was bought believing the seller authorized to sell, regardless of whether he was in effect so authorized, *held* proper.—*Houston v. State* (Tex. Cr. App.) 468.

Instruction on misdemeanor *held* properly refused.—*Donaho v. State* (Tex. Cr. App.) 469.

Instruction as to possession of stolen property *held* properly refused.—*Brooks v. State* (Tex. Cr. App.) 640.

Application for continuance *held* properly refused.—*Brooks v. State* (Tex. Cr. App.) 640.

Where a defective indictment will be complete by the rejection of a word, it will be rejected as surplusage, and the indictment sustained.—*Matthews v. State* (Tex. Cr. App.) 647.

One accused of stealing cattle is not entitled to a charge that conviction cannot be had on confession alone, where there was evidence to show the cattle were stolen.—*Matthews v. State* (Tex. Cr. App.) 647.

Where evidence showed that accused was near accomplice, going towards where stolen property was concealed, *held* not error to refuse instruction to disregard the evidence unless accused was near accomplice.—*Nash v. State* (Tex. Cr. App.) 649.

Evidence that an accomplice was seen, after a theft, going towards where stolen property was concealed, followed by accused, *held* admissible against accused as showing that they were going after it.—*Nash v. State* (Tex. Cr. App.) 649.

Evidence *held* to connect accused with the theft, and sufficient as a corroboration of an accomplice.—*Hankins v. State* (Tex. Civ. App.) 992.

An instruction that, to convict, accused must have been concerned in the original taking, accompanied by a definition of a "principal," is sufficient.—*Hankins v. State* (Tex. Cr. App.) 992.

Evidence *held* sufficient to sustain conviction.—*Piland v. State* (Tex. Cr. App.) 1007.

Evidence *held* insufficient to sustain a conviction for theft of a dog.—*Hicks v. State* (Tex. Cr. App.) 1016.

## LEASES.

See "Landlord and Tenant."

## LEGACIES.

See "Wills."

## LEVY.

See "Attachment"; "Execution."

## LIBEL AND SLANDER.

### § 1. Privileged communications, and malice therein.

Matter alleged in an answer, if pertinent and relevant, can never give a right of action for libel, though false and alleged with malice.—*Gains v. Aetna Ins. Co.* (Ky.) 884.

### § 2. Justification and mitigation.

That defendant's correspondent was imposed on is no defense to an action for libel.—*Courier-Journal Co. v. Sallee* (Ky.) 226.

### § 3. Actions.

It was competent for plaintiff to show that defendant had received from the same correspondent and published a letter containing a correct account of the injury to which the subsequent libelous publication related.—*Courier-Journal Co. v. Sallee* (Ky.) 226.

Punitive damages may be recovered for a libel if the words were published recklessly, even without special ill will.—*Courier-Journal Co. v. Sallee* (Ky.) 226.

### § 4. Slander of property or title.

In slander of title, plaintiff, under Sayles' Civ. St. art. 3347, may prove title by limitations without pleading it.—*Hines v. Lumpkin* (Tex. Civ. App.) 818.

Lawyer employed to examine title to realty *held* guilty of slandering title if he falsely and maliciously declares it bad, when he knows it good, or could have known the fact by ordinary prudence.—*Hines v. Lumpkin* (Tex. Civ. App.) 818.

Lawyer employed to examine title, as shown by an abstract, would not be liable for slander if he declared it bad, though the records might show a perfect title.—*Hines v. Lumpkin* (Tex. Civ. App.) 818.

### § 5. Criminal responsibility.

The state is not required to prove on the trial the consent of the person slandered to the finding of the indictment.—*Conrand v. State* (Ark.) 628.

Under Sand. & H. Dig. § 2126, the objection that an indictment for slander was not found with consent of the person slandered is waived if not taken by motion to set the indictment aside.—*Conrand v. State* (Ark.) 628.

In a prosecution for slander, a verdict that accused is guilty is sufficient, since the crime does not consist of different degrees.—*Conrand v. State* (Ark.) 628.

## LIENS.

*Liens acquired by particular remedies or proceedings.*

See "Garnishment," § 8; "Taxation," § 5.

*Particular classes of liens.*

See "Maritime Liens"; "Mechanics' Liens."

Pledge, see "Pledges."

Vendor's lien on lands sold, see "Vendor and Purchaser," § 6.

Civ. Code, § 692, does not authorize the enforcement of a lien asserted by cross petition without summons thereon, where the cross-petition plaintiff is merely made a defendant to

the original petition, without any statement as to whether he has a lien, nor does that section apply to liens acquired pending the action.—*Mitchell v. Fidelity Trust & Safety-Vault Co. (Ky.)* 446.

The default of a debtor *held* not to prevent him from asserting the waiver of a statutory lien, where such default has been occasioned in part by the default of the creditor.—*Casey & Hedges Mfg. Co. v. Weatherly (Tenn. Sup.)* 432.

A contract to perfect title to lands, and to sell them for a compensation out of the proceeds, *held* not to create a lien on them.—*Girard v. Barnard (Tex. Civ. App.)* 482.

## LIFE ESTATES.

A gift for the life of the donee may be made of personal property which will not be consumed in the use.—*Johnson's Adm'r v. Johnson (Ky.)* 883.

On facts pleaded, *held*, that the party claiming land showed only a reversionary interest, and hence his right of action accrued only on the death of the life tenant.—*Caffey's Ex'rs v. Cooksey (Tex. Civ. App.)* 66.

## LIFE INSURANCE.

See "Insurance," § 6.

## LIMITATION OF ACTIONS.

Laches, see "Equity," § 2.

### § 1. Statutes of limitation.

An action on a note by a surety who has paid it, against the maker, may be brought within five years, under Mansf. Dig. § 4483, governing actions on written obligations.—*Sparks v. Childers (Ind. T.)* 316.

A mortgage debt being barred by limitations, the lien is also barred.—*Worsham v. Lancaster (Ky.)* 448.

An execution debt being barred, the lien of the execution plaintiff acquired by his purchase of mortgaged land at a sale made under the execution is also barred.—*Worsham v. Lancaster (Ky.)* 448.

A pleading seeking relief on the ground of fraud, which shows that more than 10 years have elapsed since the fraud, is bad on demurrer.—*Gowdy v. Johnson (Ky.)* 624.

The 30-years statute of limitations (Rev. St. 1889, § 6770, in regard to the recovery of real estate, the equitable title of which shall have emanated from the government, also applies to cases where the "legal" title has emanated from the government.—*Collins v. Pease (Mo.)* 925.

Rev. St. 1889, § 6770, providing that 30 years' nonpossession and nonpayment of taxes shall be a bar to an action to recover land, contains no saving clause in favor of persons under disability, and hence a court cannot make any exceptions in their favor.—*Collins v. Pease (Mo.)* 925.

The burden *held* on one pleading coverture to show that coverture existed at time the suspension of the statute during the Civil War ceased.—*McConnico v. Thompson (Tex. Civ. App.)* 537.

Action for goods lost in transit is barred in two years, as provided in Rev. St. 1895, art. 3354.—*Galveston, H. & S. A. Ry. Co. v. Clemmons (Tex. Civ. App.)* 731.

### § 2. Computation of period of limitation.

The seven years which will bar an action against a surety in a note must be counted

from the maturity, and not from the execution, of the note.—*Dohn v. Bronger (Ky.)* 619.

The failure of a court to order papers destroyed in a chancery case supplied does not terminate the case, so as to set the statute of limitations in motion, especially where there are funds in the case to be distributed.—*Weaver v. Ruhm (Tenn. Ch. App.)* 171.

A chancery suit no longer carried on the docket is not by that fact terminated, so as to set the statute of limitations in motion, especially where there are funds in the case to be distributed.—*Weaver v. Ruhm (Tenn. Ch. App.)* 171.

Right of action by old county against county created out of it, to recover the latter's proportion of the debt of the original county, does not arise until discontinuance of payment by such new county.—*Hardeman County v. Foard County (Tex. Civ. App.)* 30.

Where trust deed provided that note should become due on default of interest, and the note provided that on such default it should become due on election of payee, limitations did not run until such election.—*Bowman v. Rutter (Tex. Civ. App.)* 52.

Where mortgage note provided that payee could elect to declare it due on default of interest, where he did not so elect limitations did not commence to run from such default.—*Bowman v. Rutter (Tex. Civ. App.)* 52.

An amended petition alleging negligence in defendant's foreman and in the machinery generally does not state a new cause of action, though the original petition confined the negligence to a portion of the machinery.—*Caswell v. Hopson (Tex. Civ. App.)* 54.

Statute does not commence to run, on the construction of a ditch by a city, against action for damages to property, so as to bar recovery for subsequent damages, where the property was not directly invaded.—*City of Houston v. Parr (Tex. Civ. App.)* 393.

The statutes of limitations begin to run against heirs holding subject to the life estate in their father at the time the estate is cast, and not at death of life tenant.—*McConnico v. Thompson (Tex. Civ. App.)* 537.

### § 3. Acknowledgment, new promise, and part payment.

There can be no recovery on a new promise to pay a debt already barred, unless the promise is clear and absolute.—*Chism v. Barnes (Ky.)* 232.

A promise to pay a debt barred by limitations will not be implied from a conditional or qualified acknowledgment of the debt.—*Chism v. Barnes (Ky.)* 875.

A written request for extension of time, and written notice of payment of interest, *held* to remove bar of limitations.—*Clayton v. Watkins (Tex. Civ. App.)* 810.

### § 4. Pleading, evidence, and province of court and jury.

Where plaintiff admitted limitations, but alleged facts relieving him of the bar, which were not denied, plea that cause of action arose more than a year before suit presents immaterial issue.—*Southern Ry. Co. v. Harris (Tenn. Sup.)* 1096.

By pleading title under a deed, and seeking equitable relief, grantee was estopped from pleading limitations to a count for damages for failure to execute the consideration.—*San Antonio & A. P. Ry. Co. v. Gurley (Tex. Sup.)* 513.

A petition declaring on a note apparently barred, and on written promises not barred admitting the justness of the debt, and promising to pay it, *held* to state a cause of action.—*Clayton v. Watkins (Tex. Civ. App.)* 810.

**LIMITED PARTNERSHIP.**

See "Partnership," § 6.

**LIQUOR SELLING.**

See "Intoxicating Liquors."

**LIVE STOCK.**

Carriage of, see "Carriers," § 3.

**LOAN ASSOCIATIONS.**

See "Building and Loan Associations."

**LOCAL ACTIONS.**

See "Venue," § 1.

**LOCAL LAWS.**

See "Statutes," § 2.

**LOCAL OPTION.**

Traffic in intoxicating liquors, see "Intoxicating Liquors," § 1.

**LUNATICS.**

See "Insane Persons."

**MALICE.**

See "Libel and Slander," § 1.

**MANDAMUS.****§ 1. Subjects and purposes of relief.**

Mandamus lies to compel the county judge and justices of the peace to levy a tax which it is made their duty by statute to levy.—Fleming v. Dyer (Ky.) 444.

Mandamus will not issue to compel county judge to audit illegal cost bill.—State v. Wilbur (Tenn. Sup.) 411; Same v. Martin, Id.; Walker v. State, Id.

Invalidity of a municipal ordinance, under which offenses also punishable by statute are being prosecuted, is no ground for a writ to compel the court to permit the county attorney to take charge of the prosecutions.—Jackson v. Swayne (Tex. Sup.) 711.

The writ will be refused where there is an adequate legal remedy.—Jackson v. Swayne (Tex. Sup.) 711.

Where a court is void, mandamus will not lie to compel it to permit the county attorney to take charge of certain prosecutions therein.—Jackson v. Swayne (Tex. Sup.) 711.

Mandamus will lie to compel a court of civil appeals to find conclusions of fact, when it wholly fails to do so, but not to correct insufficient conclusions.—Moore v. Waco Bldg. Ass'n (Tex. Sup.) 716.

A petition to compel a justice of the peace to certify appeal papers to a county court *held* insufficient.—White v. Meyers (Tex. Civ. App.) 476.

A judge may be directed by mandamus to proceed to the trial of an issue as to the ability of plaintiff in error to pay the costs of an appeal, as provided by Rev. St. 1895, art. 1401, since it is not an attempt to control his judgment.—Cox v. Hightower (Tex. Civ. App.) 1048.

Mandamus lies to compel the court in which a judgment was entered to determine the issue

as to the ability of plaintiff in error to pay the costs of an appeal, under Rev. St. 1895, art. 1401.—Cox v. Hightower (Tex. Civ. App.) 1048.

**§ 2. Jurisdiction, proceedings, and relief.**

Application for mandamus to compel a court of civil appeals to find additional conclusions of fact comes too late after refusal of writ of error.—Moore v. Waco Bldg. Ass'n (Tex. Sup.) 716.

The supreme court will examine petition for mandamus before ordering citation, and dismiss it without process when of the opinion that it should not be granted.—Moore v. Waco Bldg. Ass'n (Tex. Sup.) 716.

**MANDATE.**

See "Mandamus."

**MANSLAUGHTER.**

See "Homicide," § 2.

**MARITIME LIENS.****§ 1. Creation, operation, and effect.**

Lien *held* waived by agreement to give credit for purchase price beyond statutory time for its enforcement.—Casey & Hedges Mfg. Co. v. Weatherly (Tenn. Sup.) 432.

**§ 2. Enforcement.**

Under Shannon's Code, § 5313 et seq., a demand is a prerequisite to enforcement of lien, and defense that it was not made may be raised by answer.—Casey & Hedges Mfg. Co. v. Weatherly (Tenn. Sup.) 432.

**MARRIAGE.**

See "Divorce"; "Husband and Wife."

**MARRIED WOMEN.**

See "Husband and Wife."

**MASTER AND SERVANT.****§ 1. Master's liability for injuries to servant.**

An employé injured by the breaking of a wire rope which he had found to be a little rusty *held* not guilty of contributory negligence.—Purcell Mill & Elevator Co. v. Kirkland (Ind. T.) 311.

An employer *held* guilty of negligence in not testing a wire rope after he was informed by the employé that it was rusty.—Purcell Mill & Elevator Co. v. Kirkland (Ind. T.) 311.

A master directing a servant to use a wire rope in ascending a smokestack 60 feet high must himself see to it that the wire is safe.—Purcell Mill & Elevator Co. v. Kirkland (Ind. T.) 311.

A master's failure to promise that he would supply a new appliance is not obviated by the servant's belief that such new appliance would be supplied when he was injured by defects in the old one.—Purcell Mill & Elevator Co. v. Kirkland (Ind. T.) 311.

Evidence *held* to show that an employer had not promised his employé a new appliance before a defect in the old one caused the injury sued for.—Purcell Mill & Elevator Co. v. Kirkland (Ind. T.) 311.

A mining company is liable for the death of its servant resulting from its failure to use proper care to prevent the accumulation of gases.—Lexington & Carter County Min. Co. v. Stephens' Adm'r (Ky.) 321.

A railroad company is liable to a brakeman only for the gross negligence of his superiors.—*Louisville & N. R. Co. v. Foard* (Ky.) 342.

A brakeman who is thrown from the pilot of an engine by the negligence of the fireman in charge, and is injured, may recover of the railroad company.—*Louisville & N. R. Co. v. Foard* (Ky.) 342.

It is error to permit plaintiff suing to recover damages for personal injuries to prove the neglect of a physician employed by defendant railroad company to treat his injuries.—*Louisville & N. R. Co. v. Foard* (Ky.) 342.

One employed in digging a ditch *held* to have assumed the danger of its caving where the loose character of the soil was apparent.—*Brown v. Chattanooga Electric Ry. Co.* (Tenn. Sup.) 415.

An employé who continues in the employment after the time when the master has promised to repair a defect has expired without the repair being made assumes the risk.—*Trotter v. Chattanooga Furniture Co.* (Tenn. Sup.) 425.

It is not negligence, as a matter of law, for a section hand, at command of track foreman, to attempt to board street car going three or four miles an hour.—*Chattanooga Electric Ry. Co. v. Lawson* (Tenn. Sup.) 489.

Track foreman running trolley car carrying tools and controlling the car *held* a vice principal in ordering track hands to board the car while in motion.—*Chattanooga Electric Ry. Co. v. Lawson* (Tenn. Sup.) 489.

Boss over the wiper of an engine house *held* not a vice principal.—*Knox v. Southern Ry. Co.* (Tenn. Sup.) 491.

Evidence *held* insufficient to show that the boss over the wipers was negligent, whereby the wiper was crushed by the center piece of the turntable.—*Knox v. Southern Ry. Co.* (Tenn. Sup.) 491.

Section boss operating brake on hand car *held* fellow servant of section hands under his order or traveling with him on the car.—*Nashville, C. & St. L. R. Co. v. Gann* (Tenn. Sup.) 493.

A section boss in not providing a proper brake for a hand car occupies position of master.—*Nashville, C. & St. L. R. Co. v. Gann* (Tenn. Sup.) 493.

Employés operating hand car assume risk of a known defect in the brake.—*Nashville, C. & St. L. R. Co. v. Gann* (Tenn. Sup.) 493.

An employé doing dangerous work under protest *held* to assume the risk.—*Corbett v. J. Allen Smith & Co.* (Tenn. Sup.) 694.

Where a division superintendent and conductor did all that was incumbent on them to stop the train, the movement of which caused a brakemen's death, *held*, that no recovery could be had therefor.—*Louisiana Western Extension Ry. Co. v. Carstens* (Tex. Civ. App.) 36.

A brakeman *held* to have assumed the risk in going between cars against his superior's orders, or without them, or assurance of protection, but not so if by orders and assurance that he would be protected against injury from the movement of the train.—*Louisiana Western Extension Ry. Co. v. Carstens* (Tex. Civ. App.) 36.

Proof of ordinary, and not gross, negligence *held* to be sufficient for a cause of action or defense.—*Louisiana Western Extension Ry. Co. v. Carstens* (Tex. Civ. App.) 36.

A charge *held* not on the weight of evidence nor objectionable, as selecting and laying stress on particular testimony.—*Louisiana Western Extension Ry. Co. v. Carstens* (Tex. Civ. App.) 36.

In an action for a brakeman's death, charges stating the rules where an employé seeks to recover for defective machinery *held* inapplicable.—*Louisiana Western Extension Ry. Co. v. Carstens* (Tex. Civ. App.) 36.

In an action against a railroad company for a brakeman's death in a collision between cars, a charge on negligence of fellow servants *held* proper, with certain qualifications.—*Louisiana Western Extension Ry. Co. v. Carstens* (Tex. Civ. App.) 36.

In an action against a railroad company for a brakeman's death killed in a collision between cars, a charge *held* to call the court's attention to a substantive defense which should have been submitted.—*Louisiana Western Extension Ry. Co. v. Carstens* (Tex. Civ. App.) 36.

Where a brakeman was ordered into danger, between cars, *held* that, if he discovered or should have discovered his danger in time to have gotten out, no recovery could be had for his death.—*Louisiana Western Extension Ry. Co. v. Carstens* (Tex. Civ. App.) 36.

Act of foreman in ordering rope passed under electric wires *held* not negligent.—*Newnom v. Southwestern Telegraph & Telephone Co.* (Tex. Civ. App.) 669.

Where person ordered to pass rope under electric wires understands danger of contact with wires, he assumes risk, in obeying order.—*Newnom v. Southwestern Telegraph & Telephone Co.* (Tex. Civ. App.) 669.

Act of servant who touches electric wire while passing rope under it, and not act of foreman in ordering rope passed under, is proximate cause of injury.—*Newnom v. Southwestern Telegraph & Telephone Co.* (Tex. Civ. App.) 669.

An instruction, in an action for injuries, as to ordinary care and plaintiff's right of recovery, *held* not misleading.—*Texas & P. Ry. Co. v. Breadow* (Tex. Civ. App.) 816.

A proviso in an instruction in an action for injuries *held* not misleading.—*Texas & P. Ry. Co. v. Breadow* (Tex. Civ. App.) 816.

Yard master *held* not to assume risk of switch engine, on which he is riding, striking rock on track.—*Galveston, H. & H. R. Co. v. Bohan* (Tex. Civ. App.) 1050.

Use of word "natural" instead of "ordinary," in sentence "natural risks of employment," *held* harmless error.—*Galveston, H. & H. R. Co. v. Bohan* (Tex. Civ. App.) 1050.

Allegations as to negligence in petition *held* sufficient.—*Galveston, H. & H. R. Co. v. Bohan* (Tex. Civ. App.) 1050.

## § 2. Liabilities for injuries to third persons.

Testimony showing that railroad ties torn up in a wreck appeared not to be sound, and to be old ties, does not support a verdict for the death of a brakeman, obtained on the ground that defendant permitted the track to remain in an unsafe condition.—*Louisville & N. R. Co. v. Victory* (Ky.) 440.

Granting that the derailment of a train is evidence from which negligence as to a brakeman may be presumed, it does not support the averment of negligence in permitting the track to remain in an unsafe condition.—*Louisville & N. R. Co. v. Victory* (Ky.) 440.

A railroad company *held* not liable for a negligent act of an employé in running a hand car against a vehicle at a public crossing, while using it on a private errand.—*Branch v. International & G. N. R. Co.* (Tex. Sup.) 974.

A railroad hand car *held* not to come within the rule imposing on the master the duty of "consummate care" in the custody of things

dangerous in themselves.—*Branch v. International & G. N. R. Co.* (Tex. Sup.) 974.

A railroad company *held* not estopped to deny that the act of an employé in running a hand car without its consent was a part of the operation of the road.—*Branch v. International & G. N. R. Co.* (Tex. Sup.) 974.

## MECHANICS' LIENS.

### § 1. Nature, grounds, and subject-matter in general.

The provisions of the mechanic's lien law as to enforcing the lien *held* not to apply to liens created under the constitution for the improvement of homesteads.—*Myers v. Humphreys* (Tex. Civ. App.) 812.

### § 2. Operation and effect.

Mechanics' liens of a contractor and subcontractor take precedence of the lien of a mortgagee who took his mortgage with actual notice of the contract for the improvements, which had progressed to a considerable extent at the time of the execution of the mortgage.—*Humbolt Bldg. Ass'n v. Volmering* (Ky.) 1084.

A mistake in written contracts for improving a lot and adjacent parts of lots, intended to give the improver a lien therefor, in stating the number of feet frontage, *held* not to affect the extent of the lien.—*Bringinghurst v. Mutual Building & Loan Ass'n* (Tex. Civ. App.) 831.

### § 3. Waiver, discharge, release, and satisfaction.

A mechanic's lien *held* not waived by taking a renewal note for additional indebtedness and for additional security.—*Myers v. Humphries* (Tex. Civ. App.) 812.

### § 4. Enforcement.

Two contracts to build *held* one, in effect, so that a material man could not fix a lien on the amount due the contractor on the one building, where the cost of completing the other building, which the contractor had abandoned, was more in excess of the contract price than the amount due on the former building.—*Timmons v. Casey* (Tex. Civ. App.) 805.

The enforcement of mechanics' liens *held* not barred by four years' limitation, where a renewal note payable in five years, including additional indebtedness, was taken.—*Myers v. Humphries* (Tex. Civ. App.) 812.

An allegation, in a petition to foreclose a lien, of a legal conclusion, in that, by contracts set forth, a lien on described property was given, is sufficient.—*Bringinghurst v. Mutual Building & Loan Ass'n* (Tex. Civ. App.) 831.

## MEMORANDA.

Required by statute of frauds, see "Frauds, Statute of," § 4.

## MERGER.

Of cause of action in judgment, see "Judgment," § 5.

## MESSAGES.

See "Telegraphs and Telephones."

## MINORS.

See "Infants."

## MISREPRESENTATION.

See "False Pretenses."

## MONEY RECEIVED.

Recovery of price paid for land, see "Vendor and Purchaser," § 7.

## MORTGAGES.

Personal property, see "Chattel Mortgages."

### § 1. Requisites and validity.

A variance between the petition and mortgage, as to the number of acres in the mortgaged tract, is immaterial, the boundary given being the same.—*Mitchell v. Fidelity Trust & Safety-Vault Co.* (Ky.) 448.

### § 2. Construction and operation.

Mortgage construed, and *held* that clause excepting from the mortgage a portion of the property for a public street was waived by abandonment of the project of opening the street.—*Carter v. Foster* (Mo.) 6.

Junior mortgagee on purchase at tax sale *held* to acquire no title as against senior mortgagee.—*Chrisman v. Hough* (Mo.) 941.

An absolute deed, with agreement to reconvey, *held* not to pass legal title.—*Williamson v. Huffman* (Tex. Civ. App.) 276.

The title to mortgaged land remains in the mortgagor.—*Denison & P. Suburban Ry. Co. v. Smith* (Tex. Civ. App.) 278.

### § 3. Payment or performance of condition, release, and satisfaction.

The indorsee and holder of a note secured by deed of trust is, under Rev. St. 1889, § 7094, the person authorized to release same.—*Ripley Nat. Bank v. Connecticut Mut. Life Ins. Co.* (Mo.) 1.

Release of deed of trust by the payee of a note after transfer thereof *held* invalid.—*Ripley Nat. Bank v. Connecticut Mut. Life Ins. Co.* (Mo.) 1.

Evidence *held* not to show that a son of the mortgagor purchased at foreclosure sale in the interest of the mortgagor, so as to cancel the debt.—*Morris v. Housley* (Tex. Civ. App.) 846.

### § 4. Foreclosure by exercise of power of sale.

Power to sell under a trust deed *held* not affected by the death of the owner, where the time in which administration might have been taken out had not expired.—*Silverman v. Landrum* (Tex. Civ. App.) 404.

### § 5. Foreclosure by action.

Action to foreclose mortgage *held* governed by limitations applying to sealed instruments, where founded on covenant therein to pay the debt.—*New England Mortgage Sec. Co. v. Reding* (Ark.) 132.

A slight variance between the description of the land given in the judgment and that given in the mortgage or petition is immaterial.—*Mitchell v. Fidelity Trust & Safety-Vault Co.* (Ky.) 446.

Service of summons in any county in the state will authorize a personal judgment for the mortgage debt.—*Mitchell v. Fidelity Trust & Safety-Vault Co.* (Ky.) 446.

Bill to foreclose *held* prematurely filed.—*Union Trust Co. v. Chattanooga Electric Ry. Co.* (Tenn. Sup.) 422; *Bayley v. Same, Id.*

A sale under a trust deed without the knowledge of grantor, where the notice of sale was published in an obscure paper, and where the property was bid off by the grantee of the deed at one-third its value, *held* fraudulent, so as to be set aside.—*Stewart v. Hamilton Building & Loan Ass'n* (Tenn. Ch. App.) 1106.

In action to foreclose, where undisputed evidence showed it was not a homestead, it was not error to fail to charge in reference thereto.—*Bowman v. Rutter* (Tex. Civ. App.) 52.

Application by husband and wife for loan, stating that the property was not their home-

stead, *Acid* admissible on foreclosure to show that, if it ever was, it had been abandoned.—*Bowman v. Rutter* (Tex. Civ. App.) 52.

## MOTIONS.

Arrest of judgment in criminal prosecutions, see "Criminal Law," § 8.

Continuance in civil actions, see "Continuance." Direction of verdict in civil actions, see "Trial," § 4.

New trial in civil actions, see "New Trial," § 3. — in criminal prosecutions, see "Criminal Law," § 8.

## MUNICIPAL CORPORATIONS.

See, also, "Counties"; "Schools and School Districts," § 1.

Ordinances relating to intoxicating liquors, see "Intoxicating Liquors." Street railroads, see "Street Railroads."

### § 1. Creation, alteration, existence, and dissolution.

The chancellor may refuse to approve the annexation of territory which would receive no substantial advantage from the municipal government.—*Town of Latonia v. Hopkins* (Ky.) 248.

The fact that less than 75 per cent. of the freeholders of a town have remonstrated against the annexation of territory is not conclusive in favor of annexation.—*Town of Latonia v. Hopkins* (Ky.) 248.

Acts 1898, cc. 6, 13, 14, providing for the annexation of territory to the city of Memphis, etc., are so closely interwoven that the unconstitutionality of chapter 6, §§ 3, 4, invalidates all.—*Jones v. City of Memphis* (Tenn. Sup.) 138.

Acts 1898, c. 6, § 4, providing that certain territory annexed to the city of Memphis shall not receive the benefit of police protection, etc., is invalid, since all parts of a city are entitled to the same advantages.—*Jones v. City of Memphis* (Tenn. Sup.) 138.

On a division of a municipality, in the absence of legislative regulation, each portion will hold in severalty for public purposes the public property which falls within its limits.—*Prescott v. Town of Lennox* (Tenn. Sup.) 181.

### § 2. Proceedings of council or other governing body.

When a municipal charter requires a reference of any proceeding of the city council to the board of public works, such reference must be formally made to the board as such.—*Storrie v. Woessner* (Tex. Civ. App.) 837.

### § 3. Officers, agents, and employés.

The board of public safety in a city of the first class cannot remove a police officer without notice and investigation.—*Gorley v. City of Louisville* (Ky.) 263.

A city officer who has been removed cannot recover salary accruing subsequent to his removal, until it has been adjudged in a direct proceeding that his successor is a usurper.—*Gorley v. City of Louisville* (Ky.) 263.

A nonresident of the state cannot hold a city office.—*Barker v. Southern Const. Co.* (Ky.) 608.

An amendment to the charter of towns of the sixth class, providing how the vacancy in the "entire board" of trustees shall be filled, is not inconsistent with a subsequent amendment providing merely for the filling of "a vacancy," and the former is not repealed by the latter.—*Lewis v. Town of Brandenburg* (Ky.) 862.

Where a councilman was charged with asking for a bribe, and the proof showed merely that

he failed to disclose to the council that a bribe had been offered him, the variance was fatal.—*Hayden v. City Council of Memphis* (Tenn. Sup.) 182.

Where a judgment of amotion of a member of a city council recited that the council did not determine whether the member offered to take a bribe as charged, or whether he was offered a bribe, the judgment was without support.—*Hayden v. City Council of Memphis* (Tenn. Sup.) 182.

In proceedings to remove a member of a city council, formulated charges are essential.—*Hayden v. City Council of Memphis* (Tenn. Sup.) 182.

### § 4. Property.

Const. § 203, providing that no corporation shall lease any franchise so as to release itself from liabilities incurred in the operation of the franchise, has no application to municipal corporations.—*Carrollton Furniture Mfg. Co. v. City of Carrollton* (Ky.) 439.

### § 5. Public improvements.

Under Sand. & H. Dig. §§ 5334, 5335, an improvement assessment becomes a lien at once for its full amount, and can be satisfied only by a full payment of such amount.—*Sanders v. Brown* (Ark.) 461.

A judgment against the city for the cost of street improvements was proper where the abutting property was not liable.—*City of Louisville v. Gosnell* (Ky.) 211.

The reception by the city engineer of the work on a street, its approval by the council, and the issue of the apportionment warrants, do not conclusively establish the liability of the abutting property.—*City of Louisville v. Gosnell* (Ky.) 211.

The city is the sole judge of the necessity for street improvements.—*Bullitt v. Selvage* (Ky.) 255.

A street was not void as amounting to confiscation, though it equaled the value of the lots, and though the grade of the street was raised so as to render the lots worthless unless filled.—*Bullitt v. Selvage* (Ky.) 255.

A street assessment cannot be enforced to the extent that it is for the cost of keeping street in repair.—*Bullitt v. Selvage* (Ky.) 255.

No personal judgment can be rendered against property owners for the cost of street improvements.—*Barker v. Southern Const. Co.* (Ky.) 608.

It is improper to assess the cost of making sidewalks at an average price per yard for the whole length of a street, where the cost varies in different blocks.—*Barker v. Southern Const. Co.* (Ky.) 608.

To get a lien for street improvements, there must be a strict compliance with the substantial requirement of the statute.—*Barker v. Southern Const. Co.* (Ky.) 608.

The council must fix the amount chargeable to the several property owners in assessing the cost of street improvements and not leave the matter to the clerk.—*Barker v. Southern Const. Co.* (Ky.) 608.

No lien exists for the cost of street improvements unless the contractor has given bond as required by the statute.—*Barker v. Southern Const. Co.* (Ky.) 608.

The authority of an agent to make a contract on behalf of the city must appear of record, in order to bind property owners.—*Barker v. Southern Const. Co.* (Ky.) 608.

A lien on abutting property for the cost of constructing a sewer has priority over a mortgage lien on the property, though the mortgage was executed before the improvement was made.—*Dressman v. Semonin* (Ky.) 767.

A resolution and contract for a street improvement *held* to create a liability in favor of the city against abutting owners.—*City of Waco v. Chamberlain* (Tex. Sup.) 527.

An ordinance *held* not to deprive the city council of its power, under the charter, to let contracts for street improvements without advertising for bids.—*City of Waco v. Chamberlain* (Tex. Sup.) 527.

The city council's authority under its charter to let a contract for a street improvement without advertising for bids *held* not lost by first attempting to let it by advertising.—*City of Waco v. Chamberlain* (Tex. Sup.) 527.

A city charter *held* not to require a resolution for a street pavement to specify the kind of pavement to be used.—*City of Waco v. Chamberlain* (Tex. Sup.) 527.

Describing a proposed pavement as on "F. street, between the north line of M. street and the north line of K. street," *held* sufficient to charge abutters with notice.—*City of Waco v. Chamberlain* (Tex. Sup.) 527.

Const. art. 3, § 48, providing that the legislature shall not levy taxes except for specified purposes, does not prohibit the legislature from conferring on cities the power to impose special taxes on persons and property for street improvements.—*Storrie v. Woessner* (Tex. Civ. App.) 837.

Roll ownership of property affected by local improvement *held* sufficiently certified by the engineer.—*Harrell v. Storrie* (Tex. Civ. App.) 838.

Assessment for municipal improvement based on front-foot rule *held* valid.—*Harrell v. Storrie* (Tex. Civ. App.) 838.

That roll ownership of property to be assessed was not approved *held* no defense in action on improvement certificate where work was duly performed.—*Harrell v. Storrie* (Tex. Civ. App.) 838.

#### § 6. Police power and regulations.

City board of health *held* to have power to destroy building infected with smallpox as a nuisance.—*Waters v. Townsend* (Ark.) 1054.

Acts 1893, c. 84, § 4, *held* not to authorize a city to create a new privilege and then tax the same.—*International Trading-Stamp Co. v. City of Memphis* (Tenn. Sup.) 136.

A city council has no power to create a privilege and tax the same unless authorized by the legislature.—*International Trading-Stamp Co. v. City of Memphis* (Tenn. Sup.) 136.

San Antonio Charter, § 103 (Sp. Laws 1885, p. 11), does not authorize an ordinance requiring vendors of illuminating oils to pay the city oil inspector fees for inspecting such oils.—*Waters-Pierce Oil Co. v. McElroy* (Tex. Civ. App.) 272.

A city ordinance which is identical in terms with a section of the Penal Code is invalid.—*Ex parte Wickson* (Tex. Cr. App.) 643.

#### § 7. Use and regulation of public places, property, and works.

The owner of abutting property may recover damages for injury to his property caused by the grading of a street, whereby the flow of water has been changed, or the ingress and egress permanently interfered with.—*City of Ludlow v. Detweller* (Ky.) 881.

#### § 8. Torts.

A city *held* not liable for loss by fire through the negligence or inefficiency of its fire department, though a tax is specially levied to support the department.—*Irvine v. City of Chattanooga* (Tenn. Sup.) 419.

Attempting to drive a horse by a scraper left in the street *held* not to constitute contributory negligence.—*City of Weatherford v. Lowery* (Tex. Civ. App.) 34.

A city is liable for injuries sustained by one whose horse is frightened by a scraper left in the street after close of the day's work.—*City of Weatherford v. Lowery* (Tex. Civ. App.) 34.

#### § 9. Fiscal management, public debt, securities, and taxation.

Agricultural lands within the limits of a town are not exempt from municipal taxation.—*Town of Latonia v. Hopkins* (Ky.) 248.

Bonds issued under Ft. Worth City Charter, §§ 87, 87a, authorizing its council to issue bonds, are not invalid because negotiable.—*Winston v. City of Ft. Worth* (Tex. Civ. App.) 740.

Contracts, resolution, and ordinance relating to the purchase of waterworks and the erection of additions thereto *held* one transaction, in determining time of creation of the debt therefor, and the provision for its payment.—*Winston v. City of Ft. Worth* (Tex. Civ. App.) 740.

Ordinances providing for the issue of bonds *held* not to show that the debts for which they were to be issued were invalid.—*Winston v. City of Ft. Worth* (Tex. Civ. App.) 740.

Under certain recited circumstances, *held*, that a city might create a valid debt without complying with Const. art. 11, § 7.—*Winston v. City of Ft. Worth* (Tex. Civ. App.) 740.

#### § 10. Claims against corporation.

City ordinance *held* to give mayor a discretion as to whether physician conducting post mortem shall receive a fee.—*Frank v. City of St. Louis* (Mo.) 508.

#### § 11. Actions.

A petition against the trustees of a town may be amended so as to make the town a defendant.—*Town of Latonia v. Hopkins* (Ky.) 248.

### MURDER.

See "Homicide," § 1.

### MUTUAL BENEFIT SOCIETIES.

See "Beneficial Associations."

### NAMES.

See, also, "Trade-Marks and Trade-Names."

A deed from Anton Metzger is not admissible to prove title in plaintiff who claims through Anton Metzger.—*Mattfield v. Cotton* (Tex. Civ. App.) 549.

### NATIONAL BANKS.

See "Banks and Banking," § 8.

### NAVIGABLE WATERS.

The owners of land fronting on the Ohio river, used by them as a wharf for hire, may enjoin another from mooring his barge to their property.—*Exterkamp v. Covington Harbor Co.* (Ky.) 1086.

### NEGLIGENCE.

Causing death, see "Death," § 1.

Measure of damages, see "Damages," § 2.

*By particular classes of parties.*

See "Municipal Corporations," § 8.

Employers, see "Master and Servant," § 1.

Railroad companies, see "Railroads," § 4.

Telegraph or telephone companies, see "Telegraphs and Telephones," § 1.

*Condition or use of particular species of property, works, or machinery.*

See "Railroads," § 4; "Street Railroads," § 1; "Turnpikes and Toll Roads," § 2.

**§ 1. Acts or omissions constituting negligence.**

A charge defining ordinary care as such as would be exercised by a person of ordinary prudence in the same situation "as plaintiff" *held* not error, though plaintiff, at the time of the injury to his property, was represented by an agent.—*Waco Artesian Water Co. v. Cauble* (Tex. Civ. App.) 538.

**§ 2. Contributory negligence.**

A child less than four years old cannot be guilty of contributory negligence.—*South Covington & C. St. Ry. Co. v. Herrklotz* (Ky.) 265.

The negligence of the parent cannot be imputed to the child, who is too young to be guilty of contributory negligence.—*South Covington & C. St. Ry. Co. v. Herrklotz* (Ky.) 265.

An experienced driver who attempts to drive through a street partly obstructed by a telephone company in laying its wires under ground, when he has full knowledge of the surroundings, assumes the risk, and for his death, resulting from injuries caused by his horse becoming frightened, there can be no recovery.—*Cain's Adm'r v. Ohio Val. Tel. Co.* (Ky.) 759.

**§ 3. Actions.**

In an action to recover damages for personal injuries, no instruction as to willful neglect should be given.—*Louisville & N. R. Co. v. Foard* (Ky.) 342.

Facts from which either negligence or ordinary care may be inferred are not sufficient to support a verdict for plaintiff.—*Louisville & N. R. Co. v. Victory* (Ky.) 440.

The rule confining the evidence to the particular acts of negligence charged does not apply where no specific acts of negligence are alleged.—*Chesapeake & O. Ry. Co. v. Dixon's Adm'r* (Ky.) 615.

A cause of action is not stated by complaint that on a certain day defendant "wrongfully and negligently killed" plaintiff's intestate.—*Chattanooga Cotton Oil Co. v. Shamblin* (Tenn. Sup.) 496.

Where no recovery of exemplary damages was sought in an action for negligence, a definition or allusion to gross negligence in the charge was improper.—*Louisiana Western Extension Ry. Co. v. Carstens* (Tex. Civ. App.) 36.

It is error for the court to charge that certain facts amount to negligence.—*Citizens' Ry. Co. v. Gifford* (Tex. Civ. App.) 1041.

When facts alleged in petition do not develop contributory negligence on plaintiff's part, it is unnecessary to allege due care on his part.—*Galveston, H. & H. R. Co. v. Bohan* (Tex. Civ. App.) 1050.

**NEGOTIABLE INSTRUMENTS.**

See "Bills and Notes."

**NEWLY-DISCOVERED EVIDENCE.**

Ground for new trial in civil actions, see "New Trial," § 2.

**NEW TRIAL.**

In criminal prosecutions, see "Criminal Law," § 8; "Homicide," § 8.

**§ 1. Nature and scope of remedy.**

*Thomp. & S. Code*, § 3122, *held* to preclude a third new trial, where the former new trials were granted on the merits.—*Louisville & N. R. Co. v. Green* (Tenn. Sup.) 221.

**§ 2. Grounds.**

Where exceptions to instructions given are specifically reserved in the bill of exceptions,

the failure to as specifically note them in the motion for a new trial is not an abandonment, if they are referred to in a general manner in the motion.—*Geary v. Parker* (Ark.) 238.

The discovery after trial of a copy of a will, which could not be found after diligent search before the trial, was sufficient to authorize a new trial, provided it would have changed the result.—*Collins v. Burge* (Ky.) 444.

Where the verdict is excessive because of error in the instructions, plaintiff may be required to reduce his judgment, if the amount of the excess can be determined from the proof, and defendant cannot then insist on a new trial.—*Johnson's Adm'r v. Johnson* (Ky.) 883.

Newly-discovered evidence, not of a conclusive character, does not authorize a new trial.—*Shely v. Shely* (Ky.) 1071.

Where the court's erroneous holding that a party's evidence made a *prima facie* case probably misled such party to refrain from adducing further testimony, the case will, on reversal, be remanded for a new trial.—*Rhodes v. Alexander* (Tex. Civ. App.) 754.

**§ 3. Proceedings to procure new trial.**

A petition for a new trial may be filed in the original action, and, when so filed, it is error to overrule it as a mere motion, without requiring the adverse party to plead.—*Hacket v. Rosenham* (Ky.) 450.

**NOTES.**

Promissory notes, see "Bills and Notes."

**NOTICE.**

See "Garnishment," § 2.

**NUISANCE.****§ 1. Private nuisances.**

A landowner may bring successive actions for a nuisance resulting from the outflowing of a sewer maintained by a city, which might abate it by an extension of the sewer.—*City of Chattanooga v. Dowling* (Tenn. Sup.) 700.

**§ 2. Public nuisances.**

To continuously suffer trains to stand across highways for more than five minutes at a time is a nuisance.—*Illinois Cent. R. Co. v. Commonwealth* (Ky.) 255.

**OBLIGATION OF CONTRACT.**

Laws impairing, see "Constitutional Law," § 4.

**OFFICERS.**

See, also, "Clerks of Courts"; "Coroners"; "District and Prosecuting Attorneys"; "Judges"; "Justices of the Peace"; "Receivers"; "Sheriffs and Constables."

Assessors of taxes, see "Taxation," § 4.

Corporate officers, see "Corporations," § 3.

County officers, see "Counties," § 2.

Municipal officers, see "Municipal Corporations," § 3.

State officers, see "States," § 1.

**§ 1. Appointment, qualification, and tenure.**

Act March 5, 1898, creating the board of penitentiary commissioners, and providing for their election by the legislature, is valid; the legislature having power to create inferior state offices, and to provide how they shall be filled.—*Commissioners of Sinking Fund v. George* (Ky.) 779.

The act creating board of penitentiary commissioners is void in so far as it fixes the term of one of the commissioners at more than four



years.—Commissioners of Sinking Fund v. George (Ky.) 779.

Though the legislature has no power to fix the term of an officer at more than four years, a statute fixing a term of six years is void only as to the excess.—Commissioners of Sinking Fund v. George (Ky.) 779.

An act creating a board of penitentiary commissioners, and conferring upon it the power to appoint officers of the penitentiaries theretofore conferred upon the commissioners of the sinking fund, put an end to the terms of officers of the penitentiaries who had been appointed by the commissioners of the sinking fund.—Commissioners of Sinking Fund v. George (Ky.) 779.

It was within the power of the legislature to put an end to the terms of officers by repealing the law under which they held.—Commissioners of Sinking Fund v. George (Ky.) 779.

Plaintiff, suing for damages for removal from office, must allege that causes set forth in petition for removal were untrue.—Hooten v. Orr (Tex. Civ. App.) 814.

## OPINION EVIDENCE.

In civil actions, see "Evidence," § 9.  
In criminal prosecutions, see "Criminal Law," § 5.

## ORDINANCES.

Municipal ordinances, see "Municipal Corporations," § 6.

## PARDON.

Pardon construed, and *held* to cover petit larceny.—Redd v. State (Ark.) 119.

## PARENT AND CHILD.

See "Guardian and Ward"; "Infants."

## PARTIES.

Competency as witnesses, see "Witnesses," § 1.  
Domicile or residence as affecting venue, see "Venue," § 2.  
Rights and liabilities as to costs, see "Costs," § 2.

*In particular actions or proceedings.*

See "Judgment," § 1; "Trespass," § 1; "Trove and Conversion," § 1.

*To particular classes of conveyances, contracts, or transactions.*

See "Fraudulent Conveyances," § 2.

### § 1. Defendants.

A deed conveying to the grantor's wife land which he held in trust for a former wife "and the issue of his body" passed no interest, and the grantee therein was not a necessary party to an action to enforce a lien on the land.—Park v. Humpich (Ky.) 768.

Under a deed conveying land to M. in trust for his wife "and the issue of his body," the wife being dead, the only child of M. is the sole beneficiary, and her children, having no interest, are not necessary parties to an action to enforce a lien on the land.—Park v. Humpich (Ky.) 768.

### § 2. New parties and change of parties.

Defendant cannot object, in a suit to rescind a sale made by him, that a certain person who furnished part of the consideration was not a plaintiff, where such person, on the death of the original plaintiff, became a plaintiff as one of his heirs, and adopted his pleadings.—Cabaness v. Holland (Tex. Civ. App.) 879.

### § 3. Defects, objections, and amendment.

In order to take advantage of the fact that plaintiff, as administrator with the will an-

nexed, cannot sue for land, defendant must file a special demurrer on that ground.—De Haven v. De Haven's Adm'r (Ky.) 597.

Misjoinder of parties must be pleaded in abatement.—Denison & P. Suburban Ry. Co. v. Smith (Tex. Civ. App.) 278.

## PARTITION.

### § 1. By acts of parties.

Averments *held* to charge a parol partition, and not a resulting trust.—Kash v. Coleman (Mo.) 503.

Facts *held* to establish a parol partition.—Kash v. Coleman (Mo.) 503.

### § 2. Actions for partition.

Where land in one county had been a part of another county, partition proceedings in the former county, in which it was assumed to sell the land, were void.—Hubbard v. Godfrey (Tenn. Sup.) 81.

The rule of common source applies, though the action is one of partition, where defendants make a case for the test of titles.—Smith v. Davis (Tex. Civ. App.) 101.

## PARTNERSHIP.

### § 1. The relation.

One who shares in the profits and losses of a business is a partner.—Sharpe v. McCreery (Ky.) 1076.

Mere participation in profits *held* not necessarily to constitute a partnership.—Mackie v. Mott (Mo.) 897.

Evidence *held* insufficient to show partnership.—Mackie v. Mott (Mo.) 897.

A partnership in a land venture construed as to its scope and to the power of a partner.—Spencer v. Jones (Tex. Civ. App.) 29.

### § 2. The firm, its name, powers, and property.

Where a firm name contains the surnames of all the partners, a conveyance to the firm vests title in partners.—Cole v. Mettee (Ark.) 407.

### § 3. Mutual rights, duties, and liabilities of partners.

A partner *held* estopped to deny that his co-partner had power to borrow money on notes due the firm.—Spencer v. Jones (Tex. Civ. App.) 665.

### § 4. Rights and liabilities as to third persons.

A partner in absolute control of the business has no right to assign the partnership property for the benefit of creditors of the concern.—Cox v. Swofford Bros. Dry-Goods Co. (Ind. T.) 303.

Land purchased with partnership funds, and used for partnership purposes, is to be treated as partnership property as to lien creditors of a partner who have acquired their liens with notice of the partnership character of the property.—Holmes v. Stix (Ky.) 243.

One partner is chargeable with fraud of another partner in procuring a note, whether he had actual knowledge or not.—Gill v. First Nat. Bank (Tex. Civ. App.) 751.

### § 5. Dissolution, settlement, and accounting.

Positive allegations of a plea cannot be overthrown on demurrer by the fact that dates stated therein conflict with facts stated.—Wiggins v. Basso (Tex. Sup.) 637.

### § 6. Limited partnership.

A testamentary direction to continue an investment unsuccessfully attempted to be made as a special partner *held* to make the estate chargeable with firm debts created after testa-

tor's death.—*Ussery v. Crusman* (Tenn. Ch. App.) 567; *Elliot v. Carney*, Id.

An attempted limited partnership *held* to be general as to third parties, though special as between the partners themselves, under Mill. & V. Code, §§ 2404, 2406.—*Ussery v. Crusman* (Tenn. Ch. App.) 567; *Elliot v. Carney*, Id.

A firm debt to one who unsuccessfully attempted to become special partner cannot be set off against a liability to pay firm debts, under Mill. & V. Code, § 2420, postponing special partners to all creditors in case of the firm's insolvency.—*Ussery v. Crusman* (Tenn. Ch. App.) 567; *Elliot v. Carney*, Id.

Under statute postponing claims of special partners of insolvent firms to all creditors, a firm note to an attempted special partner cannot be set off against the insolvent firm's current account against him individually.—*Savage v. Carney* (Tenn. Ch. App.) 571.

The liability of an estate as a general partner for firm debts *held* not an asset in hands of assignees of firm as to which it stood as a special partner.—*Savage v. Carney* (Tenn. Ch. App.) 571.

## PARTY WALLS.

Where an adjoining owner uses a party wall erected by the other adjoining owner under a contract between the parties, but not erected in full compliance with such contract, he is liable on a quantum meruit.—*Keith v. Ridge* (Mo.) 904.

## PASSENGERS.

See "Carriers," § 4.

## PAYMENT.

See, also, "Compromise and Settlement"; "Tender."

Subrogation on payment, see "Subrogation."

*Of particular classes of obligations or liabilities.* See "Mortgages," § 3.

Price of land sold, see "Vendor and Purchaser," § 4.

Evidence *held* not to show payment.—*Cunningham v. Davis* (Tenn. Ch. App.) 140.

The presumption that a debt long overdue has been paid is rebuttable.—*Shotwell v. McCordell* (Tex. Civ. App.) 39.

Where a lender took up vendor's lien notes, and built a house on borrower's homestead, without acquiring a lien therefor, his payments should be applied first to cancellation of the lien notes as the more onerous debt.—*Paschall v. Pioneer Savings & Loan Co.* (Tex. Civ. App.) 98.

## PERJURY.

### § 1. Prosecution and punishment.

An indictment, under the statute for false swearing, need not state the nature of the prosecution on the trial of which the defendant swore falsely.—*Cope v. Commonwealth* (Ky.) 436.

Defendant was not prejudiced by the exclusion of testimony tending to show that he was excited when he gave the alleged false testimony.—*Cope v. Commonwealth* (Ky.) 436.

Evidence of absent witnesses *held* material, so as to justify a continuance.—*Hull v. State* (Tex. Cr. App.) 472.

The court's error in failing to define "willfully" in a charge on perjury *held* harmless.—*Garza v. State* (Tex. Cr. App.) 983.

Instruction as to materiality of false testimony *held* error.—*McAvoy v. State* (Tex. Cr. App.) 1000.

False testimony *held* immaterial.—*McAvoy v. State* (Tex. Cr. App.) 1000.

## PERSONAL INJURIES.

See "Assault and Battery," § 1; "Negligence." Measure of damages, see "Damages," § 2. To employé, see "Master and Servant," § 1.

## PERSONAL PROPERTY.

See "Property."

## PETITION.

In pleading, see "Pleading," § 1.

## PHYSICIANS AND SURGEONS.

Where one obtaining the services of a physician knew the latter was going away, the physician is not responsible for the negligence or want of skill of the physician who continued the case under an independent contract.—*Keller v. Lewis* (Ark.) 755.

Physicians may testify as to value of physician's services.—*Camp v. Ristine* (Tenn. Sup.) 1098.

Rev. St. 1895, art. 3778, requiring the board of medical examiners to be composed of physicians graduated from colleges recognized by the American Medical Association, is not repugnant to Const. art. 16, § 81.—*Dowdell v. McBride* (Tex. Sup.) 524.

Evidence *held* insufficient to show that accused had practiced medicine five years consecutively prior to 1876, which, under Pen. Code 1895, art. 441, would allow him to practice without certificate.—*Ranald v. State* (Tex. Cr. App.) 976.

## PIERS.

See "Wharves."

## PLEA.

In civil actions, see "Pleading," § 2.

## PLEADING.

Conformity of judgment to pleadings, see "Judgment," § 1.

*Allegations as to particular facts, acts, or transactions.*

Statute of frauds, see "Frauds, Statute of," § 6.

*In particular actions or proceedings.*

See "Equity," § 3; "Trespass," § 1; "Trove and Conversion," § 1.

Indictment or criminal information or complaint, see "Indictment and Information."

Suits to set aside fraudulent conveyances, see "Fraudulent Conveyances," § 3.

### § 1. Declaration, complaint, petition, or statement.

A petition designating defendant as guardian may be good against him individually.—*Clift v. Newell* (Ky.) 270.

A petition for the recovery of land may refer to an exhibit filed therewith for the description of the land.—*De Haven v. De Haven's Adm'r* (Ky.) 597.

### § 2. Plea or answer, cross complaint, and affidavit of defense.

An allegation that an assignment for the benefit of creditors was fraudulent and void, and conveyed no title, states a mere conclusion, and is

insufficient.—Cox v. Swofford Bros. Dry-Goods Co. (Ind. T.) 303.

Under Mansf. Dig. § 5033, a plea that property claimed under an assignment from an individual is partnership property need not allege whether the partnership agreement is in writing.—Cox v. Swofford Bros. Dry-Goods Co. (Ind. T.) 303.

An answer denying that injury was inflicted through defendant's negligence does not deny the injury.—South Covington & C. St. Ry. Co. v. Herrklotz (Ky.) 265.

It was error to strike defendant's answer from the files for his refusal to paragraph, the answer as copied in the record being sufficiently paragraphed, and one of the paragraphs containing a good defense.—Dohn v. Bronger (Ky.) 619.

### § 3. Replication or reply and subsequent pleadings.

Allegation in answer not denied under oath must be taken as true.—Gill v. First Nat. Bank (Tex. Civ. App.) 751.

### § 4. Demurrer or exception.

The fact that conclusions of law are stated in connection with the facts in a pleading does not subject it to be stricken out on demurrer.—State v. Walker (Tenn. Sup.) 417.

### § 5. Amended and supplemental pleadings and replader.

An amendment to a complaint for personal injuries alleging that plaintiff was specially employed by defendant, instead of under defendant's general employment, does not change the cause of action.—Purcell Mill & Elevator Co. v. Kirkland (Ind. T.) 311.

Amendment may be allowed in title of action commenced by W. and B., the only parties in interest, changing it to "W. to the Use and for the Benefit of B."—Missouri, K. & T. Ry. Co. v. White (Ind. T.) 351.

It was not an abuse of discretion to permit an amended answer to be filed, to conform the issues to the proof.—Harris-Seller Banking Co. v. Bond (Ky.) 764.

There is no error in refusing to allow defendants to amend their answer on the trial to state matters which were necessarily within their knowledge before trial.—McGregor v. Skinner (Tex. Civ. App.) 398.

Allowing the filing by defendants of a trial amendment after judgment is not error where the ruling allowing it to be filed was made before trial.—Foster v. Eoff (Tex. Civ. App.) 399.

### § 6. Signature and verification.

Verification of plea in abatement held sufficient.—Armstrong v. State (Tenn. Sup.) 492.

### § 7. Issues, proof, and variance.

An allegation that an assignment for the benefit of creditors, under which property is claimed, is fraudulent and void, held surplusage, where the rest of the answer stated a good defense.—Cox v. Swofford Bros. Dry-Goods Co. (Ind. T.) 303.

Where plaintiff specifies in his petition the negligence complained of, he cannot recover by showing a different character of negligence.—Louisville & N. R. Co. v. Victory (Ky.) 440.

One is not estopped by an averment that a loan was made on a certain day to show that it was not consummated until a later day, where all the parties have so treated it.—United States Saving & Loan Co. v. Miller (Tenn. Ch. App.) 17; Peck v. Same, Id.

The defense in an action for failing to seize property under execution, that it was in possession of another officer, cannot be shown under a general denial.—Reilly v. Lewis (Tex. Civ. App.) 552.

Under petition alleging injury resulting from contact with two primary wires, testimony of plaintiff that he was guarding against such wires, and did not touch them, constitutes fatal variance.—Newnom v. Southwestern Telegraph & Telephone Co. (Tex. Civ. App.) 609.

A writing in evidence proposing terms of a contract, which were accepted without signing, was no variance from allegations setting forth the making of a contract in substantially the same terms.—Slayden v. Stone (Tex. Civ. App.) 747.

Where a pleading does not refer to credits on a note which the note offered in evidence shows, held no variance, it being alleged that installments of interest had been paid, and the credits are for such interest.—Myers v. Humphries (Tex. Civ. App.) 812.

### § 8. Defects and objections, waiver, and aid by verdict or judgment.

A demurrer is waived by filing an answer and a cross complaint after it has been overruled.—Thompson v. Brazile (Ark.) 299.

Fact that a plea of not guilty was filed to a declaration in assumpsit held immaterial after verdict.—Winn v. Fidelity Mut. Life Ass'n (Tenn. Sup.) 93.

A declaration is cured by a plea putting in issue facts improperly omitted from the declaration.—Bruce v. Beall (Tenn. Sup.) 204.

## PLEDGES.

A sale under which the seller reserves the privilege of buying back the property is not a pledge.—Spencer v. Jones (Tex. Civ. App.) 29.

## POLICE POWER.

Of municipality, see "Municipal Corporations," § 6.

## POSSESSION.

See "Adverse Possession."

## POWERS.

Of attorney, see "Principal and Agent."  
Of sale in mortgage, see "Mortgages," § 4.

### § 1. Construction and execution.

The purchaser is not bound to see that the proceeds are applied in accordance with the terms of the power under which the sale is made.—Young v. Mutual Life Ins. Co. (Tenn. Sup.) 428; Same v. Crozier, Id.

A conveyance for a consideration by warranty deed which stated the will as the source of the title held a sufficient execution of a testamentary power.—Young v. Mutual Life Ins. Co. (Tenn. Sup.) 428; Same v. Crozier, Id.

## PRACTICE.

Procedure of particular courts, see "Courts."

In particular civil actions or proceedings.

See "Ejectment"; "Habeas Corpus," § 2; "Mandamus," § 2; "Replevin"; "Trespass to Try Title," § 2; "Trover and Conversion," § 1.

Particular proceedings in actions.

See "Continuance"; "Costs"; "Damages," § 4; "Divorce," § 1; "Evidence"; "Execution"; "Judgment"; "Judicial Sales"; "Jury"; "Limitation of Actions"; "Parties"; "Pleading"; "Process"; "Reference"; "Removal of Causes"; "Stipulations"; "Trial"; "Venue."

Verdict, see "Trial," § 7.

Particular remedies in or incident to actions.

See "Attachment"; "Deposits in Court"; "Garnishment"; "Injunction"; "Receivers"; "Recognizances."

*Procedure in criminal prosecutions.*  
See "Bail."

*Procedure in exercise of special jurisdictions.*  
In admiralty, see "Maritime Liens," § 2.  
In equity, see "Equity."

*Procedure on review.*  
See "Exceptions, Bill of"; "Justices of the Peace," § 1; "New Trial."

## PREFERENCES.

In fraudulent conveyance, see "Fraudulent Conveyances," § 1.

## PRESUMPTIONS.

In civil actions, see "Evidence," § 2.  
In criminal prosecutions, see "Criminal Law," § 5.

## PRINCIPAL AND AGENT.

See, also, "Brokers"; "Factors."  
Corporate agents, see "Corporations," § 3.  
Insurance agents, see "Insurance," § 1.

### § 1. Mutual rights, duties, and liabilities.

Authority of agent to indorse draft cannot be questioned by principal, who received the proceeds, in an action to recover the same.—Wells, Fargo & Co. v. Simpson Nat. Bank (Tex. Civ. App.) 1024.

### § 2. Rights and liabilities as to third persons.

An agent to collect a note cannot exchange it for his note, as that is not a collection.—Farmers' & Drovers' Bank v. Bennett (Ky.) 623.

Actual knowledge by a principal of his agent's acts is essential to a ratification of the act.—Iron City Nat. Bank v. Fifth Nat. Bank (Tex. Civ. App.) 533.

Whether mere silence of principal, and failure to repudiate agent's acts within a reasonable time after knowledge thereof, amounts to ratification, is question for jury.—Iron City Nat. Bank v. Fifth Nat. Bank (Tex. Civ. App.) 533.

Act of agent within apparent authority held to bind principal.—Greer v. First Nat. Bank of Marble Falls (Tex. Civ. App.) 1045.

## PRINCIPAL AND SURETY.

See, also, "Bail"; "Recognizances."  
Liabilities of sureties on bonds for performance of duties of office or trust, see "Guardian and Ward," § 6; "Trusts," § 4.  
—in legal proceedings, see "Appeal and Error," § 20; "Attachment," § 5.

### § 1. Creation and existence of relation.

The burden is on one who appears on the face of a note to be a principal to show that he was surety merely.—Breckinridge v. McRoberts (Ky.) 454.

### § 2. Discharge of surety.

Where a contractor and the owner agreed to a material change in the contract, it is immaterial, as to the contractor's sureties, that the building was not completed as changed, since it is the execution of a different contract which works the discharge of sureties.—O'Neal v. Kelley (Ark.) 409.

An agreement to change the plans of a building contract to be completed within a certain time held to be a material change, which discharges sureties on the contractor's bond.—O'Neal v. Kelley (Ark.) 409.

A contractor's assurance that the alteration of a building contract would not affect the original contract does not bind sureties on his bond not consenting to the change.—O'Neal v. Kelley (Ark.) 409.

The rule that one who, in taking bond from a surety, conceals from him facts which increase his risk, is guilty of fraud, which will release the surety, does not apply to public officers.—Fidelity & Deposit Co. v. Commonwealth (Ky.) 579.

Where a creditor for a valuable consideration extends the time of payment of a note for the principal without the knowledge or consent of the surety, the surety is released.—Dohn v. Bronger (Ky.) 619.

A surety is released by the granting of indulgence to the principal for a valuable consideration without his consent, if the creditor had notice of the suretyship at the time, though he did not have such notice when the note was executed.—Harris-Seller Banking Co. v. Bond (Ky.) 764.

A surety will not be relieved in equity, in start of the bar of the statute of limitations, where his reason for not filing claim against the estate of his deceased principal is that he had forgotten the claim.—Weaver v. Ruhm (Tenn. Ch. App.) 171.

The fact that a note was not presented to maker or surety held not to relieve the latter from liability.—Weaver v. Ruhm (Tenn. Ch. App.) 171.

### § 3. Rights and remedies of surety.

A surety who pays a note may sue the maker on an implied promise to reimburse or on the note, as being subrogated to the rights of payee.—Sparks v. Childers (Ind. T.) 816.

## PRIORITIES.

Of taxes, see "Taxation," § 5.

## PRISONS.

Shannon's Code, § 7423, empowering commissioners of workhouse to discharge a prisoner, held not to confer power to discharge a prisoner under control of court.—Rogers v. State (Tenn. Sup.) 697.

## PRIVATE NUISANCE.

See "Nuisance," § 1.

## PRIVILEGE.

Of witness as to testimony, see "Witnesses," § 2.

## PRIVILEGED COMMUNICATIONS.

Defamatory communications, see "Libel and Slander," § 1.

## PROBATE.

Of will, see "Wills," § 8.

## PROCESS.

See, also, "Execution"; "Garnishment"; "Injunction"; "Mandamus"; "Replevin."

### § 1. Service.

Evidence held to show that defendant was duly cited to appear and answer.—Limburger v. Engle (Tex. Civ. App.) 683.

Where the trial was not had until the March term, publication for four consecutive weeks preceding the January term was sufficient.—Patterson v. Seeton (Tex. Civ. App.) 732.

**§ 2. Defects, objections, and amendment.**

The misstatement of the time of filing the petition in the citation *held* corrected by serving with it a copy of the petition showing the proper date.—*Pruitt v. State* (Tex. Civ. App.) 553.

**PROHIBITION.**

Of traffic in intoxicating liquors, see "Intoxicating Liquors."

**PROMISSORY NOTES.**

See "Bills and Notes."

**PROPERTY.**

Constitutional guaranties of rights of property, see "Constitutional Law," § 3.  
Taking for public use, see "Eminent Domain."

*Particular species of property.*

See "Animals"; "Franchises"; "Trade-Marks and Trade-Names."

In replevin for timber cut into ties by a trespasser, where delivery cannot be had, the measure of damages is the value of the ties, less the labor expended on the timber, not to exceed the increase in value.—*Eaton v. Langley* (Ark.) 123.

**PROSECUTING ATTORNEYS.**

See "District and Prosecuting Attorneys."

**PROSTITUTION.**

See "Disorderly House."

**PUBLIC DEBT.**

See "Counties," § 4; "Municipal Corporations," § 9.

**PUBLIC IMPROVEMENTS.**

By municipalities, see "Municipal Corporations," § 5.

**PUBLIC LANDS.****§ 1. Disposal of lands of the states.**

Validity of power of attorney in ancient instruments will be presumed.—*Batcheller v. Besancon* (Tex. Civ. App.) 296.

The legal title to land patented to assignor of certificate after assignment *held* to vest in assignee.—*Batcheller v. Besancon* (Tex. Civ. App.) 296.

Under Sayles' Rev. Civ. St. art. 4218LL, in order to forfeit contract for school lands for failure to pay interest by November 1st of any year, it must be shown for what year unpaid interest is due.—*Scott v. Blackburn* (Tex. Civ. App.) 480.

Under Sayles' Rev. Civ. St. art. 4218LL, a forfeiture of contract as to common-school lands, for failure to pay interest due March 1, 1897, declared on August 20, 1897, is premature.—*Scott v. Blackburn* (Tex. Civ. App.) 480.

Fifteen years after sale of school lands, purchaser could assume that tabulated report from the commissioner's court had been filed with commissioner of land office, as required by law.—*Scott v. Blackburn* (Tex. Civ. App.) 480.

**PUBLIC NUISANCE.**

See "Nuisance," § 2.

**PUBLIC USE.**

Taking property for public use, see "Eminent Domain."

**PUNISHMENT.**

See "Criminal Law," § 15.

**PUNITIVE DAMAGES.**

See "Damages," § 1.

**QUESTIONS FOR JURY.**

In criminal prosecutions, see "Criminal Law," § 7.

**RAILROADS.**

See, also, "Street Railroads."

Carriage of goods and passengers, see "Carriers."

**§ 1. Railroad companies.**

Sand. & H. Dig. § 6251, providing a lien for labor on a railroad, does not apply to a contractor who does not perform any work personally.—*Little Rock, H. S. & T. Ry. Co. v. Spencer* (Ark.) 196.

Facts *held* insufficient to show that the line of road was operated by defendant.—*Missouri Pac. Ry. Co. v. Wright* (Ark.) 557; *Same v. Spelce*, *Id.*

Acts 1875, c. 142, § 5, providing that a corporation may fix the amount of capital stock by by-law, is restricted by section 6, relating especially to railroad companies.—*Union Ry. Co. v. Sneed* (Tenn. Sup.) 89.

**§ 2. Construction, maintenance, and equipment.**

Sand. & H. Dig. § 6263, relating to crossings of highways by railroads, *held* not applicable to highways laid out across previously existing railroads.—*Prairie County v. Fink* (Ark.) 301.

Damages may be recovered for injury to abutting property on account of annoyance and discomfort habitually suffered by the occupants from smoke, cinders, and unusual noise from trains passing over a railroad in the streets of a city.—*Louisville Southern R. Co. v. Hooe* (Ky.) 621.

In an action to recover such damages it is proper for the court to instruct the jury that it is competent for them to consider whether the personal annoyance of the occupant will conduce to a diminution of value.—*Louisville Southern R. Co. v. Hooe* (Ky.) 621.

A petition stating that the operation of defendant railroad along a street rendered plaintiff's abutting dwelling uninhabitable, destroyed its value, and claiming a stated sum as damages, *held* sufficient.—*Texarkana & Ft. S. Ry. Co. v. Bulgier* (Tex. Civ. App.) 1047.

Evidence *held* to warrant a conclusion that property damaged belonged to plaintiff.—*Texarkana & Ft. S. Ry. Co. v. Bulgier* (Tex. Civ. App.) 1047.

That lot owners generally on a street along which a railway is operated suffered similar damages will not prevent a recovery of damages suffered by plaintiff.—*Texarkana & Ft. S. Ry. Co. v. Bulgier* (Tex. Civ. App.) 1047.

**§ 3. Receivers.**

Confirmation of report of master that a judgment against the company is a lien of the sixth class, payable out of the earnings of the road in the hands of a receiver, does not preclude payment of the claim from the proceeds of the sale of property on which it is adjudged a lien, if the earnings are insufficient to pay all claims of said class.—*Vollmer v. San Antonio & G. S. Ry. Co.* (Tex. Civ. App.) 378.

**§ 4. Operation.**

In action for injuries to drunken trespasser on track, an instruction giving the injured person immunity from liability for contributory negligence *held* error.—*St. Louis, I. M. & S. Ry. Co. v. Jordan* (Ark.) 115.

Evidence in action for injuries to drunken trespasser on track *held* erroneous, as allowing a finding of negligence without evidence to sustain it.—*St. Louis, I. M. & S. Ry. Co. v. Jordan* (Ark.) 115.

Contributory negligence is available as a defense in an action against a railroad, under Act April 8, 1891.—*Texarkana & Ft. S. Ry. Co. v. Bullington* (Ark.) 560.

Evidence that plaintiff, a child, had been warned not to go on defendant's track, where he was injured, is not admissible.—*Louisville & N. R. Co. v. Chism* (Ky.) 251.

Servants in charge of a train owe to a trespasser on the track the duty of exercising ordinary care after his peril is discovered.—*Louisville & N. R. Co. v. Chism* (Ky.) 251.

Acquiescence in the use of tracks by public does not amount to license to so use it.—*Chesapeake & O. Ry. Co. v. Perkins* (Ky.) 250.

Company owes no duty to trespasser except to avoid injuring him after discovering his peril, except that in cities a lookout must be kept.—*Chesapeake & O. Ry. Co. v. Perkins* (Ky.) 250.

Where a person who is in possession of all his faculties is found dead on a railroad right of way, evidently killed by a train, no presumption of negligence on the part of the company arises.—*Louisville, St. L. & T. Ry. Co. v. Terry's Adm'r* (Ky.) 588.

Defendant was not prejudiced by evidence that there was no flagman at the crossing where the accident occurred, there being no instruction in regard thereto, and the crossing being one which in fact required a flagman.—*Chesapeake & O. Ry. Co. v. Dixon's Adm'r* (Ky.) 615.

It is negligence to run a train from 15 to 20 miles an hour over a much-used crossing in a city.—*Chesapeake & O. Ry. Co. v. Dixon's Adm'r* (Ky.) 615.

Where a railroad corporation and its servants are jointly guilty of negligence resulting in the death of plaintiff's intestate, they may be joined as defendants.—*Chesapeake & O. Ry. Co. v. Dixon's Adm'r* (Ky.) 615.

Mill. & V. Code, § 1298, subsec. 4, requiring persons in charge of engines to sound whistle and down brakes where obstruction appears on track, does not require such action where the greatest diligence fails to discover the obstruction in time.—*Mobile & O. R. Co. v. Thompson* (Tenn. Sup.) 151.

Shannon's Code, §§ 1587, 1588, requiring railroads to fence their tracks, does not apply to private crossings, since section 6869, subsec. 4, and Acts 1879, c. 183, § 1, forbid the obstruction of private ways.—*Mobile & O. R. Co. v. Thompson* (Tenn. Sup.) 151.

Under Rev. St. 1895, art. 4507, a railroad company must signal at least 80 rods from a crossing.—*Houston & T. C. R. Co. v. O'Neal* (Tex. Sup.) 95.

As great care is incumbent on operatives of a train passing along a public street as at a crossing.—*Houston & T. C. R. Co. v. Laskowski* (Tex. Civ. App.) 59.

Facts *held* not to give rise to a conclusive presumption of contributory negligence, but to require a submission of the question to the jury.—*Houston & T. C. R. Co. v. Laskowski* (Tex. Civ. App.) 59.

Contributory negligence *held* not conclusively presumable in action for injuries on track.—

*Houston & T. C. R. Co. v. Laskowski* (Tex. Civ. App.) 59.

Where the evidence did not show failure to give signals for crossing to be the proximate cause for injury to stock, an abstract instruction, permitting recovery if the signals were not given, *held* error.—*Missouri, K. & T. Ry. Co. of Texas v. Hunt* (Tex. Civ. App.) 70.

Instructions in action for the killing of stock at a private crossing construed, and *held* not applicable to the facts.—*Missouri, K. & T. Ry. Co. of Texas v. Hunt* (Tex. Civ. App.) 70.

Where an engine near a public thoroughfare is carelessly permitted to "pop off" steam, those in charge knowing that passing teams might be frightened, the owner of a team so frightened may recover of the company for damages resulting.—*Missouri, K. & T. Ry. Co. v. Traub* (Tex. Civ. App.) 282.

Negligence in permitting cars on a switch in a street to remain beyond the time prescribed by ordinance *held* not the proximate cause of an injury received by a person from such cars at a place beyond the street.—*Boyd v. Cross* (Tex. Civ. App.) 478.

Where the injury did not occur at a public crossing, the burden is on plaintiff to show that the engine was not provided with a proper bell.—*Boyd v. Cross* (Tex. Civ. App.) 478.

A failure to construct a cattle guard *held* not the proximate cause of the killing of stock by a train.—*Southern Kansas Ry. Co. of Texas v. McKay* (Tex. Civ. App.) 479.

Whether plaintiff was guilty of contributory negligence *held* a proper question to submit to the jury in an action for damages for stock killed by a train.—*Southern Kansas Ry. Co. of Texas v. McKay* (Tex. Civ. App.) 479.

A station *held* not of such a character as to exempt the railroad company from fencing its tracks to shield itself from presumed negligence.—*Southern Kansas Ry. Co. of Texas v. McKay* (Tex. Civ. App.) 479.

Boarding a freight train, and thereafter going on the platform, *held* not negligence, where the passenger had traveled on freight trains of that road before, and where the conductor insisted on his jumping off the moving train.—*Texas & P. Ry. Co. v. Kelly* (Tex. Civ. App.) 809.

It is negligence for a train to approach a crossing, at which a train on an intersecting road is due, without giving a warning of its approach.—*Missouri, K. & T. Ry. Co. of Texas v. Settle* (Tex. Civ. App.) 825.

Failure of the engineer of defendant railroad to give signals, when he found the air brakes would not work so as to stop the train before reaching a crossing, *held* actionable negligence as against the conductor on intersecting road, who was injured in the collision.—*Missouri, K. & T. Ry. Co. of Texas v. Settle* (Tex. Civ. App.) 825.

A complaint alleging negligence in approaching a crossing *held* sufficiently broad to allow a recovery on any negligence shown in the running of the train as it approached the crossing.—*Missouri, K. & T. Ry. Co. of Texas v. Settle* (Tex. Civ. App.) 825.

**RAPE.****§ 1. Offenses and responsibility therefor.**

A conviction will not be disturbed merely because the defendant was under 14 years of age.—*Davidson v. Commonwealth* (Ky.) 213.

Pen. Code 1895, art. 634, defining force as applied to rape, *held* not to change the rule in regard to the force necessary to convict for as-

sault with intent to rape.—McCullough v. State (Tex. Cr. App.) 990.

## **§ 2. Prosecution and punishment.**

An indictment charging the offense to have been committed on a female 14 years of age *held* to charge it to have been committed on a person under 16 years of age, within Sand. & H. Dig. § 1865.—Inman v. State (Ark.) 558.

An indictment for rape, under Ky. St. § 1154, defining the offense, need not use the word "ravish"; that word not being used in the statute.—Wilkey v. Commonwealth (Ky.) 219.

Facts *held* not to establish assault with intent to rape.—Hancock v. State (Tex. Cr. App.) 465.

Evidence *held* sufficient to sustain a conviction.—Sawyer v. State (Tex. Cr. App.) 650.

In a prosecution for assault with intent to rape, *held* error to refuse to instruct as to aggravated assault, where defendant denied any assault.—McCullough v. State (Tex. Cr. App.) 990.

In a prosecution for assault with intent to rape, *held* error to refuse to instruct as to aggravated assault, where defendant denied any assault.—McCullough v. State (Tex. Cr. App.) 990.

## **REAL ACTIONS.**

See "Ejectment"; "Forcible Entry and Detainer," § 1; "Trespass to Try Title."

## **REAL PROPERTY.**

See "Property."

## **REBUTTAL.**

Evidence, see "Trial," § 3.

## **RECEIVERS.**

Of railroad companies, see "Railroads," § 3.

### **§ 1. Nature and grounds of receivership.**

Property owned jointly by a debtor with another ought not to be placed in the hands of a receiver, unless the equities of the case clearly demand it.—Holmes v. Stix (Ky.) 248.

### **§ 2. Appointment, qualification, and tenure.**

Under Rev. St. 1895, art. 1405, the district judge has authority to appoint a receiver in vacation.—Williams v. Odell (Tex. Civ. App.) 151.

### **§ 3. Management and disposition of property.**

A receiver must account for a bank deposit lost by the failure of the bank.—Ficener v. Bott (Ky.) 251.

### **§ 4. Actions.**

It was *held* not error for the court to settle, in an action against a company which subsequently went into the hands of a receiver, the status of plaintiff's claim under the receivership proceedings.—San Antonio & G. S. Ry. Co. v. Ryan (Tex. Civ. App.) 749.

### **§ 5. Accounting and compensation.**

It was error to adjudge a reduction of rent under a lease made by the owner prior to the receivership.—Ficener v. Bott (Ky.) 251.

## **RECOGNIZANCES.**

To authorize the recovery of the penalty in a recognizance to keep the peace there must have been a judicial conviction of the principal.—Commonwealth v. Williams (Ky.) 214.

## **RECORDS.**

Transcript on appeal or writ of error, see "Appeal and Error," § 7; "Criminal Law," § 11.

## **REFERENCE.**

### **§ 1. Nature, grounds, and order of reference.**

In order to object that a master should not have found on a claim in attachment proceedings, interpleader must except at the time to the order of reference.—Walsh v. Tyler (Ind. T.) 308.

### **§ 2. Referees and proceedings.**

Fees of master appointed by consent *held* to be divided between the parties.—City Electric St. Ry. Co. v. First Nat. Bank (Ark.) 855.

## **REFORMATION OF INSTRUMENTS.**

### **§ 1. Right of action and defenses.**

Where the parties were mistaken as to the quantity of land sold in gross, *held*, that the vendor could not recover for the excess.—Perry v. Williamson (Tenn. Ch. App.) 189.

### **§ 2. Proceedings and relief.**

Evidence *held* insufficient to authorize the reformation of an instrument for a mistake in the amount of land conveyed.—Judson v. Mullinax (Mo.) 565.

## **REHEARING.**

See "New Trial."

On appeal or writ of error, see "Appeal and Error," § 11.

## **RELEASE.**

See, also, "Compromise and Settlement"; "Payment."

Of particular classes of rights and liabilities. See "Mortgages," § 3.

Settlement by one of his claim for personal injuries bars action by his wife therefor on his death therefrom.—Brown v. Chattanooga Electric Ry. Co. (Tenn. Sup.) 415.

## **RELIGIOUS SOCIETIES.**

The burden is on excluded members of a church who claim the right to use the church property to show that there is such a division as to entitle each faction to the use of the property.—Iglehart v. Rowe (Ky.) 575.

The courts will not review the action of religious societies in excluding members.—Iglehart v. Rowe (Ky.) 575.

Under the rules and usages of the denomination of General Baptists, the exclusive power to admit and exclude members lies in the local congregations, and the associations have no power to review their action.—Iglehart v. Rowe (Ky.) 575.

## **REMAINDERS.**

See "Life Estates."

## **REMOVAL OF CAUSES.**

### **§ 1. Citizenship or alienage of parties.**

The fact that the plaintiff and one of several defendants are citizens of different states does not authorize the removal of the cause to the United States circuit court, though the other defendants were joined for the purpose of preventing such removal, provided there was in

fact a joint liability.—*Chesapeake & O. Ry. Co. v. Dixon's Adm'r* (Ky.) 615.

**§ 2. Amount or value in controversy.**

Amount in controversy *held* more than \$2,000.—*Building & Loan Ass'n of Dakota v. Cunningham* (Tex. Sup.) 714.

Where amount in dispute in action to cancel a lien exceeds \$2,000, defendant is entitled to a removal, although evidence may show that he is entitled to less than that sum.—*Building & Loan Ass'n of Dakota v. Cunningham* (Tex. Sup.) 714.

**RENT.**

See "Landlord and Tenant," § 4.

**REPLEADER.**

See "Pleading," § 5.

**REPLEVIN.**

Nature of an action, as one for recovery of possession of certain personalty, *held* not affected by the fact that plaintiff directed sheriff to return the order for delivery without service.—*Eaton v. Langley* (Ark.) 123.

**REPLICATION.**

See "Pleading," § 8.

**REPLY.**

See "Pleading," § 8.

**REQUESTS.**

For instructions in criminal prosecutions, see "Criminal Law," § 7.

**RESCISSION.**

Of contract for sale of goods, see "Sales," § 1.  
— of land, see "Vendor and Purchaser," § 3.

**RES GESTÆ.**

In criminal prosecutions, see "Criminal Law," § 5.

**RES JUDICATA.**

See "Judgment," § 5.

**RESTRICTIONS.**

In deeds, see "Deeds," § 2.

**RETROSPECTIVE LAWS.**

Constitutional restrictions, see "Constitutional Law," § 5.

**RETURN.**

Of garnishment process, see "Garnishment," § 2.

**REVERSIONS.**

Where property has been conveyed for a valuable consideration on condition that it should be used for school purposes, the fact that the grantees have devoted it to other purposes does not entitle the grantors to recover it as the donors of a charity which has failed.—*Carroll County Academy v. Trustees of Gallatin Academy* (Ky.) 617.

**REVIEW.**

See "Appeal and Error"; "Certiorari"; "Criminal Law," § 10.

**ROADS.**

See "Turnpikes and Toll Roads."

**ROBBERY.**

Evidence *held* insufficient to warrant a conviction of assault with intent to commit robbery, where defendant merely held prosecutrix, and, after she got loose, said he wanted berries which she was picking.—*Denman v. State* (Tex. Cr. App.) 366.

**SALES.**

See, also, "Vendor and Purchaser."

Of property of decedent under order of court, see "Executors and Administrators," § 6.

On foreclosure of mortgage, see "Mortgages," § 4.

On order or judgment of court, see "Judicial Sales."

Tax sales, see "Taxation," § 7.

**§ 1. Modification or rescission of contract.**

A material misrepresentation, if acted on, may be ground for rescission, though innocently made.—*Cabaness v. Holland* (Tex. Civ. App.) 379.

Declarations, made by defendant to witnesses relative to his cattle a few days before he sold them to plaintiff, and which witnesses at his direction communicated to plaintiff, *held* admissible against him in an action to rescind for his fraud.—*Cabaness v. Holland* (Tex. Civ. App.) 379.

**§ 2. Operation and effect.**

Where a draft for the price of goods is forwarded for collection, attached to the bill of lading, the title to the goods does not pass until the draft is paid, and prior to that time the goods are subject to attachment for the consignor's debts.—*Kentucky Refining Co. v. Globe Refining Co.* (Ky.) 602.

Actual possession need not accompany the sale of a car load of oil in the custody of a common carrier.—*Kentucky Refining Co. v. Globe Refining Co.* (Ky.) 602.

Contract of sale construed, and *held*, that title passed, so that the seller was not thereafter liable for taxes.—*Irvin v. Edwards* (Tex. Sup.) 719.

Where instrument recited an absolute sale of certain shingles, but did not definitely describe them, title passed only if the parties designated the particular shingles, so that delivery could be had.—*Goldberg v. Bussey* (Tex. Civ. App.) 49.

Where one makes a pretended sale, an innocent purchaser from the buyer, without notice, will be protected.—*Therriault v. Compere* (Tex. Civ. App.) 750.

**§ 3. Warranties.**

That a purchaser of cattle, after discovery of the seller's fraud, instructed his agent to sell the cattle, which, however, was not done, does not show a waiver of the fraud.—*Cabaness v. Holland* (Tex. Civ. App.) 379.

Though one selling cattle refuses to warrant the number of them, he may be liable for fraudulent representations as to their number.—*Cabaness v. Holland* (Tex. Civ. App.) 379.

One selling stock is responsible to the purchaser for representations in regard to them by one to whom the seller refers the buyer for information.—*Cabaness v. Holland* (Tex. Civ. App.) 379.

That plaintiff at defendant's suggestion wrote to certain persons inquiring about de-



pendant's cattle, for the purchase of which he was negotiating, does not show that he did not rely on defendant's representations as to them.—*Cabaness v. Holland* (Tex. Civ. App.) 379.

#### § 4. Remedies of buyer.

Formal demand for rescission by buyer before suit therefor is unnecessary, where the seller refuses to do anything on being charged with his fraud.—*Cabaness v. Holland* (Tex. Civ. App.) 379.

In order to constitute breach of warranty of soundness of mule, warrantor need not have known of unsoundness.—*Sanders v. Britton* (Tex. Civ. App.) 550.

Instruction that warrantor must have known that property was not as represented, in order to constitute breach, is not cured by another correct charge as to warranty.—*Sanders v. Britton* (Tex. Civ. App.) 550.

### SATISFACTION.

See "Compromise and Settlement"; "Payment." Of judgment, see "Judgment," § 9. Of mortgage, see "Mortgages," § 3.

### SCHOOLS AND SCHOOL DISTRICTS.

#### § 1. Public schools.

Under Acts 1884, Sp. Sess. pp. 43, 44, § 29, the erection of a new district *held* not to presuppose a final judicial determination that a majority of voters in old district consented thereto.—*Whitmire v. State* (Tex. Civ. App.) 293.

Under Acts 1884, Sp. Sess. pp. 43, 44, § 29, the attempted creation of a school district *held* void for want of consent of a majority of voters.—*Whitmire v. State* (Tex. Civ. App.) 293.

Designation of school districts *held* irregular, but not so as to avoid an order creating them, under Sayles' Rev. Civ. St. arts. 3731, 4732.—*Whitmire v. State* (Tex. Civ. App.) 293.

### SENTENCE.

In criminal prosecutions, see "Criminal Law," § 9.

### SET-OFF AND COUNTERCLAIM.

#### § 1. Subject-matter.

In an action for the settlement of a partnership, personal demands in favor of one partner may be set off against a final balance found to be due the other partner.—*Wathen v. Russell* (Ky.) 437.

A bank deposit belonging to decedent's estate *held* not a proper set-off to a note of his executrix, given in consideration of the cancellation of another note held by the bank.—*Reuter v. Sullivan* (Tex. Civ. App.) 683.

The claim of one sued on an interest bearing debt should be set off against the debt as of the time it became due.—*Brown v. Montgomery* (Tex. Civ. App.) 803.

### SETTLEMENT.

See "Payment."

### SHERIFFS AND CONSTABLES.

#### § 1. Compensation.

A settlement made by the sheriff with the county judge as commissioner, though irregular, will not be disturbed after many of the vouchers have been lost, being substantially correct and having been approved by the full court.—*Montgomery County Court v. Chenault* (Ky.) 457.

All taxes levied by the county constitute one fund, in counting the sheriff's commissions.—*Montgomery County Court v. Chenault* (Ky.) 457.

In a settlement with the county court on account of the county levy for a particular year, the sheriff is entitled to credit for exonerations which were omitted to be credited for the previous year.—*Montgomery County Court v. Chenault* (Ky.) 457.

The sheriff was entitled to the commission of 25 per cent. on taxes collected on property discovered and reported by him.—*Montgomery County Court v. Chenault* (Ky.) 457.

Fees of sheriff in attending criminal court determined.—*State ex rel. Troll v. Brown* (Mo.) 504.

Certificates of judges of criminal courts that certain fees are due the sheriff for attendance are of no binding force.—*State ex rel. Troll v. Brown* (Mo.) 504.

#### § 2. Powers, duties, and liabilities.

The sheriff will not be required to account for county taxes neither collected by him nor certified to him for collection.—*Montgomery County Court v. Chenault* (Ky.) 457.

The sheriff is not chargeable with delinquent taxes returned and allowed as such by the fiscal court, though they may not be returned on the day fixed by law.—*Montgomery County Court v. Chenault* (Ky.) 457.

Receipts presented by the sheriff in a settlement with the county court on account of taxes collected and disbursed were properly rejected as credits, in the absence of any showing as to what the amounts were paid for.—*Montgomery County Court v. Chenault* (Ky.) 457.

#### § 3. Liabilities on official bonds.

The county court may require the sheriff to give an additional bond when the interest of the state or county demands, and the surety therein is liable for the county levy for the year, though collected before the execution of the bond.—*Fidelity & Deposit Co. v. Commonwealth* (Ky.) 579.

### SHIPPING.

See "Maritime Liens"; "Wharves."

### SIGNATURES.

To pleading, see "Pleading," § 6.

### SLANDER.

See "Libel and Slander."

### SODOMY.

The court, in defining an assault as an element of sodomy, need not charge the penalty for assault and battery.—*Darling v. State* (Tex. Cr. App.) 1006.

### SPECIAL LAWS.

See "Statutes," § 2.

### SPIRITUOUS LIQUORS.

See "Intoxicating Liquors."

### STALE DEMAND.

See "Equity," § 2.

### STATEMENT.

Of plaintiff's claim, see "Pleading," § 1.

## STATES.

Courts, see "Courts."

Public lands, see "Public Lands," § 1.

## § 1. Government and officers.

The relation of a state printing contractor to the preceding contractor is not that of a public officer to his successor.—*Geo. G. Fetter Printing Co. v. Courier-Journal Job-Printing Co.* (Ky.) 241.

## § 2. Property, contracts, and liabilities.

A state printing contractor may, after the expiration of his contract, complete certain kinds of unfinished work which he had previously begun in good faith.—*Geo. G. Fetter Printing Co. v. Courier-Journal Job-Printing Co.* (Ky.) 241.

## STATUTES.

Laws impairing obligation of contracts, see "Constitutional Law," § 4.

Validity of retrospective or ex post facto laws, see "Constitutional Law," § 5.

*Provisions relating to particular subjects.*

See "Intoxicating Liquors"; "Mechanics' Liens."

Statute of frauds, see "Frauds, Statute of."

## § 1. Enactment, requisites, and validity in general.

Neither a joint resolution of the general assembly, authorizing a meeting of the joint assembly to elect penitentiary commissioners, nor the vote in such election, need be presented to the governor for his approval.—*Commissioners of Sinking Fund v. George* (Ky.) 779.

An act containing an emergency clause becomes a law at once when passed over the governor's veto.—*Commissioners of Sinking Fund v. George* (Ky.) 779.

## § 2. General and special or local laws.

Ky. St. § 2882, providing a special limitation of six months as to certain actions against cities of the first class, is unconstitutional.—*Gorley v. City of Louisville* (Ky.) 263.

A statute prohibiting the sale of liquor in a county repeals that part of a previous act prohibiting the sale of liquor in a town within the county which fixes a less penalty.—*Douglas v. Commonwealth* (Ky.) 329.

Act of March 17, 1896, authorizing a vote by the people of any county on the question of "free turnpikes," is not unconstitutional as special and local, being expressly authorized by Const. § 60.—*Maysville & L. Turnpike Road Co. v. Wiggins* (Ky.) 434.

The special limitation of six months provided by the charter of cities of the first class

as to actions against such cities for damages is unconstitutional, being a local or special act to regulate the limitation of actions.—*City of Louisville v. Kuntz* (Ky.) 592.

A statute is not objectionable as special legislation because it imposes upon corporations, for failing to list or report their property to the auditor, a penalty different from that imposed upon an individual who fails to list his property for taxation.—*Louisville & J. Ferry Co. v. Commonwealth* (Ky.) 877; *Central Railway & Bridge Co. v. Same, Id.*

Act March 1, 1897, vesting the judge of the criminal court of Buchanan county with the powers of a circuit judge when holding court in another county, he having only criminal jurisdiction, under 2 Rev. St. 1889, p. 2209, § 3, is invalid for want of uniformity of operation.—*State v. Hill* (Mo.) 798.

Act March 1, 1897, vesting the judge of the criminal court of Buchanan county, when called on to hold circuit court in another county, with the powers of a circuit judge, is unconstitutional as a special law.—*State v. Hill* (Mo.) 798.

Const. art. 3, § 56, forbidding the passage of any local or special law except for specified purposes, has no application to local improvements by cities.—*Storrie v. Woessner* (Tex. Civ. App.) 837.

## § 3. Amendment, revision, and codification.

Where a statute is amended "so as to read as follows," a former amendment omitted from the quotation of the statute after those words is not thereby repealed.—*Lewis v. Town of Brandenburg* (Ky.) 862.

## § 4. Repeal, suspension, expiration, and revival.

Mansf. Dig. § 1571 (Act Dec. 17, 1838), punishing carnal knowledge of a female under the age of puberty, is repealed by Sand. & H. Dig. § 1865 (Act April 1, 1893), punishing carnal knowledge of a female under 16 years of age.—*Inman v. State* (Ark.) 558.

A statute embodying the same provisions as a prior statute supersedes it, and an act amending the former amends the latter.—*United States Saving & Loan Co. v. Miller* (Tenn. Ch. App.) 17; *Peck v. Same, Id.*

## § 5. Construction and operation.

A proviso that an act shall not affect contracts theretofore made does not apply to a contract of loan not entirely consummated until after the act went into effect.—*United States Saving & Loan Co. v. Miller* (Tenn. Ch. App.) 17; *Peck v. Same, Id.*

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**STIPULATIONS.**

Oral stipulation that a pending cause should be governed by result of another trial, not made in open court nor entered of record, *held* of no effect, under rule 47 of the district court.—*Wills & Bro. v. Sims' Heirs* (Tex. Civ. App.) 55.

**STOCKHOLDERS.**

Of corporations, see "Corporations," § 2.

**STREET RAILROADS.**

See, also, "Railroads."

**§ 1. Regulation and operation.**

Where motorman by ordinary care might have discovered, in time to stop the car, that a child was about to cross the track, the company is liable for injury to the child.—*South Covington & C. St. Ry. Co. v. Herrklots* (Ky.) 265.

Where injuries were caused by motorman reversing the car when a prudent person would not have done so the company is liable.—*South Covington & C. St. Ry. Co. v. Herrklots* (Ky.) 265.

Instructions requiring plaintiff to use ordinary care to avoid a collision with defendant's car approaching from the rear, and to give the right of way to the car, were sufficient to present the idea that, if plaintiff suffered his horse to start across the track when it was too late to avoid a collision, he could not recover.—*Louisville Ry. Co. v. Stammers* (Ky.) 841.

The expression "any railroad," in Rev. St. 1895, § 3017, giving a right of action for death against the receiver of "any railroad," includes street railroads.—*Bammel v. Kirby* (Tex. Civ. App.) 392.

Evidence *held* to show negligence of motorman.—*City Ry. Co. v. Thompson* (Tex. Civ. App.) 1038.

Degree of care required in maintaining wires of electric street railroad determined.—*Citizens' Ry. Co. v. Gifford* (Tex. Civ. App.) 1041.

**SUBROGATION.**

Sureties of an officer cannot be subrogated to the rights of one to whom they have been compelled to account, where the loss ought to fall on them as between them and the person against whom the recovery is sought.—*Stewart v. Commonwealth* (Ky.) 332.

The acts of a deputy clerk in issuing fraudulent witness certificates and forging indorsements thereon and selling them are official acts, rendering the clerk liable to the person to whom they were sold for any loss sustained by him.—*Stewart v. Commonwealth* (Ky.) 332.

**SUBSTITUTION.**

Of devisees or legatees, see "Wills," § 4.

**SUMMARY PROCEEDINGS.**

Recovery of possession by landlord, see "Landlord and Tenant," § 5.

**SUMMONS.**

See "Process."

**SUPPLEMENTAL PLEADING.**

See "Pleading," § 5.

**SUPPLEMENTARY PROCEEDINGS.**

See "Execution," § 4.

**SURETYSHIP.**

See "Principal and Surety."

## SURVIVORSHIP.

Of devisees or legatees, see "Wills," § 4.

## SWINDLING.

See "False Pretenses."

## TAXATION.

### § 1. Nature and extent of power in general.

Lands outside a town, which are included in the town after the passage of an act providing for the levy of a tax on lands outside the town to pay for the construction of roads and for keeping the same in repair, are exempt from the tax for repairs.—*Donnelly v. Carpenter* (Ky.) 336.

### § 2. Constitutional requirements and restrictions.

A statute imposing a franchise tax on certain corporations, requiring them to make report to the auditor, is not unconstitutional.—*Louisville & J. Ferry Co. v. Commonwealth* (Ky.) 877; *Central Railway & Bridge Co. v. Same*, *Id.*

Acts 1895, p. 278, § 3, taxing patent medicine vendors and manufacturers for the benefit of the state university free scholarship fund, violates Const. art. 10, § 8, permitting taxes for public purposes only.—*O. F. Simmons Medicine Co. v. Ziegenhein* (Mo.) 10.

Acts 1898, c. 6, § 3, exempting certain territory annexed to the city of Memphis from taxation for certain purposes for a certain time, violates Const. art. 2, §§ 28, 29, providing for uniform and equal taxation.—*Jones v. City of Memphis* (Tenn. Sup.) 138.

### § 3. Liability of persons and property.

Wharf property of a city, being of a private or proprietary character, is subject to taxation.—*Commonwealth v. City of Louisville* (Ky.) 865.

Under a statute directing the assessment of all real estate not exempt, property held by a city as trustee may be assessed the same as other property.—*City of St. Louis v. Wenneker* (Mo.) 105.

Under Const. 1875, art. 10, § 6, exempting property of municipal corporations, property devised to a city in trust for charitable purposes is not exempt.—*City of St. Louis v. Wenneker* (Mo.) 105.

One locating two surveys under a Confederate land scrip cannot demand a patent until the land commissioner has selected one of them for the school fund, and hence until then his survey is not taxable.—*Abney v. State* (Tex. Civ. App.) 1043.

### § 4. Levy and assessment.

Under Gen. St. c. 92, art. 6, § 12, providing that no error or informality in the description of property assessed shall invalidate the assessment if the property can, with reasonable certainty, be located from the description given, an assessment of the "wharf property" of a city is sufficient.—*Commonwealth v. City of Louisville* (Ky.) 865.

A taxpayer failing to ask a hearing by the board of supervisors, from whose decision he might have appealed to the county judge, cannot thereafter complain of excessive valuation.—*Royer Wheel Co. v. Taylor County* (Ky.) 876.

An increase of valuation by the state board of equalization applies as well to the county revenue and other special taxes as to state taxes.—*Royer Wheel Co. v. Taylor County* (Ky.) 876.

Where the list of the taxpayer is at his instance made out by the assessor, he cannot complain that the assessment was made without the list having been previously furnished by him.—*Royer Wheel Co. v. Taylor County* (Ky.) 876.

Under Rev. St. 1889, § 7553, requiring an assessment to be made in the name of the owner, where property was assessed as a "Relief Fund" instead of in the name of the trustee holding the fund, the tax bills were void.—*City of St. Louis v. Wenneker* (Mo.) 105.

### § 5. Lien and priority.

The two-years limitation does not operate against a claim for taxes, where a statute forbidding it was omitted from the Revision, but reinstated within the two years.—*Abney v. State* (Tex. Civ. App.) 1043.

### § 6. Collection and enforcement against persons or personal property.

Under Act May 23, 1890, the commonwealth may maintain an action against a city to recover taxes upon its wharf property, as such property cannot be seized and sold by a collecting officer.—*Commonwealth v. City of Louisville* (Ky.) 865.

Act May 23, 1890, authorizing the state to recover taxes on property which cannot be seized and sold by a collecting officer, was not repealed by the revenue law of 1892.—*Commonwealth v. City of Louisville* (Ky.) 805.

A taxpayer, upon mere opinion of excessive valuation, cannot prevent, by injunction, the collection of taxes due the state or county.—*Royer Wheel Co. v. Taylor County* (Ky.) 876.

Fees of back-tax attorney under Acts 1895, c. 120, § 87, determined.—*State v. Murphy* (Tenn. Sup.) 1098.

The fact that state comptroller on final settlement with a back-tax attorney appointed under Acts 1895, c. 120, erroneously assumed that certain fees had accrued to such attorney, does not prevent a different construction of the statute by the court.—*State v. Murphy* (Tenn. Sup.) 1098.

Under Act April 5, 1889, levying a state tax on each case before a recorder where it can be collected in money, the tax is collectible, although the fine paid might have been worked out.—*State v. Stong* (Tenn. Ch. App.) 1103.

Where a suit is for money alleged to have been collected by the recorder, a recovery cannot be had on a showing that it was his duty to collect it, but he did not do so.—*State v. Stong* (Tenn. Ch. App.) 1103.

A recorder is not liable for the state tax on litigation before him, where the fines were collected by his clerk appointed by the city, and authorized by ordinance to collect them.—*State v. Stong* (Tenn. Ch. App.) 1103.

Act April 5, 1889, levying a state tax on each case before a recorder's court where the tax can be collected in money, does not impose on the recorder the duty of collecting the tax.—*State v. Stong* (Tenn. Ch. App.) 1103.

Under Act April 5, 1889, levying a state tax on each case before a recorder, the tax is collectible in cases where money deposited as bail is forfeited without trial.—*State v. Stong* (Tenn. Ch. App.) 1103.

Under Act April 5, 1889, levying a state tax on each case before a recorder, a city cannot escape the tax by claiming it did not receive the tax collected by the recorder as such, but as fines.—*State v. Stong* (Tenn. Ch. App.) 1103.

One attempting to escape the payment of a tax, on the ground that municipal debts are invalid, has the burden of proving it.—*Winston v. City of Ft. Worth* (Tex. Civ. App.) 740.

### § 7. Sale of land for nonpayment of tax.

A sale of land for taxes where no list of the land and no certificate thereof are recorded as required by Sand. & H. Dig. § 6606, *held* invalid.—Taylor v. State (Ark.) 1055.

### § 8. Tax titles.

A tax deed issued by the city treasurer of Kansas City, as treasurer, under the charter of 1889, *held* valid, though the tax sale was made when the 1875 charter, requiring the treasurer to execute a deed as collector, was in effect.—Chrisman v. Hough (Mo.) 941.

Where a purchaser at a tax sale transfers the certificate of purchase to another by a mere indorsement, the latter is authorized in writing a formal assignment above the indorsement.—Chrisman v. Hough (Mo.) 941.

One holding under tax deeds which conveyed mere color of title on account of defects conveys to his grantee assurance of title only.—Hubbard v. Godfrey (Tenn. Sup.) 81.

### § 9. Forfeitures and penalties.

Under the statute requiring a corporation to report its property to the auditor for taxation, and requiring the auditor to prescribe a form of report, it is not necessary that the auditor should furnish that form to the corporations.—Louisville & J. Ferry Co. v. Commonwealth (Ky.) 877; Central Railway & Bridge Co. v. Same, *Id.*

To constitute a willful failure to make a report to the auditor, it is not necessary that the person in default should have actual knowledge of the existence of the law requiring the report.—Louisville & J. Ferry Co. v. Commonwealth (Ky.) 877; Central Railway & Bridge Co. v. Same, *Id.*

## TAXATION OF COSTS.

See "Costs," § 4.

## TELEGRAPHS AND TELEPHONES.

### § 1. Regulation and operation.

Evidence *held* not to show any damage resulting from delay in the delivery of a telegram, excepting the cost of it.—Brewster v. Western Union Tel. Co. (Ark.) 560.

Measure of damages for delaying a telegram, to close an option of purchase, is the difference between the contract price and the market price of the goods at the place of purchase on the day when the option closed.—Brewster v. Western Union Tel. Co. (Ark.) 560.

Telegraph companies, in the transmission of messages, are bound to a very high degree of diligence.—Jones v. Western Union Tel. Co. (Tenn. Sup.) 699.

A charge that the company need deliver message at only one of two places *held* properly refused, where the action was for negligence in failing to deliver.—Western Union Tel. Co. v. Waller (Tex. Civ. App.) 396.

On an issue whether one could have obtained money for a certain purpose, evidence that a person owed him *held* competent.—Western Union Tel. Co. v. Waller (Tex. Civ. App.) 396.

A telegram, "Your child is low. Come at once," *held* to put company on notice that child might die at any time, and to form basis for damages for failure to arrive in time for the funeral.—Western Union Tel. Co. v. Waller (Tex. Civ. App.) 396.

In an action for nondelivery, a defense that plaintiff could not have arrived at the funeral had the message been delivered fails, where he could have arrived within three hours of the usual time for interment, and it was de-

layed that long.—Western Union Tel. Co. v. Waller (Tex. Civ. App.) 396.

The sender of a telegram is not charged with notice that the place of delivery is outside the company's "free limits," and his right to recover for negligence in delivery does not depend on his offering extra pay for outside delivery.—Western Union Tel. Co. v. Sweetman (Tex. Civ. App.) 676.

The company receiving a message relating to serious sickness or death must take notice of the purpose for which it is sent as disclosed by it, and that the addressee has a serious interest in its prompt delivery.—Western Union Tel. Co. v. Sweetman (Tex. Civ. App.) 676.

A charge as to how a company could have discharged its liability in delivery of a telegram *held* not to be on the weight of the evidence.—Western Union Tel. Co. v. Sweetman (Tex. Civ. App.) 676.

A charge referring to "injured feelings" *held* to cover both bodily and mental suffering.—Western Union Tel. Co. v. Sweetman (Tex. Civ. App.) 676.

A company waives extra pay for delivering a telegram outside the free limits, where it made no demand therefor at sending or receiving office.—Western Union Tel. Co. v. Sweetman (Tex. Civ. App.) 676.

A telegraph company is charged with notice of the relationship between the addressee and a sick person concerning whom the telegram is sent.—Western Union Tel. Co. v. Sweetman (Tex. Civ. App.) 676.

Even though the company notified the sender of a telegram that the place of delivery is outside its "free limits," it assumes responsibility where it changes the point of delivery to within the free limits.—Western Union Tel. Co. v. Sweetman (Tex. Civ. App.) 676.

Evidence of the manager of the company that time was saved by not holding a telegram for extra pay *held* inadmissible in an action for delivering it at the wrong place.—Western Union Tel. Co. v. Sweetman (Tex. Civ. App.) 676.

It is no defense to an action for negligently delivering a telegram that plaintiff did not pay for its transmission.—Western Union Tel. Co. v. Sweetman (Tex. Civ. App.) 676.

Mental anguish, caused by negligence in delivering a telegram, is an element of damages for which there can be a recovery, whether accompanied by injury to the person or not.—Western Union Tel. Co. v. Sweetman (Tex. Civ. App.) 676.

## TENANCY IN COMMON.

### § 1. Creation and existence.

An actual verbal claim of adverse ownership to a co-tenant personally is not necessary to prove an ouster by one in possession doing overt acts, which indicate a hostile claim.—Dunlap v. Griffith (Mo.) 917.

### § 2. Mutual rights, duties, and liabilities of co-tenants.

Long-continued possession under claim of ownership, and nonassertion of claim by the other tenant, where all the parties are dead, *held* to show repudiation of claim of such co-tenant.—Illg v. Garcia (Tex. Sup.) 717.

## TENDER.

See, also, "Deposits in Court."

Where lessee claimed no rent was due, but, on being served with notice to quit, tendered such rent, *held*, that the tender did not prevent him from maintaining his defense in a suit for unlawful detainer.—Geary v. Parker (Ark.) 238.

## TERRITORIES.

Manuf. Dig. §§ 5347-5357, providing for restoring lost records, are not within Act Cong. March 1, 1889, § 6, adopting for Indian Territory the practice, pleading, and forms of proceeding of Arkansas.—*Bohart v. Hull* (Ind. T.) 306.

## TESTAMENT.

See "Wills."

## TESTAMENTARY POWERS.

Restrictions on power to devise or bequeath, see "Wills," § 1.

## THEFT.

See "Larceny."

## TITLE.

Of taking effect of statute, see "Statutes," § 5.

## TITLE.

Color of title, see "Adverse Possession."  
Slander of title, see "Libel and Slander," § 4.  
Sufficiency of title of vendor of land, see "Vendor and Purchaser," § 4.  
Tax titles, see "Taxation," § 8.

*Particular matters affecting title.*

See "Dedication," § 2.

## TOLLS.

Toll roads, see "Turnpikes and Toll Roads."

## TORTS.

Measure of damages, see "Damages," § 2.

*By particular classes of parties.*

See "Municipal Corporations," § 8.

Employés, see "Master and Servant," § 2.

*Particular remedies for torts.*

See "Trespass"; "Trove and Conversion," § 1.

*Particular torts.*

See "Assault and Battery," § 1; "Conspiracy"; "Forcible Entry and Detainer," § 1; "Libel and Slander"; "Negligence"; "Nuisance"; "Trespass"; "Trove and Conversion."

Causing death, see "Death," § 1.

## TOWNS.

See "Counties"; "Municipal Corporations."

## TRADE-MARKS AND TRADE-NAMES.

### § 1. Infringement and unfair competition.

Where two distilling concerns began the use of the same brand on their whiskeys near the same time, and continued its use for 10 years, one of them, whose prior right to the use of the brand was not clear, could not then enjoin its use by the other, who had added greatly to its value by expending large sums of money in its advertisement.—*Old Times Distillery Co. v. Casey* (Ky.) 610.

## TRANSCRIPTS.

Of record for purpose of review, see "Criminal Law," § 11.

## TRANSITORY ACTIONS.

See "Venue," § 1.

## TRESPASS.

To the person, see "Assault and Battery," § 1.

### § 1. Actions.

Under Sand. & H. Dig. § 3895, making a person cutting timber on the land of another liable to the owner, the state, to recover for such trespass, must show that it was the owner of the land.—*Taylor v. State* (Ark.) 1055.

In trespass *quare clausum fregit* a plea in bar admits plaintiff's title and right of possession.—*Nafe v. Hudson* (Tex. Civ. App.) 675.

The defense that the premises were in the exclusive possession of a lessee must be specially pleaded.—*Nafe v. Hudson* (Tex. Civ. App.) 675.

Nominal damages are recoverable where no actual damages were sustained.—*Nafe v. Hudson* (Tex. Civ. App.) 675.

## TRESPASS TO TRY TITLE.

See, also, "Ejectment."

### § 1. Right of action and defenses.

A judgment recovered on a disclaimer in trespass to try title *held* to estop defendant from setting up a title acquired prior thereto in a subsequent similar action for the same land.—*Easterwood v. Dunn* (Tex. Civ. App.) 285.

Where the petition does not show whether legal or equitable title will be relied on, a plea of stale demand is not demurrable.—*McConico v. Thompson* (Tex. Civ. App.) 537.

Rev. St. 1895, art. 5266, providing that it shall not be necessary for plaintiff to deraign title beyond a common source, applies, though the title is specially pleaded beyond such common source.—*Smith v. Davis* (Tex. Civ. App.) 101.

Where plaintiffs prove common source and a superior title under it, they may recover, unless defendants show a superior title which they have acquired, or that title never vested in the common source.—*Smith v. Davis* (Tex. Civ. App.) 101.

Refusing to instruct for plaintiff on the ground that defendants claimed under a common source *held* proper, where plaintiffs had offered contradictory evidence as to the identity of their ancestor with the common source.—*Smith v. Davis* (Tex. Civ. App.) 101.

Deeds *held* sufficient conveyances as links in establishing a common source.—*Smith v. Davis* (Tex. Civ. App.) 101.

### § 2. Proceedings.

Finding that defendant had been in possession of land in controversy since 1865 *held* justified by the evidence.—*Petrucio v. Gross* (Tex. Civ. App.) 43.

Findings as to boundaries of islands *held* sustained by the evidence.—*Petrucio v. Gross* (Tex. Civ. App.) 43.

Testimony that decedent was not an Odd Fellow *held* inadmissible in trespass to try title against an Odd Fellow's Lodge, claiming as devisee of land in which it was alleged that testator had only a life estate.—*Caffey's Ex'rs v. Cooksey* (Tex. Civ. App.) 65.

An instruction *held* erroneous because it required defendants to disprove the identity of plaintiffs' ancestor with the patentee who was the common source, and also prove that the ancestor did not acquire title of the true grantee.—*Smith v. Davis* (Tex. Civ. App.) 101.

On an issue as to the identity of plaintiffs' ancestor, it was error to require the jury to find immaterial facts concerning his life and actions as the basis of such identity.—*Smith v. Davis* (Tex. Civ. App.) 101.

Where plaintiffs proved a common source, and then introduced evidence tending to disprove the identity of their ancestor with the common source, it was *held* error to put on them the burden of establishing identity.—*Smith v. Davis* (Tex. Civ. App.) 101.

Refusing to instruct that plaintiffs could recover unless defendants had shown by a preponderance of the evidence that the land was not granted to plaintiffs' ancestor *held* proper, where plaintiffs' evidence raised question of ancestor's identity with common source.—*Smith v. Davis* (Tex. Civ. App.) 101.

A defendant claiming land under a common source cannot show a superior outstanding title.—*Easterwood v. Dunn* (Tex. Civ. App.) 285.

Value of use and occupation of land cannot be had in trespass to try title, where no claim therefor is asserted in the pleadings.—*Foster v. Eoff* (Tex. Civ. App.) 399.

Where plaintiff claims under foreclosure of a trust deed, and there is evidence that the land was a homestead, the question of homestead must be submitted to the jury.—*Silverman v. Landrum* (Tex. Civ. App.) 404.

Where defendant relies on a parol extension of time for payment of the debt secured by a trust deed under which plaintiff claims as purchaser, defendant must show that plaintiff had notice thereof.—*Silverman v. Landrum* (Tex. Civ. App.) 404.

Refusal to instruct as to what constitutes a fence or inclosure of land *held* error.—*Cox v. Sherman Hotel Co.* (Tex. Civ. App.) 808.

In view of the evidence, authority of an administrator to execute a deed on which plaintiff relied *held* not presumable from lapse of time.—*Perry v. Blakey* (Tex. Civ. App.) 843.

Where plaintiff relied on an administrator's deed, evidence for defendant of another deed by the administrator to the same grantee, to different lands, *held* admissible to rebut presumption that an order confirming a sale of undescribed land referred to the deed on which plaintiff relied.—*Perry v. Blakey* (Tex. Civ. App.) 843.

## TRIAL.

See, also, "New Trial"; "Reference"; "Witnesses."

### *Proceedings incident to trials.*

See "Continuance."

Conformity of judgment to verdict or findings, see "Judgment," § 1.

Entry of judgment after trial of issues, see "Judgment," § 1.

Right to trial by jury, see "Jury," § 1.

*Trial of particular civil actions or proceedings.*

Criminal prosecutions, see "Criminal Law," §§ 6, 7; "Homicide," § 7.

Trespass to try title to real property, see "Trespass to Try Title."

Trial of right to property levied on, see "Attachment," § 4.

### § 1. Dockets, lists, and calendars.

Where an action is brought in the wrong forum, and neither side applies to have it transferred, plaintiff is entitled to a trial of the issues involved, under *Manuf. Dig.* §§ 4925, 4928.—*Sparks v. Childers* (Ind. T.) 316.

The court is not bound to transfer a suit to the proper forum on its own motion where neither party asks a transfer.—*Sparks v. Childers* (Ind. T.) 316.

Where an issue as to the ownership of attached property involves a question of fraud, the court may, of its own motion, transfer the case to equity.—*Henderson v. Baker* (Ky.) 211.

It was error to transfer to the equity docket an action presenting only legal issues.—*Rubel v. Avritt* (Ky.) 460; *Lanham v. Same, Id.*

### § 2. Course and conduct of trial in general.

It is not error to refuse to exclude from the court room the wife and children of plaintiff suing to recover damages for personal injuries.—*Louisville & N. R. Co. v. Foard* (Ky.) 342.

The plaintiff cannot, by negating in his petition exceptions to a statute which he is not required to negative, take upon himself the burden of proof.—*Bush v. Wathen* (Ky.) 599.

It is a reversible error to deny to the party on whom is the burden of proof the concluding argument to the jury.—*Fitch v. Parker* (Ky.) 627.

A party on whom is cast the burden of proof *held* entitled to open and conclude the argument.—*Hillboldt v. Waugh* (Tex. Civ. App.) 829.

### § 3. Reception of evidence.

Certain evidence *held* admissible in rebuttal.—*Galveston, H. & S. A. Ry. Co. v. Patterson* (Tex. Civ. App.) 686.

### § 4. Taking case or question from jury.

Whether a license to sell liquor authorized the licensee to sell at a certain place was a question of law for the court.—*Commonwealth v. Asbury* (Ky.) 217.

A peremptory instruction should be given at the conclusion of all the evidence where there is no testimony for plaintiff tending to show negligence on the part of defendant railroad company, and defendant's evidence completely negatives such negligence, as to one who has been killed on the track.—*Louisville, St. L. & T. Ry. Co. v. Terry's Adm'r* (Ky.) 588.

Where the evidence conduces in any degree to establish a right to recovery, it is error to give a peremptory instruction for defendant.—*Jenkins v. Louisville & N. R. Co.* (Ky.) 761.

Where one party offers testimony to sustain his burden of proof, and the other party offers nothing to contradict it, a direction of a verdict against him is proper.—*Gannon v. Laclede Gas-light Co.* (Mo.) 907.

A suit should be dismissed on demurrer to plaintiff's evidence, if it is insufficient.—*Corbett v. J. Allen Smith & Co.* (Tenn. Sup.) 604.

On a demurrer to plaintiff's evidence, unfavorable evidence will be considered.—*Corbett v. J. Allen Smith & Co.* (Tenn. Sup.) 604.

Direction of a verdict for plaintiff *held* not error where the evidence, though conflicting, would not justify a different verdict.—*Lancaster Gin & Compress Co. v. Murray Ginning-System Co.* (Tex. Civ. App.) 387.

### § 5. Instructions to jury.

An exception reserved to the giving of "each and every one" of certain numbered instructions is sufficiently specific.—*Geary v. Parker* (Ark.) 238.

A refusal of an instruction is proper, where the instructions given cover the subject.—*Purcell Mill & Elevator Co. v. Kirkland* (Ind. T.) 311.

An instruction improperly authorizing a recovery for ordinary negligence is not cured by an instruction authorizing a recovery only for gross negligence.—*Louisville & N. R. Co. v. Foard* (Ky.) 342.

It is not error to fail to give an instruction upon a question as to which no instruction is asked.—*White v. Cole* (Ky.) 759.

An instruction that in determining the weight of testimony the jury may consider the apparent prejudice of the witnesses comments on the



weight of the testimony.—Houston, E. & W. T. Ry. Co. v. Runnels (Tex. Sup.) 971.

A comment on the weight of the testimony held prejudicial error.—Houston, E. & W. T. Ry. Co. v. Runnels (Tex. Sup.) 971.

A charge should be directed to the particular facts on which a case depends, and not embodied in an abstract rule of law.—Louisiana Western Extension Ry. Co. v. Carstens (Tex. Civ. App.) 36.

The refusal of a charge is not error, where the same matters are embraced in the general charge.—International & G. N. R. Co. v. Satterwhite (Tex. Civ. App.) 41.

Instruction held erroneous, as misleading and confusing.—Goldberg v. Bussey (Tex. Civ. App.) 49.

A charge as to the burden of proof held not misleading, when considered with other portions of the charge.—Missouri, K. & T. Ry. Co. of Texas v. Wright (Tex. Civ. App.) 56.

It is proper to refuse to submit an issue to the jury where only one reasonable deduction can be drawn from the evidence.—Smith v. Richardson Lumber Co. (Tex. Civ. App.) 386.

The court is not bound to separate and charge that which was not erroneous from a requested instruction which contains error.—Waco Artesian Water Co. v. Cauble (Tex. Civ. App.) 538.

A charge argumentative in its nature held properly refused.—Hurst v. McMullen (Tex. Civ. App.) 666.

A charge directing the weight to be given to certain of the testimony held properly refused.—Hurst v. McMullen (Tex. Civ. App.) 666.

Instructions embodying several distinct propositions of law in general terms, and not submitting to the jury any issue to be decided by it, held properly refused.—Hurst v. McMullen (Tex. Civ. App.) 666.

Omission to submit a question whether a contract provided for a penalty or liquidated damages was not error where no proper instruction was asked.—Slayden v. Stone (Tex. Civ. App.) 747.

Facts held not to justify a court in characterizing defendant's defense a fraudulent scheme.—Alexander v. Bank of Lebanon (Tex. Civ. App.) 840.

Request for instruction as to issue not raised by pleadings held properly refused.—Galveston, H. & H. R. Co. v. Bohan (Tex. Civ. App.) 1050.

#### § 6. Custody, conduct, and deliberations of jury.

Where the jury was apparently unable to agree after considering a case for two days, a request by the court that they should deliberate further was not improper.—Shely v. Shely (Ky.) 1071.

Permitting the jury, on their request, after retirement, to take into the jury room a book not offered in evidence, held prejudicial error.—Goar v. Thompson (Tex. Civ. App.) 61.

Where the charge and requests have been given, and the jury has separated for a day prior to deliberation, the giving of further requests not preferred until the day of deliberation is discretionary.—First Nat. Bank v. Stephens (Tex. Civ. App.) 832.

#### § 7. Verdict.

Failure to find that one amount reported due on county warrants included an amount due if a different theory were adopted held error.—Mountain Grove Bank v. Douglas County (Mo.) 944.

It is discretionary with the court to submit a plea of privilege to the jury along with the main case, instead of separately, before a trial on the merits.—Caswell v. Hopson (Tex. Civ. App.) 54.

## TROVER AND CONVERSION.

### § 1. Actions.

Joinder of mortgagor with persons who had converted the mortgaged property held proper in an action to recover the amount of the mortgage.—Cobb v. Barber (Tex. Sup.) 963.

On satisfaction of judgment for conversion, title to property vests in defendant as of the time when the conversion occurred.—Greer v. Lafayette County Bank (Tex. Civ. App.) 737.

## TRUSTEE PROCESS.

See "Garnishment."

## TRUSTS.

Conveyances in trust for creditors, see "Assignments for Benefit of Creditors." Trust deeds, see "Chattel Mortgages"; "Mortgages."

### § 1. Creation, existence, and validity.

To create an enforceable parol voluntary trust, it is not necessary for the donor to declare the trust in express terms, it being sufficient to employ language which shows clearly an intention on his part to create or declare a trust in himself for the donee.—Krankel's Ex'r v. Krankel (Ky.) 1084.

One who has by parol declarations created a trust in favor of another cannot revoke it without the consent of the donee.—Krankel's Ex'r v. Krankel (Ky.) 1084.

Agreement at time of conveyance that grantee should pay off incumbrance and reconvey on repayment creates an express trust, which must be in writing.—Hillman v. Allen (Mo.) 509.

That corporation directed its president to purchase land for it, and that he purchased for himself, taking deed in his own name, making him trustee for the company, may be shown by parol.—Halsell v. Wise County Coal Co. (Tex. Civ. App.) 1017.

### § 2. Management and disposal of trust property.

Where a trustee has an interest as husband in property which he holds in trust for his wife and her heirs, a contract concerning the property made by him, not designating himself as trustee, affects only his own interest, and any reservations therein are for his personal benefit.—Lexington Hydraulic & Manufacturing Co. v. Preston (Ky.) 330.

### § 3. Execution of trust by trustee or by court.

Where a corporation to which property has been conveyed in trust for school purposes devotes the property to other uses, the remedy is an action to have the trustees removed.—Carroll County Academy v. Trustees of Gallatin Academy (Ky.) 617.

### § 4. Liabilities on trustees' bonds.

Shannon's Code, § 4472, providing six years' limitation of actions, applies to actions against trustee's surety.—Hamby v. Reid (Tenn. Sup.) 692.

Action against trustee's surety held barred.—Hamby v. Reid (Tenn. Sup.) 692.

## TURNPIKES AND TOLL ROADS.

### § 1. Establishment, construction, and maintenance.

A county may be authorized by the general assembly to purchase from a corporation a

turnpike road, such a purchase not being within the prohibition of Const. Ky. § 179.—*Maysville & L. Turnpike Road Co. v. Wiggins* (Ky.) 434.

The duty of keeping in repair is imposed on a receiver by a decree placing part of the turnpike in his hands with direction to collect toll.—*Lock v. Franklin & H. Turnpike Co.* (Tenn. Sup.) 133.

A bill for injunction against turnpike commissioners is not defective for omitting as a party the county or an ex officio member of the board, where the active members are joined.—*Allen v. Smith* (Tenn. Ch. App.) 206.

A turnpike company's charter construed to require the building and maintenance of bridges where needed over ordinary streams.—*Allen v. Smith* (Tenn. Ch. App.) 206.

The report of turnpike commissioners of the necessity of a bridge at a point on a toll road is prima facie evidence of the fact, under which they may order gates to be thrown open, under Shannon's Code, §§ 1748-1757.—*Allen v. Smith* (Tenn. Ch. App.) 206.

The fact that a town built and maintained a bridge on a turnpike within its limits, until its charter expired, will not relieve the turnpike company from liability to keep in repair such bridge as part of its road.—*Allen v. Smith* (Tenn. Ch. App.) 206.

A charter remedy open to the public, to have toll gates thrown open on failure of company to keep its road in repair, does not supersede an existing statutory remedy, giving turnpike commissioners like power.—*Allen v. Smith* (Tenn. Ch. App.) 206.

Injunction will lie for an abuse of power by turnpike commissioners in condemning a turnpike as in bad repair, and ordering gates thrown open, under Shannon's Code, §§ 1748-1757.—*Allen v. Smith* (Tenn. Ch. App.) 206.

## § 2. Regulation and use for travel.

In action to recover from turnpike company for its negligence, recovery cannot be had for negligence of its receiver.—*Lock v. Franklin & H. Turnpike Co.* (Tenn. Sup.) 133.

Where portion of turnpike is in exclusive charge of receiver, the turnpike company cannot be held liable for his negligence in repairing it.—*Lock v. Franklin & H. Turnpike Co.* (Tenn. Sup.) 133.

A purchaser at a judicial sale of the rights, immunities, and franchises of a turnpike company, has the right to collect tolls.—*Allen v. Smith* (Tenn. Ch. App.) 206.

## UNDERTAKINGS.

See "Bonds."

## UNDUE INFLUENCE.

Procuring making of will, see "Wills," § 2.

## UNITED STATES.

See "Territories."

Courts, see "Removal of Causes."

Indians, see "Indians."

## UNLAWFUL DETAINER.

See "Forcible Entry and Detainer."

## USAGES.

See "Customs and Usages."

## USE AND OCCUPATION.

Evidence of the value of the property conveyed at the time of the trial held inadmissi-

ble, standing by itself, to show its rental value.—*Temple Nat. Bank v. Warner* (Tex. Sup.) 515.

## USURY.

### § 1. Usurious contracts and transactions.

The change of the payee in a note is not a payment of usury embraced therein.—*Shirley v. Stephenson* (Ky.) 581.

Interest in excess of the legal rate should be credited on the principal as of the time of payment.—*Day's Adm'x v. Davis* (Ky.) 769; *Davis v. Day's Adm'x*, Id.

Where the amount of a loan and interest thereon for five years were added together, and separate notes aggregating the amount executed therefor, payable before the expiration of the five years, the contract was usurious.—*Miller v. Ferguson* (Ky.) 1081.

While it was permissible, as part of the consideration for land, to add to the principal interest for five years, and make separate notes, aggregating the amount payable before the expiration of the five years, yet the vendor having come into a court of equity to enforce his lien, claiming the right given him by the contract to treat all of the notes as due because the purchaser was in arrears as to as many as four of them, he can recover only the principal, with interest thereon at 6 per cent. from date of the sale.—*Miller v. Ferguson* (Ky.) 1081.

Usury cannot be objected against a Minnesota contract sought to be enforced in Tennessee, where it is in accordance with the laws of Minnesota.—*United States Saving & Loan Co. v. Miller* (Tenn. Ch. App.) 17; *Peck v. Same*, Id.

Defense of usury held not available, unless specially pleaded and verified.—*First Nat. Bank v. Penman* (Tex. Civ. App.) 68.

### § 2. Penalties and forfeitures.

The averment that the debt for which a note was given is the same debt for which a prior note was given is not a mere conclusion.—*Shirley v. Stephenson* (Ky.) 581.

## VARIANCE.

Between pleading and proof in civil action, see "Pleading," § 7.

— in criminal prosecutions, see "Indictment and Information," § 6.

## VENDOR AND PURCHASER.

See, also, "Exchange of Property"; "Sales."

Purchasers at sale on execution, see "Execution," § 3.

— at tax sale, see "Taxation," § 8.

Requirements of statute of frauds, see "Frauds, Statute of," § 3.

### § 1. Requisites and validity of contract.

Agreement that purchaser should be released from interest on deferred payment until a question of conflicting title was determined held based on a sufficient consideration.—*Kerr County v. Kitchens* (Tex. Civ. App.) 551.

### § 2. Construction and operation of contract.

Plaintiff cannot claim that a contract for the sale of land signed by R. was made by him as agent for others, it being alleged by him that R. had acquired a tax title.—*Linville v. Langford* (Ky.) 248.

A deed and notes given in part payment for land held properly construed as one instrument, evidencing an executory contract to sell, and preventing the title from passing by the deed.—*New England Loan & Trust Co. v. Willis* (Tex. Civ. App.) 389.

If a deed describes land as so many acres, more or less, and recites a gross consideration, the burden is on the vendee claiming that the sale was by the acre to show that fact.—Hurst v. McMullen (Tex. Civ. App.) 668.

**§ 3. Modification or rescission of contract.**

A vendor's action of trespass to try title on nonpayment of the price *held* an election to rescind the executory contract to sell.—New England Loan & Trust Co. v. Willis (Tex. Civ. App.) 389.

A contract with an administrator, respecting lands of the estate, is void if induced by the administrator's fraudulent representations.—Cross v. Freeman (Tex. Civ. App.) 473.

A tenant under a contract to purchase land if the title is good, or, if not, to pay rent, is not estopped from showing that the contract was obtained by fraudulent representations.—Cross v. Freeman (Tex. Civ. App.) 473.

**§ 4. Performance of contract.**

Title acquired by a vendee under possession given by the vendor will not inure to the latter where he falsely represented to the vendee that he had good title, and failed to execute a deed giving such title.—Foster v. Eoff (Tex. Civ. App.) 399.

Judgment for recovery of land having been obtained against vendees not in default, *held*, that the vendees were entitled to judgment for the purchase money paid, and for their improvements.—Foster v. Eoff (Tex. Civ. App.) 399.

A vendor *held* not to show good title when he merely connects himself with the original grantee by deed executed by persons claiming to be the grantee's heirs, but furnishes no evidence that they were such heirs.—Foster v. Eoff (Tex. Civ. App.) 399.

Where a vendor's lien is not reserved in a deed, and the purchase-money note has become barred, the lien cannot be enforced.—Johnson v. Dyer (Tex. Civ. App.) 727.

**§ 5. Rights and liabilities of parties.**

One who takes a mortgage for a pre-existing debt is not a purchaser for value.—Holmes v. Stix (Ky.) 243.

A lienholder asserting that his lien was paid when senior lienholder accepted vendor's lien notes *held* a proper party on foreclosure of the vendor's lien.—Scharff v. Whitaker (Tex. Sup.) 519.

A vendor's transfer of a purchase-money note and all his interest in the land *held* to transfer the legal title to the transferee.—New England Loan & Trust Co. v. Willis (Tex. Civ. App.) 389.

A vendor who sues the vendee and the vendee's grantee cannot complain that the judgment provided for return to the latter of purchase money which the vendee had paid, and which one of them was entitled to recover back, where the vendee made no complaint.—Foster v. Eoff (Tex. Civ. App.) 399.

Facts *held* to show one an innocent purchaser, entitled to protection against a prior unrecorded deed from his vendor, and a vendor's lien.—Johnson v. Dyer (Tex. Civ. App.) 727.

**§ 6. Remedies of vendor.**

It will be presumed, after a lapse of nine years, that timber reserved by a vendor has been taken from the land; and a judgment for the sale of the land will not be reversed because the timber is not excepted.—Daniels v. Gibson (Ky.) 621.

In the absence of proof showing that a house and lot in a town can be advantageously divided, a court should not order a sale thereof, to satisfy a vendor's lien, until all the purchase money is due.—Melton v. Brown (Ky.) 764.

Where a contract for the sale of land provided that, if any two of the purchase-money notes should become due and be unpaid, the vendor might treat them all as due, and enforce his lien therefor, the receipt of payments on the notes was not a waiver of the right to treat them as due, it not being necessary that two of the notes should be wholly unpaid in order to mature them all.—Mudd v. Carico (Ky.) 1080.

Contract construed, and *held* that, on forfeiture of the sum, purchaser was exonerated from all obligations thereunder.—Barrett v. Metsker (Mo.) 926.

Deed of administrator, containing reservation of lien, *held* an executory contract, entitling vendor, on default, to recover the land.—Shotwell v. McCardell (Tex. Civ. App.) 39.

Lien reserved in deed extends only to that part of the price for which the lien is expressly reserved.—Shotwell v. McCardell (Tex. Civ. App.) 39.

A transferee of a purchase-money note and the vendor's interest in the land *held* not to hold title in trust simply to insure payment of his note, but entitled to recover the land on default of payment.—New England Loan & Trust Co. v. Willis (Tex. Civ. App.) 389.

District court *held* to have jurisdiction of action on note and collateral vendor's lien notes.—Sanderson v. Ralley (Tex. Civ. App.) 667.

In a suit on a vendor's lien note providing that, should title to the land fail before maturity of the note, it should be void, the maker may set up failure of consideration to the extent of the quantity of land lost.—Medlan v. Abeel (Tex. Civ. App.) 1041.

A provision in a vendor's lien note voiding it should title to the land fail *held* not to throw the burden on payee of showing that title had not failed.—Medlan v. Abeel (Tex. Civ. App.) 1041.

A note given for part of the price of land, which provided that, should title fail before the note's maturity, it should be void, contemplated that the maker should only pay for that part of the land to which he received a good title.—Medlan v. Abeel (Tex. Civ. App.) 1041.

**§ 7. Remedies of purchaser.**

Where the owner of a decree foreclosing a vendor's lien made an agreement to convey the premises to the judgment debtor, an instruction submitting the issue whether payment of the consideration for such agreement extinguished the lien *held* proper.—First Nat. Bank v. Stephens (Tex. Civ. App.) 882.

## VENUE.

Criminal prosecutions, see "Criminal Law," § 3.

**§ 1. Nature or subject of action.**

Action by mortgagee of cattle against purchaser on execution against the mortgagor, brought by sequestration before maturity of the note for foreclosure, *held* not an action of trespass, and maintainable in a county other than that in which the purchaser resides, where sequestration is dismissed and complaint is amended.—London v. Miller (Tex. Civ. App.) 734.

Action to cancel trust deed on ground of fraud is properly brought in county where fraud was committed.—Moore v. Byars (Tex. Civ. App.) 752.

Action to cancel trust deed is properly brought in county in which land on which it is an incumbrance is situated.—Moore v. Byars (Tex. Civ. App.) 752.

**§ 2. Domicile or residence of parties.**

Where several defendants in conversion resided in different counties, *held* proper to sue in

any county in which any of them resided.—*Cobb v. Barber* (Tex. Sup.) 963.

Pleas to the venue *held* properly sustained to a petition which stated no cause of action against the only defendant who lived in the county.—*Girard v. Barnard* (Tex. Civ. App.) 482.

## VERDICT.

Directing verdict in civil actions, see "Trial," § 4.

Necessity of conformity of judgment, see "Judgment," § 1.

## VERIFICATION.

Of pleading, see "Pleading," § 6.

## VESTED RIGHTS.

Protection, see "Constitutional Law," § 3.

## VILLAGES.

See "Municipal Corporations."

## VINDICTIVE DAMAGES.

See "Damages," § 1.

## WAIVER.

See "Estoppel."

Of objections to particular acts or proceedings. See "Criminal Law," § 7; "Equity," § 3.

Of rights or remedies.

See "Insurance," § 8; "New Trial," § 2.

## WARRANTY.

On sale of goods, see "Sales," § 3.

## WATERS AND WATER COURSES.

See "Navigable Waters."

## WHARVES.

A city is not liable for injury to property on a wharf boat, resulting from the negligence of one to whom it has leased the wharf privileges.—*Carrollton Furniture Mfg. Co. v. City of Carrollton* (Ky.) 439.

## WIDOWS.

Rights under statutes of descent and distribution, see "Descent and Distribution."

## WILLS.

Construction and execution of trusts, see "Trusts."

### § 1. Nature and extent of testamentary power.

A donor cannot in a will place restrictions on a gift made before the execution of the will.—*Tolley v. Wilson* (Tenn. Ch. App.) 156.

### § 2. Requisites and validity.

Slight evidence of undue influence is sufficient to authorize an instruction on that subject, that being peculiarly a question for the jury.—*Lisachy v. Schrader* (Ky.) 611.

A will devising the greater part of the estate to the husband of a deceased aunt, who had reared testator and been his guardian, is not unreasonable, testator being unmarried, and having no living parent, brother, or sister.—*White v. Cole* (Ky.) 759.

A verdict for a will, contested on the ground of undue influence, will not be set aside because the will was written by the principal devisee; he having been a practicing lawyer, and having written other wills for relatives of the testator.—*White v. Cole* (Ky.) 759.

That a son to whom his father willed his property had taken care of him in his old age *held* not evidence of undue influence.—*Aylward v. Briggs* (Mo.) 510.

A son who had taken care of his parents in their old age, and to whom his father willed his property to exclusion of his daughters, has not burden of proving absence of undue influence.—*Aylward v. Briggs* (Mo.) 510.

On contest of will, beneficiary cannot be asked whether he did not consider it unjust.—*Aylward v. Briggs* (Mo.) 510.

### § 3. Probate, establishment, and annulment.

An agreed judgment dismissing an appeal from an order probating a will does not bind parties in interest not before the court.—*Lisachy v. Schrader* (Ky.) 611.

In a contest of a will on the ground of undue influence, the evidence being conflicting and sufficient to support a verdict for either party, a verdict for the will will not be set aside.—*White v. Cole* (Ky.) 759.

A codicil cannot be admitted to probate where it is inconsistent with the original will probated at a former term.—*Couchman v. Couchman* (Ky.) 858.

After a will has been probated, a paper which is not consistent therewith cannot be probated at a subsequent term as a codicil thereto.—*Thruston v. Prather* (Ky.) 871.

### § 4. Construction.

Under a will providing for the sale of the real estate of testatrix and a division of the proceeds at a future time between her then living children, "or the heirs of their body, respectively," and then giving to each of two children of a deceased son \$200 out of the proceeds, the two grandchildren first take \$400 out of the proceeds and then a child's share of what remains.—*Best v. Swift* (Ky.) 253.

A devise to M. "and her children in their exclusive right" creates a life estate in M., remainder to the children.—*Adams v. Adams* (Ky.) 335.

A will devising certain property to the widow for the support of the family during her widowhood, and making certain provisions as to its division, if she should marry, *held* to give her only a widow's part if she married before the youngest child arrived at age, but gave her a child's share in the event she did not marry until after that time.—*Collins v. Burge* (Ky.) 444.

Under a devise of testator's estate to his wife for the support of herself and the children of the marriage during her life or widowhood, and at her death or marriage to be equally divided among testator's "then living children," the descendants of deceased children share in the division on the widow's death.—*Smith v. Miller's Adm'r* (Ky.) 1074.

A will devising to remainder-men "what is left" at the life tenant's death *held* to give a life estate without power of alienation.—*Brammell v. Adams* (Mo.) 931; *Same v. Cole*, Id.; *Same v. Collins*, Id.

Rev. St. 1879, § 3971, does not preserve an otherwise lapsed devise to a grandchild of testator's wife by a former marriage.—*Brammell v. Adams* (Mo.) 931; *Same v. Cole*, Id.; *Same v. Collins*, Id.

A will *held* to give testator's widow only a life estate in his lands, with power to sell and convey fee.—*Young v. Mutual Life Ins. Co.* (Tenn. Sup.) 428; *Same v. Crozier*, Id.

Devisee held to have no power to mortgage land.—*Quisenberry v. J. B. Watkins Land-Mortgage Co.* (Tex. Sup.) 708.

### § 5. Rights and liabilities of devisees and legatees.

A widow who elects to take under her husband's will is estopped to claim her own property devised by the testator to others.—*Cooke v. Fidelity Trust & Safety-Vault Co.* (Ky.) 325; *Fidelity Trust & Safety-Vault Co. v. Burnett, Id.*; *Cooke v. Cooke, Id.*

A legatee's recognition of the executor named in the will as the executor held not to constitute an election to take under the will, so as to estop the legatee from denying its provisions.—*Pryor v. Pendleton* (Tex. Sup.) 706.

The act of a daughter of testator in receiving from the estate property not disposed of by the will, and which she would have received if no will had been made, does not estop her from claiming adversely to the will.—*Pryor v. Pendleton* (Tex. Sup.) 706.

## WITNESSES.

See, also, "Evidence."

Experts, see "Evidence," § 9.

Opinions, see "Evidence," § 9.

Perjury, see "Perjury."

Testimony of accomplices, see "Criminal Law," § 5.

### § 1. Competency.

The fact of one testifying under a pardon sent to his attorney held to show delivery and acceptance.—*Redd v. State* (Ark.) 119.

Ruling on first trial as to competency of witness is not res judicata on second trial.—*Redd v. State* (Ark.) 119.

Under Sand. & H. Dig. § 2916, subd. 4, husband and wife are, after termination of the marital relations, competent to testify against each other concerning facts which became known to them outside the relation.—*Inman v. State* (Ark.) 558.

Conviction of felony does not render a witness incompetent before sentence, where the time for applying for a new trial has expired.—*Luna v. State* (Tex. Cr. App.) 656.

One cannot testify for himself concerning a transaction with an agent since deceased, though the principal be living.—*Breckinridge v. McRoberts* (Ky.) 454.

Declarations of the grantor in a deed as to how he intended to make it are not admissible to show a mistake, being made in the absence of the grantee.—*Gish v. Nolen* (Ky.) 757.

Testimony of conversations with a deceased person do not become incompetent by reason of the witness afterwards becoming a necessary party on appeal from the judgment.—*Kash v. Coleman* (Mo.) 503.

Evidence as to transaction with decedent held not incompetent on appeal, because after judgment by death of party the witness was substituted as such.—*Kash v. Coleman* (Mo.) 503.

The wife of accused, who testified that on day crime was committed she rode to town with a certain person, may be asked on cross-examination whose wagon it was they rode in.—*State v. South* (Mo.) 790.

Testimony as to transactions of decedent with his wife, by one claiming adversely to both, held not within Rev. St. 1895, art. 2302, making testimony of transactions with decedent incompetent against his personal representatives.—*Caffey's Ex'rs v. Cooksey* (Tex. Civ. App.) 66.

A plaintiff suing an executor on an account against his testator held incompetent to testify in his own behalf to transactions with decedent.—*Garrett v. Garrett* (Tex. Civ. App.) 76.

Wife cannot be interrogated on cross-examination, in a prosecution against her husband, as to matters now testified to in chief.—*Hull v. State* (Tex. Cr. App.) 472.

Where two men are indicted for same offense, and by agreement with one of them his case is dismissed, his wife is competent to testify for state in prosecution of other.—*Rios v. State* (Tex. Cr. App.) 987.

### § 2. Examination.

A witness, on being recalled, need not be sworn.—*Redd v. State* (Ark.) 119.

It was harmless error to permit a witness to refresh his recollection by referring to the minutes of a trial, there being other satisfactory evidence of the fact in question, and the witness being no more positive after refreshing his recollection than before.—*Cope v. Commonwealth* (Ky.) 436.

A motion to strike part of a witness' answer as not responsive held properly overruled.—*Griffin v. Payne* (Tex. Sup.) 973.

Refusing to compel defendant's attorney to deliver to plaintiff a statement which he had used as a guide in examining defendant held not error.—*Timmons v. Casey* (Tex. Civ. App.) 805.

Where defendant's witness states that one of plaintiff's witnesses was untruthful, he may be asked on cross-examination if the latter was not given recommendation by defendant when he quit his job.—*Galveston, H. & H. R. Co. v. Bohan* (Tex. Civ. App.) 1050.

Exemption of witness from giving incriminating testimony applies to the giving of testimony before a grand jury.—*Ex parte Wilson* (Tex. Cr. App.) 996.

Forged bill of sale need not be produced when witness shows it would tend to incriminate him.—*Ex parte Wilson* (Tex. Cr. App.) 996.

A statement of witness before the grand jury that an answer would not incriminate him is not a waiver of his right to show otherwise when brought before the court for contempt.—*Ex parte Wilson* (Tex. Cr. App.) 996.

### § 3. Credibility, impeachment, contradiction, and corroboration.

Defendant having testified that he had not taken one or more intoxicating drinks just before the homicide, it was admissible to prove in rebuttal that he had done so.—*Stephens v. Commonwealth* (Ky.) 229.

On an issue as to the credibility of a witness, who had been elected to public office, testimony that he had been elected by disreputable rascals is irrelevant and improper.—*Kellogg v. McCabe* (Tex. Sup.) 520.

Evidence of collateral matters held inadmissible to impeach witness.—*Batcheller v. Besancon* (Tex. Civ. App.) 296.

Impeachment of a witness by proof of his conviction of a felony held not to authorize introduction of record of the examining trial to support his testimony by showing that it was the same as that then given.—*Scott v. State* (Tex. Cr. App.) 531.

Testimony that a witness expressed a belief of the guilt of one charged with murder, and desire to see him hung, held admissible to prove bias.—*Reddick v. State* (Tex. Cr. App.) 993.

The mere failure of a witness to testify to facts expected to be proved by him will not authorize his impeachment.—*Finley v. State* (Tex. Cr. App.) 1015.

Where a witness introduced to prove a fact, instead of proving such fact, gives damaging testimony against the party introducing him, he may be impeached.—*Finley v. State* (Tex. Cr. App.) 1016.

## WORK AND LABOR.

Liens for work and materials, see "Mechanics' Liens."

## WRITS.

See "Process."

*Particular writs.*

See "Certiorari"; "Execution"; "Garnishment," § 2; "Habeas Corpus"; "Injunction"; "Mandamus"; "Replevin."

## WRONGFUL EXECUTION.

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